IN THE HIGH COURT OF SWAZILAND

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CRIMINAL CASE. 118/97

IN THE MATTER BETWEEN REX

VS

MOSES PAULOS DUBE AND OTHERS

CORAM		S.B. MAPHALALA - A J
FOR CROWN		MR J. MASEKO
FOR DEFENCE	ACCUSED NO. 1	MR K. VILAKATI
	ACCUSED NO. 2	MR M. MANZINI
	ACCUSED NO. 3	MR D. MNGOMEZULU

RULING ON APPLICATION AT THE CLOSE OF THE CROWN'S CASE

(20/05/98)

Accused No. 1 to 3 are jointly charged with armed robbery. The accused are alleged to have been acting in furtherance of a common purpose in committing the armed robbery at Kalanga Bricks on the 25th June, 1997 and robbed one Sipho Zikalala at gunpoint a sum of E500,000-00. The crown led a number of witnesses in support of the charges. At the conclusion of the crown's case applications were made in respect of accused no. 1 and accused no.2 in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 (as amended) for the discharge of the two accused persons on the grounds that the crown had failed to establish a prima facie case to place the accused on their defence. Mr Mngomezulu for accused no. 3 rightly conceded that a prima facie has been made in respect of his client accused no. 3 after a bid to render a confession made by accused no.2 inadmissible failed. However, on that point the court ruled that the statement made to the Judicial Officer was made freely and voluntarily in conformity with section 226 (1) of the Criminal Procedure and Evidence Act.

Mr Maseko, for the crown opposed the applications made on behalf of accused no. 1 by Mr Vilakati and accused no. 2 by Mr Manzini.

Mr Vilakati on behalf of accused no. 1 contended that there is no evidence before court that accused no. 1 was present when the robbery took place at Kalanga Bricks on the day in question. The evidence that attempts to link accused no. 1 with the commission of the offence is the evidence of two crown witnesses Logwaja Dlamini and Charles Ginindza. This evidence does not assist the court at all because the two crown witnesses gave contradictory accounts of what they

knew concerning the matter. Mr Vilakati applied that their evidence be taken as that of accomplice witnesses who according to them they have been invited to participate in the heist. The cautionary rule should be applied. The court has to ask itself if they have not. After the court had addressed to that

question the court will not be required to look any further.

The only evidence, Mr Vilakati continued would be the money itself that was found in the possession of the accused and perhaps the motor vehicle which accused no. 1 was found driving. On the question of the money found in the possession of the accused was it the one which was taken at gunpoint from the lawful possession of Zikalala. If there was some mark of identification like serial numbers or special ink marks the accused no. 1 has to go to the witness stand to explain how the money came to his possession. There may be an argument that the E5,000-00 found in accused no.l when he was arrested in Nhlangano was part of the E500,000-00 stolen by the robbers at Kalanga Bricks. The question of the motor vehicle which accused no. 1 was found driving in Nhlangano the Toyota Cressida has nothing to do with the robbery. Thus that evidence is irrelevant for the purposes of this case. The motor vehicle is not connected with the robbery all the crown evidence showed that the getaway car which was used by the robbers was a Toyota Corolla.

Mr Manzini for accused no. 2 also moved a similar application holding the view that there is no evidence before court which places accused no.2 at the scene of the crime on the date and time of the robbery. In fact the evidence of Nhlabatsi who was leading the investigating team in this case confirms that on the date and time of the robbery he (Nhlabatsi) established that accused no. 2 was at work here in Mbabane when the robbery took place. The crown bears the onus to prove either directly or by circumstantial evidence that accused no. 2 was involved in the common purpose alleged in the indictment. On the evidence before court there is no single proven fact for the court to infer common purpose. Nhlabatsi told the court that on the 8th August, 1997 he approached accused no. 2 and told him that he was investigating an armed robbery case and cautioned the accused. He said on the 9th August, 1997 accused no. 2 took him to his home in Malkerns where accused no. 2 produced a sum of E6,020-00 in E20 notes. What is significant is that the officer does not say that he was taken there pursuant to his investigations he merely says he was taken there. Nhlabatsi does not tell the court if accused no. 2 displayed any knowledge of the robbery and the money that was taken. It is not in dispute that accused no. 2 took Nhlabatsi there but the investigating officer wants the court to assume that it was part of the investigations. When Nhlabatsi was cross-examined on the specific notes which he tendered as evidence he admitted that these notes were not identified by anyone from First National Bank to positively say to the court that these notes were the same notes that were dispatched on the day of the robbery. On further cross-examination Nhlabatsi admitted that he himself cannot positively say that the money before court was the same money that was taken in the robbery. He mentioned that the money taken from accused no. 2 as "loot". The fact that he decided to refer the money as "loot" does not take the crown case any further. It was his own conclusion. The fact that he decided to refer to it as "loot" does not impute knowledge on the part of accused no. 2 the investigating officer does not give the court the factual basis on which he came to the

conclusion that the money was "loot".

Even a verdict of receiving stolen property knowing it to be stolen cannot be returned. The first requirement which the crown has to prove in that instance, is whether the money was stolen. Mr Manzini referred the court to The South African Law of Evidence by Hoffmann and Zefferit (3rd ed) at page 474 in support of that contention. The crown has not proved that the money presented before court as an exhibit was stolen. Nhlabatsi told the court that he could not say whether the money before court was the one that was stolen. That admission on its own cast a reasonable doubt on whether the money before court was the money stolen from PW1.

The crown as represented by Mr Maseko made a spirited effort to show that the crown has proved a "prima facie". The evidence as it stands is that Sipho Zikalala was robbed of money to the tune of E500,000-00 and that he cannot identify these people who robbed him. After the police have received certain information they went about investigating and came along the three accused before court. The

accused were informed why they were being arrested and cautioned in terms of the judge's rules and the accused took the police to various places where they produced money. Accused no. 1 upon being asked after he was handed over to the Manzini Police Station by the Nhlangano Police gave an explanation which explanation cannot be reasonable true. He informed the police that the car belonged to his sister Thoko Dube. However, when Thoko Dube came to testify she said she does not know anything about the car in question. Accused no. 1 on the day of the robbery crossed the border at Oshoek Border Post to R. S. A. on foot and on the same day he bought the motor vehicle on the 25th June, 1997 he then came back to Swaziland and when he is asked about it he tell lies. Mr Maseko invited the court to infer that the motor vehicle bought by the accused had something to do with the robbery at Kalanga Bricks.

The crown went further to state that Logwaja and Ginindza cannot by any stretch of the imagination be called accomplice witnesses. That an accomplice witness is a person who had a hand in the commission of the offence. These witnesses did not associate themselves with the commission of this offence. The crown argued that the accused persons had a common purpose based on the fact that the whole case relies on circumstantial evidence. He referred the court to the cases of S vs Safatsa 1988 (1) SA 868 and S vs Khoza 1982 (3) SA 1019 in support of that proposition. He argued on that it was important that accused no. 2 must give an explanation of how he received the money. To support this view he cited the case of Rex vs Duncan Magagula and 10 others Criminal Case No. 43/96. All in all the crown submitted that the two accused persons have a case to answer.

The court then heard the defence in reply on points of law which I will deal with as I proceed with my ruling.

I have listened to the impressive arguments on both sides and have looked carefully at the evidence of the crown witnesses to determine whether the crown has made a prima facie case in terms of the section.

There is a standard which the court ought to apply. Justice J. Matsebula in the case of Rex vs Thabsile Mhlambo Criminal Case No. 81/95 (unreported) succinctly articulated the standard to be applied by the court, thus:

"It is appropriate at the stage to deal briefly with the standard the court applies at the end of the crown case when dealing with whether or not there is a prima facie case. That standard is to consider whether or not there is a prima facie case made out against an accused person, and the court has got a discretion if that discretion is exercised judicially the application is granted or refused then the next stage is another standard to be applied, that is whether the crown at the close of the defence case the crown has proved the case beyond any reasonable doubt...."

In the case in casu it is doubtful that the crown has proved a prima facie case in respect of both accused no. 1 and accused no. 2.

I will start with accused no. 1 he is found with a sum of E5,000-00 which the police suspects was stolen from Kalanga Bricks. But there is no tangible evidence before the court that the E5,000-00 found in his possession is part of the loot of E500,000-00 robbed at Kalanga Bricks. Nhlabatsi himself when giving evidence in fact admitted that he could not say that the money found in the possession of the accused is part of the loot. The evidence of the motor vehicle which he was found driving is irrelevant. It does not in any way connect the accused with the crime it would have been a different matter if he was found driving the Toyota Corolla which was used in the heist. Then surely, he would have a case to answer. I agree with the submissions made by Mr Vilakati in this respect. Now I come to the evidence of Logwaja and Ginindza and agree with Mr Vilakati that they may be termed quasi-accomplice witnesses. To this end Mr Vilakati referred the court to The South African Law of Evidence by Hoffmann and Zefferit (3rd ed) where the learned authors described the term "quasi - accomplices" and they stated that this term has been used to describe persons who are not accomplices but appear to know good deal about the offence and

have some purpose of their own to serve in giving evidence. The reasons for the cationary rule equally applies to such persons and similar circumspection ought therefore to be shown in dealing with their evidence. The learned authors gave examples of such people e.g. fellow members of an illegal organization (refer E Dutoit and other Commentary on Criminal Procedure Act 24 - 5) They go further at page 576 of the 4th edition that:"

"There is some dispute over whether in such cases the cautionary rule applies as a requisite of procedural law or whether caution is simply dictated by common sense (S V Ganie 1967 (4) S.A. 203 (n). but the point is somewhat academic since, as we have seen, the cautionary rule is itself no more than an admonition to use common sense (see the remarks of Van Winsen J in S V Xoswa 1965 (1) S. A. 267 © at page 269 h)

These two witnesses were the only crucial witnesses to the crown case to put the accused no. 1

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into the spotlight as according to the summary of evidence he seem to be the mastermind behind this robbery. The crown case stands or falls on their evidence. However, they failed both the police who took their statements and the crown who put up a valiant fight to have them to testify. The crown even applied to court in terms of section 200 to have Ginindza incarcerated for four days as he was blatantly refusing to testify. Even after his brief sojourn at His Majesty's pleasure he sidelined the issues. He together with Logwaja can be described as quasi - accomplice witnesses.

It appear that they had a fear to tell on accused no. 1 in court lest they be killed. They followed the infamous motto of the members of the underworld that "hear not, see not and say not" they are both by their own admissions criminals who have been in and out of prison for similar offences most of their adult lives. They both departed drastically from what their statement given to the police and reflected to in the summary of evidence. This turn of events was described by Mr Vilakati in referring to the "dicta" in the case of Rex vs Duncan Mngomezulu (supra) where the learned Justice Dunn articulated the courts approach to such evidence at the close of the crown case where the credibility of the witness becomes an issue in determining a prima facie case where the learned judge in that case stated that section 174 (4) of the Criminal Procedure and Evidence Act is similar in effect to section 174 of the South African Criminal Procedure Act 81 of 1977. The South African decisions on the question as to whether or not the credibility of the crown witnesses should be taken into account in deciding whether or not the credibility of the crown witnesses should be taken into account in deciding whether or not to grant a discharge have not always been harmonious observed the learned judge after making an exhaustive study of South African decisions touching on the matter. The learned judge went further to consider cases in other jurisdictions. This involved a study of the High Court of Lesotho decision of Rex vs Pabilone Nalawa and others Criminal/T/51/69 (unreported) and in the later case also emanating from the High Court of Lesotho in the case at the close of the crown case.

Rex vs Teboho Tamati Romakatsane 1978 (1) s. i .r. 70 Contran CJ stated at page 73-4.

"In Lesotho, however, our system is such that the judge (though he cites with assessors is not bound to accept their opinion) is the final arbitrator on law and fact so that he is justified, if he feels that credibility of the crown witnesses has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence"

Dunn J in Duncan stated as follows after reviewing these decisions thus:

"The position of a trial judge in Swaziland is the same as that in Lesotho and I am persuaded that a similar approach should be followed by the courts in Swaziland. It must however, be always borne in mind that the section in question confers a discretion, to be properly exercised and that it may vary from one case to another depending on the circumstances of each particular case".

The evidence of Logwaja and Ginindza in the case in casu is totally devoid of credit. Their evidence differs materially from what is reflected in the summary of evidence. They even contradict each other on material aspects of this case. As I have pointed out that the crown case as it pertains to accused no. 1 stands or falls of the evidence of the witnesses. These two witnesses betrayed both the police who painstakingly investigated the case and the crown, despite Mr Maseko spirited opposition to the application. I thus rule that the crown has not made a prima facie case against accused no. 1 in the face of the reasons I have outlined he is therefore discharged in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended) If I were to call him to answer what tangible evidence is there connecting him with the robbery? The answer to this question would be in the negative.

Now I come to accused no. 2 . The only evidence which attempts to connect him with the offence is the evidence that he led the police to his home at Malkerns and he handed to Nhlabatsi a sum of E6,020-00 and Nhlabatsi concluded that it was part of the "loot" that was robbed at Kalanga Bricks. There is no factual basis which led Nhlabatsi to come to this conclusion. Nhlabatsi himself in cross-examination admitted that he cannot say that the money exhibited in court forms part of the "loot" robbed from Kalanga Bricks. He admitted that he cannot say that the money was stolen. Further, and of more significance, Nhlabatsi himself the head of the investigating team admitted that accused no. 2 was in Mbabane at his place of employment when the robbery was taking place at Kalanga Bricks a distance of about 70 kilometres away. He cannot by any stretch of imagination be one of the robbers and consequently answer in his defence for the crime of robbery. The least he can be called upon to answer for is receiving stolen property knowing it to have been stolen. But even here as Mr Manzini rightly argued that the money before court was not proved to have been stolen. Mr Manzini referred me to the case of R vs Charlston 1955 (3) S.A. 168 where the head notes in that case state, thus:

"In circumstances where property has been stolen and is found in the possession of the accused not long afterwards and accused gives an unsatisfactory or false explanation the court may infer his guilt. But before the question of any explanation arises or a need for an explanation, there must be sufficient proof (my emphasis) that the property is stolen property, whether from a specific person or some person unknown"

For theses reasons I also hold that the crown has not made a prima facie to put accused no. 2 to his defence.

In conclusion, I wish to point out that it is a great pity especially in the case of accused no. 1 that he is discharged as a result of crown witnesses who either refuse to testify or even when they testify they evade the real issues which brought them to court and state their own versions which totally does not link accused no. 1 with the robbery at Kalanga Bricks. However, one cannot expect much from people of their ilk who had most of their adult lives have been involved in robberies and have been in and out of prison where they met. Outside prison they kept on their

nefarious close-knit organization. The crown and the police are not to be blamed for this state of affairs Accused no. 3 now remains to come to his defence.

S.B. MAPHALALA

ACTING JUDGE