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IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO. 21/98

IN THE MATTER BETWEEN

JABULANE JOSEPH DLONGOLO

1st APPELLANT

JABULANE SIMELANE

2nd APPELLANT

And

THE KING

RESPONDENT

CORAM:

DUNN J. MAPHALALA A J.

FOR THE APPELLANTS:

IN PERSON FOR THE CROWN:

MR D. WACHIRA

JUDGEMENT

(17/06/98)

The two appellants to whom I shall continue to refer to as the accused appeared before the Senior Magistrate at Manzini charged with the crime of robbery. The offence was alleged to have taken place at the Matsapha Industrial Sites on the 5th August 1996 and the complainant was stated to be Royal Simelane. The property alleged to have been taken was a sum of E145 878.80. The accused who were represented at the trial pleaded not guilty to the charge. At the conclusion of the trial they were both convicted as charged and were each sentenced to six years imprisonment with effect from the 5th August 1996. They have both noted appeals against the conviction and sentence.

In so far as the evidence of the commission of the offence is concerned, the crown led sufficient evidence to establish this. The witnesses who are employees of the Swaziland United Bakeries from whom this money was taken, explained the banking procedure which was followed and the fact that Elite Security personnel would collect the money to convey from the Swaziland United Bakeries premises to the bank. Evidence was led as to how on the morning in question the Elite Security personnel arrived at the S. U. B. premises and took possession of the metal trunk containing the money. Evidence was led of how at an intersection along the way to the bank an armed man caused the driver of the security vehicle to stop and as to how the armed security guards who were in the vehicle were disarmed and forced out of the security vehicle. The Elite Security personnel fled in different directions. One fled onto premises where a police officer happened to be. The police were given a description of the vehicle used by the robbers and it was

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seen driving away from the scene. The police gave chase and radioed to other police stations for assistance. The Malkerns Police were alerted as the vehicle had been seen heading in the Mbabane direction. The end result of this was that the Malkerns police were able to mount a roadblock and the vehicle in question was forced to a stop at the roadblock. The first accused was found driving the motor vehicle. He was alone in the vehicle.

Upon his arrest accused no. 1 led the police to a spot some distance from where the road block was mounted and the metal box and two firearms belonging to the Elite Security guards were found at that place. The metal box had been opened and emptied by that stage. Certain passports were also found in the vehicle driven by accused no 1.

In so far as accused no.2 is concerned, there is evidence that the investigating officer came across him in the police cells. As a result of questioning by the officer accused no.2 led the officer to his parental homestead where a sum of E18 100.00 was recovered from accused no.2's wife and mother.

The explanation given by accused no. 1 as to how he came to be driving the vehicle in question was that he had been hired by somebody from Piet Retief to drive him to Swaziland in order to collect some goods. Certain people were picked up in Nhlanguano and he was told to drive to Matsapha. It was his evidence that whilst he was parked at Matsapha, at the place where he expected that the goods would be collected, the people he was with suddenly turned on him. One of them pointed a firearm at him. The registration plates of his vehicle were removed and he was directed to drive his vehicle in a particular direction. Along the way, he was made to stop. The people he was with got out of the vehicle. Some money, which he assumed, was payment for the trip from Piet Retief was thrown at him and the people he was with then disappeared. That is how, he explained, he found himself driving along the road leading to Malkerns.

The Senior Magistrate in my view correctly rejected the evidence given by the first accused as being totally false. It was a totally fanciful story. It is quite clear that this was a carefully planned operation from Piet Retief into Swaziland and Matsapha in particular, where at the correct time of the movement of the security vehicle the accused and his companions happened to be. Whether or not the first accused took part in the actual robbery is immaterial as it is quite clear that he was a party to the commission of the offence. He cannot now seek to appear as the innocent owner of a vehicle who was merely hired to come to Swaziland. His friends managed to escape and he is now left holding the baby as it were. The evidence against the first accused is overwhelming and the appeal against his conviction is dismissed.

Turning to the second accused the magistrate indicated that the evidence upon which he was convicted was entirely circumstantial. The second accused was employed by Elite Security. The court a quo concluded that the robbery had been carried out with information from somebody working for Elite Security. Such information would have been in relation to the time when cash was moved from S. U. B. and as to when substantial sums were expected to be

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moved. The court concluded that accused no.2 must have been the person who provided the relevant information for the commission of the offence. The recovery of the money from accused no.2's wife and mother strengthened the court's view that accused no.2 must have been involved in the robbery. There are difficulties that arise with the court's approach to the evidence on which this conclusion was drawn.

No evidence was led of the circumstances under which accused no.2 was arrested. Accused no.2 was said to have been arrested by members of the Operational Support Services Unit of the Royal Swaziland Police. The officers who effected the arrest should have been called to testify and explain the basis for the arrest.

Further, it does not appear that any of the employees of S. U. B. who were responsible for preparing the cash for banking were ever called upon to examine the cash that was found in accused no. 2's possession. Such an examination may have shed some light on the source of the cash. As the evidence stood there was nothing linking either the second accused or the cash found in his possession with the robbery.

In the circumstances the conviction of accused no.2 cannot be allowed to stand. The conviction and sentence are set aside. There remains the question of the exhibit, that is the cash that was recovered from accused no.2. The question of the return of exhibits at the conclusion of a trial is governed by section 324 of the Criminal Procedure and Evidence Act no 67/1938. The section provides in part as follows-

(1) After the conclusion of any trial and subject to any special provision contained in any law, the court may make a special order as to the person entitled thereto of the property in respect of which the offence was committed or of any property seized or taken under this Act or produced at such trial.

(2) If no such order is made the property shall, on application, be returned to the person from whose possession it was obtained (unless it was proved during the trial that he was not entitled to such property) after deduction of the expenses incurred since the conclusion of such trial in connection with the custody of such property:

Provided that if within a period of three months after the conclusion of the trial no application is made under this section for the return of the property, or if the person applying is not entitled thereto or does not pay such expenses, such property shall vest in the Government.

The court a quo did not make any special order in terms of the section. No application was made for the return of the money in terms of sub-section 2. The trial was concluded on the 23rd January 1998. The three months period that is provided for under the proviso to sub-

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section 2, expired on the 23rd April 1998. The property now vests in the Government of Swaziland.

Turning to the question of sentence, this was a carefully planned robbery. It is becoming clear that local criminals are getting into the habit of recruiting seasoned thugs from outside Swaziland to carry out crimes such as the present one. This is obviously a highly attractive approach for the local criminals because the outsiders are easily able to leave the country undetected, with the loot. It is the duty of the courts in cases where the outsiders are apprehended, to deal with them in such a way as will make them think twice before allowing themselves to become party to such crimes.

The trial magistrate referred in his reasons for sentence, to the escalation in crimes of robbery in the country. He also referred to the fact that this was a well-planned robbery. He quite correctly stated that the interests of the community far outweighed those of the accused in the present case. From the reasons filed for sentence, it cannot be said that the trial magistrate in anyway misdirected himself on the question of sentence. As such, this court sitting as a court of appeal has no reason to interfere with the six year sentence imposed on the accused. The appeal against sentence by accused no.1 is in the circumstances dismissed.

B. DUNN

S.B. MAPHALALA

JUDGE

I agree

ACTING JUDGE