IN THE HIGH COURT OF SWAZILAND

The King

V

PETER LAUER

Crim. Case No. 7/99

Coram

S.B. Maphalala J

For the Crown *MR. P. NGARUA*
For the Defence *MR. P. DUNSEITH*

JUDGEMENT
(10/08/99)

Maphalala J:

The accused person was initially charged with one other by the name of Selby Dlamini with two counts under the Counterfeit Currency Order, 1974. The accused only faces the first count where the crown alleges that upon or about the 4th day of January 1999, at or near Sidvwashini Filling Station in the Hhohho district, the accused persons acting jointly and in furtherance of a common purpose did knowingly and unlawfully hold 988 counterfeit notes with a face value of E99, 800 – 00.

At the commencement of trial the court was informed that Selby has escaped from lawful custody where he was kept with the accused pending trial and is thus a fugitive from justice. In view of this the crown applied for a separation of trial in terms of ***Section 170 of The Criminal Procedure and Evidence Act No. 67/1938 (as amended)*** to proceed with the accused. The defence as represented by Mr. Dunseith did not oppose the application and it was accordingly granted. The trial then commenced with the accused as the only accused person.

The accused pleaded not guilty to the indictment.

At the pre-trial conference conducted by this court on the 28th June 1999, it was agreed that the evidence of PW5 Patrick Phakamile Dlamini and that of PW6 Musa S. Khumalo reflected in the crown's summary of evidence was

entered by consent. The effect of this agreement is that the evidence of PW5 who is a Manager of Central Bank who was going to tell the court that he inspected and examined the bank notes and found them to be counterfeit was not in dispute. Further, that the evidence of PW6 who works for the Central Motor Registry who was to tell the court that a motor vehicle SD 492 DG Nissan Sedan was registered under the name of the accused was also not in dispute. Furthermore, in the course of the trial another agreement was reached in order to curtail the proceedings that the evidence PW4 0058172 Johannes Frederick Hotting according to the crown's summary of evidence was to be entered by consent. This witness is a forensic expert who is in the South African Police Service based in Pretoria. He examined the bank notes and found them to be counterfeit and prepared reports which were subsequently submitted to the Royal Swaziland Police. His affidavit is attached to the summary of evidence and I will refer to it later in the course of this judgement.

The crown called a total of three witnesses to prove its case.

The first witness for the crown was PW1 1644 Detective Sergeant David Magagula of the Fraud Unit Mbabane Regional Police Headquarters who told the court that on the 4th January 1999, in the company of 2353 Detective/W Inspector M. Dlamini went to Sidvwashini Filling Station at about 19.30 hrs. What prompted them to go there was a "tip off" he received. There they found the accused person with one Selby Dlamini in a motor vehicle registration number SD 429 DG a motor vehicle registered under the name of the accused person. He stated in-chief that the other officers who were with them was 1060 Detective Sergeant Maphosa and Constable Jele. He said he went to the accused's motor vehicle and found the accused sitting in the driver's seat on the left as this motor vehicle was left-hand drive and Selby Dlamini was seated on the passenger's seat. He asked the two to get out of the motor vehicle after he had introduced himself and the other officers that they were police officers. The two occupants of the motor vehicle came out of the motor vehicle. Where Selby Dlamini was seated he found some money which was left on the seat and he suspected that this money was fake. He stated that the accused's motor vehicle came to the filling station when they were already at the scene. On seeing these notes which were wrapped in a bundle with rubber bands inside a "Spar Supermarket" carrier bag he cautioned both the accused and Selby in terms of the Judges Rules. The two failed to tell him anything in respect of money which was suspected to be counterfeit. The accused person fell down and collapsed he then applied first aid on the accused person who thereafter stood up. He again administered the caution in terms of the Judges Rules. They then took the accused persons to the Mbabane police station where he told them that he was arresting them for being found in possession of counterfeit currency.

The officer handed to court as an exhibit the "Spar Supermarket" plastic carrier bag as exhibit "1". PW1 again cautioned the accused in terms of the Judges Rules whereupon the accused took them to his home where they found a machine which looked like a photo copier. Accused home is also at Sidwashini not very far from the filling station. PW1 pointed to the court the machine which was taken from accused homestead. At the accused homestead the accused was using his servants quarters as an office. PW1 asked him to show him how the machine worked. He

gave him a E50 note which the accused placed on the machine and he pressed a button and the E50 note was reproduced in an A4 ordinary paper. He kept this reproduction as an exhibit in this case.

The photocopying machine was entered as exhibit “2” to form part of the crown’s testimony and the photocopied note was entered as exhibit “A”. PW1 also deposed that in accused office they found a machine for cutting paper called a guillotine. The accused also demonstrated how the guillotine worked.

The guillotine was entered as exhibit “3” to form part of the crown’s evidence. He took all these items as exhibits. He called Constable Mabuza who was later called as a third witness for the crown who is a scenes of crime officer to take photographs of the scene. At the police station the counterfeit currency was counted in the presence of the accused person and it amounted to an equivalent of E99, 800 – 00 real currency. It was in E100 notes. He noticed that the same serial number appeared more than twice and this is what made him suspicious that this was counterfeit currency. He then took the “money” and put it in an envelope which he sealed with a sealing wax and he sent it to Silverton in Pretoria for forensic tests. He personally sent it to South Africa. Thereafter a report came from Pretoria with the results of the test conducted by the Director of the Forensic Unit one Johannes Frederick Hotting. The officer went on to hand to court 14 bundles of these notes which were entered as exhibit “B1” up to “B14”. He also entered as part of his evidence as exhibit “C” a covering letter he had written to the Commander in Pretoria when he dispatched the currency for forensic analysis.

This is about the extent of PW1’s testimony.

He was subjected to lengthy and relentless cross examination by the defence. The thrust of the defence cross examination was that it is not true that the accused came with Selby Dlamini at filling station driving accused motor vehicle. The officer maintained that the two arrived together the accused driving the motor vehicle and Selby Dlamini was a passenger. It was put to him that accused person came alone to shop at the filling station and parked his motor vehicle outside the entrance of the shop. The witness was adamant that this was not true and he stuck to his version that took place that evening. It was further put to him that accused was going to tell the court that after accused had parked his motor vehicle in front of the shop’s entrance Selby approached him and requested for a lift and he agreed. He then reversed his motor vehicle after Selby had boarded on the passenger side. The witness told the court that this would not be true. Another question of significant was that it was put to PW1 that where the police motor vehicle was parked they could not see the entrance of the shop. The witness maintained that they could see the shop front. It was further put to this witness that after they were cautioned at the scene the accused told PW1 that he did not know anything about the counterfeit currency found in his motor vehicle. The officer replied that no such answer was offered by the accused person. It was also put to this witness that at the police station PW1 instructed the accused person to take the police to his home. PW1 answered this question in the negative. PW1 also devulged under cross-examination that the accused when they were at his home said the machine was a money making machine. That he bought this machine in Germany.

This was about the extent of PW1's cross-examination by the defence.

Under re-examination PW1 questioned by crown answered as follows:

Q: On the night of the 4th January, 1999 did you expect to see someone?

A: Yes.

Q: Who did you expect to see?

A: The accused person.

Q: Did you expect to find anything there?

A: No.

Q: What did you expect the accused person would be doing?

A: I expected to see him meeting another person (my emphasis)

The crown then called PW2 3033 Constable W. Jele who told the court that he was also in the team which proceeded to Sidvwashini Filling Station on the 4th January 1999, following a "tip off" the police had received that a "deal" was to take place there. The time was about 6.45pm. The police car was parked facing the direction of Oshoek border. They were in a Toyota Corolla white in colour bearing registration number SG 037 PO. They had been waiting for about 45 minutes when they saw a motor vehicle registration number SD 429 DG. They immediately proceeded to that motor vehicle following that tip off. Before the driver of that motor vehicle could switch off the car engine there were two passengers therein. The accused and one Selby Dlamini. They ordered the pair to come out of the motor vehicle in order to conduct a search. It was then that PW1 who was on the right side of the motor vehicle found a plastic from "Spar Supermarket". They then ordered the accused to come and see the contents of the bag. When PW1 opened the bag they saw a batch of suspected counterfeit in E100 notes. At that juncture PW1 cautioned the two in terms of the Judges Rules. They then took the two with the motor vehicle to the Mbabane Police Station where they were again cautioned in terms of the Judges Rules. At that time the accused led the police to his house at Sidvwashini. On their arrival at his home the accused led them to his office and pointed a machine. PW1 then requested the accused to demonstrate how the machine worked. He handed to him a E50 note. The accused demonstrated and a reproduction of the E50 note came out of the machine. I must say that the evidence of this witness is materially similar to that of PW1. This witness was asked to draw a sketch plan of the

scene at the filling station. This was entered as part of the crown's evidence as exhibit "C". I must also mention that PW1 also made a sketch plan of the scene which was entered as exhibit "D". He told the court that accused motor vehicle entered the filing station from the Oshoek direction and parked facing the Mbabane direction where they could see the motor vehicle. There was a powerful light there. Accused just parked near the diesel pumps facing the police motor vehicle. The distance between their motor vehicle and that of the accused was about 15 to 20 metres.

At this point in the proceedings the crown applied that the court adjourn for purposes of conducting an inspection ***in loco*** of the scene of crime. Indeed the court proceeded to the scene. The court observed that the shop is facing the Oshoek direction with two rows of petrol pumps in front. On the south side of the shop there is a single row of diesel pumps in a kind of island where a car can move on either side of the pumps to the Mbabane direction or the Oshoek direction. The court observed that the entrance of the shop on the south of the shop front at the extreme end there is a night till just opposite upper petrol pump. Between the diesel pumps and the main Mbabane/Oshoek main road there is a grass island with a powerful spot-light in the middle of the island.

PW2 at the inspection ***in loco*** showed the court where the police motor vehicle was parked which was on the left lane of the diesel pumps when one was facing the Oshoek direction. The motor vehicle was about in the middle of the shop south side. He also showed the court where the accused car was when they came to it. It was opposite a sign next to the grass island facing the Mbabane direction. The distance from where the accused motor vehicle was to the shop's entrance was 25 paces.

This is about the extent of PW2's testimony.

He was also cross-examined at length by the defence. It was also put to this witness that it was not true that it was the accused who led the police to his house but the police requested to be taken there. The witness maintained that it was the accused who led them to his house where he pointed out the machine before court as the money-making machine. It was also put to him that he has discussed his evidence with PW1 because both their evidence was similar that they even made the same mistake as to the registration number of the accused motor vehicle. The officer replied that they never discussed this case and to the mistake its purely a mistake on his part.

The crown then called its last witness PW3 2672 Constable Mabuza who is a scene of crime officer. On the 4th January 1999, he was called at the charge office in Mbabane where he found PW1, other officers, the accused and Selby Dlamini. He was asked by PW1 to photograph some money which was on a table at the police station. After photographing the money they all proceeded to Sidvwashini to the homestead of the accused person. The accused person opened his office and he photographed his office in its original position. The accused also pointed a machine in which he took a photograph of same. Accused proceeded to show PW1 how the machine operated. On the 5th January 1999, he sent the film to headquarters for processing. The photographs were entered as part of the crown's evidence as exhibit F1, F2, F3 and F4.

This is about the extent of PW3's testimony.

He was cross-examined briefly by the defence. The nature of the cross-examination was based on technical aspects but what is of significance in the following exchange between PW3 and the cross-examination by Mr. Dunseith.

Q: Whilst you were present did PW1 ask the accused to take the police to his house?

A: Yes

Q: He agreed to that?

A: Yes.

Q: "F3" was taken after PW1 had instructed the accused to do so?

A: He was told to point at the machine by Sergeant Magagula.

Further on re-examination by the crown the following exchange was recorded;

Q: At the police station do you recall what PW1 told the accused after you left the police station?

A: I cannot recall.

Q: Did you hear anything?

A: PW1 told the accused that he will go with us to his home to <u>show us the machine which produced the money</u> (my emphasis).

The significance of these exchanges will become apparent as I proceed with this judgement. For now I can only say that the evidence of PW3 as reflected by the above exchanges create a patent inconguity in the crown case as PW1 and PW2 gave evidence to the effect that it was the accused out of his volition and after he was cautioned in terms of the Judges Rules who led them to his house where this machine was found. That he proceeded to point at it and a photograph was taken of it.

The crown at this stage closed its case.

The accused gave a lengthy account on the sequence of events that day led in-chief by his attorney Mr. Dunseith. He told the court he was a German who is an Engineer and Loss Adjustor by profession. The long and short of his story is that in the evening of the 4th January 1999, he went as he usually did to the filling station to buy cigarettes, sweets and cold drinks. He had established this pattern. He does this in the mornings and in the evenings. On this particular day he went to the filling station with that in mind and approached the filling station from the Oshoek entrance. He drove his motor vehicle and stopped it in front of the entrance of the shop. As he was about to alight to go to the night till as the shop had closed Selby Dlamini who is known to him through his involvement in football in the country approached him coming from the right in front of the motor vehicle to his side. He observed that Selby had a plastic bag tucked under his armpit. Selby Dlamini asked for lift to Nkoyoyo to see his brother and he appeared desperate. Accused asked Selby if the road to that place was good in which Selby answered in the affirmative. Since he saw that Selby was desperate and the night till was busy with other customers clamoring in that area, he agreed to give Selby the lift and to come back later to buy his sweets and cigarettes. Selby entered his motor vehicle and sat in the passenger side still carrying his plastic bag and accused reversed back and stopped at the spot where the police suddenly pounced on them. The police asked them to get out of the motor vehicle and started searching the motor vehicle. The police found the plastic bag where Selby had been sitting and opened it. When he saw the contents of the bag he was shocked. The police told him that this was counterfeit currency and that is when he had jelly knees and fell on his knees. He was then handcuffed and they were both taken to the police station. That it was not true what PW1 and PW2 said that when he came to the station he was in the company of Selby Dlamini. He then related what took place at the police station. PW1 then told him that accused was to take them (police) to his house. As he had nothing to fear he told the police where his house was. On their arrival at his house the police wanted him to show them where his office was. He took them to his office. They entered the office and PW1 looked around and he saw the machine. He said this was the machine that accused had used to make the counterfeit currency accused told him that this was an ordinary photocopying machine. He demonstrated by making a copy of front page of the "Times of Swaziland" newspaper. He was then given a E50 note to reproduce and he did. He was then asked what he used to cut the paper and he told them that he used scissors. Accused further told the court that he does not challenge the evidence of PW3 whose evidence is more in tune to what transpired at his home. On the 6th January 1999, he was called by PW1 who told him that he was not happy with his statement that he cut the paper with scissors and was taken back to his office at home where PW1 looked for the papers cutter. Accused denied that he used this machine to cut money. The accused was on another day taken to the Magistrates court for a formal remand.

This is about the extent of the accused story.

He was subjected to a lengthy and incisive cross-examination by the crown. The crown probed at great length that it was not true that he met Selby Dlamini at the filling station but they came together in accused motor vehicle. However, the accused was adamant that he met Selby Dlamini there. It was also put to him that he received a message in his cell phone instructing him to meet someone at the police station. He replied in the negative. In the

course of the crown cross-examination an interesting exchange took place between Mr. Ngarua and the accused person as follows:

Q: In one photograph you appear to be physically afraid in "F3".

A: I am not afraid.

Q: Do you normally close your eyes when a picture is taken of you?

A: Only when there is a flash light.

Q: Your left arm you seem to be intimidated?

A: No I was not intimidated.

Q: You appear to be praying?

A: No.

I am going to come back to the import of this exchange later in the course of this judgement. It was also put to him that the machine was worth E74, 000 – 00, but this fact was later disproved where an invoice was introduced and marked exhibit "J" showing that accused through his company A.R. Edwards (Pty) Ltd bought the machine from a company called Business Systems Networks based here in Mbabane for a sum of E5, 100-00. The great portion of the crown cross-examination was taken up in a probe on technical issues pertaining to the machine where it was revealed that the machine which is the subject matter of this case was not an ordinary photocopier but a scanner (inkjet printer). He was also asked to demonstrate to the court how the paper cutter operated. It was also put to him that on the 4th January 1999, he received a phone call from one Eric Dlamini, however, the accused replied that he did not and that he did not know any person by the name of Eric Dlamini.

In re-examination the accused revealed that any ordinary scanner in the market is capable of making a colour reproduction of a bank note.

This is the evidence of the accused.

The defence then called a defence witness DW2 Robert Mavuso who is petrol attendant at the filling station and he gave evidence of what he observed on the 4th January 1999 pertaining to this case. He told the court that he knew the accused person who was a regular customer at the filling station where he usually come to fill up petrol, buy newspapers, sweets, cigarettes, etc. The accused was a very friendly person who was open with everyone there. He

also knew that the accused was a referee in football in matches. He was on duty on the 4th January, 1999 at about 7.30pm. Before the incident he saw the accused entering the filling station in his left hand drive motor vehicle and he parked it next to the door of the shop and a man appeared who went in front of accused motor vehicle and briefly talked to the accused. The accused opened the window to talk to this man. DW2 said he knew this man although he did not know his name. The man was one of the players for Umbelebele Football Club. After the two had finished talking the man jumped into the passenger side of the accused motor vehicle. He noticed that the man was carrying a plastic bag which was tucked under his left armpit. The accused then reversed and stopped under the 24 hrs sign. Then at that point some people approached the accused motor vehicle from both sides. These people came from the direction of the diesel pumps. He had not seen these people prior to them surrounding the accused motor vehicle. He did not see the white Toyota Corolla parked next to the diesel pumps. DW2 deposed that at that time the filling station was very busy as it was month end. He then saw the accused falling down and picking himself again. He entered his motor vehicle and it was driven by one of these men who surrounded his motor vehicle.

This is about the extent of this witness testimony.

He was cross-examined at great length by the crown in a searching and incisive cross-examination. The thrust of the crown’s cross-examination was that this witness was lying in saying he saw accused coming alone and later joined by Selby and thereafter being confronted by the police. That if that was the case they (DW2) and the other petrol attendants would have come to the accused rescue at the time they did not know that these people were police officers. The accused was well known to them as a prominent personality in the football fraternity. Moreover he was their regular customer and a sociable man. The witness maintained what he saw and that he could not come to the accused rescue as he was busy. This witness was quizzed at some length as to the position of the cars that evening. He maintained throughout his story that he gave in his evidence-in-chief.

The defence then closed its case.

The court entertained submissions. The submissions by both counsel were equally lengthy. The crown contended that it is common cause that the accused was arrested at Sidvwashini on the 4th January 1999, with his companion and the pair had in their possession 998 - E100 counterfeit notes. There is no dispute about that. What is in dispute are the circumstances under which he was arrested. On one hand the crown witnesses all being police officers gave evidence that on the 4th January 1999, at about 7.00pm they were at the filling station. They were not there by coincidence but were investigating certain information. After waiting there for 30 to 40 minutes the accused person came accompanied by one Selby Dlamini and as soon as they parked near the diesel pumps the police pounced on them and after searching the motor vehicle found fake currency in the passenger side of the accused motor vehicle where Selby was seated. The counterfeit currency was wrapped in an ordinary plastic bag exhibit “1”. Constable Jele who was part of the investigating team gave a similar account of the events to that given by PW1.

The crown contended that the two officers had no other interest other than their usual professional calling. None of them knew the accused in his personal capacity and none of them had any reason to be particularly biased against the accused. The court was invited to take cognizance of their demeanor when giving evidence. That their testimony was simple, clear and uncontradicted.

The crown contends that the only issue confronting this court is whether or not the court should believe the evidence of the three crown witnesses and in particular of PW1 and PW2.

Mr. Ngarua further submitted that the weighing of the two versions given in court is important because if on one hand the court believes the accused that he came alone and parked his motor vehicle at the entrance of the shop and thereafter Selby entered the motor vehicle with the money accused had not committed an offence because he did not have knowledge.

However, he contends that the two crown witnesses PW1 and PW2 were competent witnesses and in terms of ***Section 236 of the Criminal Procedure and Evidence Act (as amended)*** their evidence is competent. They had the opportunity to see what they saw. They were in the cause of duty.

If one looks at accused version that he came to the petrol station to buy sweets and cigarettes and that he was alone he cannot be said to have given a reasonable true story if the court were to find that the police officers were telling the truth. He will be left defenceless. The crown went on to pin point some loopholes in the defence case. The evidence that Selby Dlamini at about 7.30pm was carrying about E100, 000-00. It was too risky and dangerous to hang around that place without a plan. Selby approached him and there he abandons his mission and attends to Selby's needs.

The police were watching the scene for about 45 minutes. Even if the accused parked his motor vehicle in the manner he has described, the police could have certainly have seen Selby coming from the diesel pumps to the accused motor vehicle. There could be nothing prejudicial in making accused an accomplice witness against Selby Dlamini. They had nothing to lose and would have had an excellent witness against Selby Dlamini. Accused does not know of any grudge he has against the police.

Mr. Ngarua further attacked the evidence of DW2 that it was not only very inconsistent but to be out of tune with human emotions. He says he knows the accused person very well but does not come to his rescue when he is being attacked. The crown went to point out a number of contradictions in DW2's version and also questioned his demeanor when he gave evidence in court. He gave evidence favourable to the accused and conveniently stated that he did not see things which are adverse to the accused defence as he was busy. All in all the crown urged this court to take the evidence of DW2 with a pitch of salt.

Then the crown directed the court's attention to the evidence of the pointing out by the accused of the machine and the papers cutter. On the evidence of pointing out the court was referred to the case of ***July Petros Mhlongo vs Rex Appeal Case No. 155/92.*** The crown submitted that it does not press on the statement made by the accused to the police but is only interested in the evidence of the pointing out of the scanner and the paper cutter (***Vide Rex vs Magungwane Shongwe and four others 1982 – 1986 (2) S.L.R. 427).*** The accused was pointing out a thing in which he had been cautioned. The court was further directed to the evidence of the forensic expert at page 3 paragraph 5.2 which shows that the counterfeit notes were produced in a machine similar to the one found in accused house. The relevant paragraphs reads ***ipsissima verba,*** thus:

> "5.2. The disputed bank notes were produced by making use of an ink-jet printer and printing process (intaglio, letterpress and offset litho) that are used to produce genuine E100 bank notes are not present in the counterfeit banknotes".

Further, exhibit "A" is also proof that the instrument before court is able to do this kind of printing.

On the doctrine of common purpose the court was referred to the case of ***R vs Nsele 1955 (2) S.A. 145 (AD)*** that the accused person acted in common purpose with Selby Dlamini and should consequently be found guilty as per the indictment.

The defence on the other hand filed heads of arguments. The first issue taken by the defence is an attack on the indictment. The offence created by Section 3 (1) © of the ***Counterfeit Currency Order 1974*** reads as follows:

> "Any person shall be guilty of an offence who-
> holds, utters, tenders or accepts any counterfeit coin, knowing it to be counterfeit, or a forged or altered note, knowing it to be forged or altered".

The accused was charged as follows:

> "That upon or about 4th January 1999, and at or near Sidvwashini filling station in the Hhohho district, the accused person acting jointly and in furtherance of a common purpose with one Selby Dlamini did knowingly and unlawfully hold 988 counterfeit notes with a face value of E99, 800 – 00".

The charge appears to be defective as there is no allegation that the accused held a forged or altered note. The term "counterfeit" applies only to coinage, in the content of the statute. It is alleged that accused "knowingly" held the notes. The statutory offence requires knowledge that the notes are forged or altered. The word ***holds*** means something different to "possession" for purposes of the offence created by Section 3 (1) ©. Section 3 uses the term

"possession" in other subsections, so clearly the legislature distinguishes between the two words. "Possession" has a widely interpreted juristic meaning, both in civil and criminal law. "To hold" has no legal meaning, only its ordinary dictionary meaning:

> "To keep fast, grasp (especially in the hands or arms;
> To keep or sustain in a particular position;
> To grasp so as to control. Concise Oxford Dictionary

The legislature argued Mr. Dunseith clearly intended that criminal "possession" was not sufficient to constitute the offence. The accused must be actually, physically grapping or holding the notes so as to be in control of them before the offence can be committed. He must be caught "red handed" as it were. The crown also has to prove that the accused was aware that he was "holding" the notes that were forged or altered; and intended to exercise control over the notes for his own benefit (see ***S vs R 1971 (2) S.A. 470 (2) and S vs Adams 1986 (4) S.A. 882 A.D.).*** The crown alleged that the accused acted in common purpose with one Selby Dlamini. The crown in the case in ***casu*** is not assisted by any presumptions. No doubt this allegation is necessisted by the fact that only Selby Dlamini was caught "red handed" – holding the false notes and the crown is thereby obliged to prove that the accused aided and abetted Selby to unlawfully hold the notes.

The second point taken by Mr. Dunseith is the question of the burden of proof. The crown argued that the court must weigh the crown's version against the defence, and if the court believes the evidence of the two police officers, then the accused "is left without a defence" and must be found guilty. Mr. Dunseith contends that this argument is misconceived and entirely ignores the principles of our law regarding the criminal burden of proof. To this effect he referred the court to the celebrated ***dictum*** in the case of ***R vs Difford 193*** where the principle was laid down thus:

> "No onus rests on the accused to convince the court of the truth of any explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

I was further referred to the case of ***S vs Singh 1975 (1) S.A. 227 (N)*** where it was held that in criminal cases, where there is a conflict between the evidence of the crown witnesses and that of the accused, it would be quite impermissible to approach the case on the basis that, because the court is satisfied as to the reliability of crown witnesses, it therefore must reject the accused evidence.

In the case of ***S vs Munyai 1986 (4) S.A. 712 at 715*** it was held as follows:

> "There is no room for balancing the two versions, i.e. the state case against the accused's case and to act on prepounderances [of probability]"

The case of ***S vs Kubheka 1982 (1) S.A. 534 at 537 (D-H)*** was also cited in this connection.

Mr. Dunseith went further at great length to apply the test propounded in the aforementioned cases to the defence explanation in the present case.

He went further to deal with the evidence of DW2 Robert Mavuso and contended that he was a truthful witness who corroborated the accused explanation in every material respect.

Mr. Dunseith then dealt with the crown case. That the court must accept the testimony of the two police officers because they had no reason to lie. That this is not a correct approach. (see ***S vs Kubheka op cit 537 A – D).*** He also went on in detail to attack the evidence of the pointing out. Mr. Dunseith went into detail in amplifying his point that I have outlined above and for the sake of brevity I am not going to outline them save to refer to them as I proceed in this judgement. I shall now proceed to consider the facts ***vis a vis*** the submissions submitted.

First and foremost I proceed to determine the issue of whether or not the indictment is defective. On this aspect I tend to differ with the contention by the defence. I agree with Mr. Ngarua that the terms "counterfeit" and "forged" are synonymous when one take their ordinary meaning. Section 3.1 of the Order mentions three things, viz a) counterfeit coin, b) forged note and c) uttered note. There is no prejudice to the accused person in the way the crown has phrased the indictment (see ***Maxwell Interpretation of Statutes – Chapter 2)*** that the mischief rule of interpretation should be applied in the present case. "Hold" and "possession" are the same in that ***inter alia*** "to hold" given its ordinary dictionary meaning means "to keep or sustain in a particular position" (per ***Concise Oxford Dictionary***). Further to "keep" according to the ***Longman Concise English Dictionary*** means inter alia "to take notice of by appropriate conduct. It does not mean in all instances that "to hold" requires grasping at a thing physically.

On the second issue raised that of the burden of proof I am in total agreement with the defence that the view taken by the crown in this regard is misconceived that the court must weigh the crown's version against the defence version, and if the court believes the evidence of the two police officers (PW1 and PW2) then, the accused "is left without a defence" and must be found guilty. This is not the correct approach as it entirely ignores the principles of our law regarding the criminal burden of proof. For the proper approach the cases of ***R vs Difford (supra)*** has laid out the proper approach. Further the case of ***R vs M 1964 A.D. 1023 at 1027*** where it was stated as follows:

> "The court does not have to believe the defence story, still less does it have to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

In ***S vs Singh (supra)*** Leon J held that in criminal cases, where there is a conflict between the evidence of the crown witnesses and the accused, it would be quite impermissible to approach the case on the basis that, because the court is satisfied as to the reliability of the crown witnesses, it therefore must reject the accused evidence.

Further as Mr. Dunseith contended in the case of ***S vs Munyai*** (supra) at page 715 it was stated as follows:

> "There is no room for balancing the two versions, i.e. the state case as against the accused case and to act on preponderances (of probability)".

> "Even if the state case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false" ***op cit at 715 F.***

Slomawitz A.J. remarked in the case of ***S vs Kubheka*** (supra) thus:

> "Whether I subjectively disbelieve the accused is however, not the test, I need not even reject the state case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if these exist a reasonable possibility that his evidence may be true. Such is the nature of the onus on the state".

Applying the test enunciated above to the facts of the present case it would appear to me and I agree with Mr. Dunseith in this regard that the accused gave an explanation which cannot on any basis be regarded as demonstrably false or inherently so improbable as to be rejected as false. The crown concedes that if the explanation is accepted, then the accused must be acquitted.

In my view the accused gave his evidence-in-chief in an open and honest manner. He displayed an amazing mental acuity for a man who had had two strokes in custody and is partly paralysed. He told his story without hesitation not fencing with the crown in a long, incisive and exacting cross examination. The impression he gave is that of an honest witness. It cannot be said that his evidence, or his explanation, is demonstrably false. The only inconsistency is in the evidence of the accused that the crown tried to point out, was regarding the accused fainting or falling down. It appears that Mr. Dunseith is correct in his summation as regards this inconsistency. That each witness was describing an event from his own perspective or observation. It is reasonable to assume that in

becoming dizzy and falling, the accused leaned against the car before falling down, that Sergeant Magagula only noticed when the accused was already on the ground. Likewise, DW2 Robert Mavuso very likely saw the accused when he was getting up. All three versions can be reconciled. The accused was apparently fainting, and is not expected to have a clear recollection of the event.

As to the submission that the accused evidence must be false because "the police were waiting for Mr. Lauer at the filling station" any statement of the police witness to the effect that they were waiting for the accused is disguised hearsay and is inadmissible as evidence. As there is no admissible evidence that the police were waiting for the accused person. The only evidence regarding the police presence at Sidvwashini is that they received a tip-off on the basis of which they proceeded to the filling station.

On the probabilities, there were only two improbabilities in the accused evidence that the crown referred to. Firstly, that Selby Dlamini was hanging around a garage at night with E100,000-00 in currency. I agree with the defence that this submission overlooks the facts, on both the crown and defence versions, Selby Dlamini was a criminal in possession of counterfeit money. Criminals do not act rationally. They have criminal purposes to achieve, and detection to avoid the police themselves testified that they went to Sidvwashini to intercepts a meeting (PW1's version) and "a deal" (PW2's version). I found it strange that the police pounced on the accused and Selby Dlamini before the "meeting" took place or the "deal" was consummated if the police story is correct that these two came together in accused motor vehicle. It does not make sense to me why the police acted the way they did if their version was correct.

The second improbability is that the accused gave Selby a lift before doing his shopping. The accused explained that Selby said he was desperate and needed a lift urgently and also that there were many customers waiting to be served. There is nothing inherently improbable in the accused deciding to give Selby a lift before doing his shopping.

Now coming to the evidence of DW2 Robert Mavuso without sounding condescending, inspite of his poor educational background he gave intelligent answers under a lengthy and incisive cross-examination. I was impressed with his evidence. He has no interest in the case and nothing to gain by testifying for the accused. His evidence has high probative value. I agree ***in toto*** with Mr. Dunseith's submissions as regards the evidence of this witness.

Now I come to consider the crown's case. The crown submitted that the court must accept the testimony of the two police officers because they had no reason to lie.

The correct approach was enunciated by Millin J in the case of ***Schulles vs Pretoria City Council*** a judgment delivered on the 8th June 1950, but not reported and quoted in ***S vs Kubheka (supra)*** at page 537 A – D where he says:

> "It is a wrong approach in criminal cases to say" why should a witness for the prosecution come to commit perjury?" It might equally be asked "why does the accused come here to commit perjury?" True the accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is therefore quite a wrong approach to say". I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that, therefore his evidence must be true and accused must be convicted the question is whether the accused's evidence raises a doubt".

Indeed, the police witnesses were obviously interested in securing a conviction and cannot be regarded as impartial or independent. PW3 Constable Mabuza contradicted the evidence of PW1 and PW2 in material respects regarding the visit to accused's office. He discredited PW1 and PW2. PW1 and PW2's version is that at the police station after the accused was duly cautioned according to the Judges Rules led them to his house at Sidvwashini and in his office he showed them his office where he pointed at the machine and the guillotine. Accused was not threatened at all when he offered to give this type of evidence. However, this evidence is at variance with the evidence of PW3 where he stated the following under re-examination by the crown:

Q: At the police station do you recall what PW1 told the accused after you left the police station?

A: I cannot recall

Q: Did you hear anything?

A: PW1 told accused that he will go with us to his home to show us the machine which produced money (my emphasis)

Further, the failure of the crown to produce any register of exhibits or any other documentary testimony, corroborates accused's version that the guillotine was fetched on the 6th January, 1999. PW3 said he never saw the guillotine that night and this is surprising that a person whose job was to assess the scene and collect all physical exhibits pertinent to the case could not see such a machine. Moreover, according to PW1 and PW2 the accused demonstrated how the guillotine was used at the scene where PW3 was also present. Even the summary of evidence refers to an incorrect date.

The crown evidence of the "pointing out" is discredited. It must be accepted that the accused was taken to his office by the police. A photograph of the copier was taken immediately on entry (exhibit F2) instead of the photograph which shows the accused pointing at the machine. One would have expected if the evidence of PW1 and PW2 was correct that exhibit F3 should have been taken first to confirm that accused led them there. But that is not to be the first photograph taken is F2 which is the machine. This fact indicates that the police knew what they were to find in accused's office. Nothing was discovered as a result of the "pointing out" which was not otherwise known to the police. No alleged accompanying statements are admissible. The case of ***R vs Mangungwane Shongwe and others 1982 – 1986 S.L.R. 427 at 432*** is instructive on this point where Hannah CJ (as he then was) had this to say:

> "Without the element of discovery there is nothing like a confirmation of the inadmissible confession by something beyond the statement of the accused… the element of discovery, though it provides no absolute guarantee of the truthfulness of the inadmissible concession, removes some of the risk that evidence may be manufactured by compelling the accused to perform self-incriminatory acts".

Turning to the crown evidence regarding the copier and the guillotine I agree with the defence that it goes no further that this: that the police found a copier and guillotine in the office of the accused.

The crown called no evidence to the effect that the false money was made on the accused's machine. The court is not an expert on electronic copying devices without expert testimony, the court cannot say that these notes (exhibit B) could have been made on the exhibit 2.

It has been shown that this is an ordinary and common office machine. This is confirmed by the "user manual" and that it can be found in most offices in Swaziland and throughout the world, even Mr. Ngarua the Director of Public Prosecutions who prosecuted the case under cross-examination of the accused revealed that he also does have such a machine in his office. The machine was bought here in Mbabane for the sum of E5, 000-00. There is nothing sinister in one having such a machine. Moreover, the accused told the court he was an Engineer and a Loss Adjustor who uses this kind of machine in the course of his work. There is no basis for inferring that the machine was used for counterfeiting.

Mr. Dunseith contended that the evidence of the police officers was not materially shaken in cross-examination. However, since they were simply denying the events which occurred before the arrest of the accused, there was little opportunity in cross-examination to test their denial. It is possible that the police did not in fact see the accused arrive at the filling station, only observed his vehicle after it reversed. There is inherent improbability in the police testimony. If they went to the garage to intercept a "meeting" or a "deal", why did they not wait for the event to occur? It seems very strange that they immediately arrested the occupants of the car, especially as Sergeant Magagula said he was not expecting to find counterfeit money in the car. I also find this aspect of the crown's

evidence strange. The accused version is supported by this: Selby was supposed to make a “deal” with someone. His contact never arrived, Selby got worried, perhaps spotted the police, and asked the accused for a lift. This possibility cannot be discarded, especially where the crown does not disclose the source of the tip-off and put him in the witness box. What we know about the source is what was sneaked through cross-examination of the accused that he received a phone call from a certain Eric Dlamini in his cell phone informing him that he should go to Sidvwashini Filling Station at 7.30pm to meet someone to make a counterfeit deal. I must say it would have boosted the crown’s case if this Eric Dlamini was called to give evidence. However, he was not called and a golden opportunity was lost.

In sum, therefore, I come to the following conclusions which are in tune with the facts of this case and the law which operates in these type of cases:

1. The accused gave a plausible explanation which cannot be rejected as false.

2. The accused’s explanation is corroborated by an independent witness.
3. The crown case is tainted by the discrediting of its two main witnesses and the improbability of its version.

4. The possession of the copier by the accused does not advance the crown case. It is a neutral piece of evidence.

5. The defence case, even on a civil standard of proof is more probable that the crown case. Applying the criminal standard, the accused’s explanation is reasonably possible.

The accused is entitled to his acquittal.

The copier and guillotine must also be returned to the accused.

S.B. MAPHALALA J