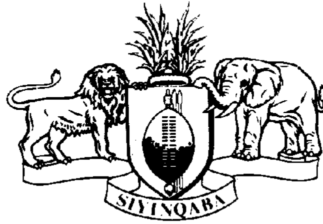

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.42/00

In the matter between:

REX

VS

ISAAC SIPHO MGABHI

CORAM	**:**	**ANNANDALE J**
FOR THE CROWN	**:**	**MS. M. DLAMINI**
FOR THE ACCUSED	**:**	**MR. MKHWANAZI**

JUDGMENT

16th NOVEMBER 2001

Headlines in the local press sensationalised a huge cash heist during May 2000 wherein two cash-in-transit security guards made off with some 4.8 million Emalangeni. They collected sealed money boxes from Standard Bank in Manzini for safe transit to the Central Bank neither the two guards nor the money reached the destination as the guards abandoned their vehicle and went to Mkhaya from where they ordered bags in which to carry the loot and returned to Manzini the same night. The following morning they ordered some personal clothing and shoes, thereafter to disappear with all of the money, which to date has not been recovered. During the course of the trial, one of the thieves, Sipho Dube, returned to his parental homestead in Swaziland where he passed on. The other of the two thieves, Hebron Zwane is still at large.

The accused before court was indicted as "acting jointly in common purpose with the two others who are still at large". For all practical purposes, as shown below, the accused did not partake in the actual *contrectatio*, nor is there evidence in support of a finding that he assisted in the planning of the theft as a co-conspirator before the event. His role is limited to the rendering of assistance to the two thieves after they had already committed the crime, in the role of an accessory after the act. The main issue to decide is whether the accused was aware that the other two had committed the theft and assisted them knowingly, with knowledge of wrongfulness, to make their escape, or whether it can be inferred that he must have known.

As a prerequisite for a possible conviction as accessory after the fact it is incumbent on the prosecution to prove that the actual crime had been committed, by another, the principal offender. See R V LEE 1952(2) SA 67 (T) where it was held that where the accessory after the fact is charged separately, the Crown must prove the guilt of the principal offender. In actual fact, the accused before court was not formally charged an accessory, but as *socius criminis* in the amended indictment. Initially he was indicted as perpetrator, the actual thief.

An accessory is not a *socius criminis* and in R V MLOOI AND OTHERS 1925 AD 131 it was held that since this is so, it was not possible on a charge for the main crime, as *in casu*, to convict an accused of being an accessory after the fact to that crime. This procedural obstacle has been recognised by the law makers of Swaziland and resulted in the inclusion of Section 181(3) in the CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938 (Act 67 of 1938) hereinafter referred to as "the Act", which reads thus:-

> "Any person charged with an offence, may be found guilty as an accessory after the fact in respect of such offence, if such be the facts proved, and shall on conviction, in the absence of any penalty expressly provided by law, be liable to punishment at the discretion of the court convicting him:

> Provided that in no case shall such punishment exceed that to which the principal offender would under any law be subject".

From the early stages of the trial it was clear that the accused could not be at risk of a conviction of the theft itself, and also not as *socius* unless it would be so proven, or acting in a common purpose with Dube and Zwane, unless that was proven. The evidence does not sustain any of these findings. Thus, the focus is to fall on the role of an accessory, though he was not charged or indicted as such. If the accused conducted his own defence, this would have had to be explained to him from the onset of the trial, so that he would know what case to meet. This was not done, but causes no prejudice as he has legal representation, and in any event, during the case for the prosecution, I already gave such an indication to both his attorney and the Crown's counsel. See S V JASAT 1997(1) SACR 489 (SCA) at 493h – 494a regarding the non-prejudice.

The Crown has been able to prove, as per S V LEE (*supra)*, that the theft has been committed by the principal offenders, Hebron Zwane and (the late) Sipho Dube.

Mrs. Hypecia Gumede (PW VII) is an employee of the Standard Bank in Manzini. On 17th May 2000 she prepared the packing and counting of cash banknotes for deposit with the nearby Central Bank, which monies were to be transferred by security guards, packed into two steel trunks. The documents she used during her evidence, exhibits "A" and "H", supports her evidence that the money consisted of E3 050 000 local and R1 760 000 South African currency, 4.8 million in total.

These two trunks with the money was given to Hebron Zwane and Dube, the two security officers, and receipt of it was acknowledged by Hebron (Zwane) on a document marked exhibit "I". Her further evidence is that this money never reached the Central Bank, to be lost until this day.

She alerted the security company whose operations manager, Mr. Mavimbela (PW1), confirmed that the two men who took delivery of the money but disappeared with it *en route* to the Central Bank were their employees. Dube and Zwane left with hardly a trace. The vehicle that was allocated to Zwane and used to convey the cash also went missing. Mavimbela alerted the police about the turn of events when the loss was reported to him. Neither of the two security guards were apprehended, not was any of the money recovered.

Further details of the heist were given by Mr. Ephraim T. Dlamini (PW IV) who knew Zwane and Dube as colleagues at work. On the day in issue, 17th May 2000, he was with the former and they drove to various businesses in Manzini to collect money boxes for safe deposits as armed cash in transit security guards. When they got to Standard Bank they found Dube's vehicle parked there and did so likewise. Here, Dlamini left Zwane and entered the bank to collect empty money deposit boxes but on his return found that Zwane had left – he saw his vehicle disappear at a traffic light. Though he saw Dube standing next to his parked vehicle on their arrival, he was now also gone having left his vehicle where it was parked. He never saw the two men again.

In court, he also identified the exhibited jacket as property of Zwane, as did the operations manager, Mr. Mavimbela, which jacket the accused had arranged from prison to be removed from his workplace. He further confirmed that the exhibited black canvas boots are just like those issued by the company, and which Dube and Zwane wore on the day of the theft, as part of their uniform. He also said that at any given time the guards have only one pair of boots, as old ones have to be handed in before replacements are issued.

It is on strength of this evidence that it is found that the Crown has established a *prima facie* case that Zwane and Dube, the principal offenders, stole the banknotes to the value of 4.8 million Emalangeni and

South African Rand, the lawful property of Standard Bank and at the time in lawful possession of Mrs. Gumede, on the 17th May 2000, at Manzini.

The further evidence heard is centred on the role of the accused, Mr. Mgabhi. Mr. Makhanya, who was introduced as an accomplice by the Crown's counsel only after the oath was already administered, was at that stage informed of the provisions of Section 243(1) of the Act and chose to proceed and testify. He said that around the middle of May 2000, either the 13th or the 14th, (which is prior to the theft) he and two other people (who were not called by the Crown) made small cash loans from the accused, E170 in all. He later on visited his erstwhile colleague in prison. There the accused asked him about his cellphone, given to the witness at the time of his arrest, and which the witness later on sold. He was also asked to try and recover the outstanding small loans in order to pay an account of the accused.

He again visited the accused at prison some time later, this time to be asked to recover a jacket and shoes from the accused's workplace and take it home for safekeeping. This colleague then retrieved the items from a parcel shelve at work, where employees could keep their belongings. He took the two pairs of shoes and the jacket, which were in a plastic bag and kept it at his home. The following week at prison the accused confirmed it to be the correct items, collected from his place of work.

These same black boot "takkies" and jacket were identified by the operations manager of the cash-in-transit security company to have belonged to the security guards who collected the money from Standard Bank, Dube and Zwane. This he did by noting that a number which is written inside one of the pairs of takkie-boots No.831, is the same as the "clock number" of one of the two, Hebron Zwane. He also relies in his identification to support his opinion, that the boots are of a commercial type that, although not exclusively made for his firm, are not readily

available in the open market, also that the sizes of both are the same as that issued to them, upon signature, as per their "uniform issues" documents, exhibits "E" and "F" respectively, as "brand new" on 5th November and 25th August, 1999. The jacket he said to have recognised as the one "he used to wear to work".

This evidence about the two pairs of canvas boots and the jacket, said to belong to Dube and Zwane, the principal offenders, *prima facie* proves it to belong to them, but not beyond reasonable doubt. It is not conclusive proof, but there is no evidence to gainsay it, nor reason to believe it to be otherwise, although there might have been margin for error. The evidential value of this evidence was proven by the Crown only at face value and no more. It serves as evidential link in the absence of an explanation by the accused person as to how these items, the property of the two thieves, came to be at his place of work and why he went through the trouble of seeing to it that it was removed from his workplace at OK Bazaars in Manzini. It raises the question as to why he wanted to have it removed. Was it because he was apprehensive that it could serve as evidence to establish a link between him and the thieves? Why did he have it, where did he get it, why dispose of it through Makhanya? To a large extent these questions will remain unanswered – it was not properly canvassed in cross-examination when the accused gave his evidence. All he said about these items was that he differed from the witness in that he wouldn't have asked him to keep the items with him or especially not to destroy it, but to give it to one Timothy Maseko, who in turn would have taken it to Zwane's home.

So doing, by his own admission, the accused himself acknowledges that the boots and jacket he arranged to be taken away from his place of employment, belong to the perpetrators, as said by their overseer. It serves to increase the probative value of the evidence and enhances the questions posed above, begging for an answer as to how he got hold of the items and when, and for what reason. This being so, even in a worst

case scenario, is still no proof that the accused conspired with the perpetrators to commit the theft, neither in isolation, nor in the context of the totality of evidence.

At this stage of the judgment it is recorded under section 234(2) of the Act that witness Sikhumbuzo M. Makhanya has answered all questions put to him to satisfaction of this court while under examination and that he shall be absolutely freed and discharged from any liability to prosecution arising from this offence, having regard to the limited extent he was involved.

The evidence of a further witness, Ms. Zwakele Dlamini (PW II) proved a much closer link between the accused and the principal offenders. Although my own notes date her evidence as pertaining to events of 7th and not 17th May 2000, and there is no transcript available to verify this, there is no reason to doubt that she related events that could not have occurred ten days earlier, on the 7th May. I take her evidence to relate to events of the 17th May 2000, the date of the theft.

She related how one Hezekiel Zwane came to their homestead at Mkhaya during the morning around 11h00 – 11h30 and signalling for someone to come to him, which she did. He then introduced himself to her and sent for her mother, who when she saw him, told her that it was “bad”. Before he sent her off to Siphofaneni to buy food, she saw her mother carrying something in a big bag on her head, covered in a sheet, which she got from Zwane and the man who was with him,. taking it into the bedroom of the house where her mother placed it onto the bed. On her return with the food, the two men told her not to change her clothes as she was to be sent to Manzini.

When it transpired that she wouldn’t be able to purchase a cellphone, on her own, in Manzini, Zwane gave her a note which she was to take to the OK Furniture shop and hand to a Mr. Mgabhi, the accused. In addition, he

gave her E4 000.00. At Manzini, she handed the note to the accused, on which was written, according to the accused, a request to purchase a cellphone, two big and two smaller bags. She did not know the accused beforehand, but there is some dispute over whether the accused immediately knew who the sender of the note was, or if he knew right away. The version of the accused is that he first had to ask where Hezekiel (Zwane) worked and only when she said at Cash Security, did the penny drop. Ms. Dlamini has it that he knew right away when he got the note.

There is also some dispute as to whether this witness had read the contents of the note or not, but it is of minor consequence.

This witness and the accused then set off to purchase the items listed in the note and bought a cellphone, two big carry bags and two smaller ones. Not being able to find a specific taxi as mentioned in the note, they took another taxi after 17h00 and the two travelled to Mkhaya where they stopped about 750 metres from her home instead of right at it, on prior instructions of Zwane. The accused then paid the driver and told him to wait for their return and the two then walked to the house, carrying the newly purchased items. She then put the bags onto the bed and while in the dimly lit bedroom, noticed a whole lot of small cartoons on the floor, full of money. These cartons, she said to be about the size of 500ml milk cartons, stood side by side covering an area of just over a square metre. When she left the bedroom the accused entered, greeted the two men and they had a hushed conversation after which the accused made his exit and ran off, presumably to the waiting taxi.

Later that night, just after midnight, she saw Hezekiel (Zwane) and his friend (Dube) leave the house, carrying the bags now filled with the money.

Some distance from the house they waited for the taxi, driven by Mr. Justice Mamba (PW VI) who was engaged by the accused in Manzini about an hour earlier. Mamba's evidence is that at around 23h00 two men hired his taxi to convey them, one to be taken to the "Rest Camp", the other further. He added some fuel and was asked if it would be enough for a longer trip, to Malindza. After the first passenger alighted, the other man informed the driver that it was a ruse to have told him his destination was Malindza, as he didn't want the first man to know he actually was destined for Mkhaya. This passenger, the accused, now introduced himself as "Maphalala" (and not "Mgabhi") and again wanted assurance that there is enough petrol in the car for a return trip. He was then told that the purpose of the journey was to collect his sick girlfriend, his brothers already having been sent ahead to prepare her for the trip. He was also told by "Maphalala" that if the girlfriend was too sick to make the journey, only her baggage would be taken back to Manzini.

On their arrival at Mkhaya, they found four people on the side of the branch road he was directed to take. Here he was told to stop, turn the car around and wait. "Mr. Maphalala" (the accused) alighted and went to the waiting four people. At this stage the taxi driver became fearful, but then the accused returned and four bags were loaded into his taxi. Two of the four then left with their own vehicle, one of which he recognised as another taxi driver, one Gwebu. The other two men and the accused got into his taxi and they set off back to Manzini. There, he was told not to drive through the city but directed via the by-pass road until they came to a halt in the Fairview area, near the Tinkhundla centre. His passengers alighted and took their luggage, leaving him with an extra tip for the fare.

Before he again saw the accused in court, Mamba said he met him a week and half after the Mkhaya journey in Manzini, where both recalled the other by name, the accused still being "Mr. Maphalala" and not Mgabhi.

The essence of Mamba's evidence stood the test of cross-examination. Smaller details of the accused's version that were put to him were consistently rejected where in conflict with his own evidence. For instance, he held his ground when the story of going to Mkhaya to fetch a sick girlfriend was contested and he wouldn't have it that instead, the purpose of the trip would rather have been to take food for the men there. He also was not headstrong or belligerent when told that "Maphalala" is used by the accused as a "praise name" for his own surname, and was used to avoid confusion with regard to a disgraced politician also called Mgabhi. He further denied that the accused would have told him about telephone calls he couldn't make, nor that he knew about any difficulties to have a cellphone battery charged. Mamba did not try to refute any instructed statements of fact put to him, but about which he couldn't be expected to have known.

As with Ms. Zwakele Dlamini, there is no reason at all not to believe their evidence. They made good impressions as witnesses, stuck to their versions and leaving no doubts as to the veracity of their evidence. Neither of them seemed to have any ulterior motives and both related the events as well as they could, desisting from adding embellishments to place the accused in a negative light. I am satisfied that the factual findings of their evidence, set out lower down, can safely be relied on as true and correct. There is no diminishment by way of any unfavourable observations of their demeanour in court, nor of the way they presented their evidence or responded to questions asked.

Mr. Timothy Maseko (PW V) was called by the Crown and testified that he is also employed at OK Furnishers in Manzini, just as the accused was and that he had known him for some years. He related how he read about the theft of the large sum of money in this matter, a day after the event. This was at work and the involvement of two security guards was also reported. Apparently the accused, who was present and with who the news was also discussed, didn't seem to bat an eyelid. The following day

the theft was again reported on, this time with a photograph of Hebron Zwane, and a report that Dube was also involved (they being the two principal offenders). Again Maseko spoke about the report with the accused, especially concerning Zwane, whom they both knew, but again the accused appeared nonplussed and ignorant about the whereabouts of the two thieves.

More information came to light when the attorney of the accused questioned him. It was this Maseko who had introduced Zwane to the accused a few years before, had been an erstwhile colleague of Zwane, knew in which area his parental home was and met Zwane from time to time at his work, also on the odd social occasions. What was repeatedly put to him and consistently denied is that he, Maseko, would have made arrangements for Zwane to spend some time at the accused's home in Fairview, Manzini, at a time prior to the theft. The accused was said to be reluctant to agree and would hold Maseko responsible for possible loss of property. Also put and denied was an allegation that Maseko was to have received the boots and jacket fetched from the accused's workplace in order to take it to Zwane's parental homestead.

During an inspection of the accused's house in Manzini in the course of the trial, Maseko disclosed for the first time that he had been to the house of the accused before, said to have been when he assisted the accused with the removal of his personal effects from Mbabane, around January 2000. He said they had parked some distance away from the house, at the same place the convoy stopped for the inspection *in loco*. This aspect, of having assisted the accused with moving to Fairview, was contested during subsequent cross-examination. It was also put to him that he had indeed been there before, once only, but on the day the accused would have taken him there, during the lunch hour, when Zwane and Dube were left behind while the accused went to work. This latter day was two days after the theft, middle May 2000, and not in January that year.

Mr. Maseko consistently maintained that he was at the house in January, equally consistently denied being there in May. I find this position rather odd. Nothing much defends on the factual accuracy of the two alleged visitations, save the credibility of Maseko and also that of the accused. Maseko maintained that in January, it was not possible for a vehicle to reach the house. It seems nonsensical for the house to have been built, requiring various loads of building materials in its construction, while no access was available by any vehicle. At the inspection, various routes seemed to be available to reach the house in a vehicle, apart from the foot-path. I am disinclined to believe the evidence that it was not possible to reach the home by vehicle as Maseko said, and also have doubts as to his denial of visiting the house of the accused just after the theft. But, as stated above, it can at best lead to a question mark being placed over the veracity of Maseko's evidence, which in any event does not do much to support the Crown's case. Mr. Maseko's evidence is not such that the court can rely on it with any measure of comfort or safety and I reservedly refrain from drawing further adverse conclusions, especially as to his propriety in the events of this matter.

The final prosecution witness was detective Sergeant Kunene (PW VIII). He investigated the matter and subsequently arrested the accused, nine days after the theft. He further gathered evidentiary materials like the black canvas boots and jacket, the property of the principal offenders, and located witnesses. In the main, his evidence served to prove a cautionary statement made by the accused, exhibit "J". Therein the accused gave a version comparable to his evidence later adduced to court. It is devoid of any admissions, save for his version of how it came about that he assisted the principal offenders in obtaining various goods that he so obligingly conveyed to them during the night and remained at their back and call, also allowing them to stay in his house.

The police officer's further evidence is that the accused proferred an explanation to him about the boots and jacket, saying that he received it

from Dube and Zwane, with instructions to destroy it. The defence version was that instead, although left behind in the house of the accused, he was not to have it destroyed but rather sent through intermediaries (Makhanya and Maseko) to the parental home of one of the thieves. The police officer stood his ground and there is no reason to doubt his evidence in this regard, but it remains in conflict with the version of the Crown witness Makhanya, who said he was told to hold on to it, contrary to having it destroyed. For this reason, I am reluctant to draw too strongly on adverse conclusion against the accused, and do not readily find that he tried to destroy incriminating evidence, but that he disposed of it remains as fact.

It is against this body of evidence presented by the prosecution that the accused put forward his own version of the events. He mainly endeavoured to offer an innocent explanation as to how he inadvertently got stuck in the vortex of events, the image of a man innocently drawn into events over which he had no control.

Mr. Mgabhi testified at length and gave numerous minute details. It certainly cannot be said that he was at a loss for words or that he has a tendency to gloss over the events. He came across as a coherent and well articulated intelligent person with a good memory and an eye for detail.

His evidence is in line with that presented by the Crown, save for some minor points. He related how he was going about his usual business on the date of the theft, which he claims not to have known about, when the lady from Makhanya arrived with the note from Zwane. This set off the events which caused him to take off from work to buy the cellphone and luggage bags, using the money sent along with the note. He then took the trouble of accompanying the lady to Makhanya, after spending quite some time and effort to fruitlessly look for a specific taxi to take them there. Still not knowing the purpose of his expedition, he was again not

told the reasons for it by the men he met there, in the house of Ms. Dlamini, the bearer of the note. Yet, he acceded to return all the way to Manzini to purchase food and make some telephone calls, after which he diligently returned to Makhanya to report his failed mission. Still, it was not the end of the onerous duties he so readily agreed to do. From Mkhaya, he once more returned to Manzini, this time accompanied by the two men for whom he took so much trouble already, without knowing the reason for it, according to him. At Fairview he put them up in his house for what little remained of the night. In the morning, Mr. Mgabhi again took on some errands for the two men, this time to have Maseko (PW V) called to come and see them and further to buy them leather jackets and "Hi-Tech" shoes, apart from more food and drink.

Ever obedient, the accused performed his duties as ordered, during work hours, before going back to his house during lunchtime with Maseko. There, he was told to return after work, when he would be informed "… about their work for which they were busy sending me up and down". Maseko would have told him that he "…had also been warned not to reveal anything to me as well". That afternoon after work, he and Maseko again went to his house, this time to find it empty, with no message or note by either Zwane or Dube.

The accused concluded his evidence by denying any participation in the theft itself, or planning thereof or assisting the thieves knowing about what they had done. He said he never saw the contents of the bags and the men left without leaving him any money.

Mr. Mgabhi was cross-examined at length by Crown's counsel and enumerated further on the myriad of details. He maintained that he never knew that the men he so obligingly helped had almost five million Emalangeni and SA Rand with them, that he didn't know that they stole anything and that was an innocent victim of circumstances. He was not

shown to be an outright liar, nor did he deviate significantly from his basic version.

The upshot of the evidence as a whole is not that there are two different versions of the facts before the court. In essence, as said above, there is very little factual dispute between the prosecution and the defence, the only real difference being subjective perspectives. In my view, the decisive factor in deciding this case is whether the accused's story may reasonably probably be true. It will not be a correct approach to weigh up the Crown's version against that of the accused and to accept or reject the one or the other on the probabilities – See for instance the remarks in this regard by Zulman J (as he then was) in S V MAKOBE 1991(2) SACR 456(W) at 460b-c. He went on to say at 460i-j that "the test is, and remains, whether there is a reasonable possibility that the appellant's evidence may be true. In applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true (R V M 1946 AD 1023 at 1027)".

This same authority was relied on by Tebbutt J in S V JAFFER 1988(2) SA 84 (C) at 89-D. At 88E-G he had this to say, much as Zulman J in Makose (*supra)*:- "It is of course, always permissible to consider the probabilities of a case when deciding whether an accused's story may reasonably possibly be true (See S V SINGH 1975(1) SA 227 (N); S V MUNYAI 1986(4) SA 712 (V) at 716-B). The story may be so improbable that it cannot reasonably possibly be true". The learned Judge who now sits as JA in our local Court of Appeal however also stressed the unacceptability of weighing the two versions and accepting or rejecting the one or the other on a balance of probabilities. It must be borne in mind throughout this exercise that there is no burden of proof (or onus) on the accused to prove his innocence. Unlike civil cases where the balance of probabilities come into play, criminal case require proof beyond a reasonable doubt to sustain a conviction.

It is from the above perspective that the evidence is considered in its totality. The established and accepted facts proven is that on the date of the theft, the accused was visited by Ms. Dlamini who had money and a note for him. It cannot be deducted that he expected the note or anticipated her arrival. Her evidence is that she was only given his name (by the thieves) when she said that she would not be able to purchase a celllphone on her own. There is also no evidence whatsoever that the accused either participated in the theft or that, acting with a common purpose as alleged in the charge sheet, he helped to plan the heist or that he even knew about it beforehand.

As said at the onset of this judgment, the worst case scenario is that the accused may be found to have been an accessory after the fact, if such is established and proven by the Crown. The crime of being an accessory after the fact is distinct from the principal crime and not part of it (REX V MLOOI AND OTHERS 1925 AD 131). It is also "committed only when a person does act in relation to a crime committed by another" (R V GANI AND OTHERS 1957(2) SA 212 at 220-A). Pivotal to this is that the "accessory" must have knowledge of the commission of the crime and such knowledge may be inferred from the surrounding circumstances of each case (R V LEE AND SCOTT, 172 ER at 1354). Instructive on the aspect of a possible conclusion that an accused person had knowledge of the offence, is S V KAZI 1963 (4) SA 742 (W) at 750-A: "Such knowledge may be actual or constructive. The latter means a realisation or suspicion of the offence being committed coupled with a deliberate abstention from acquiring any relevant information about it in the hope of thereby evading culpability, but mere negligence, even if gross, in failing to acquire such knowledge is not sufficient".

Applied to the present facts, the following comes to surface – The accused person time and again said that he did not know that Zwane and Dube had stolen the huge amount of cash on the day he assisted them. There

is no evidence to contradict that. He further repeatedly said that he was held in suspension as to what was ultimately required of him and that when he thought he would finally be let into the picture, so to speak, the two men had unexpectedly left his house without leaving any message for him, nor any money.

The inevitable question in my mind is how would this man have gone through all the troubles he took to help the people as he did, without knowing the reasons why. He walked more than the proverbial extra mile, much more. He took time off from work, went on shopping expeditions with money in abundance. Why could the men not have done their own shopping? Why did he lose sleep in the process? Why go through so much trouble to make phone calls on their behalf? These and more questions raise a strong suspicion that the accused must have known that all is not above board.

I cannot believe that a reasonable man in the position of the accused would have done the same. I do not believe Mr. Mgabhi played the role of the Good Samaritan in total ignorance of knowledge of wrongfulness as he wants this court to believe. But, this is not the test to apply, whether I believe him or not. Is the version of the accused, that he did not know that Zwane and Dube whom he assisted after they stole the money by doing their shopping and running to their beck and call but without him being aware of their crime, so inherently improbable that it could not reasonably probably be true and has to be rejected? And if so, is the only reasonable conclusion that may be drawn from the facts, to the exclusion of all others, that he did know they committed the theft? Did the Crown prove his guilt beyond reasonable doubt?

It is on these questions that the matter hinges. There is no direct evidence that the accused knew that the principal offenders committed the theft and the Crown only relies on the circumstantial evidence to show that he must have known about it form which his guilt is sought to be

inferred. The Crown referred to a number of aspects during submissions from which such inferences are to be drawn.

One aspect is that Zanele Dlamini testified that she saw a number of small cardboard boxes in the dimly lit room of their house which contained money. The accused says he never saw it. The evidence of the Bank's official was that the money was packaged in transparent plastic wrappings. It begs the question why and when the two thieves would have transferred the banknotes into small cartons, the size of 500ml milk boxes, if it was already packed in plastic. Of more importance is that Ms. Dlamini's evidence was that the room was devoid of much light and that she was only able to see the boxes on the floor by light shining through an open door. There is no electricity at the place, and no indication of how much ambient light there was inside the room or the type and strength of light from the adjacent room.

Can it be found that the accused person did see boxes full of money in that room? Is it the only conclusion that can be drawn? I think not.

A further major point was made about the arrangements made by the accused, after his arrest and from prison, to have the boots and jacket, which belong to the thieves, removed from his place of work. Can the guilt of the accused be inferred from this action? A number of negative deductions may be made but it is not the only one to say that through that, he acknowledged that he knew at the time he rendered his assistance, he was aware of what they had done.

The Crown also pointed out that Mgabhi too readily accepted the onerous tasks placed on him to have done so in innocence. Again I fully agree, but though I do not believe his story, it cannot in my considered view be the only conclusion that he did so with a knowledge of wrongfulness.

Similarly the aspect of Mgabhi introducing himself as a Maphalala to the taxi driver. There is no evidence to gainsay his version that he considers the latter surname as a "praise name" for Mgabhi, especially so as he wanted to avoid a connotation with a certain politician by the same name, apparently disgraced through some "cow dung scandal".

The taxi route to his home in Fairview via the by-pass road instead of through Manzini town is also propounded as reason to convict. Fact of the matter is that although it may be possible to infer that the accused wanted to avoid being seen or confronted by the police, the taxi driver himself considered it to have been the best route. Again, there is not an only inference that can be drawn from the facts to establish a guilty frame of mind by the accused.

There is also the evidence of Maseko that the accused feigned ignorance when told about newspaper reports covering the theft. The more I scrutinise Maseko's evidence, the less I feel inclined to accept his *bona fides* and am loath to find that the reactions of the accused are by necessity indicative of guilt. Maseko's evidence about having been to the home of the accused some months prior to the event does not take the matter further, save to wonder why it only surfaced at the scene of the inspection. If his evidence is analysed it rather points to concerns about his own propriety and his connections with the two thieves than to the guilt of the accused.

These and other conclusions that are sought to be drawn by the Crown must not be seen in isolation, as if each is to be considered and ticked off individually to decide if there are more than one inference that can reasonably be drawn. In this case where there is so little factual dispute between the versions of the Crown and that of the accused, it is necessary to view the evidence in its totality and from such an overall picture decide if an inference can properly be drawn that indeed the accused must have known what he had let himself in for, or not. It thus needs to be seen if

the accused had constructive, if not actual knowledge, that the two men be so dutifully helped had committed the theft.
As said, the accused was subjected to very tedious, protracted and intense cross-examination. The Crown's counsel was bent on showing that he is a person whose explanations about the circumstances cannot possibly be true and that it has to be rejected. Over the long duration of this exercise I was able to form an opinion of the accused which does not favour him at all, one which is detrimental to his protestations of being innocently drawn into a maelstrom of events, which is pivotal in the outcome of the trial.

One of the many negative aspects which repeatedly surfaced is his inability to give a straightforward answer to a simple and uncomplicated question. For instance, in his warning statement he mentioned some keys. He was asked "which keys were these". In his elongated answer he volunteered a lot of unsolicited information. I noted at the time that he started to stammer and he developed a sudden difficulty to formulate his sentences. Yet he was eventually asked by the court "which keys" to which he gave the reply expected, namely "the house keys". An innocent man with nothing to camouflage need not resort to the subterfuge of long verbiose replies as he need not anticipate what else he may be asked and try to shut as many doors as he can when seeing an opportunity to do so, without being prompted.

A further tendency was shown by the accused that as soon as he was confronted with differing versions attributable to him, he repeatedly and readily shifted blame away from himself and onto his legal representatives. One such example is that he was confronted with his affidavit which was used in support of his bail application. Therein, he stated that the lady who brought the note to his office (PW II Ms. Zwakele Dlamini) left him behind as she went to do the purchases, to return later in the afternoon whereupon he accompanied her to Mkhaya. In his own evidence, after hearing the evidence of Ms. Zwakele Dlamini, he readily

stated how he accompanied her during the shopping as she couldn't do it herself. He added that he first arranged with his employer to take time off.

On realising that there is a material discrepancy of fact between the two versions, he blamed his attorney for surreptitiously causing him to sign the affidavit under circumstances which prevented him from first reading and verifying the statement. When further asked about the discrepancy, as to how his attorney would present a different version in the statement than what he was instructed, he again blamed the attorney, this time for misunderstanding him. The accused yet again blamed his attorney who appeared at the trial for failing to put questions to Ms. Dlamini about the accused telling her to go and buy the items herself, by saying that he didn't set up the questions his attorney was to ask. He blamed his attorney a number of times for failures when it became convenient for him to do so. My own impression of his attorneys instructions was that he was fully and comprehensively briefed by his client and that blaming the attorneys were last ditch efforts to shift blame away from himself, contrary to what he tried to convey.

I am aware that not each and every minute detail in the long course of events is known to a defence attorney but the repeated discrepancies and omissions that emerged tended to rather point to the accused as a man who has a fertile mind and who has no qualms to fabricate excuses as and when convenient or else to blame his lawyers.

I also noted that Mr. Mgabhi apparently became hard of hearing during cross-examination. The interpreter on numerous occasions had to repeat questions put to him that were short and unambiguous. The impressions I got were not that he didn't hear the questions but that he needed extra time to consider his answers very carefully in an effort not to contradict himself. In itself, it need no negative inference, but the instances that were noted were mostly when he was shown that indeed his versions are

not all computable with each other or with that given by the Crown's witnesses on the same aspects.

Another aspect that came to light during the course of cross-examination was his obsession, as opposed to disposition, with wanting to serve the criminals to the full extent. During the Crown's case and his evidence-in-chief, the image of a good Samaritan was portrayed. Later on, this Madonna-like image was tarnished. The accused jumped to the left, right and centre in order to portray himself as merely a good friend in need and the perfect host. He said that he missed his sleep not because he wanted to help the men staying over at his house, but because he did not require much sleep as he is a "free person" who can do as he pleases. Although he was told to "rush to Mkhaya immediately", he did not bother to enquire why there is this sudden emergency. It was, according to him, no concern of his to know the reasons why he was the one to do all sorts of shopping, with an unexpected fist full money, knowing full well that the emissaries did not earn a fortune. Suddenly money became available to pass tips around and not being called upon to account for expenses. Though he was called upon to unveil no secret to anybody, the accused himself had no inkling as to why he would run backwards and forward to minister to the needs of his new found acquaintances. He most unconvincingly tried to portray himself as a man who heeded to warnings of secrecy, without any substance as to the reasons why it has to be cloak and dagger operations, a man with no reason to be suspicious.

The accused was also very unconvincing about his version of events as opposed to that related by the taxi driver that took him to Mkhaya. The issue about the pseudonyms he used about his identify has been mentioned above, but the trend of the conversations they had poses a further question mark on his veracity. The accused was taken to task about the explanations he gave to the driver on the reasons why he had to go to Mkhaya in the first place, also his version about the co-passenger who had to alight halfway along the route. I do not find his answers

plausible, nor does it fall within the category of untrue explanations given without a reason to deceive. He deliberately tried to deceive the taxi driver about his mission to Mkhaya, he deliberately tried to prevent the other passenger from learning of his destination. This does not tie in with an innocent man on a mission of compassion.

A further aspect of the evidence by the accused is that when he was confronted with different versions between what he said in court and that what he wrote himself when given an opportunity, by the police, he readily resorted to blaming the police for threatening and pressuring him. He went as far as saying he was mentally disturbed. That this version was a recently fabricated one stands to reason when it is viewed in context with his instructions to counsel and his own earlier evidence. It is only when confronted with conflicting statements that the new avenue of escape springs to mind and is offered as an explanation. When something as crucial as actually being threatened by the police that they were going to kill him if he does not write what he is told in his statement is indeed the case, it is to be expected to be put to the relevant police officer during his evidence. Added, if the attorney was told about it.

The prevailing trend throughout the course of the trial was that the accused wanted to be seen as a man on a mission of compassion, without knowing the cause of it. As soon as it is shown time and time again that his protestations of innocence cannot be reconciled with the factual situation or that he offers different explanations for the same set of facts, he passes the buck to whoever may be at hand. New versions of the truth emerged all along. He volunteered new facts when it suited him, even that at the end he said that the cellphone remained behind when the men had left contrary to an earlier version that nothing remained when he found that they had gone, leaving no trace behind.

On a full consideration of all that Mr. Mgabhi had said, the way in which he did so and when comparing that to the evidence led by the Crown, I can

come to no other conclusion than that the accused is a very erudite and intelligent pathological liar. There is no way in which it can be accepted that his version, however plausible he tried to convey it, is anywhere near the truth. Initially his evidence and instructions seemed to be possible and as it was so near to the truth, it had the ring of truth to it. It almost seemed as if it could reasonably possibly be true. But it cannot possibly be true, not even remotely.

The accused has shown himself too many times to be a man who is not only sparing with the truth but a person who does not hesitate to manipulate the truth as he deems fit at the time. There is no way to accommodate his own evidence in any way to support his contention of unwitting and unknowing participation. It is not possible, in my view, to reconcile his assistance to the actual perpetrators in any way apart from finding that he knew what he had let himself in for. He knew from the onset who he dealt with and what and why he had to do as he did. He was not an innocent victim of circumstance. He was not a good Samaritan who walked much further than the extra mile.

The exculpatory evidence of the accused stands to be rejected in so far as it is irreconciliable with the Crown's case.

The factual finding of this court is that indeed the accused knew the reasons of his mission. He knew that the theft was committed by Zwane and Dube at the time he assisted them to make their preparations to escape the course of justice. He knew that they had committed the crime, if not to the full extent of how much they actually stole, until he read the newspaper reports. He assisted them in the procurement of what they needed in order for them to take off. By his own account he did not profit by his rendering of assistance as the thieves took him for a ride as well.

As indicated initially in this judgment, the conduct of the accused renders him liable to be convicted as an accessory after the fact and not as a co-

perpetrator or as a wrongdoer who acted with a common purpose. The conviction ordered is that he be found guilty, as an accessory after the fact, of the crime changed with.

The matter is remanded for proceedings on sentence as soon as counsel are able to secure time on the rolls, but no later than the end of this month.

It is ordered that the corporeal exhibits tendered and received as evidence not be destroyed but kept in safe custody, pending further

investigations and a possible prosecution of the remaining principle offender if and when he is apprehended.

JACOBUS P. ANNANDALE
Judge