

# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 19/08

In the matter between:

LUCKY NHLANHLA KHUMALO

APPELLANT

VS

REX

RESPONDENT

CORAM

BANDA CJ

MAMBA J

FOR APPELLANT

IN PERSON

FOR RESPONDENT

S. FAKUDZE

## JUDGEMENT

19<sup>th</sup> February, 2009

MAMBAJ

[1] On the evening of the 13<sup>th</sup> March, 2007, Joseph Ndzinisa, the complainant herein, closed his bottle store business for the day and proceeded home in his Toyota Hilux Motor Vehicle. He got home just after 7 p.m. and found the gate to his house partially closed. He stopped his Motor Vehicle outside the gate alighted from the motor vehicle and went to open that part of his gate that was not opened.

As he went back to his motor vehicle, he was confronted by a gunman who had his weapon pointed at him and he immediately realized that another man, wielding a knife was, menacingly standing behind him. The gunman ordered him to go into the back of his panel van which had a canopy. He complied and

the gunman followed him into the back of the motor vehicle. He was ordered at gun point to lie prostrate (face down) and the gunman sat on his back before picking his pockets and taking from him a sum of about E3 300.00 plus various personal items including a cellular telephone from him.

[2] The man armed with a knife drove the motor vehicle away and after travelling for about 20 minutes in the dark, the motor vehicle stopped. The complainant's assailants got out of the motor vehicle and had a private conversation between themselves before ordering him to alight from the motor vehicle. He was pushed and ordered to go across a barbed wire fence. This was after the gun-rnan had suggested to his companion that he should kill the complainant.

[3] After walking for a short while in the dark, the complainant was able to hear the sound of his motor vehicle driving away from where he had left it. He got to a certain compound where he was assisted to telephone his home and the Sidvokodvo Police. Eventually his business partner Mr Ron Ngwenya came to collect and take him to Manzini Police Station where the incident was reported.

[4] The crown claims that the Appellant was one of the persons who robbed the complainant of his property including the said motor vehicle. He denies this. The crown based its case on the following allegations: that were believed by the learned trial Magistrate who convicted the Appellant and sentenced him to a term of 7 years imprisonment, without the option of a fine (on a charge of robbery). He has appealed against both his conviction and sentence. The Appellant was the second Accused in the court below. What follows is the evidence that was led by the Respondent in the court a quo.

[5] According to Mr Wellington Xolani Khanyile, a member of the South African Police services who was stationed at Pongola at the relevant time, at about 8.30 p.m. on the 15<sup>th</sup> March 2007 after receiving certain information pertaining to a specified motor vehicle he set out on the N2 Public Road in the company of two of his colleagues looking for the said motor vehicle. They were on a police vehicle. They stopped at a place known as Kwamlogo Hill and the vehicle under suspicion appeared and was driving from Pongola towards Piet Retief. They followed it and indicated to its driver to stop. The driver did not comply with their demand and drove on and stopped after traveling for about one and a half kilometers. Khanyile immediately approached the driver who was still inside the motor vehicle and introduced himself and his colleagues that they were members of the South African Police. The driver of the motor vehicle introduced himself to him as Nhlanhla Khumalo whilst his companion said he was Vusie Matsebula. When Mr Khumalo was asked about the absence of the licence disc for the motor vehicle he was driving he failed to give a clear answer. (The court record does not say what was the exact answer actually given). Mr Khumalo further told the Police that he and his companion were traveling from Johannesburg. This further fueled Khanyile's suspicion about his interviewees as according to him they were traveling from Pongola towards Piet Retief which is towards Johannesburg and not away from it. Nhlanhla Khumalo informed Khanyile that the motor vehicle belonged to his uncle who was a resident of Swaziland. On further enquiries, Khanyile noted that Khumalo had a forged Swaziland Motor Vehicle Drivers Licence. The motor vehicle in question had the number plate SD 482 ZG on it. It was a maroon Toyota Hilux bakkie with a canopy on. The motor vehicle and its occupants were taken into custody at Pongola police station on suspicion that the motor vehicle was stolen.

[6] On the 16<sup>th</sup> March 2007, police officers from Swaziland inspected the motor vehicle at Pongola police station and confirmed that it had been reported stolen in Swaziland. Following this information the Appellant and his companion were formally "charged with the possession of a stolen motor vehicle" by the South African Police. (This, I suspect is a reference to theft as a continuing offence under South African Law). Both suspects were searched and a sum of E1000.00 and E1690.00 was found in the possession of the Appellant and Mr Matsebula respectively. This money was, according to Wellington Khanyile, eventually handed over to the Swaziland Police when the suspects were repatriated and deported to Swaziland. This occurred after the charges against them had been withdrawn in the South African Court. The money, motor vehicle registration plate number SD 482 ZG and Swaziland motor vehicle driver's licence number A061273 in the name of Lucky Khumalo were handed over by the South African Police to their Swaziland counterparts as exhibits.

[7] As to what transpired at the Pongola Police station regarding or pertaining to the motor vehicle in question, the withdrawal of the charges against the suspects and their eventual deportation by the South African police to Swaziland is substantially confirmed by Police officer 3791 Constable Garnedze who testified as PW4. This witness further testified that the motor vehicle he found at the Pongola police station was identified by the complainant as his and its Engine and Chassis numbers confirmed this fact.

[8] According to Pw4, once in Swaziland, both suspects led the police to a certain spot in Hluthi near the home of one Fikile Ngwenya and there retrieved the official registration number plates of the complainants motor vehicle. Garnedze told the court that this was done by the suspects after they had been duly warned that they were not obliged to say or to point out anything to them but if they chose to do so such would be taken down in writing and used

as evidence in court against them. The two number plates were found separately but in the same area. Fikile Ngwenya also witnessed the retrieval of the second plate by the Appellant. Thereafter the suspects acting freely and voluntarily led the police to a place near Sidvokodvo where after a brief search a Nokia 6820 Cellular telephone was spotted and retrieved by the Appellant's companion. This finding occurred in the presence of Pw2. This telephone was later identified by the complainant as his and it is a Nokia 6822 and not a Nokia 6820. (See in this regard page 7 line 24 and page 9 line 4 of the court record).

[9] The appellant denied that he was arrested whilst driving the motor vehicle in question. He also denied that he was arrested in the manner, place and for the reasons stated by Wellington Xolani Khanyile. He said he had gone to South Africa to seek employment and had been confronted by a group of South African police at a place where he had gone for that purpose and had been detained and charged for being in that country without the requisite documents. He stated further that he had met the first Accused for the first time in the Pongola Police station cells a day after he had been arraigned at the Ngcotshane Magistrates court, where he entered a plea of not guilty. He testified that whilst in Police custody he had been questioned by members of the Royal Swaziland Police on the reasons for his presence in South Africa. During his next court appearance the charge against him was withdrawn by the State Prosecutor and he was immediately arrested by members of the Royal Swaziland Police who were waiting outside the court house at Ngcotshane. From there he was taken to the border post/gate whereupon after a conversation amongst the South African Police and Border officials, who refused to allow him to cross into Swaziland without the passport he was handcuffed and taken across into Swaziland and told he was being investigated for the robbery. He denied any of the two pointings out testified to by PW4. His evidence was that the police had led him to and shown him the registration number plates for the stolen motor vehicle and the 6822 Cellular

telephone had been produced by Police officer Kunene from his own pocket whilst they were near Tri Cash; at Sidvokodvo. He also stated that the police had not found money on him but had instead confiscated a sum of E1100.00 from his home which had been kept in between a mattress and its base in his bedroom.

[10] The learned trial Magistrate came to the conclusion, correctly in my view, that the crown had established the guilt of the Appellant beyond a reasonable doubt. After analyzing the evidence, the learned Magistrate concluded that:

"The evidence of PW3, a Police officer stationed at Pongola Station, of the description of the persons he actually founding the car in question cannot be faltered. Time in this case is of essence considering the date of the commission of the crime and the finding of both accused at Pongola driving the said [motor vehicle] that was robbed from the complainant. The evidence of PW4 is to the effect that he was led to a spot where the original registration plates of the [motor vehicle] were found and to another spot where the cellphone which complainant described as stolen was found. It is hard to think [how] if both Accused were already at Pongola on the date of the commission of the [crime], they could point out sports were the exhibits ...were found. PW4 was only called to collect the Accused in South Africa and it will be absurd to think that he knew of the spot that they kept these items, and that would be tantamount to saying Police investigate through divine powers, which notion is frivolous and dangerous."

It is clear from the above that the learned Magistrate held that the two pointings out were freely and voluntarily made by the Appellant and his companion. The court a quo also rejected the complainant's evidence that he had positively identified the Appellant as one of his attackers - as the gun man who bundled him into the motor vehicle and sat on his back. The evidence of the complainant on this point came in rather late - under cross examination and clearly as an afterthought. He was unable to say whether he had, in the first instance, told the police that he could identify his assailants if he came across them and by what mark or feature or thing he could identify any of them. One would have expected the complainant, if indeed he was able to identify the Appellant as the person who was armed with a gun and who

picked his pockets, to have referred to him as such in his evidence in chief; instead of referring to such a person as "one of these assailants" or "the man who sat on my back and pick pocketed me" or "the one armed with a gun". Again, the learned Magistrate's assessment and consequent rejection of this piece of evidence is, in my view, unassailable.

[11] The Appellant submitted before us and in his heads of argument that there was a contradiction in the evidence by the crown or how, where and by whom the sum of E1000.00 allegedly found in his possession was actually found. He is correct in this regard. The crown witnesses were not one on this aspect. PW4 said the money was shown to him wrapped in a piece of paper placed in a corner in one of the police cells in Manzini, whereas PW3, the South African Police said he had actually confiscated the money from the Appellant on arrest and handed it over to the Swaziland Police at Pongola when the suspects were deported to Swaziland. Nothing at all, however, turns on this apparent inconsistencies or differences in my judgement. The Appellant was after all not charged either with importing into or exporting from Swaziland Swazi currency. The fact that the two crown witnesses or one of them may have been shown to have lied on this point, would not justify or warrant a total rejection of his or their evidence on the rest of the matter. (See *R v Khumalo*, 1946 AD 480.)

The Appellant was convicted based on the evidence that he was found driving the motor vehicle in question at KwaMlogo Hill in South Africa and the two pointings out relating to the discovery of the motor vehicle registration number plates and the mobile telephone belonging to the complainant.

[12] The Appellant has also submitted that his trial was a nullity inasmuch as he was arrested in South Africa but was not extradited from that country to stand trial in Swaziland. He says his arrest by the Swaziland Police in South

Africa and his subsequent repatriation into Swaziland was illegal and so was his trial and conviction.

[13] The general rule under Public International Law is that the sovereignty of a state is to be respected by all other states. It is inviolable. This rule is founded on Public and International Policy based on the recognition and respect for the individual sovereignty of states. A cross border or frontier arrest of an individual by agents of a foreign state without the knowledge and consent of the state wherein the arrest is made, is seen as a violation of the sovereignty and integrity of the state concerned. Because of this violation, courts in arresting state would decline to try persons who have been illegally arrested and smuggled from such a country. (See the judgement of Masuku J in the case of R v Mefika Carlos Dlamini and another, Criminal Case 96/00, judgement delivered on the 31 January, 2002 and the cases cited therein.)

[14] Extradition is, however, not the only mechanism of handing over criminal fugitives between or amongst states. Extra-curial and less formal and less cumbersome procedures or measures such as deportation, are often employed.

In casu, the evidence is that after the withdrawal of the charges against him in South Africa the Appellant was transported by the South African Police to the Nsalitje Border Post (with Swaziland) and there he was formally handed over to the authorities in Swaziland. His deportation or repatriation into Swaziland was done by the South African State apparatus or agents in compliance with their own procedures. That this was done after consultation with the Swaziland Police who were physically present in Pongola is clear, but does not make the arrest of the Appellant to have been effected by the Swaziland Police in Pongola. The said Police received the Appellant from the South African Police at the Nsalitje Border Post, in Swaziland, upon his deportation by South Africa. There is no merit in fact and in law in the assertion by the



Appellant that the Swaziland Police illegally arrested him in South Africa and smuggled him into Swaziland. There is no evidence that the sovereignty of the state of the Republic of South Africa was violated in this case and this ground of Appeal must fail too.

[15] It is regretted that when the issue of the appellant's arrest in South Africa and his conveyance or transportation into Swaziland by

members of the Swaziland Police was raised by him in the court a quo, the presiding officer declined to hear it and said that it could only be raised before this court. He was in error in so holding and he should have dealt with it himself. This misdirection did not, however, result in a failure or miscarriage of justice.

[16] As stated above, the Appellant was found guilty of robbery and sentenced to a term of 7 years of imprisonment. The sentence was backdated to the 15<sup>th</sup> day of March 2007, that being the date on which he was arrested and detained in South Africa, by the South African Police. In passing this sentence the court a quo took into account all the matters submitted before it by the Appellant in mitigation; the nature of the offence, its prevalence in Swaziland and the interests of society in general. It noted that in committing the offence, the Appellant and his companion were motivated by greed, the crime was premeditated, well planned and executed; the complainant was physically assaulted, threatened with death and dumped in a bush at night.

[17] This court as the Appellate Court may only interfere with the sentencing discretion of the trial court if it finds that the court misdirected itself or ignored a fact or issue which it should have considered in the passing of sentence or if the sentence imposed is such that this court would not have imposed or it

induces a sense of shock or that there is a vast disparity between this sentence and that which this court could have imposed. I can find nothing of the sort in this Appeal.

n

[18] The Appellant has also submitted that the whole sentence or a part thereof be conditionally suspended. Robbery (the offence for which he was convicted), is a third-schedule offence as per section 313 of our Criminal Procedure and Evidence Act and therefore in law, no portion of the sentence imposed on him may be suspended.

[19] For the foregoing, I would therefore dismiss the Appellant's appeal on both the conviction and the sentence.

MAMBA J

I agree

BANDA CJ