IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Appeal Case No: 45/2011

In the matter between:

PATRICK SIMELANE

vs

THE KING

Neutral citation: *Patrick Simelane vs The King 45/2011 [2012] SZHC 200 (17th September 2012)*

Coram : MAPHALALA PJ

Heard : 31ST JULY 2012

Delivered : 17TH SEPTEMBER 2012

Summary : *In this appeal evidence in cross-examination was not disputed in re-examination by the Crown. This court finds that the Court* a quo *erred in not taking this fact into account. This court finds that the conviction in the Court* a quo *cannot be sustained and accordingly finds in favour of the Appellant.*

The Appeal

[1] The Appellant appeared before the Nhlangano Magistrate Court under case No.210/10 before Senior Magistrate P.M. Simelane charged with the crime of theft.

[2] The particulars of the said crime were that upon or about the 8th October 2010 and at or near Sandleni Inkhundla in the Shiselweni region, the said accused acting within the scope of his duty as an elected *indvuna yenkhundla* of Sandleni Inkhundla did unlawfully and intentionally steal 14 rolls of diamond mesh valued at E13, 102.60 the property of Mzilazembeni Farmers Association and thus the accused did commit the crime of theft.

The chronicle of the evidence

[3] The Crown called the evidence of nine (9) witnesses who were each cross examined and thereafter the Crown closed its case whereupon the attorney for the accused advanced submissions of points of law in terms of section 174(4) of the *Criminal Procedure and Evidence Act*. The point of law advanced before the court *a quo* was to the effect that the evidence adduced did not necessarily implicate the accused person in the commission of the offence. Therefore the doubt ought to accrue to the accused person.

[4] However, the learned Senior Magistrate held that was not so and placed Appellant to his defence.

[5] The Appellant then took the witness stand under oath and led his evidence in his defence. He was thereafter cross-examined by the Crown in accordance with the law. He was subsequently re-examined by his attorney.

[6] The defence then closed its case. The Appellant was found guilty and sentenced to pay a fine of E2, 600.00 or in default of payment imprisonment of two (2) years and six (6) months.

[7] Presently, the Appellant has filed a Notice of Appeal against this sentence as follows:

1. The court *a quo* erred both in fact and in law by convicting the Appellant on insufficient evidence.

2. The court *a quo* erred both in fact and in law by failing to appreciate that the Appellant bore no *onus* of proving his innocence.

[8] The matter appeared before me on 31st July 2012 where both attorneys filed comprehensive Heads of Arguments for which I am grateful.

The arguments of the parties

(i) By the appellant

[9] The essence of appeal as gleaned in Appellant's arguments is centred around the evidence of PW6. It was the evidence of the Crown that the accused stole the fence by sending one Ncamiso Magutshwa (PW6) to collect the same and the latter gave evidence indicating that the fence he delivered to accused person is the one he gave to the Mtongo Farmers Association. This evidence was confirmed by Sarah Fakudze (PW5) corroborating the Appellant's version.

[10] The attorney for the Appellant contends that what is apparent is that the accused's version as put to Crown witnesses under cross examination was not disputed as there was no re-examination by the Crown.

[11] That the importance of putting the defence version to Crown witnesses is a well established principle and was stated in a plethora of decided cases in paragraph [13] of this judgment.

[12] The gravamen of the Appellant case centres around the evidence of PW6 Ncamiso Magutshwa that "it to be highly unlikely that PW6 had such an opportunity or even a motive to exchange the two types of fence" that the aforegoing finding by the learned Magistrate is, with respect unfortunate.

[13] It is contended in this connection by the attorney for the Appellant that no *onus* rests on an accused person to convince the court of any defence which he traverses.

[14] In support of this argument the attorney cited a *plethora* of decided cases in this court and in South Africa including that of *S v P 1974(1) SA 581 (Rhodesia)* at page 582. *The King vs Dominic Mngomezulu & 9 Others Criminal Case No.94/90; Obert Sithembiso Chikane vs Rex Appeal Case No.41/2000; R vs Difford 1973 AD 370* at 373, *Gideon Pono Dlamini vs Rex Appeal Case No.20/98; Pius Simelane vs Rex Appeal Case No.2/1997 (unreported Court of Appeal judgment and the Appeal court case of Sean Blignaut vs The King Criminal Appeal Case No.1/2003 (unreported Court of Appeal judgment).*

(ii) By the Crown

[15] The Crown on the other hand has raised a point of law as its first point of call to the effect that on ground two the Appellant is appealing against the ruling of section 174(4) which is a discretional issue and therefore not appealable.

[16] On the merits of the case the attorney for the Crown dealt extensively with the evidence of PW6 that the Appellant was correctly convicted by the court *a* quo because there was sufficient evidence to convict him based on the facts of the matter.

[17] Various arguments are made in the unpaginated Heads of Arguments and it is difficult to pinpoint the arguments of the Crown. I must say that Heads of Arguments should be properly paginated and the various paragraphs shown for easy reading by the court.

[18] I have read the Heads of Arguments of the Crown as they centre around the evidence of PW6 which is objected to by the Appellant.

The court's analysis and the conclusion thereon

[19] The first issue to address before delving on the merits of the case is to deal with the preliminary point raised by the Crown. The point of law by the Crown is that on ground 2 the Appellant is appealing against the ruling of section 174(4) which is a discretionary issue. In argument before me, the attorney for the Appellant did not address this aspect of the matter on account that the appeal before this court is on the merits of the case in challenging the evidence of PW6.

[20] In my assessment of the arguments of the parties in this regard I do not think the Appellant is challenging the ruling of the court *aquo* in terms of section 174(4) of the *Criminal Procedure and Evidence Act*. The Appellant did not object to the ruling of the court below in terms of section 174(4) as he gave evidence

under oath and was cross-examined. I do not think anything turns on this preliminary point.

[21] The crux of the matter on the merits as contended by the Appellant's attorney is that what is apparent is that the accused's version as put to Crown witnesses under cross-examination was not disputed as no re-examination was done by the Crown.

[21] It is important therefore to reproduce this evidence in order to make my assessment whether Appellant's attorney is correct. The evidence of PW6 before the court *a quo* was as follows:

> "I am the abovenamed person and I say at Kontshingila area. I work as a tractor driver for my family tractor. I do know Patrick Simelane the accused person before the court. I am not related to him.
>
> On the 08.10.10 I received a telephone call from my brother. I then went to the Inkhundla Centre and reported what I'd gone there for. I went to the Inkhundla Centre by means of a tractor. After speaking with the lady I found there she showed me the rolls of fence I'd come to fetch. I fetched that fence at the instance of the accused person.
>
> I took the fence to the accused's home which is by my home. There were fourteen rolls of fence. I'd not be able to say how tall were those fence rolls but I'd say they'd approximately be of my height.

I would be able to identify fence similar to the one I picked at the Inkhundla Centre. Witness comes out from the witness stand and points out at the shorter roll of fence saying that those rolls were similar to it.

Witness proceeds:
The fence was rolled in the manner that this roll I've pointed out is rolled. (The fence he pointed out is rolled with transparent plastic covering each end).

Public Prosecutor: That's all.

CROSS EXAMINATION BY DEFENCE;

Q: When you were identifying the fence before the court, did you say that this is almost the very fence you took to the accused's home?

A: Yes, that fence I took was similar as this one if it is not one of the very rolls.

Q: You agree that the roll you pointed out is shorter than the other two bigger rolls which are next to it?

A: Yes, I agree.

Mr. Mabila: That's all.
Re-examination by Public Prosecutor: None.
Witness is excused."

[22] In my assessment of the arguments of the parties and the above piece of evidence of PW6 I have come to the considered view that the Appellant is correct in his arguments on the merits

of the case. Despite the aforegoing evidence the court *a quo* rejected the accused person's version finding:

> "… it to be highly unlikely that PW6 had such an opportunity on even a motive to exchange the two types of fence."

[23] In this regard I find what was stated by *Greenberg J* in the case of *R vs Difford (supra)* apposite to the following legal proposition:

> "… no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that 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."

[24] I further agree with Appellant's attorney argument in paragraph [8] of his Heads of Arguments that to further demonstrate the position of the law on the acceptance of the defence version citing the case of *Gideon Pono Dlamini vs Rex Appeal Case No.20/98 (unreported Court of Appeal judgment* to the following legal proposition:

> "In dealing with the failure by defence counsel to put appellant's version to the police witnesses the learned Judge stated that, 'it is very difficult if not impossible to believe the accused's story and I thus reject as an afterthought' (sic). This is rather unfortunately phrased since it is trite that the accused's version does not have to be believed as beyond doubt true before he may be acquitted." (emphasis and italics ours)

[25] It appears to me that the Appellant version during trial was never contradicted and the Crown and consequently the court *a quo* relied on circumstantial evidence to convict him.

[26] In this regard I agree with the *ratio decidendi* in the case of *Sean Blignaut vs The King Criminal Case No.1/2003 (unreported) Court of Appeal* where *Beck JA* stated the following:

> "In the absence of any other direct evidence to contradict what the appellant told the court (and what, incidentally, he appears to have said consistently all along from the very outset), and in the absence of any inherent witness in his evidence to justify its rejection as unreliable, the only way in which the guilt of an appellant can be proved beyond a reasonable doubt is by circumstantial evidence of so conclusive a nature that there can be no reasonable possibility that the appellant's account…can be true.

[27] *Beck JA* in the Blignaut case (ibid) concluded by saying:

‘It is trite that the cumulative effect of a number of incriminating probabilities may suffice to eliminate any reasonable possibility of innocence, even though each and every individual probability is on its own not strong enough to do so. But when reasoning by inferences drawn form circumstantial evidence the touch stone remains the two cardinal rules of logic enunciated in the leading case of *Rex vs Blom 1939 AD 199.’*

Weighing the cumulative weight of the probabilities that have been described against the direct evidence of the appellant, the reasonable possibility that an intruder may have murdered the deceased cannot be safely excluded. <u>While the circumstantial evidence is consistent with the guilt of the accused it is not wholly inconsistent with the reasonable possibility of his innocence.”</u> (emphasis and italics ours)

[28] In the result, for the above reasons I rule that the appeal is upheld with costs.

<u>STANLEY B. MAPHALALA</u>
PRINCIPAL JUDGE

FOR THE APPELLANT : MR. M. MABILA

FOR THE CROWN : MR. M. NXUMALO