IN THE HIGH COURT OF SWAZILAND

Criminal Appeal **c**ase no. 29/2009

In the matter between:-

TROY MINNIE	**1st Appellant**
MFANZILE KHUMALO	**2nd Appellant**
MUSA DADA NHLEKO	**3rd Appellant**

and

REX	**Respondent**

Neutral citation: *Troy Minnie & 2 others v Rex* (29/09) [2013] SZHC44 (21st February 2013)

Coram: HLOPHE J
For the Appellants: Ms. M. Kolbe
For the Respondents: Mr. N. Nxumalo
Heard: 20/09/2012
Delivered: 21st February 2013

Summary:

Appeal against a Judgment of the Magistrate seated at Big Bend, convicting the Appellants of common assault – Appellants convicted of assaulting

complainant because they suspected him to have been the driver of a motor vehicle involved in a hit and run of their colleague – Basis of the court's findings being appellants' version – Court a quo accepting the Appellants sought to effect a citizens arrest but not accepting appellants acted in terms of section 28 of the Criminal Procedure And Evidence Act in effecting the arrest as according to it there was no reasonable suspicion for them to effect the arrest on the complainant as the driver of the hit and run motor vehicle – This court of the view there was a reasonable suspicion to justify the arrest from the facts of the matter – Arrest not unreasonable – Court a quo not entitled to ignore the fact that the Appellants believed they were entitled to effect the arrest and therefore had no intention to commit a crime – Consequently Court a quo misdirected itself on the evidence – Accordingly the order of the court a quo is set aside and substituted with an appropriate one – appeal upheld.

JUDGMENT

[1] The three Appellants were convicted of common assault by the Magistrate sitting at Big Bend in the Lubombo District. They were then sentenced to a fine of E300-00 or to three (3) months imprisonment which was wholly suspended for a year.

[2] Although the Learned Magistrate states that the sentence was conditionally suspended the condition was however not spelt out or expressed *ex facie* the judgment. This was irregular for the conditions upon which the suspension of sentence is predicated, ought to be known to the convicted person so as to enable him know what it is he can or cannot do during the period of suspension. This court can only be

convinced this was the case if such a condition appears *ex facie* the record.

[3] Apparently the intended condition here was that the whole sentence was being suspended for a year on condition that the accused does not commit a similar offence during the period of his suspension. I must be clear however that owing to the conclusion I have reached in this matter, it is not material what the intended condition really was save to say it is irregular for the court a quo not to mention such a condition *ex facie* the record and alongside its pronounced sentence.

[4] The Appellants, upon being dissatisfied with the judgment of this court, noted an appeal against conviction only.

[5] The facts of the matter leading to the arrest and conviction of the Appellants are that on the morning of the 24th October 2005, eight (8) game rangers of Nisela Farms, who included Appellant no.3, were jogging, on the right hand side of the road from the Lavumisa direction when one of them was knocked down by a vehicle which did not stop after the accident. The ranger concerned was injured and the matter was eventually reported to the Lubulini Police.

[6] After the incident was reported to the first Appellant who was the Manager at Nisela Farms, means were made to trace and find the hit and run car, which was reported to be a blue Opel Kadet, together with its driver. From what later transpired including the findings by the court *a quo*, I can only assume that the aim was to get the driver thereof arrested for the hit and run accident.

[7] Security Personnel belonging to a neighbouring business entity, called Matata (matata security) informed the Nisela Farms Employees that a vehicle fitting the description made by them (Nisela Farms employees) had been seen by them. It was parked at the homestead of the complainant, next to the latter's house. It was further reported that they had seen two people leaving the motor vehicle and walking away from the homestead where the vehicle was parked.

[8] The Nisela Farms Game Rangers went to the said homestead and found a certain Opel Kadet motor vehicle parked next to the house which they later learnt belonged to the complainant. The motor vehicle was still warm, an indicator it had been driven that morning and had a dent on its bumper indicating it had bumped into some object. Furthermore the paint debris they had picked from the scene of the accident matched that of the car. The car further had a broken head lamp glass.

[9] When the rangers enquired, from the complaint's mother who they found at the homestead where the car was parked, as to who its owner's was, she pointed them to the complainant as the person who could help them. At that stage the complainant walked into the homestead in the company of another elderly man. He was described by the Matata Security Personnel, as one of the two people they had earlier on seen leaving the homestead as they moved away from the car.

[10] Having admitted ownership of the house next to which the motor vehicle was parked, the complainant refuted ownership or even possession of the motor vehicle concerned. He in fact refused to cooperate with the

Nisela Farms employees when they tried to establish more information about the ownership of the car and its driver that morning. The version by the crown and defence witnesses differed at this point particularly as concerns what happened. According to the complainant, he was thereafter pounced upon and assaulted by the Appellants, who began doing so through using the first accused's gun butt and eventually punched and kicked him all over the body. According to the complainant's evidence in court the car had been parked outside his house whilst he took a bath by a person he did not know and did not see.

[11] The version of the Appellants is that the first Appellant drew his gun and then held complainant by his shoulder after deciding to arrest him upon suspecting that he was the driver of the motor vehicle concerned or was an accessory after the fact. It was during the attempt to arrest him that the complainant allegedly resisted same, wriggled from Appellants' grasp, tripped and fell down causing the first Appellant to fall on him in the process.

[12] It is otherwise common cause that whilst there was what I would refer to as a tussle between the complainant and the Appellants, who were all by now holding or dragging the complainant, there arrived the Police Officer from Lubulini Police, who engaged the complainant about the accident of that morning as a result of which one of the rangers was injured and also went on to arrest and charged the Appellants with assault with intent to do grievous bodily harm on the complainant.

[13] During the trial that subsequently ensued, the court *a quo* rejected the version by the complainant that he had been assaulted in the manner he alleged he was. Accepting the version by the Appellants who were then the accused persons or the defence, the Learned Magistrate found that the Appellants had attempted to effect a citizen's arrest as envisaged by section 28 of the Criminal Procedure And Evidence Act of 1938 but had no lawful grounds for the reasonable suspicion that would have entitled them to effect the arrest against the complainant. I must say at this stage someone else other than the complainant had been arrested charged and convicted for the knocking down of the Nisela Farm game ranger and this information had come up in court during the Appellants trial. I must be clear however that it was not then open to the court *a quo* to take into account this factor in determining whether or not the Appellants had a reasonable suspicion to arrest the complainant as this factor was not known at the time of their arresting the complainant.

[14] Because of the finding it reached the court *a quo* decided to convict the Appellants, not of assault with intent to do grievous bodily harm as initially charged but of the competent verdict of common assault and sentenced them as stated above.

[15] This appeal is a sequel to the said decision of the court *a quo*. At the heart of it the appeal seeks to have the conviction of the accused overturned. Whereas several grounds were advanced *ex facie* the notice of appeal, the parties were *ad idem* during the hearing of the appeal that the question was whether, having correctly found that in doing what they did the Appellants intended to effect an arrest as envisaged by section 28 of the Criminal Procedure And Evidence Act of 1938, was

the court correct to find that there was no reasonable suspicion on for them to have sought to effect an arrest on the complainant.

[16] It was argued on behalf of the Appellants that the court *a quo* had misdirected itself to come to the conclusion it did which is that there was no such a reasonable suspicion justifying its conduct aforesaid. It was contended that the court *a quo* had overlooked the fact that the car involved in the accident was found next to his house and inside his homestead's compound which made it highly unlikely a stranger could have come and parked its car there if he was unknown to the complainant. The Matata Security had seen the two gentleman who had moved away from the car and the homestead, one of which was later identified to be the complainant where they returned to the said homestead and found the Nisela Farms employees to be there including the Matata Security. There was also the version by the complainant's mother who informed the Nisela Farms game rangers that the complainant was the person in a position to give them information about the car and its driver when they enquired about the latter's whereabouts and the ownership of the motor vehicle. It was further argued that the court *a quo* had also over looked the complainant's failure to cooperate and tell them who the driver was in a case where all indicators pointed at him. In this conduct, the inference was that the complainant was the culprit or was protecting the real culprit from arrest or was an accessory after the fact to the crime committed by the driver of the motor vehicle.

[17] Based on the foregoing it was contended that it was not unreasonable for the Appellants to have suspected the complainant as having been the

driver of the motor vehicle or of being somehow involved in the commission of the offence and therefore as having been entitled to effect an arrest on or against him. It was contended no police officer would have been prosecuted for arresting the complainant in those circumstances.

[18] It was argued further on behalf of the Appellants that the court *a quo* further overlooked the fact that even if the Appellants' conduct was unreasonable from an objective point of view, it still did not mean that the Appellants had the necessary intention, subjectively, to commit an offence if they bona fide believed they were entitled to effect an arrest, because assault, like all common law crimes, required an intention for a suspect to be convicted. In this regard this court was referred to ***S v Ntuli 1975 (1) SA 429 (A), at 436*** where common assault is defined as follows:-

> "*Assault is the intentional application of unlawful force to the person of a human being. For example, if A assaults B by striking him, this comprises –*
>
> *(i) the unlawful application of force; and*
>
> *(ii) the intention to do that unlawful act.*

[19] ***At page 436 E-F of S v Ntuli*** (supra) it was stated that if an accused person acted reasonably then there was no question of *dolus* as *dolus* consists of intention to do an unlawful act. In fact if an accused's conduct is objectively viewed unreasonably, he may still lack the necessary *dolus* to commit an unlawful act if he *bona fide* believes that he is acting lawfully.

[20] The contention being made here was that even if the court was justified in finding that the conduct of the Appellants was unreasonable it did not mean that an intention of committing an offence was established where they acted *bona fide*. It has not been shown or even contended that the Appellants were not *bona fide* in their conduct.

[21] Section 28 of the Criminal Procedure And Evidence Act of 1938 provides as follows:-

> "*Any private person may, without a warrant, arrest any other person upon reasonable suspicion that such other person has committed any of the offences specified in part II of the First Schedule"*.

[22] The court *a quo* correctly found in my view that the Appellants as citizens were entitled to effect an arrest if they reasonably suspected the complainant to have committed an offence.

[23] I agree with both Counsel that the question in this matter is whether or not there existed facts on the basis of which it could be concluded or inferred that the Appellants reasonably suspected the complainant to have committed an offence covered in the second part of the first schedule.

[24] The position is now settled that a police officer (and by extension any person having a reasonable suspicion that another person has committed an offence such as the Appellants suspected herein) who arrests a person he reasonably suspects to have committed an offence is entitled to effect an arrest. In such a situation the police or that other arresting

person does not need certainty or a conviction that the person concerned committed the offence in question in order to be entitled to arrest him. A reasonable suspicion alone suffices. The position was put as follows in ***Ngidi vs Swaziland Government, civil case no. 2758/2004***;

> *" It is not the duty of a police officer to elevate a reasonable suspicion to the level of certainty before a suspect may lawfully be arrested without a warrant. It is the function of the trial court, and not the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence gathered by the police, as the authorities show."*

[25] Having considered all the circumstances of the matter including the argument and the authorities I have been referred to, I have to agree with the argument advanced on behalf of the Appellants that the evidence established a reasonable suspicion on the part of the Appellants to effect an arrest on the complainant. The reasonable grounds for the suspicion were, as stated above, the fact that the car in question was found on the complainant's premises next to his hut and he was not cooperating on who owned it or had driven it there. Furthermore his own mother had referred inquiries to him. He was identified as having left the car in the company of somebody else by the Matata Security who further identified him upon return as the person who had been seen by them leaving the car earlier. In any event if it was not to be suspected that he was the driver responsible for the hit and run, then there was a sufficient basis to suspect he was an accessory after the fact by concealing the culprit.

[26] Even if there was to be a basis to find that there was no reasonable suspicion, (it has to be noted that I have found there was such a basis)

to effect an arrest of the complainant, it would still not mean that a conviction of the Appellants would have been appropriate in this matter because the Appellants were not shown to have lacked *bona fides* yet the court had already found they believed they were entitled to effect an arrest on the complaint.

[27] In other words I have to agree with Appellant's counsel's contention that the Appellants were not shown to have had the intention to assault the complainant when they effected an arrest on him as they *bona fide* believed they were entitled to do that on him. In other words they lacked an intention to commit a crime.

[28] I am therefore convinced that on the material at their avail the Appellants were entitled to arrest the complainant and I cannot agree that there was anything unreasonable in their conduct or that they had the necessary intention to commit a crime. That being the case the appeal succeeds. The order of the court *a quo* is therefore set aside and substituted with the following one:-

1. The accused persons are found not guilty and are acquitted and discharged.

Delivered in open court on this the …..day of February 2013.

N. J. HLOPHE

JUDGE