



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 28/2013

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS

1st Applicant

And

MFANUKHONA JOHANNES DLAMINI

1st Respondent

SIZA SIBEKO

2nd Respondent

Neutral Citation:

*The Director of Public Prosecutions Vs Mfanukhona
Johannes Dlamini & Another (28/2013) [2017] SZHC
64 (7th April 2017)*

Coram:

Hlophe J.

For the Applicant:

Mr I.S. Magagula

For the Respondents:

Mr M.T. Mabila

Date Delivered:

7th April 2017

Summary

Criminal Procedure –Application brought by the crown for an order allowing the taking of evidence on commission –Witness from whom evidence is required is currently held in custody in Katimo Mulilo, Namibia –Requirements for application to be granted – Witness cannot be procured without an amount of delay, expense or inconvenience which would be unreasonable in the circumstances – Whether the requirements are met in this matter –Court of the view that the likelihood of delay is not brought about only by the fact that the matter has started but is underpinned by the fact that to bring the said witness here will entail diplomatic engagements between three states, namely Swaziland, South Africa and Namibia –Such a process is likely to take time be expensive and inconvenient when considered on the point of security and transport .

JUDGMENT

[1] This Judgement relates to an interlocutory application brought by the crown to have the evidence of a witness currently held in custody in the Republic of Namibia, Katimo Mulilo Police Station, taken on commission.

[2] Otherwise the main matter is a criminal trial against the two accused persons who are currently facing 72 counts of various charges ranging from several of car theft at common law and several others related to theft of motor

vehicles and are founded on alleged violations of the Theft of Motor Vehicles Act of 1991.

[3] So far the evidence led in Court is to the effect that several motor vehicles and vehicle components, comprising several chassis frames, several engines and engine blocks, several motor vehicle bodies and various chopped car bodies were allegedly found at the two homesteads of the first accused person situate at Ngwane Park and Nhlambeni. These discoveries led to the said items being seized by the police in accordance with the provisions of the Criminal Procedure and Evidence Act. They were kept at the Police Car Yard at Lobamba Police Station. The two accused persons were themselves arrested and charged with various offences ranging from the theft of the said motor vehicles at Common Law, to receiving stolen property knowing it to be stolen and to several alleged violations of the Theft of Motor Vehicles Act of 1991.

[4] The crown's case is apparently that although most of the car theft charges against the accused persons are said to have occurred at various places in the Republic of South Africa, such as Paul Peter's Burg (Dumbe), Piet Retief,

Sulphar Springs, Phongola, Badplaas Mine, Marikana, Durban, Richard's Bay and Johannesburg to mention but a few, the accused persons are liable for the theft of the said motor vehicles at common law given that theft is in law, a continuing offence. The accused persons are alleged to be guilty of the said theft on the basis of the doctrine of common purpose it being alleged they acted jointly with others in committing the alleged offences. There are also various charges of receiving stolen property well knowing such property to be stolen levelled against the accused persons as alternative charges to those of theft at Common Law.

- [5] With most of the evidence led indicating that some of the car component's found at the first accused's homestead aforesaid were from the cars stolen at the various places referred to above in the Republic of South Africa, and the defence having put a case to some crown witnesses that some of the motor vehicle components found at the first accused's home belonged to one James Maluleka, the crown filed the current application seeking an order of court that this court grants an order that the evidence of the said James Maluleka be taken on commission.

[6] The crown clarified in its application that it was seeking this remedy because the said James Maluleka was currently an awaiting trial prisoner in Namibia, Katimo Mulilo where he is facing charges relating to car theft. It was disclosed that the said Maluleka had been approached and that he had prepared a statement detailing his role and that of the accused persons in either the theft of the motor vehicles or in stripping them to their bare parts as found.

[7] It was argued on behalf of the crown that this court grants the relief sought because it was going to be cumbersome to bring the witness in question to Swaziland. This exercise it was further argued had to involve lots of diplomatic engagements and approval possibly from four states who would all one way or the other have to approve of the exercise if the witness was to be brought here by road as was envisaged. These states were said to be Namibia, Botswana, Republic of South Africa and Swaziland. There was thus a likelihood of a delay in that process. It was argued further that the process, apart from a great uncertainty that the Republic of Namibia would allow an awaiting trial prisoner to be taken to a foreign country via so many other neutral states (Botswana and Republic of South Africa in this case), it was most likely going to prove too expensive and inconvenient an exercise.

[8] In support of its case and why it was so desirous to have the witness concerned brought to Swaziland from the Caprivi Province in Namibia, the crown annexed a statement allegedly obtained from the said James Maluleka. For what it is worth, it implicated the first accused highly in the theft of some of the motor vehicles found or those whose components were found at the first accused's homesteads referred to above. It alleged that the first accused had asked Mr Maluleka to steal cars in the Republic of South Africa and supply him with same. He had meanwhile allegedly played a roll in ensuring that the said motor cars are brought through to Swaziland by making arrangements with certain Police Officers at atleast three entry points to Swaziland, namely Lavumisa Border Post, Neston (Sandlane) Border Post and the Oshoek (Ngwenya) Border Post. As concerns the 2nd accused he was implicated in the statement when it was said that he was one of two persons who were seen by the said Mr Maluleka stripping the motor vehicles brought in or stolen from the Republic of South Africa at the First accused person's homesteads aforesaid. For this reason the crown felt the evidence of this witness was crucial in its case and asked for the reliefs referred to above.

[9] The Respondents had opposed the said application stating firstly that they had not committed the alleged offences and also by claiming that it was not the only way to secure the evidence of the said witness as according to them, he could be brought to Swaziland, which they contended was cheaper and more affordable. It was also stated that sometime in December 2015, the said James Maluleka was released from the custody of the Swaziland Police after he had been found or arrested at Siteki Police Station for car theft and therefore that the crown cannot be serious to say it now wants to take the evidence from such a witness in a foreign country.

[10] Section 208 of the Criminal Procedure And Evidence Act of 1938, provides as follows with regards the taking of evidence on Commission;

“208(1) If in the course of a trial, preparatory examination or any other criminal proceeding it appears to a Court that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances of the case would be unreasonable, such court may dispense with such attendance and may issue a

commission to any magistrate or, where the witness is resident outside Swaziland to any person authorized by such Court to take evidence on commission in civil cases outside Swaziland, within the local limits of whose jurisdiction such witness resides.

Provided that in any such application, the specific fact or facts with regard to which the evidence of such witness is required shall be set out, and the court may by its order confine the examination of the witness to such facts.

Provided further that when the application is on behalf of the crown, the court may, if it thinks fit so to do, direct as a condition of such order that the expense necessary to the representation of accused by attorney of counsel at such examination shall be paid by the Government.

- (2) The Magistrate or other person to whom such commission is issued shall proceed to the place where the witness is or shall summon such witness before him, and shall take down his evidence in the same manner as in the case of an ordinary preparatory examination taken before him or if the commission

is executed outside Swaziland, in the same manner as a commission to take evidence in civil cases is executed.

[11] The question is whether in the circumstances of this matter, the evidence of the witness can be procured without an amount of delay, expense or inconvenience? It can hardly be in dispute that to secure the attendance of the witness by road, which is more practicable, there would have to be an approval by the four states referred to above which will include an approval by the security apparatus in each country.

[12] It seems to me that the obtainance of the said witness, in the circumstances would no doubt entail an amount of delay and inconvenience to all parties concerned. This would also entail high expenses, spilling over to the other countries which would ordinarily be unaffected. The alternative of using an aeroplane is likely to be too expensive as one should realistically only contemplate a chartered plane given that a scheduled one would entail a serious amount of inconvenience.

[13] I am therefore inclined to agree with the crown that the only realistic option in the circumstances is for the evidence of the witness in question to be obtained by means of issuing a commission. It was confirmed by the crown and by the affidavits from the appropriate officers in both Swaziland and Namibia that all the necessary logistics have already been put in place for the exercise. These entail the undertakings by Swaziland's Police that all their logistics, including the provision of security through Interpol within all the affected states have been arranged. It was further disclosed that there was an undertaking by the Namibian Police to ensure the proper conduct of the exercise in question in their country.

[14] For the foregoing reasons, I have come to the conclusion that the applicant's application succeeds and I accordingly make the following order:

14.1. The applicant's application be and is hereby granted.

14.2. The evidence of the intended crown witness, One Mr George James Maluleka currently incarcerated at Katimo Mulilo in the Caprivi Strip in Namibia, be and is to be recorded from him on commission as envisaged by


section 208 of the Criminal Procedure And Evidence Act of 1938.

14.3. The Principal Magistrate for Manzini, the Honourable Mr David Khumalo, be and is hereby appointed and/or authorized to record the evidence on commission from the said James George Maluleka at Katimo Mulilo, Caprivi Strip, Namibia.

14.4. The expenses for facilitating the transportation of counsel for the crown, those for the Defence, including those of the accused person's as may be out of custody including their lodging and meals are to be borne by the state. The amounts to cater for these expenses are either to be agreed upon or are to be fixed using a fair, transparent and realistic method.

14.5. The Royal Swaziland Police be and are hereby ordered to ensure that all the necessary security measures throughout the approved route shall be provided to all the affected parties.

14.6. The parties are to leave on the said mission on such day or days as may be agreed between them.



N. J. HLOPHE
JUDGE – HIGH COURT