

IN THE APPEAL COURT OF SWAZILAND

In the appeal of Appeal No. 23/81

Mbuzeni Mabuza Appellant

vs.

REGEM Respondent

CORAM: Maisels J.P.

Dendy Young J.A.

Isaacs J.A.

FOR APP.: In Person

FOR RESP.: Nsibandze.

JUDGMENT

(Delivered 26th Jan. 1982)

DENDY YOUNG J.A.

This case appears to me to raise some important issues.

Appellant was charged in the Subordinate Court of Lobombo on six (6) counts. The first alleged robbery on 23/12/80 involving the taking of a sum of E3250.73 from the store belonging to one Queen Nkosi by threatening to shoot her if she resisted.

The second count charged the theft by Appellant of a motor car on 20 - 21st December 1980 at Big Bend.

The third count alleged negligent driving of a car contrary to Section 115 (1) of the Road Traffic Act 1965.

The 4th, 5th and 6th counts charged contraventions of Section 117 of the 1965 Act or flowing from an accident in which the car was involved. It is unnecessary to be more specific.

Counts 2-6 inclusive were withdrawn before plea and the trial proceeded on count 1 alone. Appellant pleaded not guilty.

There is no doubt that on the evidence a robbery was committed by two persons and the only issue in the case is whether Appellant was proved to have been one of them.

Queen Nkosi the owner of the store related in evidence how at about 7.30p.m. on 23/12/80 she closed the shop and, together with her assistants, started counting the days taking. Of a sudden two men walked into the shop at a time when the store was opened for the purpose of removing a

fridge. One of the men ordered everybody to remain silent. Each of the intruders had a revolver in one hand and a spear in the other. The man in front approached the witness and pushed her aside. The second man was wearing a hat. Queen Nkosi went on - "He then said he would shoot me. I did not have a thorough look at these men since I was frightened. Later I was called to the police station in Manzini where I identified the (Appellant). (Appellant) was the man who threatened to shoot me. He was also the one who was following the other from behind".

when one, Mabuza, arrived on the scene there was something of a pandemonium and the robbers made off with money later calculated at E3250.73.

The witness added that at the police station she saw two toy guns and two spears. She identified the guns and the spears in Court.

In cross-examination Queen Nkosi was asked:

Q: How did you see me rob you in the shop?

A: You were wearing a hat. I saw you wearing the same hat when the police came with you in the shop.

Q: What was the colour of the hat?

A: It was a brown balaclava hat.

Q: Was there any identification parade in Manzini?

A: You were with the other person who was with you on the evening of the robbery.

Q: When did you see me at Manzini?

A: It was a day or two after the robbery.

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Q: What else did you see me wearing in the shop besides the hat?

A: I did not take notice of what else you were wearing.

Q: Is this the hat that I was wearing? (the hat is produced from the pocket of the "Accused").

A: No, this is not the hat.

The next witness was D/S/Inspector Zephania Vilakazi. He is stationed at Big Bend. He said that on 24/12/80 he went to Manzini police station where he was handed together with Appellant, a stolen motor car in which were two spears and two toy revolvers. He produced these in Court as Exhibit 1. He continued: "I then cautioned (Appellant) in accordance with the Judge's rules. I then told him that I was investigating the robbery case which had taken place at Mayaluka Store at Big Bend. I then asked (Appellant) if he knew anything about Exhibit 1. (Appellant) denied all knowledge of Exhibit 1. Along the way to Big Bend (Appellant) asked me to return to Manzini with him and that he would show me where he had placed the money which is the subject of this case. He said the money was at Embekelweni and he had handed it to his mother. We then proceeded to Embekelweni the (Appellant's) homestead. (Appellant) led the way and we arrived at his

mother's home. When we got there we found (Appellant's) mother. I cautioned the mother in the presence of (Appellant). I told her I was investigating a robbery case in which a large sum of money had been stolen. (Appellant's) mother then willingly produced E160.00 in E10.00 notes. She said Accused had asked her to keep it for him. She also said that Accused had said she should not worry about where he got it from. I then took possession of the money. This is the money in the envelope. It is E160.00. I now hand the money to Court as Exhibit 2. In (Appellant's) pocket I found a sum of E10.00. I asked (Appellant) for some more money. (Appellant) said a friend of his by the name of Simon Matsenjwa had taken some other money.

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I then conducted a search and found a sum of E21.58 from the (Appellant's) pocket. I hand in the E21.58 as Ex. 3. I also hand the bank plastic bags which were found in (Appellant's) possession. The other plastic bags which were found in the stolen car. I also hand these to Court as Ex. 4. I then asked (Appellant) to go and show me the shop where the money had been stolen from. (Appellant) led me to Mayaluka Store in Big Bend. (Appellant) then demonstrated to me in the presence of Queen Nkosi and other shop assistants what he had done when they took the money. He took one spear and a revolver toy and demonstrated how he threatened Queen Nkosi who was robbed of the cash. I then charged (Appellant) with the offence of armed robbery."

The Station Commander and other Police Officers where both present at the demonstration.

The Crown also called one Ndoda Dube (I understand that the name indicates a male). He said in evidence: "I stay at Mbekelweni Area. On 24/12/80 at about 1.00a.m. I heard a knock at the door of my house. I opened the door and (Appellant) came into the house. (Appellant) then asked for my mother. We told (Appellant) that mother was asleep in her bedroom. (Appellant then asked me to go and call my mother. I did not go to call my mother but my brother did. My mother came where we were. (Appellant) then gave my mother a sum of E140.00. He asked her to keep the money for him. That was not the only money I saw. (Appellant) also gave my mother another sum of money. He said he was returning the money which he was owing mother. Mother then went back to sleep. (Appellant) then left."

The Crown called the man Mabuza mentioned earlier. He said he saw two men in the shop, one stood next to the door and the other proceeded upwards. Thereafter he saw both men go straight to

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where the money was, grab it and rush out of the shop.

The police arrived on the 29/12/80 with (Appellant). (Appellant) demonstrated how they had come into the shop. He said: "(Appellant) said when we got to the shop we told everybody to shut up. One of us then stood next to the door and the other went to the counter."

Cross-examined the witness said :

" Q: Did you see me when I entered Mayaluka Store?

A: I did not take notice of the two men who entered the shop. I only saw you when you came to the shop to' demonstrate how you had taken the money."

That concluded the case for the Crown.

(Appellant) gave evidence on oath. He said; "I wish to tell the Court that I know nothing about this case. I was found in possession of Ex. 1 by the police after I had had a collision with another motor vehicle. The police then arrested me. I was subsequently charged with the offence of robbery. I told the police that the spears and the revolver toys were not mine but that I had found them in the motor vehicle which I was driving. That is all I would like to tell the Court." Cross-examined by Public Prosecutor:

Q: Is it true that in the morning of the 24/12/80 you handed some money to your mother?

A: Yes.

Q: Where did you find the money?

A: It was my own money.

Q: Where did you find the motor vehicle?

A: It was Matsenjwa's motor vehicle.

Q: Where is Matsenjwa? Is it Simon Matsenjwa?

A: Yes.

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Q: Did you know Mayaluka Store before you were arrested?

A: No.

Q: But you led the Big Bend police to Mayaluka Store?

A: The police led me to the shop.

Q: Is it true that you told the police that you told the people to keep quiet when you entered the shop?

A: No.

Q: Why did you not put this to PW.4 (Mabuza)?

A: I did.

That concluded the case for the defence.

The Magistrate simply recorded a verdict of guilty without giving reasons. The record of (Appellant's) previous convictions was put to him and admitted by him. This record makes depressing reading. He is obviously an habitual thief. However this very fact requires that the Court be alert to the possibility that Appellant was not in the dock because of his record.

Appellant was committed to the High Court for Sentence.

The High Court confirmed the conviction - again without giving reasons and decalred Appellant

an Habitual Criminal.

Now there are, in my view serious difficulties about the Crown evidence implicating Appellant in the robbery. First, the identification of Appellant by Queen Nkosi was unsatisfactory. She was called to Manzini and there identified the Appellant and another man as the robbers. She recognized the Appellant as the man who threatened to shoot her by his hat alone - a brown balaclava. It is not suggested that there was any special feature about the hat. The other man whom she identified was with Appellant at Manzini. Presumably she was proved wrong here as the second man was not charged. Moreover no identification parade was held.

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The identification of the Appellant is therefore suspect.

Second, much of the evidence of D/S/Insp. Vilakazi was hearsay. He knew nothing of his own knowledge about the car being stolen; the Appellant being found driving it; the presence in the car of the spears and toy pistols and the bank plastic bags (Ex. 4). However Appellant in his own evidence salvaged some of Vilakazi's evidence by saying that the spears were in the car he was driving (not his own) when he was involved in an accident. Apart from this admission by Appellant the hearsay evidence of Vilakazi must be ignored.

Then again, Vilakazi's evidence that he cautioned Appellant in accordance with the Judge's rules does not establish an acceptable caution. The question of a proper caution is a mixed question of fact and of law. A police officer must give particulars of the caution administered, for it is a matter for the Court to say whether or not there had been compliance with the Judge's rules. It follows, I think, that the subsequent incriminating statements by Appellant to not be proved to have been Vilakazi would / freely and voluntarily made. They are inadmissible.

Third, the demonstration at the store amounted, in my view, to a confession to police officers. If that is right the evidence was inadmissible by virtue of the provisions of Section 226 of the Criminal Procedure and Evidence Code.

It follows that in effect the only evidence implicating Appellant is his admission that the spears and pistols were in the car which he was driving; and the evidence of Ndoda Dube in regard to the handing over of money to Appellant's mother (admitted by Appellant).

Appellant gave an explanation for being in control of the car. He said it belonged to Simnn Matsengwa in Manzini (admitted by Vilakazi). It is true that Vilakazi said the police did not find Simon Matsenjwa, but that is not evidence that he does not exist,

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Neither the Magistrate nor the sentencing Judge justify the positive rejection of Appellant's evidence. Moreover there is no knowing that the evidence of Appellant would have been rejected had the inadmissible evidence been excluded.

In my judgment, the identification of the Appellant as one of the robbers was not established.

The conviction cannot stand.

In my judgment the appeal should be allowed and the conviction and sentence set aside.

DENPY YOUNG J.A.