IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

APPEAL NO. CA 21/1994

In the matter between

ALFRED SHEKWA First Appellant

ELIJAH JUBELA SHONGWE Second Appellant

and

THE KING Respondent

Coram:

Melamet P.

Schreiner JA.

Browde JA.

JUDGMENT

Browde JA:

The appellants were convicted by the Principal Magistrate at Manzini on two counts of housebreaking with intent to steal and theft and one count of robbery. The second appellant was also convicted of the crime of escaping from lawful custody. Both appellants were sentenced to terms of imprisonment in respect of each of the crimes committed by them and such terms were ordered to run consecutively. This had the effect

of a ten years' imprisonment sentence in respect of each appellant.

In summary the offences of which they were found guilty were the following:

(i) On 3rd of May 1991 they broke into the house of one Nkomo and stole a TV set, a hi-fi set and ten radio cassettes. (This was count 2 in the original indictment).

(ii) On or about the 11th of May 1991 and at or near the Manzini Central Primary school the appellants, after threatening to shoot her, stole from one Teresa Magagula a great deal of property including a television set and a sewing machine. (Count 4 in the original indictment).

(iii) On or about the 15th of May 1991 and at Trelawney Park in the district of Manzini they broke into the house of one Essop Amoojee and stole many items of clothing and other property belonging to

the complainant. (Count 5 in the original indictment).

It appears from the evidence that after the arrest of the second appellant the latter led Detective Inspector Walter Mazibuko to the house of the first appellant. There the first appellant was questioned about a pistol as a result of which he produced a toy pistol which was hidden in the grass. There followed a search by the police of the first appellant's premises during which according to Mazibuko both appellants were "co-operative". Certain of the stolen items were recovered and thereafter the two appellants were handed over to Detective Sergeant Elphas Mamba. He interviewed the appellants and was then led by them to various places where many of the items that were alleged to have been stolen from the various complainants were recovered. The appellants also took Sergeant Mamba to the home of one Mahlambi and there, in the presence of the appellants, Mahlambi told Mamba that a TV set and hi-fi set which were on his premises had been sold to him by both the appellants. The TV set and hi-fi sets were later identified by the witness Nellie Nobela, the wife of the complainant Nkomo, as being the goods that were stolen from her premises and which formed the subject matter of count 2. The Magistrate in his judgment said:

4

"These items were recovered as a result of both accused pointing out Mahlambi as the person to whom the goods had been sold. I, therefore, find both accused No. 1 and Accused No. 2 guilty as charged on this count. In regard to count 4 Sergeant Mamba also described how the two appellants had taken him to Mahlambi who in turn had taken them to the Lwandle area where a sewing machine and a TV set were recovered".

This evidence coupled with other evidence to which I shall advert later in this judgment led the Magistrate to a finding of guilty on count 4. As far as count 5 is concerned Mamba was also taken, according to his evidence, by the two appellants to Murray Camp and also to the Sicelwini area where much of the goods stolen from the complainant Essop Amoojee were recovered. Once again this evidence was accepted by the Magistrate and he found the two appellants guilty of housebreaking and theft as charged.

Mr Ben Simelane, who appeared for the second appellant, in a carefully prepared and ably presented argument submitted that all the evidence of the pointing out of the various places and articles by the two appellants should have been held to be inadmissible. He contended that the only evidence presented by the Crown to the effect that the pointings out

5

were made freely and voluntarily was that of Detective Inspector Mazibuko who said that he interviewed the First Appellant after the second appellant had taken him (the witness) to the house of the first appellant. He stated that this interview was in connection with a number of cases for which the two appellants had been arrested and he went on to say -

"I met Accused 2 (the second appellant) at the police station and I called him into my office. It was on 25 May 1991. In the office I cautioned Accused 2 in accordance with the Judge's Rules."

It seems from this evidence that only the second appellant was given the caution as no reference is made to the first appellant ever having been cautioned at all. It also seems that the caution was given only by Mazibuko and it was not clear whether or not this caution was given in the presence of Mamba. Consequently one must assume that after being handed over to Mamba the appellants were in no way told that they were at liberty to remain silent and, if they so chose, to refrain from pointing out anything or anybody. Mr Simelane's submission that the pointings out were inadmissible is based on the following premises, namely:

(i) The pointings out were part of a confession to the police.

6

(ii) The confession is inadmissible because there was no proper warning given to the accused in terms of the Judge's Rules; and

(iii) It was therefore not shown by the Crown that the pointings out were freely and voluntarily made.

In the case of July Petros Mhlongo and Others v The King (case No. 185/92) in this Court the judgment in S v Sheehama 1991 (2) SA 860 was approved and followed. In that case the Appellate Division in South Africa said:

"A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of section 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily. "

It seems to me that the fact that the appellants took the police to Mahlambi who then pointed out what he had bought from the appellants, and that Amoojee's goods as well as that

7

of the complainant Magegula were recovered because of pointings out, make it clear that such pointings out were part of an overall confession by the appellants. That being so they were inadmissible unless it was shown by the Crown that they were freely and voluntarily made. In this regard it was, in my opinion, essential for Detective Sergeant Mamba to have said, if such was the case, that he warned the appellants according to Judge's Rules. It was this witness to whom all the pointings out were made and who said -

"I saw all the four accused after they had been arrested by other police officers. I interviewed all the four accused about this case. The accused then took me to their respective houses. Accused 2 took me to Murray Camp. ... The accused then took me to Nkomo's house and showed me a window through which they said they had gone into the house. I had never been to Mahlambi's house or Nkomo's house before the accused took me there. Accused 1 and Accused 2 took me to Mahlambi's place of employment at Sedco. They told me that they had sold Mahlambi the sewing machine before Court. Mahlambi said the machine was at Lwandle. Mahlambi together with the accused took me to Lwandle area where I recovered the sewing machine. In Mahlambi's house I then saw the TV set and the hi-fi set and he told me that these have been sold to him by accused 1 and accused 2. This was in accused 1 and accused 2's presence."

In my opinion it could hardly be clearer that the two appellants made a confession regarding count 2 to Mamba. As I have already stated there was no evidence that this

8

confession was freely and voluntarily made to Mamba and consequently, in my opinion, the Magistrate should have ruled it inadmissible. Without the evidence of the pointings out there was no evidence linking the two appellants with the crime set out in count 2 and consequently in regard to that conviction I would uphold the appeal and set aside the conviction and sentence.

This approach to pointings out is not affected, in my opinion, by section 227(2) of the Criminal Procedure & Evidence Act which provides that:

"Evidence that any fact or things discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."

In dealing with the provision of section 218(2) of Act 51 of 1977 in South Africa (which is in almost identical terms to section 227(2)) the Appellate Division in Sheehama's case (supra) said:

9

"It is also a basic principle of our law that an accused cannot be forced to make self-incriminating statements against his will and it is therefore inherently improbable that the legislature, with a view to sound legal policy, would ever have had the intention in section 218(2) of Act 51 of 1977 to authorise evidence of forced pointings out."

I confidently believe that the same dictum regarding the legislature would be applicable in this kingdom and consequently I am of the view that unless a pointing out is proved to have been freely and voluntarily made it is inadmissible in evidence against an accused person.

Precisely the same reasoning applies to count 5. There is no evidence against the two appellants save for the goods which were recovered from them as a result of the pointings out and which were subsequently identified by the witness Essop Amoojee as being his property. Once again the Crown failed to prove that the pointings out in relation to this count were made freely and voluntarily and consequently I would uphold the appeal against these convictions and would set aside both the convictions and the sentences.

10

The pointings out were also made in relation to count 4. This count, however, was essentially different from the others since the two appellants were positively identified as being the persons who broke into the home occupied by Teresa Magagula and robbed her and her daughter Phumsile at gunpoint. In his petition for leave to appeal the second appellant has asked for leave to appeal on count 4 in that "the trial court erred in law in relying on the uncorroborated evidence of the complainant as to the identity of her assailants bearing in wind that it was at night and the robbers had woollen hats on their heads". This submission contains two important inaccuracies, namely:

The complainant was not uncorroborated since her daughter Phumsile also identified the two appellants. She stated that she had been very close to the second appellant who was wearing a woollen hat. She could, however, see "all his face and his beard". According to her the first appellant was wearing nothing on his head and although this contradicts her mother who is reported as having said "they were wearing some Cooper hats" it does not seem to me to be material. I say this because when cross-examined by the second appellant Teresa Magagula (the mother) stated "you have put on a woollen hat but your face was visible".

11

If one bears in mind that both mother and daughter had plenty of time to observe the two appellants - the evidence was that they were in the house for about 15 minutes with the electric

light switched on - and that neither appellant chose to give evidence under oath denying that they were present in the house of the complainant, there was in my judgment ample evidence on which to convict the two appellants on count 4 without the necessity for taking into account the pointings out referred to above. The witness Simon Mhlanga (who was obviously the Mahlambi already referred to) gave evidence to the effect that he knows both appellants and that they had sold him a hi-fi set and a sewing machine. He stated under oath that the first appellant was together with the second appellant when they said they were selling the sewing machine, that it was in good condition and when asked whether it had not been stolen the second appellant told him that it was not stolen property but that he had bought the sewing machine when he was still employed in Johannesburg and working in the mines. This was the sewing machine which was subsequently identified by the complainant Magagula as the one which was stolen from her house on the night of the breaking in by the two appellants. This evidence, too, is fatal to the appellants' defence particularly as they chose not to give evidence under oath contradicting it.

12

I am satisfied that this count was proved beyond reasonable doubt. There is however one additional point that should be made. The appellants were taken to the police station ostensibly to witness the pointings out by the complainant of both the television set and the sewing machine which were her property. The same procedure was followed with the witness Nellie Nobela who said that at the police station the second appellant expressed "some apologies" saying that he was sorry about the incident. While there is obviously nothing wrong with the police allowing an accused person to be present when a complainant points out property which has been allegedly stolen it would obviously be highly undesirable were the real reason for arranging a confrontation between the accused and the complainant to be to promote a possible discussion between them from which incriminating evidence could be obtained against the accused. In this regard Mr Simelane referred us to the case of The King v Charles Ginindza & Others Review Case No. 170/87 in which Hannah CJ in referring to cases dealing with the point said:

"The learned judge further pointed out that in those cases it did not appear that the accused was deliberately taken or left by the police with the third person in order that he should confess. Where that occurs it seems to me, as I think it seemed to the learned judge, that a new and important factor is introduced and has to be taken account of if only because it is in conflict with the spirit of the proviso and lends itself to abuse. It can be regarded as an indication of the unwillingness of the police to expose the accused to the safeguards inherent in

13

bringing him before a Magistrate and. may cause doubt as to whether the confession was freely and voluntarily made. "

In this case, however, nothing turns on what occurred in the police station since count 5 was adequately proved without the necessity for the Crown having to rely on it.

As far as sentence is concerned the submission made by Mr Simelane that the Magistrate should have ordered the sentences to run concurrently is no longer relevant since the conviction on count 5 should in my opinion be the only conviction which survives this appeal.

In summary therefore I would uphold the appeal on counts 2 and 5 and set aside the convictions and sentences in regard to both appellants. In regard to count 4 I would dismiss the appeal and confirm the conviction of the first appellant and the sentence of 5 years' imprisonment and in regard to the second appellant the conviction and the sentence of 5 years' imprisonment. With reference to count 6, namely the charge of escaping from lawful custody, the charge related to the second appellant only and Mr Simelane did not seriously contend that the Magistrate erred in

finding the second

appellant guilty as charged. On this count the conviction and sentence are confirmed and the sentence is ordered to run concurrently with the 5 years' imprisonment in respect of count 4.

BROWDE JA.

I agree and it is so ordered

MELAMET P.

I agree

SCHREINER JA

DATED THIS 26TH DAY OF MAY 1995.