IN THE COURT OF APPEAL – SWAZILAND

CRIMINAL APPEAL NO.6/97

In the matter between:

FELICIANO NINJA NOTISE 1ST PETITIONER

JOSEPH MAHLALELA 2ND PETITIONER

GEORGE D. KHOZA 3RD PETITIONER

VS

REX RESPONDENT

CORAM

: STEYN JA

: SCHREINER JA

: LEON JA

FOR THE PETITIONERS : IN PERSON

FOR THE RESPONDENTS :

JUDGEMENT

STEYN JA

Before us we have three applications for leave to appeal originally brought by three petitioners. The first two petitioners Notise and Mahlalela have not pursued their petitions and their applications are accordingly struck from the roll.

The third petitioner has persisted in his application for leave to appeal. He was charged in the

Magistrate Court with two counts of robbery and one of the unlawful possession of a firearm an A.K.47 rifle. He pleaded not guilty to all charges. He was acquitted on the two robbery charges but convicted on the charge of unlawful possession of the arm of war. He was sentenced to a mandatory sentence of a fine of E5,000 or in default of payment 5 years' imprisonment.

He appealed to the High Court against conviction and sentence His appeal was dismissed and he now seeks leave to appeal in this Court.

The Magistrate who tried him in the Court of first instance summarises the evidence on which he was convicted as follows:

'PW3 Terence Dlamini testified how he has a homestead where a Khoza lady was a tenant. On the 23rd March 1994 the accused came to that lady's home. He related how on the 24th March 1994 accused no.3 and the police came to the homestead. Accused no.3, the present appellant within the compound searched and produced a gun."

The Magistrate records about that:

"PW3 did not impress the Court as an agent of misinformation." The Magistrate then referred to the evidence of Detective Inspector Mavuso and he says:
"His evidence, (he was PW10) agreed wholly of what transpired on the afternoon of 24th March 1994 until accused no 3 recovered the gun." The learned Magistrate goes on to record his findings in respect of this evidence as follows:

"Both witnesses agree on minute details of what accused did," and goes on to say:

2

"Those similarities cannot possibly be the product of a made up story. I do not believe accused no.3's story that this story is made up. I see no reason why a stranger and civilian to the accused would lie.

They met only once and at the time of the meeting there was no reason to differ. I am convinced beyond any reasonable doubt that accused no.3 George was arrested on the 23rd March 1994 that night at PW3's homestead and that on 24th March 1994 he led the police to the recovery of the gun now in court."

It was on this basis that the learned Magistrate convicted the Appellant and imposed the sentence he was obliged to impose in terms of the relevant legislation.

We examined the evidence of the two witnesses PW3 and PW10 and there can be no doubt that the Magistrate was fully justified in coming to the conclusion that their evidence should be preferred beyond any doubt rather than that of the Appellant.

Detective Inspector Mavuso testified specifically that he warned the Appellant before the pointing out of the firearm and it was not challenged that the pointing out occurred voluntarily. Detective Inspector Mavuso specifically stated that the Appellant was cooperative and assisted the authorities in the investigation.

The only question is whether the fact of the pointing out of the firearm constitutes proof beyond reasonable doubt that the Appellant possessed the firearm in terms of the relevant Section. If the Appellant did not possess the firearm and the fact that he was able to point it out was consistent with his innocence, one would have expected him to have put such facts before the Court as

3

September 1997 this was the situation What did the Appellant do? He denied that he ever pointed out the firearm, he said the two witnesses had fabricated their version and that he was never at the homestead

In the absence therefore, of any explanation for his ability to be able to point out that firearm which explanation was inconsistent with his possessing it - I conclude that it has been proved beyond reasonable doubt that he was in fact in possession. It would be sheer speculation - in the absence of any evidence to that effect - to consider it reasonably possible that his ability to be able to point out the firearm was inconsistent with his possessing it. This is confirmed by the false explanation that he advanced in respect of the pointing out of the firearm.

The prima facie case which the Crown established in this matter therefore becomes proof beyond reasonable doubt in the absence of any explanation on the part of the Appellant for his possession. It follows that there are no reasonable prospects of success in this application for leave to appeal and the application is dismissed.

STEYN J A

I agree :

W. H. R. SCHREINER J A

I agree :

R H LEON J A
Delivered on 4th April 1997.