IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 20_98

IN THE MATTER BETWEEN:

GIDEON PONO DLAMINI APPELLANT

VS

REX RESPONDENT

CORAM : BROWDE J A

: VAN DEN HEEVER A J A

: SHEARER A J A

FOR THE RESPONDENT : MR MASEKO

FOR THE APPELLANT : MR MNISI

JUDGMENT

Browde J A:

The appellant was accused no. 3 in the High Court before which he was charged, together with accused nos. 1 and 2, with armed robbery. The latter two were discharged but the appellant was found guilty and sentenced to 12 years' imprisonment.

In the indictment it was alleged by the Crown that on or about 27th June 1997 and at or near ka-Langa Bricks in the Lubombo District, the three accused, acting with a common purpose, threatened one Lucky Sipho Zikalala (PW1) that unless he consented to the taking by the accused of E500 000 00 in cash and 2 pump-action shotguns they would then and there shoot him. Zikalala was, at the time, employed by Elite Security Company as a control-room officer and was en route from Siteki to Manzini with the money in his custody. His mandate was to take the money to the Central Bank in Manzini. The team from the company which was assisting Zikalala, were one Simelane who drove the kombi vehicle in which the money was being carried, a gunner Lukas Nkambule and the appellant who was referred to as the "crew commander" and who was also armed.

The evidence revealed that after the team had collected the cash from two pick-up points namely First National Bank at Siteki and Langa Bricks, they were proceeding on their way when they found the road barred by a navy Toyota Corolla which was parked across the road. This brought the kombi to a stop. Three armed robbers, one of whom fired a warning shot, then proceeded to disarm the gunmen and the appellant and took the sealed trunk of First National Bank which contained E500 000, the two shotguns and the key of the kombi.

PW1 stated in evidence that he was unable to identify any of the robbers as one had his face covered by a balaclava cap, another had concealed his face with "an orange bag" and the third, who was apparently the driver of the Toyota, was not seen sufficiently clearly for purposes of identification.

The investigating officer was Sergeant NhlabatsL The only evidence upon which the Crown relied for a conviction against accused nos. 1 and 2 is that when they were arrested they had in their possession at their homes the sums of E5 395 00 and E6 020 00 respectively. This

money could not be linked to the stolen money and consequently the two accused were acquitted. After his arrest the appellant was subjected to very lengthy interrogation. After being kept awake and being questioned uninterruptedly the appellant led the police to his homestead which he shared with his girlfriend Ntombi Nxumalo (PW7). There the appellant asked PW7 to produce the money which he had hidden under his bed. PW7 then revealed that for fear it might be stolen she had hidden the money in the thatch of a neighbour's roof. She fetched it and it turned out to be El3 700 00. The appellant gave different explanations at different times and to various people as to how he came into possession of the money but understandably no reliance was placed on that by Crown counsel, Mr. Maseko, since the appellant might have had one of many reasons for not identifying the source of so much cash. This money could also not be linked to the

2

notes stolen from the complainant and so it took the case against the appellant no further. What Mr. Maseko did rely on, however, was a statement in writing which came into existence in the following circumstances. After a lengthy interrogation which I have described, the appellant made a statement to PW6, the investigating officer, who wrote it down since the appellant was unable to do so, though he signed it. Realizing that it was a confession PW6 arranged for him to be taken before a Magistrate, Mr. Sibanyoni, who had died before the trial commenced. When the Crown tendered that statement in evidence there was an objection by the defence to its admissibility. The main ground was that it was not freely and voluntarily made. Further, there is no unequivocal admission by appellant's counsel that the Magistrate, in whose handwriting the statement was, had properly recorded what was said or the interpreter had properly interpreted from siSwati (the language spoken by the appellant) into English (the language which the statement was written by the Magistrate).

A trial within a trial was then held at the end of which the court held that the statement was admissible as it had been freely and voluntarily made. Mr. Mnisi, who appeared before us on behalf of the appellant, criticised that finding. The evidence of the appellant that the police had subjected him to torture before making any statement was perhaps not very convincing. But that was not the end of the matter. In the "trial within a trial" the evidence of the appellant made it abundantly clear that he disputed the admissibility of the statement on a further ground. He testified that the policeman who had taken him to the Magistrate, had handed the latter some "white papers" which the Magistrate consulted as he wrote. What the Magistrate had written, he did not know. It had not been read back to him. Under cross-examination at pages 109 to 112 of the record he denies that he was given any option to remain silent. (PW6 certainly did not testify that he had given such option to the appellant in regard to talking to the Magistrate, he had merely sent him off to do so). He had no idea what was contained in the papers, but suspected "when the Magistrate continued writing and referring to the (hand-written papers) that perhaps these papers had something to do with my going there".

3

The appellant does not say that those "hand written papers" may have been the statement PW6 had taken shortly before, but the onus burdened the Crown to prove that the statement had not only been voluntarily made, but was something both emanating from the appellant and correctly interpreted into - for him - a foreign language.

Because it had not been put to the relevant Crown witnesses that the Magistrate had been handed hand-written papers, there may be some doubt "whether that was true. But there was no onus on the appellant to prove that the statement was flawed. The Crown did not ask to recall the police witnesses involved, in rebuttal, or the interpreter, and the grounds on which the trial judge rejected this evidence contains a misdirection. He said that, "no Magistrate worth his salt would do such an irregularity." With respect that is hardly a ground upon which to have rejected the evidence given under oath regarding the conduct of the police in obtaining a confession from a person in their custody, nor does it address the problem as to the correctness of what was written, merely the issue as to where the words originated from.
In dealing with the failure by defence counsel to put the appellant's version to the police

witnesses the learned Judge stated that, "it is very difficult if not impossible to believe the accused's story and I thus reject as an afterthought" (sic). This is rather unfortunately phrased since it is trite that the accused's version does not have to be believed as beyond doubt true before he may be acquitted.

The most significant flaw in the learned Judge's decision to admit the statement in evidence was in my view, however, the fact that the question of the correctness of the content of the statement being questioned by the appellant appeared to have been overlooked. The learned Judge did say that "right at the commencement of the trial despite the court's enquiry on this (i.e. the inability to call the Magistrate) Mr. Mngomezulu (appellant's attorney in the court a quo) confirmed that the Crown's submission that the body of the confession is not challenged but entered by consent". The record does not bear this out. What the attorney conceded, and this concession does not, in my judgement assist the Crown, was that the document which was handed up by

the Crown had been written by the Magistrate, Mr. Sibanyoni, That was no more than an admission of the handwriting - not of the correctness of the content including that of the interpretation from siSwati into English, I am of the opinion, therefore, that the statement should have been held to be inadmissible.

During argument before us the point was raised that the statement was not a confession but purported to be exculpatory of the appellant. The relevant portion of the statement dealt with what preceded the robbery. The appellant, according to the statement, said that he had been approached by the other accused to tell them how the appellant and his co-workers in the transport of the money went about their work. What they specifically sought was information regarding the days of the week on which they made their runs. The appellant at first refused to give them the information but ultimately, after being badgered on about four different occasions, confirmed what they already knew (as one of them had previously worked for the same security company) namely that money was transported on Mondays, Wednesdays and Fridays. This, the learned Judge referred to as "vital information on which the robbers acted to commit this offence."

In submitting that the appellant had been involved on the basis of common purpose the Crown relied on the fact that the appellant confirmed the days as described above and also on the fact that on the day of the robbery the appellant saw the Toyota car in the vicinity which he knew to be the car belonging to one of the would-be robbers. Despite this he did nothing nor did he take avoiding action when he saw the car following the kombi and disappearing on another road shortly before the robbery when it obstructed the progress of the kombi. This was the basis for the contention that the appellant had "associated" himself with the robbers.

In my opinion this "association" is not sufficient to prove that the appellant had a common purpose with the robbers. His reluctance to confirm even the information which they already had and his failure to take active steps to do something about the presence of the Toyota in the vicinity of the kombi fall short of the "causal contribution" to the criminal act which was required to have made the appellant guilty by association in a

common purpose. See S V KHUMALO 1991(4) SA310 (A) headnote at 316c-d. S V WILLIAMS 1980(1) SA60 (A).

In Khumalo's case it was confirmed as had been held in S V SAFATSA 1988(1) SA865 (A) and S V MOTAUNG 1990(4) SA1019 (A) that in a murder case (and this applies to any crime involving mens rea) the causal contribution of one person solely on the grounds of a common purpose with another can be found to exist if he actively associates himself with the criminal

conduct concerned. In my opinion the conduct of the appellant before and during the robbery did not amount to the active association required for a conviction for robbery.

The only other evidence relied on by the Crown was the confession in the statement allegedly made to the Magistrate that the appellant received some of the proceeds of the robbery. If he was shown by admissible evidence to have done that he could have been found guilty of receiving stolen property well knowing it to have been stolen. Although that offence is not mentioned specifically in the CRIMINAL PROCEDURE AND EVIDENCE ACT as being a competent verdict on a charge of robbery, I nonetheless am of the view that it is. Robbery is theft accompanied by violence and "receiving" is merely a special form of theft. See HUNT; SOUTH AFRICAN CRIMINAL LAW VOL. II page 608.

There can be no doubt that the statement tendered by the Crown, while to a large extent exculpatory of the appellant, was a confession insofar as it dealt with his receiving a share of the loot. That being so, and for the reasons already set out above, I am of the view that the statement should have been held to be inadmissible. If that had been the ruling the appellant would have been entitled to be discharged along with the other accused.

For those reasons the appeal is upheld and the conviction and sentence set aside.

J. BROWDE J A

I AGREE

: L. VAN DEN HEEVER A J A

I AGREE

: D. L. L. SHEARER A J A

Delivered in open court on.....day of June 1999