IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 26/2021**

In the matter between:

Sipho Shongwe **Appellant**

Versus

Rex **Respondent**

Neutral Citation:	Sipho Shongwe v Rex (26/2021) [2022] SZSC 47(17th October, 2022)
Coram:	**SB Maphalala, JP Annandale and SJK Matsebula JJA**
Heard:	15th August 2022
Delivered:	17th October 2022

CASE SUMMARY

Extradition Request – Prisoner unlawfully and prematurely released prior to completion of sentences in South Africa – Two life sentences (concurrent) plus – additional 23 years imprisonment imposed but appellant erroneously released on fraudulent documentation – Over 13 years sentencing period remaining, well in excess of 6 months minimum – Extradition request forwarded via diplomatic channels to requested state (ESwatini) – Extradition ordered and confirmed on Appeal from the High Court.

Appeal – Eight grounds unmeritoriously raised in challenge to extradition order. Appeal dismissed, no costs ordered. High Court Order on Appeal from Magistrates Court, sitting as designated Extradition Court of ESwatini, confirmed on Appeal.

JUDGMENT

Annandale JA

[1] The appeal before us concerns a person with a long and chequered past. He was prosecuted and convicted in the Republic of South Africa due to a cash-in-transit robbery incident, together with some of his accomplices. The appellant was sentenced to two life imprisonment terms, to be served concurrently, plus a further 23 years of incarceration and he was detained in the High Security section of the Barberton Prison. As a result of fraudulent papers, he was erroneously and well prematurely released by prison officials in Barberton.

[2] This event was investigated by special local police formations, the Scorpions and Hawks. Eventually, the necessary paperwork was completed and a formal request was lodged by the South African authorities to request the Kingdom of ESwatini to extradite him back to South Africa in order to serve the remainder of his unfinished sentences. Subsequent to his arrest in ESwatini, he is currently on trial as a single accused person on a charge of murder, in alleged association where someone else fired the fatal shot.

[3] Meanwhile, after his arrest in ESwatini on a charge of murder, he was brought before a Court of Committal where he was then declared to be extraditable, pending the conclusion of his current criminal trial. If acquitted, the Minister may then authorise his extradition to the requesting state, otherwise to wait until his discharge from prison, if so sentenced. Dissatisfied with the judgment of the Court of Committal, at the magistrate's level, he appealed to the High Court. There, Mavuso AJ (as he then was) dismissed the appeal. Similar or comparable points of law, procedure and otherwise were considered by the Court below, as is now placed before us for consideration of the appeal against the dismissal of the appeal by a single judge of the High Court.

[4] This Court has discussed and anxiously debated the matter before us. We unanimously came to agree on the inevitable outcome of this appeal. What remains is to pen our reasons for concluding as we do. We have an inordinately voluminous set of papers before us. Various bundles of documentation which contain entirely irrelevant material, such as bank letters, government forms and mainly they all are impossible to tie in with

the matter before us. It serves to increase the thickness of the record to about 19 centimetres, a ream or two of paper. We do not need reams of irrelevant filler material before us in order to consider the matter at hand. Counsel for the appellant made virtually no reference to these multiple papers filed of record, save for a mere one handful. Nevertheless, counsel for both parties came to our assistance to highlight the few relevant papers. Heads of Argument also assisted in a meaningful consideration of all that is before us.

[5] Our local courts have scant exposure to extradition hearings. The concept is well known and in the recent past, international discourse has surrounded particularly long drawn out extradition hearings in for instance, matters of cyber security and allegations of data hacking.

[6] Having said that extradition is a long standing concept that goes further back in legal history. It is ancient. As a concept, it originated with the ancient Egyptian and Chinese civilisations. Following an unsuccessful HiHite invasion of Egypt, an extradition agreement formed part of the peace treaty signed between Ramses II and the Hittite King, Hattusili II. It was not thereafter until the Treaty of Falaise in 1174 AD that an English monarch officially made provisions for extradition arrangements. The first Anglo-American extradition agreement appears as a clause within the 1794 "Jay Treaty". It established a number of important principles that have continued to structure the Anglo-American and International approach to this day. It ensured that extradition was dictated by law and not by foreign policy or politics. The only crimes then listed were murder and forgery (The History Vault, 2022).

[7] The Encyclopaedia Britannica has it that in international law, the process by which one state, upon the request of another, effects the return of a person for trial for a crime punishable by the laws of the requesting state and committed outside the state of refuge, is "extradition". Extraditable persons include those charged with a crime but not yet tried, those tried and convicted who have escaped custody, and these convicted *in absentia*. Extradition is regulated within countries by Extradition Acts and between countries by diplomatic treaties. There is also a common principle named double criminality. It means that the crime for which extradition is being sought must be criminal in both the requesting and requested countries. Political crimes are taboo.

[8] Since 1968, the Kingdom of ESwatini has had an Extradition Agreement between South Africa and Swaziland (ESwatini). It is founded in Proclamation No. R 292, GGE No-2179 of the 4th October 1968 (Reg.Gaz.No.1026). This Proclamation was entered into in terms of the provisions of the Extradition Act, 1962 (Act No. 67 of 1962).

[9] Its articles denote and describe various facets of the agreement, such as the obligation to extradite on request in respect of extraditable offences, punishable by a sentence of six months or more, or by a more severe penalty. It goes on to state:- "Where extradition is requested in respect of a person convicted and sentenced in respect of such an offence in the territory or of the requesting Party for the purposes of enforcing such sentence or the balance of such sentence extradition shall be granted irrespective of the period of sentence imposed" (emphasys added). As

shown below, provision is made elsewhere to require at least six months imprisonment remaining before extradition is ordered.

[10] The agreement further provides immunity by reason of lapse of time and the lack of the original or certified copies of documentation to be submitted, and also for the authentication of documents.

[11] The judicial process in extradition proceedings is therefore founded upon the agreement between the two states of ESwatini and South Africa, with application of the principles and dictates thereof. Ultimately, when a person is held by the Courts to be extraditable, it remains for a political decision to be taken by Prime Minister's Office before actual and physical repatriation to the requesting state may be effected.

[12] It is against this backdrop that the present appeal must be considered. Importantly, it is not the function of our courts to determine guilt or innocence of the person whose extradition is sought. Also, if the complaint is centred around an unfinished sentence, the merits of the original conviction are not considered. The unfinished sentence must however be not less than six months. In the South African case of Geuking v President of the Republic of South Africa and Others 2004 (A) BCLR 895 [CC] 12 December 2002, Goldstone J said:

> "... extradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly

imposed by another state". See Bassoini, International Extradition: United States Law and Practise, 4th Ed (Oceana Publications) New York 2002 at 66, from which Goldstone J sourced this *dictum*.

[13] The present appeal before this Court lies against the dismissal of an appeal by the High Court, wherein a judgment of the Magistrates Court, sitting as a duly constituted Extradition Court which ordered the extradition of the appellant, was sought to be impugned. The current grounds of appeal overlap to some extent with those which were advanced in the High Court, but the essence remains.

[14] The brief factual background of this matter is that some years ago, the appellant was involved in a cash-in-transit robbery, committed in the Republic of South Africa. *Inter alia*, two sentences of life imprisonment were imposed due to his participation in the crime. Many years of direct imprisonment were also imposed. The serving of his sentences in the Barberton maximum security prison was interrupted by the faxed arrival of seemingly official looking papers. Therein, his release was ostensibly ordered. Controversy surrounds the authenticity and acceptance of the faxed papers, such that disciplinary enquiries were instituted against certain officers of the Barberton institution. Fact remains, the appellant was erroneously released from prison, albeit on strength of *prima facie* fraudulent papers. The appellant has disavowed himself from any involvement in a scheme to unjustly secure his release.

[15] It is not the role or function of either this Court or the Court below, to make any determination on the possible personal involvement of the appellant in

order to be prematurely released, or not. Nor is it for this Court to unambiguously decide if release and escape are mere nuances of tautology, or separate substantive offences. Likewise with the ultimate date of release in the event the appellant is to be sent back to Barberton Correctional Services, to be dealt with as then deemed to be appropriate in their local courts.

[16] Subsequent to his departure from Barberton, the appellant, who has different travel documents and differing names therein, has travelled to and from ESwatini, South Africa and Mozambique at diverse times. At certain ports of entry and departure, or in transit, there are discrepancies in the immigration stamp endorsements vis-à-vis the different travel documents. Later on, in the course of time, there was an assassination of a well-known and very successful local businessman, who also had soccer interests, just like the appellant has.

[17] Subsequently, the appellant was arrested in ESwatini and charged (as an accessory) with the crime of murder. Prior to this, the appellant was seen around the country and this galvanised the South Africa authorities to seek his arrest. The dysfunctionality of their Criminal Investigative Police Branches or Units took its toll on the expediency and effectiveness, resulting in a protracted effort to make meaningful progress. Nevertheless, it so transpired that a formal extradition process was eventually instituted via the diplomatic channels and in accordance with the aforementioned international agreement between our Nations. Whether or not any delay to do so is detrimentally prejudicial to the appellant remains to be seen, but it is a point on which his counsel has adumbrated repeatedly.

[18] The gist of the application itself to extradite the appellant is that he has either "escaped" from the Barberton Prison, or that his release was "erroneous", which is sought to be tarred and feathered by the appellant as being "*mutually destructive causes of action*". I will soon revert to this too.

[19] The gauntlet of litigation has certainly run its course in this matter. First, at the time when an application for the release on bail was heard by Nkosi J in the High Court, numerous days of evidence were devoted to the legality and mode of the person's release from the Barberton Prison, in addition to forensic evidence relating to the actual local assassination, and further peripheral aspects. The judgment on bail then took exceptionally long to be included in the record of appeal. The bail application and subsequent appeal was then followed by the institution of extradition proceedings before the Magistrate's Court at Manzini, sitting as a designated Court of Committal. It was then subjected to appeal on the High Court, and dismissed. It now ultimately ended up in the apex Court. For the reasons that follow, the appellant is yet again to be disappointed in his legal adversities, just as previously with the Supreme Court of Appeal and the Constitutional Courts in South Africa, where he sought to impugn his two sentences of life imprisonment plus a further 23 years of imprisonment, exhausting his legal remedies. His counsel still maintains that he has not yet exhausted his legal remedies. Nothing turns on this, for present purposes.

[20] There are eight grounds of appeal on which Mr Shongwe relies in order to impugn the well-reasoned and sufficiently justified Judgment of the High

Court, which dismissed his appeal against the extradition order which was granted by the Magistrate's Court sitting as Court of Committal. It is held out to be that: "...the Court *a quo* erred and misdirected itself in upholding the Magistrates' findings that the law permits a judicial officer, while accepting a portion of the witnesses' evidence, to on the other hand make adverse findings against certain portions of the evidence. In this regard the Court *a quo* conflated the principle of election and the rule of evidence pertaining to contradictions by a witness".

The foundation upon which the contentions by the appellant, in order to overturn the previous orders of the two Courts below is based, is stated as follows:-

1 The court *a quo* misdirected itself in finding that the Appellant's failure to testify rendered the State's evidence acceptable and sufficient without qualification. In this regard the court *a quo* failed to appreciate that uncontroverted evidence does not mean automatic acceptance by the court. The court *a quo* ought to have gone further and evaluated the evidence and made a finding whether the evidence is acceptable and sufficient to support a finding for extradition. The Court *a quo* failed to embark on this exercise.

2 The court *a quo* misdirected itself by finding that the documents were authenticated through oral evidence. The State did not lead such evidence at the hearing of the extradition application. The evidence led at the extradition hearing related to the merits of the extradition and not the authentication of documents contained in the extradition bundle.

3 The court *a quo* misdirected itself in finding that the appellant alleged without qualification that evidence presented by the State was hearsay evidence. This is incorrect because the Appellant attacked the evidence relating to parole and release of inmates. To that end, the appellant submitted that only the Prison Case Management Committee, which was not called to testify, could testify in that regard.

4 The court *a quo* misdirected itself in finding that a lower court could come to a different conclusion than that of a higher court. It is trite that a lower court cannot overturn any finding of a superior court.

5 The court *a quo* misdirected itself in upholding the Magistrates' Court finding that the appellant acted in common purpose with unknown individuals. The doctrine of common purpose envisages the commission of an offence by one or more persons.

6 The court *a quo* misdirected itself in finding that the Magistrates' court was correct to draw an inference from facts *post* the alleged offence, that is, escape, when applying the principle of common purpose. A prior agreement is the cardinal element of common purpose, meaning only facts before the commission and during commission of the offence ought to be considered.

7 The court *a quo* misdirected itself in finding that the appellant was the cause of delay in bringing the extradition application. The

evidence presented at the hearing of the extradition application clearly shows that the requesting state had knowledge that the appellant was in the Kingdom of ESwatini around 2009. Despite having the knowledge of the whereabouts of the appellants in 2009, the requesting State did nothing to bring an extradition application. Wherefore it may please the above Honourable Court to uphold the appeal" (sic).

[21] In his able argument before us, counsel for the appellant, advocate TS Ngwenya from Mpumalanga and instructed by Mabila Attorneys in Association with N. Ndlangamandla and S. Jele, focused on five primary aspects of the appeal. He said that both Courts below made the same errors in their alleged approach to the matter, both reasoning incorrectly. These are their approach to mutually destructive causes of action; the binding power of the High Court on inferior courts along the principle of *stare decisis*; identifying hearsay evidence; the applicability of the doctrine of common purpose and their approach on the question of unreasonable delay.

[22] Starting with the latter point, the appellant's gripe is that the South African authorities did not actively pursue his extradition right from the moment when they suspected him to be in the Kingdom, around 2009. He was released from the prison in Barberton on the 25th March 2008 and the "Scorpions" investigative unit took an interest in the matter. Why they did not pounce on him, seeking his extradition forthwith, is not clear, but it is common knowledge that not all investigations receive equal diligence. In addition, the "Scorpions" were disbanded somewhere along the line. Between 2015 and 2017, the prison authorities established that the appellant's release was not duly accounted for. He was not placed on

parole either. The matter was then reported to the Barberton Police. The investigating officer then set the ball rolling and pursued the matter of the appellant's arrest in ESwatini. The office of the Director of Public Prosecutions also took interest in the matter and commenced with the preparation of an extradition request. The evidence shows it to be a cumbersome process, establishing a *prima facie* case, the preparation process of supporting documentation, drafting of pleadings and so on.

[23] Advocate Ngwenya was hard pressed to demonstrate exactly just how long the "inordinate delay" actually was. It all depends on just when he was arrested in ESwatini, or when the diplomatic channels received and forwarded the request, or when the extradition request was received by our Director of Public Prosecutions (DPP), or when the proceedings commenced in the Magistrates Court. There is also a distinction between delay caused by the authorities or by the persons involved. Whichever way it is looked at, it was not expeditious at all. He was arrested years after his release, but the extradition process was initiated within what I consider to be a reasonable time thereafter. In any event, the appellant has not demonstrated any alleged prejudice, sufficiently so to persuade us otherwise.

[24] In dealing with the question of delay, the learned judge *a quo* correctly rejected any notion that extradition proceedings were only initiated after the appellant was arrested on a charge of murder. The contrary evidence on the preceding events clearly contradict it. With reference to relevant case law, and the evidence adduced, it was held that the appellant rendered himself *incognito*. The endorsements by immigration officials on different

passports between entry and exit at border posts or in-transit at an airport helped him to remain undetected. Interpol did not make progress either. The requesting State did not act as expeditiously as it perhaps could have done. Whatever the causes of an accumulative delay might have been, the appellant now wants its effect to be held as being unjust and unduly oppressive.

[25] Whether the extradition proceedings commenced with promptitude, instituted prior to his arrest, or lackadaisical as it now is, the netto effect on the appellant cannot be elevated to a reason by which his appeal should be upheld or for the extradition order, as confirmed on appeal by the High Court, to be set aside. In context, it must also be recalled that as soon as the appellant was arrested in ESwatini, extradition proceedings promptly followed. Until then, and with the benefit of different passports with a discrepancy between the names of the holder, it was possible to remain *incognito* and evade arrest. The Court *a quo* did not err in this regard.

[26] Accordingly, this ground of appeal stands to fail.

[27] The 6th and 7th grounds of appeal overlap. Both have it that a misapplication of the doctrine of common purpose resulted in misdirections and an unjust outcome. The appellant concedes that the expositions of the principles relating to a "common purpose" were correctly held, but that it was a misapplication to also impute it on the appellant.

[28] From the facts of the matter it is clear that more than one person had to be involved to secure the premature release of Mr Shongwe from Barberton Prison. Whatever means were needed to ensure the receipt of *prima facie* fraudulent documents to purportedly authorise and order his release remains unknown at this stage. The degree of participation, when and how it was done and by who, is not the overarching *raison d' etre* as propounded by his counsel. As has already been stated above, it is not the function of this Court, or those below, to determine the guilt or innocence of the appellant with regard to how his release was secured. Common purpose or not, the established facts are that he was prematurely released from the prison where he was serving life sentences, plus many more years of direct imprisonment. He was not paroled. He was not successful in prosecuting his appeals. The Constitutional Court declined his application for direct access. By all accounts, he seems to have exhausted his legal remedies in South Africa.

[29] It will only become relevant to judicially consider the applicability of the doctrine of common purpose once he is prosecuted in the Republic of South Africa on either a charge of unlawful escape from prison or causing his fraudulent early and premature release from prison. It is only then when the merits of his release will be adjudicated upon and if need be, to determine if there was a conspiracy, a mandate to another, which also involves the appellant.

[30] The present consideration of this appeal is not determined by an application or misapplication of this doctrine. The focus is not now to determine just how it came about that he was released from prison. Rather, whether he

was indeed lawfully released on a date when his sentences were still to be completed. The evidence which was presented in the extradition application overwhelmingly leads to the conclusion that he could not have been lawfully released at the time. The documentation which was used to release him is said to have been fraudulent. Again, it would be for a South African court to deal with the relevant details and evidence.

[31] On an overwhelming preponderance of the probabilities, the requesting state proved that Mr Shongwe was serving two (concurrent) sentences of life imprisonment as well as an additional period of 23 years on several separate convictions. At the time of his release, he served only seven years and a few days, with almost thirteen years to go. Exactly how his release was orchestrated shall be determined in due course. However, to now maintain that the decision of the High Court must be negated due to a conflated issue with the doctrine of common purpose is untenable.

[32] Accordingly, grounds six and seven of the appeal must also be dismissed.

[33] In the fifth ground of appeal, the appellant correctly says that it is trite law that a lower court cannot overturn the finding of a superior court. A so-called misdirection by the Court *a quo* lies in the contention that it would have found that a lower court could come to a different conclusion than that of a higher court.

[34] The appellant's counsel leaves this Court in the dark insofar the origin of this aspect is concerned. In its judgement, the Court *a quo* referred to the

case of R V Dhlummayo 1948 SA (2) 677 (A) at 705-706 where it was said that:

> *"...a trial Judge had the advantage of seeing and having the witness and observing their personalities and demeanour. The trial court is in the best position to draw inferences than the appeal court. The trial judge has an advantage to determine what is probable and what is improbable having observed the witness in the course of the trial."*

[35] The learned judge then stated that ".. It was possible for the lower court to come to a different conclusion from that of the High Court". It has to be read in context, with regard to the specific act of "escape" vis-à-vis erroneous release.

[36] However, the principle of *stare decisis* must not be taken out of context, as the appellant now wants to do. While it is indeed so that decisions of higher courts are binding on lower courts, the context of this ground of appeal is ambiguous. The excerpt from Dhlumayo (*supra*) deals with impressions that witnesses make on a trial court, where their demeanour and personalities can be best assessed by that court and inferences be drawn from the observations. On appeal, this advantage does not exist anymore and the probabilities or otherwise are only assessed *ex post facto*.

[37] Applied to the matter at hand, it still remains unclear just how this came about. From my reading of the record, it might well be that Nkosi J made a factual finding, based on the evidence before the High Court in the course of a bail application, that it was not sufficiently proven that the appellant

"escaped" from a prison, in the strict sense and application of the word. In any event the concepts of "erroneous release", "escaping" and "absconding" shall all be determined by the South African courts and not locally. No finding by any of our courts will then be decisive. Whether the High Court per Nkosi J or per Mavuso J on appeal from the lower court came to the same or different factual conclusions will take the matter no further.

[38] The more relevant question is whether the Court *a quo* correctly endorsed the fact that the appellant was prematurely released, or not. I cannot fault the finding that it was indeed so, and in the course of a trial it will be the duty of the requesting state to determine whether he must simply be re-admitted to prison without any further ado, or whether there might be an additional sentence to also serve in respect of a conviction of an offence in relation to his ultimely release.

[39] This ground of appeal must therefore also be dismissed.

[40] The fourth ground on which the appeal hinges is an issue of hearsay evidence. In his Judgment (para 25) the learned Judge *a quo* stated that:

> "With respect, the Court does not agree with appellant's contention that all the evidence presented was hearsay and irrelevant. From the evidence presented before the Court *a quo*, it is clear from the evidence that the appellant was an inmate at Barberton Prison, that he one way or another left prison before completion of sentence and

that he was apprehended in Swaziland (ESwatini)" (emphasis added).

[41] I also cannot agree with Mr Ngwenya on this point. In the extradition hearing, the crown presented voluminous *viva voce* evidence to substantiate the facts now said to be irrelevant hearsay evidence. The evidence was corroborated by documentation which leaves no doubt that Mr Shongwe indeed departed from the prison long before his sentence could have been completed, even if certain "discounts" were to be factored in. The release was affected by way of *prima facie* fraudulent documentation, copies of which were exhibited.

[42] The gripe against the rejection of this point by the Court *a quo* seems to be that the South African Case Management Committee was not also called to present evidence regarding the remaining period of sentence.

[43] Mr Ngwenya argued that the Court below came to a misunderstanding when it was held that the appellant "*one way or another left prison before completion of sentence*". He has it that the issue is not whether the appellant left prison or not; the issue is: If he was released erroneously, how much time must he serve if readmitted? But this is another differentiated issue, unrelated to averred irrelevant hearsay evidence. The threshold for extradition which is founded on the completion of an interrupted sentence is a minimum period of six months. If less, no extradition is to be ordered. If more, it qualifies. *In casu*, the evidence is that the balance of sentence yet to be served stands at 12 years, 11 months and 3 days. Obviously, it is well in excess of six months. Again, it will

only be on re-admission when the prison authorities or the Case Management Committee or the Parole Board, if applicable, will verify the exact period of remaining sentence, but *prima facie* and on a balance of the probabilities, it far exceeds six months.

[44] Another straw to which the appellant clings is the apparent release of another inmate, who was sentenced alongside the appellant. It was argued that if that is the case, it is unlikely that the appellant would have many more years to serve. However, it requires speculation and assumptions of major proportions, if not divination, to extrapolate the sentence of another person, with circumstances unknown, and impute it to the appellant as well. In addition, it is not for the courts of ESwatini to determine whether or not Mr Shongwe was or could have been eligible for parole in or before 2010. It falls outside our jurisdictional area and mandate.

[45] Consequently, and with more than sufficient proof that the remaining term of imprisonment is well in excess of six months, this ground of appeal also cannot be sustained.

[46] The third ground of appeal which is focussed on the authenticity of the extradition documentation is equally unmeritorious. Ordinarily, (Oxford Dictionary) authentication is the process or action of proving or showing something to be true, genuine, or valid, an act of proving on assertion.

[47] The SADC protocol on Extradition requires under article 7 thereof, dealing with the authentication of documents, that where the laws of the Requested

State (ESwatini) require authentication, documents shall be authenticated in accordance with the domestic laws of the Requesting State. This much reflects in Cape of Good Hope v Robinson 2005 (4) S I (CC) where Jacoob J said that it is in the Interests of Justice to decide whether the documents were properly authenticated (para.61). That matter concerned an extradition application by the State of Canada. There, Article 8 of the Extradition Act requires and authorises authentication by either a statement of the Minister responsible for Justice or by a statement of a person designated by that Minister.

[48] Section 31 of the Criminal Matters (Mutual Assistance) Act, 2001 (Act No.7 of 2001) which deals with the authentication of Documents, such as in this matter, reads:

> "31. Any document or other material transmitted for the purpose of or in response to, a request under this Act shall be deemed to be duly authenticated if it purports to be-
>
> (a) Signed or certified by a Judge, Magistrate or proper officer of the designated country, or
>
> (b) Authenticated by the oath of witness or any officer of the Government of the designated country or of a Minister of State, or of a Department or Officer of the Government of the designated country."

[49] In the Extradition Court, the Director of Publication Prosecutions called Advocate Elizabeth Leonard (PW6). She is a senior advocate and Deputy Director of Public Prosecutions in the requesting State, South Africa. *Inter*

alia as member of the Ministry of Justice Extradition Committee, she drafts, examines and certifies extradition requests. For the first time, she was physically called as witness to a foreign country in an extradition application. She said that normally, it is dealt with and concluded on the papers filed.

[50] On examination of the case docket relating to the appellant, she concluded that there is a *prima facie* case and prepared the necessary documentation which are to be admitted as evidence papers under Article 11 of the Bilateral Agreement between the two States. By her doing, an arrest warrant and all other relevant papers were prepared for submission to ESwatini in the form of an extradition request under the bilateral agreement between South Africa and ESwatini. She also established that the appellant was prematurely released from Barberton Prison as result of a forged court order together with other papers which facilitated his wrongful release. It resulted in a further two charges, forgery and uttering, being added.

[51] Her evidence about the documentation in the extradition request was not challenged. No issue about authentication of the extradition documents was made. Her evidence was also not rebutted, despite its weight. The documents were handled in as a collective bundle, "Exhibit "O", without protestation. For present purposes, her conclusions about a collective effort to liberate the prisoner, a common purpose, does not matter. It will only be, yet again, for a South African court to determine so in the event that it becomes relevant in legal proceedings.

[52] The learned Judge in the Court *a quo*, when deciding an appeal against the orders by the Extradition Court, held that the challenge based on authentication had no merit, "*...more particularly because [of] oral evidence which had the effect of authenticating the documents before their admission was led.*" In my respectful view, I cannot fault the finding by the High Court, which in turn confirmed the positive finding on authentication of the extradition documentation by the learned Magistrate. I am not convinced by this ground of appeal. If indeed there was genuine concern about the authenticity of the extradition documents, it would have been raised at the time when it was presented as evidence in the extradition Courts. It was not done.

[53] The second ground on which the appellant relies to succeed in this appeal relates to the absence of any evidence by himself. He contends that his failure to testify was held to have rendered the State's evidence acceptable and sufficient without qualification. He says that the Court should have gone further to evaluate the evidence and to have made a finding whether it is acceptable and sufficient to support a finding for extradition.

[54] It is misconceived to allege this. The evidence was indeed evaluated and weighed in both Courts below. It was not found to be wanting, as it is now argued to be.

[55] It is, in my considered view, overwhelmingly sufficient to sustain the orders in both Courts below. In a nutshell, the uncontroverted and uncontested evidence that was presented in the application sufficiently establishes, on a strong balance of the probabilities, that the appellant was

tried and sentenced to two terms of life imprisonment (concurrent). A further twenty-three years of imprisonment was also imposed, all in relation to a cash-in-transit robbery with aggravating circumstances, imposed in March 2001. Thereafter, with no success in appeals and also to the Constitutional Court, he was incarcerated in Barberton Prison. Fraudulent papers received by the prison authorities resulted in his untimely and wrongful release from prison. At this time, he was not considered for parole and had more than 13 years of imprisonment ahead of him. Aspersions of impropriety have been cast on some prison officials, but it does not diminish the probative value of the factually based evidence. Conspiracies, common purpose, the exact statutory offences relating to the matter and the propriety of the roles played by any official from the prison are all matters and issues yet to be subjected to judicial consideration in the course of a criminal trial or official enquiry into the matter of Mr Shongwe's release from Barberton Prison. It will also be again availed to the appellant to testify in rebuttal and state his own side of the story, for the first time.

[56] The further evidence which the Court *a quo* endorsed relates to more recent events. The evidence, again uncontroverted and essentially uncontested, relates to investigations and enquiries which resulted in a formal extradition application being made by the Government of South Africa. In this jurisdiction, the Crown presented *viva voce* evidence to the effect that the court was shown all relevant documentation relating to this matter, and it was admitted as evidence without protestation by the appellant's counsel.

[57] The Court *a quo* is now sought to be impugned on appeal on the basis that uncontroverted evidence does not equal "automatic acceptance", that the court had to go further and to have "evaluated the evidence and to have made a finding on acceptability and sufficiency to support a finding for extradition."

[58] Counsel for the appellant relies on Shaenker Bros v. Bester 1952 (3) SA 644 (A) 670 F-G in an effort to target the acceptance of the evidence as encapsulated above. It is this evidence, which it is argued, that should not have been accepted by Courts below, since it had not been subjected to proper judicial scrutiny, now to result in its rejection on appeal. The relevant passage from Shaenker (*supra*) reads:

> "*Similarly, the circumstance that evidence is un-controverted is no justification to shutting one's eye to the fact that if it be a fact, that it is too vague and contradictory to serve as proof of the question in issue.*"

[59] Mr Ngwenya sought this Court to interpret and apply this *dictum* to the effect that the evidence of the crown was "not only contradictory and vague, but the very essence and basis of the causes for extradition were mutually destructive if regard is to be had to the provisions of the CSA Act" (of South Africa –i.e. The Case Management Committee, established under the Correctional Services Act). He was at pains to demonstrate just how this came about in order to have negativated.

[60] With all respect, I cannot agree that the evidence is vague and contradictory, certainly not to the extent that the Court had to reject it, or place no evidentiary reliance on it. To the contrary. When evidence is evaluated, it is the primary function of a trial court, such as the Extradition Court herein, to evaluate the veracity, reliability and import of just what witnesses have said. It is that judicial officer who had first-hand exposure to the demeanour and personality impressions made upon the Court. It is also best placed to then decide the evidentiary weight of such evidence and in the process of doing so, to also have regard to cross examination, the weight to be attached to documentary evidence as presented and moreover, to assess the case on the other side of coin. Of course, this is only possible if the court has heard such person in rebuttal. Discrepancies, contradictions and other anomalies are best analysed and evaluated when the contrasting version is presented to the court for its consideration.

[61] The learned Justice Mavuso also thought along these lines. He referred to R V Dhlumayo 1948 SA (2) 677(A) at 705 – 706 where the South African Court of Appeal (as it then was) held:

> "*...a trial Judge had the advantage of seeing and having the witness and observing their personalities and demeanour. The trial Court is in the best position to draw inferences than the Appeal Court. The trial Judge has an advantage to determine what is probable and what is improbable having observed the witness in the course of a trial.*"

[62] The approach of the appellant seems to me a misapplication of the evidentiary burden which rests on the Crown. Colloquially, it is said that

one does not see the trees because of the forest. The appellant is pre-occupied with the forest, not the trees. Indeed, as it is argued, there are many open questions arising from the evidence. But, these relate to ancillary issues, such as who is to blame for the wrongful release; who fabricated the forged documents to secure the premature and unlawful release; which section and subsection of the South African Correctional Services Act was contravened; is the Barberton Police investigation and computerised records determinative; did the Scorpion Police Unit adequately expedite the matter, and so forth.

[63] However, the Court below held that "...From the evidence presented before the Court *a quo* [the Magistrate's Extradition Court] it is clear from the evidence that the appellant was an inmate at Barberton, that he one way or another left prison before completion of sentence and that he was apprehended in Swaziland (ESwatini)". This is what constitutes the trees in the equation.

[64] From a careful reading of the evidence as recorded and transcribed, the factual acceptance of the material essence of the evidence is well justified. Peripheral issues distract the appellant's counsel from the so called "bottom line". The Court *a quo* was entirely correct, in my respectful view, to have confirmed the accepted essential evidence, as it did. In turn, the findings by the learned Magistrate were vindicated and the appeal was justifiably dismissed, as it is again to be.

[65] Turning to the first stated ground on which the appellant relies to have his extradition order set aside on appeal overlaps to a great extent with the

other points which have already been dealt with above. A misdirection is alleged insofar as acceptance of certain portions of the witnesses' evidence and an adverse finding against certain other portions of the evidence, is concerned. It is argued to have manifested in a conflation of the principle of election and the rule of evidence pertaining to contradictions by a witness.

[66] No specific witness or portions of evidence was referred to in the course of argument. Instead, it is a blanket approach without substantiating the point which is sought to be made. In essence, it seems to boil down to a contention that the Court selectively allowed mutually destructive causes of action. Approbation and reprobation is interwoven with an adverse conclusion drawn from the taciturnity of the appellant who presented no evidence in rebuttal at all. To illustrate his reasoning, counsel for the appellant argues that the failure of the appellant to testify is because he did not know which case he has to meet since there were "two mutually destructive causes of action as a basis for the request for extradition." These are held out to be an escape from prison, on the other hand an erroneous release from prison. To bolster this postulation, he aptly relies on the South African Correctional Services Act, No 111 of 1998.

[67] Starting with section 117 of the Act, which must be read *inter alia* with Section 39, it criminalises various offences and degrees of participation as follows:

"117. Escaping and absconding.

Any person who –

a) escapes from custody;

b) conspires with any person to procure his or her own escape or that of another offender or who assists or incites any offender to escape from custody;

c) ...

d) in any manner collaborates with a correctional or custody official or any other person, whether under the supervision of such correctional or custody official or not, to leave the correctional centre without lawful authority or under false pretence; or

e) ...

is guilty of an offence and liable on conviction to a fine or to incarceration for a period not exceeding ten years or to incarceration without the option of a fine or both."

[68] Section 39 of the Act determines the commencement, computation and termination of sentences. Subsection (3) holds that:

"39. (3) The date of expiry of any sentence of incarceration being served by a sentenced offender who escapes form lawful custody or is extradited in terms of the Extradition Act, 1962 (Act No. 67 of 1962), and returns to the Republic or who absconds from the system of community corrections or who is unlawfully discharged is postponed by the period by which such sentence was interrupted."

[69] The term "escape' is not defined in the Act and assumes its normal and ordinary meaning. It is common knowledge that an escape from prison can take on numerous, almost limitless forms. Cinemagraphic renditions from

Hollywood of various memorable incidences readily come to mind. It could be violent, or by unnoticed subterfuge, or even, as it is alleged in this matter, to leave the correctional centre without lawful authority or under false pretences. Uncontroverted and unchallenged evidence *prima facie* establishes that the release was accomplished by the use of fraudulent documentation. This also resulted in further charges being added to the arrest warrant and extradition request.

[70] In contrast, it is argued that a different cause of action was followed as well, resulting in mutually destructive causes. "Erroneous Release" is the bell on which this is hung. Section 39 (6) (a) regulates the issuing of a warrant in respect of a person erroneously released from a prison. It reads:

> "39 (6) (a) After the National Commissioner is satisfied that a sentenced offender has been released from a correctional centre erroneously, he or she may issue a warrant for the arrest of such a sentenced offender to be re-admitted to a correctional centre, to serve the rest of his or her sentence."

[71] It is common cause that a warrant under this statutory provision has already been issued. The question on the appellant's mind is just how it is to be effected. His counsel argues that this section does not provide for his arrest and return to prison, when read in conjunction with Section 31(d) of the Act. Firstly, there is no section 31 (d) which could be relied upon. Rather, Section 31 (d) amended section 39(6) (a) (*supra*) to now regulate as stated. His argument is developed to read into Section 39 (6) (a) that a prisoner who was released erroneously merely ought to be re-admitted, not arrested, to serve the remainder of his sentence. This contention, in the face of the

provisions for the issue of arrest warrants for prisoners who have either escaped, (in a strict and narrow meaning of the word), absconded, were unlawfully released, or fraudulently or erroneously or however they departed, is now held out to be a manifest obstacle. The terms of "escape" and "erroneous release" are used to justify the conclusion of "mutually destructive causes of action".

[72] The South African legislation, in Section 117 (*supra*) provides for both "escape" and "erroneous release" in the same section. Whether distinct crimes or overlapping to some extent, it still boils down to what the learned Judge *a quo* held to be "one way or the other" in relation to his untimely departure from prison. It is, as already stated above, not for this Court or any Court below in this jurisdiction, to determine just exactly how the release was effected and which crime, if any, was actually committed. Also, there is no indictment before the Courts of ESwatini. If the need arises in the requesting state, it will then be for the prosecutor to formulate the charges. The statutory offences may then be put as alternatives, or further counts or whichever way it is chosen to be done. The crimes as listed in Section 117 and elsewhere in the Act can therefore not now be held out to justify a finding which is favourable to the appellant, but in the process negates the facts as testified about.

[73] In its assessment of the appeal before the High Court, the learned Judge considered the totality of evidence adduced to find the same as was done in the Extradition Court. He also considered very similar grounds of appeal which were argued before him, as now before us. I respectfully agree with his assessment and that all in all, the case of the requesting state, as

presented by the Crown, overwhelmingly renders support for the granting of the extradition request. Remarkably, despite this, the appellant chose to remain silent, which is his right, but which also has consequences. He referred to the case of Erick Makwakwa vs Rex, Criminal Appeal Case No.2/2006 at paragraph 9 of his judgment, citing with approval the case of S v Snyman 1968 (2) SA 582 (A) at 588 where Ramodibedi JA (as he then was) had this to say:

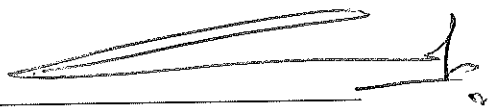
> "...failure to testify does not always lead to a conviction. It all depends on the particular circumstances of each case. This much is certain, however. Where there is a *prima facie* case implicating the accused which calls for an answer, his failure to testify can properly be used as a factor against him."

[74] It is trite that nobody can be compelled to testify against himself, or in his defence if he so chooses, similar to the Fifth Amendment of the American Constitution. There is no evidentiary burden, or an *onus* of proof, which could compel the appellant to testify. However, he chose to make no attempt from his own side to rebut any of the body of evidence against him. The case for granting an extradition order is overwhelming.

[75] It is with anxious consideration of the merits of this appeal and due to the reasons as stated above that I cannot come to any other conclusion than that it stands to be dismissed.

[76] In the event it is ordered that:

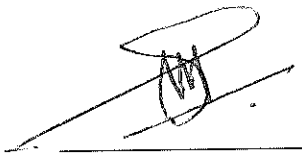
1. The appeal is dismissed
2. No costs order is made.



JP ANNANDALE

Justice of Appeal

I agree



SB Maphalala

Justice of Appeal

I agree

SJK Matsebula

Justice of Appeal

For the Applicant: Adv. P.S. Ngwenya, Instructed by Mabila Attorneys in Association with N. Ndlangamandla.)

For the Respondent: Messrs. D M Nxumalo and N Dlamini, DPP's Chambers.