

IN THE HIGH COURT OF SWAZILAND

In the matter of: Criminal Case No. S.97/83

REGINA

VS

ROBERT CHRISTOPHER KIMERA

CORAH:: NATHAN C. J.

FOR CROWN: MR. TWALA

FOR DEFENCE: ADVOCATE TUCHTEN INSTRUCTED BY MR, WILSON

JUDGMENT

(Delivered on 13th May, 1983)

NATHAN C.J.

The Accused is charged with contravening Sections 11 (1), 11 (2) and 14 (1) of the Arms and Ammunition Act 24/1964 (the illegal possession of arms of war, ammunition and the illegal importation of these).

It is common cause, and indeed the evidence of Assistant Superintendent Dlodlu of the Royal Swaziland Police was to this effect, that the arms referred to in the indictment and produced were arms of war within the meaning of the Act, and that the ammunition was ammunition for arms of war. It appears that these were largely of Russian and Soviet Block origin and that terrorists or persons against the Government were the type of person likely to possess this type of weapon. Assistant Superintendent Dlodlu said he only knew the African National Congress as using such weapons. The African National Congress is variously described as a National Liberation Movement or as a

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terrorist organisation. He said that the object of the A. N. C. is to overthrow the South African Government by force, but that its activities are not directed against Swaziland. The arms land up in Swaziland because the A. N. C use Swaziland as a depot before taking the arms across the border into South Africa.

Detective Sergeant Ndlovu of the Royal Swaziland Police told the Court that following upon information received he and certain other police officers raided the Accused's flat No.31 situate in a Government block called New Checkers. Sergeant Ndlovu said the information had been to the effect that there was some sinister stuff at the Accused's flat, but he said that he did not know what this was. According to him the informant did not say where he got this knowledge or whether he knew the Accused. He declined to give the name of the informant. He appears to have been within his rights in taking up this attitude; but it seems probable that the informant divulged more to him than he told the Court.

Sergeant Ndlovu said he and his companions searched the Accused's flat in the presence of the Accused, but found nothing. He then asked the Accused where the garage was, and the Accused took them there. The garage is really an open car port, at the back of which is a store room which can be entered through a door. These store rooms are numbered similarly to the flats. The store room umbered 31 was locked with the ordinary key and a keyhole lock. Sergeant Ndlovu said that he asked the Accused whose store room it was, and the Accused said it belonged to him.

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Sergeant Ndlovu asked for the keys to the lock and keyhole lock and the Accused was unable to produce either key. Sergeant Ndlovu then sent for people from Public Works Department to come and force the locks. This was done and inside the storeroom there was found the arms of war and ammunition which Assistant Superintendent Dlodlu had described. These were contained in tin boxes, canvas bags and plastic buckets.

Sergeant Ndlovu said in cross-examination that he had thoroughly searched the flat in an attempt to find the keys, but he was unsuccessful in this. He said he asked the Accused where the keys were and the Accused said he did not know anything about them. He also denied that he knew anything about the arms of war and ammunition. At the Police Station the Accused was asked whether he had keys to the padlocks of the trunks and he said he had no such keys. The padlocks were then broken.

It appears that the Accused occupied Flat No.31 from the time of his arrival in Swaziland in 1976. Sergeant Ndlovu said that the Accused told him that in 1978 one King Dlamini stayed with him in the flat. In 1979 King Dlamini left and one Lucas Nyageni took his place. The last person to occupy the flat with the Accused was one George Nene. This was for 8 months in 1980. The Accused told Sergeant Ndlovu that he had chased Lucas and Nene away from the flat because he had information that the Police were looking for them. It appears that Nene was in fact one of the Accused in an Arms and Ammunition case in March, 1981. He was convicted but the conviction

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was set aside on appeal in November, 1982.

Sergeant Ndlovu said in evidence that the Accused had told him that he never had a car. If, the Accused in fact said this, it was not true, because the Accused did have a yellow Datsun car for some months in 1981 until it was involved in an accident and overturned. But I have some reservation in regard to accepting that the Accused said he had had no car at any time. Sergeant Ndlovu says that he checked up and found that the Accused had had a car; but the surprising thing is that he did not confront the Accused with this information, which one would have expected him to do if the Accused had indeed denied that he had ever possessed a car. His reasons for not confronting the Accused were by no means convincing. In other parts of his evidence, Sergeant Ndlovu was also not above suspicion. On one of the canvas bags containing arms there is printed the name and address of a person in Grahamstown R. S. A. When asked what steps he had taken to follow up this clue, Sergeant Ndlovu said he had spoken to the Oshoek police and asked them to find out, but had heard nothing more. This sounds improbable. Furthermore when asked in cross-examination to produce the notebook in which he said he had made notes he said this was in the pocket of the clothes he was wearing the previous day. He was sent to fetch the notebook but returned without it and he launched into a lengthy, but very unconvincing, explanation of how it had allegedly gone missing.

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For these reasons I also have some hesitation in accepting that the Accused told Sergeant Ndlovu that the storeroom was his storeroom.

The Accused denied that he had told Sergeant Ndlovu that it was his storeroom, but was not convincing when he said he did not know that he had a right to use the carport numbered 31, the same number as his flat. But the Accused appeared to have difficulty in giving a straight answer to a number of questions, including many which could not incriminate him. He was also giving evidence in English which is not his home language. Although educationally he appears to be of more than average intelligence I was left with the distinct impression that he seems to suffer from some sort of mental blockage which prevents him from expressing himself clearly.

The Accused was, rather unfairly, cross-examined in regard to his lease with the Government and was attacked for having told his Counsel he thought he had returned the lease to the Government. I do not regard this portion of the evidence as casting any real doubt upon the Accused's credibility.

It clearly emerges, and Sergeant Ndlovu agreed that this was so, that the Accused always maintained, that he had never had a key to the storeroom, or used the storeroom, and there is no evidence to show that such a key was ever issued to him. The Accused said, and again there is nothing to contradict him, that he never had any occasion or need to use the storeroom, because he had a large flat and very few possessions. I stress that no key was found in his possession.

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The Accused denied that he had had any political affinity with Luca Nyageni or with Nene, and there is nothing to indicate that this was untrue.

The position that emerges on the evidence is accordingly that the Accused may have stored the arms and ammunition in the storeroom, but that it is just as likely that either Nyageni or Nene did this without the knowledge of the Accused. A storeroom attached to a garage that is not being used by the flat owner would be an ideal place in which to store a cache of arms, I should mention that if it is true - and again there is nothing to gainsay this - that the Accused chased Lucas and Nene away from his flat, it is improbable that he was harbouring arms and ammunition in association with them. It appears to me that this is par excellence a case falling within the decision in *R v Blom* 1939 AD 188, in which it was said at p.202;

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

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Mr. Twala for the Crown strongly relied upon Section 11 (9) of the Arms and Ammunition Act which provides:

"An occupier of premises or a person who is on or in charge of or who accompanies any animal, aeroplane, motor or other vehicle, on or in which there is any arm or ammunition, shall, unless the contrary is proved, be presumed to be the possessor of such arm or ammunition, as the case may be".

But as Mr. Tuchten for the defence pointed out, before the presumption raised by this section can apply, it must first be established that the Accused is an occupier.

It has been held in a large number of cases that before a person can be said to be an occupier of premises he must be shown to have some appreciable measure of control thereof. See generally the judgment of Lord Denning in *Wheat v E Lacon and Co. Ltd.*, (1966) 1 All EE at pp. 592 - 593 . So too in *Cowie v Pretoria Municipality*, 1911 TPD 628 at P.636 Vessels J said "the person who hold a place, who controls it, and who is actually upon the premises, is the occupier of that place." Cowie's case was approved in the *Stellenbosch Students Case*, 1915 CPD 599, in which it was pointed out, at p. 609, that the exercise of control is essential. A right of use is not synonymous with the exercise of control. Cowie's case also approved the decision in *Alheit's case*, 20 S C 227 in which it was held that where the would - be occupier is excluded from the premises in

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question because they have been locked (obviously not by him) he cannot be said to be the occupier thereof.

Reference should also be made to the case of *S v Socishe*, 1967 (1) SA 116 (ECD) in which it was held that the presumption in the South African Section 32 of Act 28 of 1937, the counterpart of Swaziland Section 11 (9) of Act 24/1964, only applies in the case of the sole occupier of premises. It appears to me that it follows a fortiori that if he is not shown to be in occupation at all he cannot be said to be an occupier.

I think it is clear from what I have said that the presumption in Section 11 (9) is of no assistance to the Crown, and as a result the prosecution must fail.

I should point out that this case was badly investigated and badly presented. There was no attempt to show that the Accused was ever supplied with a key to the store-room or that he ever used the storeroom. There was no proper attempt, assuming that there was one at all, to follow up the name and address in Grahamstown that was printed on the canvas bag. There was no attempt to search for fingerprints on the tin trunks in which the arms were stored. Sergeant Ndlovu said in this regard that it is not the practice to take fingerprints in this type of case. If this is true, which I doubt, then the sooner the practice is changed, the better. He also made the excuse that dust on the trunks

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would have prevented the fingerprints from being successfully taken. But one could have tried.

The Accused is found Not Guilty and is discharged.

C. J. M. NATHAN

CHIEF JUSTICE