

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. S.91/84

In the matter of:

REGINA

vs

DOCTOR HLATSHVAYO AND OTHERS

CORAM: Will, C.J.

FOR THE CROWN: Mr. Donkoh

FOR THE DEFENCE: In person except one represented by Mr. Pupuma

JUDGEMENT

Will, C.J.

Originally there were seven Accused who appeared before me on several counts of robbery and housebreaking with intent to steal and theft. The charges were withdrawn against Accused Nos 5, 6 and 7, the last mentioned of whom was subsequently called by the Crown, as an accomplice witness.

Most of the witnesses for the Crown were clearly truthful. I shall touch on their evidence, if necessary to do so, when I deal with individual counts. There are, however, two witnesses with whose evidence it is necessary to deal in more detail because their evidence requires special treatment.

One of the witnesses is Fikile. Although she was not tendered to the Court as an accomplice witness, and although it is not entirely clear that she was an accomplice I consider that I should approach her evidence with the caution with which accomplice evidence must be weighed. She must have suspected that the goods which were brought into her house were stolen and she must have realised that the breaking of the safes was associated with criminal conduct. It could be that, by allowing her house to be

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used for these purposes, she was an accomplice after the fact to one or more of the robberies.

The other witness whose evidence must be approached with caution is Dladla who was clearly an accomplice and who was tendered as such by the Crown. He was one of those who was originally charged but who was acquitted after the charge against him had been withdrawn.

I have no doubt that in so far as these two witnesses gave evidence implicating the Accused their evidence is reliable. Fikile, in particular, was an obviously truthful witness who was subjected to lengthy cross-examination from which she emerged without any appreciable damage to her credibility. There were some slight inconsistencies in her evidence which I have duly taken into account in assessing her credibility. Some of them were due to the facts that there were several Accused, five charges and many exhibits. To have expected an absolutely consistent version, in such circumstances, of what happened after the lapse of almost a year would have been to expect the impossible. She may have tried to play-down her knowledge of the crimes but this is a characteristic of accomplice evidence which can be expected.

The acknowledged accomplice Nelson Dladla was a less satisfactory witness than Fikile. I consider it to be unsafe to rely on his evidence except to the extent that it is satisfactorily corroborated.

Before passing on to deal with the particular counts, I should mention that the crown case, on three counts, largely turns on the identification of the First Accused on two counts and of the Fourth Accused on another. I am aware of the danger of erroneous, though honest, identification and the necessity, therefore for a court to be careful in considering such evidence.

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I am aware that a court must be satisfied that the identifying witness is sure of his identification and that ample opportunity existed for him to see and memorise the features of the person identified. I am satisfied that all the identifying witnesses in this case had ample opportunity to identify the Accused concerned and that they were sure of their identification.

The evidence of all the Accused was most unsatisfactory. Their evidence was contradictory, evasive and in some respects, especially in so far as Accused No.1 was concerned, absurd.

It is, I think convenient to deal first with those charges which have been laid against the First Accused only before dealing with the other charges.

On Count 2 First Accused was charged with robbery at Mantenga Store. The two witnesses for the Crown were Mrs. Beale, the wife of the proprietor of the shop and the shop-assistant Enoch Ndlanga-mandla. Their evidence was that First Accused, armed with a revolver, entered the store and held up Mrs. Beale at gun point, whilst other men who accompanied Accused No.1 guarded the door and kept customers in the shop at bay. Money was then taken from the till. Both these two witnesses identified First Accused on an identification parade which, however, was not really required to be held because both of the witnesses had dealt with him before and knew him well as a customer at the shop. First Accused's defence was that a false charge was brought against him because he and Mr. Beale had quarrelled about a business transaction. I have already stated that I reject the Accused's evidence in general. In particular I reject his denial that he held up Mrs. Beale at gun point whilst a robbery was committed. I therefore convict First Accused on Count 2.

I deal now with Count 5. On this count a postal assistant Thandi Ndlovu gave evidence. Two men entered the post office. One

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said "What are you doing" and then, soon afterwards said "take out all the money". She looked up and stared into the barrel of a revolver pointed at her by First Accused. He jumped over the counter and took money and then ripped out the telephone cable. This witness identified First Accused on a properly conducted identification parade. Another woman Gcinisa who was called to the parade failed to identify the Accused but she had been in a telephone booth throughout the incident. The door of the booth was closed and, according to Thandie would not have had a view of the persons who entered at all.

In convicting First Accused on this count I am conscious of the fact that there was only one identifying witness so that, added to the caution required when considering evidence of identification was the caution required before convicting on the evidence of only one witness. I nevertheless have no hesitation whatever in convicting on the sole evidence of Thandie. She was an exceptionally good witness, who had ample opportunity of memorising the features of the Accused. The Accused's defence was a denial of his participation in the robbery and an attack on the evidence of identification mainly based on the failure of Gcinisa to identify him on the parade.

I deal now with Count 4 on which First Accused was charged with breaking and entering the premises of Atlas Motors. Several articles were stolen including a motor vehicle, a safe and two cases of Whisky and Vodka. Among the items which had been stolen and were recovered at Fikile's house when it was raided by the police were a cardboard box containing whisky and Vodka which had been buried in her yard, and two new pens, on which were inscribed the words "Atlas Motors Engineering". The safe which had been

stolen from the premises was also buried in the yard.

The Accused denied knowledge of these items. He admitted

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that the goods, including the two safes which were stolen from Jabula Inn, were taken to Fikile's house. The two safes from Jabula Inn were buried there. Goods stolen from the Swaziland Meat Supply and Atlas Motors were also found in Fikile's house and when they were recovered from her house by the police Accused No.1 was sleeping in the house. As I have stated liquor and the safe stolen from Atlas Motors were buried in the yard. First Accused denied that the goods and the safe, other than the goods and safes from Jabula Inn were brought to Fikile's place by him. Fikile stated that First Accused brought all the goods and that he was among the persons who broke open the safes. I accept Fikile's evidence. I find therefore that First Accused brought the safe, liquor, and pens, which were stolen from Atlas Motors, to Fikile's premises and that he took part in the breaking open of the safe. I convict First Accused therefore, on Count 4.

I now deal with Count 1. First Accused pleaded guilty on this Count. Despite his plea of guilty which was clearly established in any event, by the evidence, it is necessary to deal with two aspects of this count, which were put in issue by First Accused. It is necessary to resolve this dispute if for no other reason than that the question of sentence could be affected.

The Crown case was that First Accused held up a nightwatchman by pointing a revolver at him and that he was the leader of a gang which committed this, and the other crimes. According to First Accused, however, it was the accomplice witness Dladla who was the leader of the gang and that he seduced First Accused into participating in the robbery. First Accused denied that he held up the watchman with a revolver. He merely sat on one bed whilst the watchman sat on another, during the robbery. This was in accordance with the pre-arranged plan with the watchman who also participated in the robbery, to make it appear as if the watchman was

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being kept under surveillance. First Accused denied that he possessed or had access to a revolver. In saying this, of course, he lied, as he lied throughout his evidence. He produced a revolver to hold up Mrs Beale and Thandie Ndlovu. I am not entirely satisfied that the watchman was a completely innocent victim of the robbery, but I am nevertheless satisfied that First Accused was armed with a revolver and that it was he, and not Dladla who was the leader of the gang.

Accused No.2 is the brother of First Accused and he was arrested at approximately the same time and place as First Accused.

Dladla stated that Second Accused took part in the robbery at Jabula Inn and Fikile stated that it was he who brought two safes to her premises in a van and that he rolled them off the van into the yard. Two safes were stolen from Jabula Inn, one of which Exhibit 7, was identified by Fikile as one of the two which he brought there. Exhibit 7 was one of the safes taken from Jabula Inn.. Accused No.2 was also one of those who took part in the breaking open of the safes. As I have already stated in dealing generally with the evidence of Accused No 2 - I reject his evidence that he had nothing to do with the robbery on Count 1 - I accordingly convict him on this Count.

Dladla stated that Third Accused took part in the robbery. Corroboration of his evidence is to be found in the evidence of Fikile who stated that Accused No. 3 was one of those who visited her house with First and Second Accused. He was one of those who assisted in the breaking of the safes. That Accused No.3 was known to First Accused is shown by the evidence of Ndlangamandla that Accused No.3 was one of those who were with First Accused when Mrs. Beale was held up at gun-point. I convict Accused No.3 on Count 1.

The evidence against Fourth Accused is overwhelming. His

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evidence was very bad. There was little to choose between his evidence and the evidence of First Accused. He was identified, on a properly conducted identification parade, by the watchman. Dladla stated that Fourth Accused' was one of those who took part in the robbery and Fikile stated that he was one of those who were at her house and who took part in the breaking of the safes, one at least of which, Exhibit 7 was taken from Jabula Inn. Accused No.4 is convicted on Count 1.

I proceed now to deal with the remaining Count, namely Count 3. Goods which were identified as having been stolen from the Swaziland Meat Corporation, were found at Fikile's house. They included cups, saucers, assorted crockery, stationary, tins of coffee, all of which were similar to goods stolen. Among goods definitely identified as having been stolen were deboning knives, a sail, 9 cassettes and albums, and some old coins. As before I accept Fikile's evidence that First Accused brought the stolen goods on to her premises and I reject First Accused's denial of her evidence. I accordingly convict First Accused on this Count of housebreaking with intent to steal and theft, and not of robbery as charged, because Aaron Mahlalela, the security guard, was not called to give evidence of the alleged robbery.

Fikile's evidence was that on the morning of the 14th November 1985, First Accused, when he brought these stolen goods to her premises, was accompanied by his brother, Second Accused. The offence took place on the night of 13/14 November. I convict Accused No.2 on this Count.

As far as Third Accused is concerned the evidence was that goods similar to those stolen from the Meat Corporation, together with E90 which was still in plastic bank bags, were found at his home. He denied knowledge of the goods and denied that they were found there. The police, he said, lied when they said they found the goods on his premises. Additional evidence against Third

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Accused on this Count was that he was seen with First and Second Accused by Fikile on 13th November. He is convicted of housebreaking with intent to steal and theft on Count 3.

To sun up I convict the Accused as follows:

First Accused;

- (1) Robbery on Count 1
- (2) Robbery on Count 2
- (3) Housebreaking with intent to steal and theft on Count 3
- (4) Housebreaking with intent to steal and theft on Count 4
- (5) Robbery on Count 5

Second Accused:

- (1) Robbery on Count 1
- (2) House breaking with intent to steal and theft on Count 3

Third Accused:

- (1) Robbery on Count 1

(2) House breaking with intent to steal and theft on Count 3

Fourth Accused: Robbery on Count 1

D.D. Will CHIEF JUSTICE

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SENTENCE

Accused No.1, you have been convicted on three Counts of robbery and two of house breaking with intent to steal and theft. The robberies were committed whilst you threatened your victims with a revolver. The watchman at the Jabula Inn collapsed in fear and could only manage to crawl out of the room in which you held him. Mrs. Beale was so afraid that her period, which was not due, was brought on. In some countries the death sentence may be imposed for armed robbery. Although that is not the position in Swaziland armed robbery is nevertheless a crime for which a heavy sentence must be imposed.

You were the leader of a gang which committed these crimes in some of which safes were removed and then broken open. Although you were the only person charged and convicted on some of these Counts that was only because other members of the gang were not identified.

You also have a record of previous convictions for theft. I sentence you to:

- (1) 4 years on Count 1
- (2) 3 years on Count 2
- (3) 3 years on Count 3
- (4) 2 years on Count 4
- (5) 3 years on Count 5

The sentences on Counts 3 and 4 will run concurrently with the sentences imposed on the other Counts. Your effective sentence is therefore 10 years imprisonment.

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Accused Nos. 2, 3 and 4. You took part in the armed robbery on Count 1, and you, Accused Nos 2 and 3 took part in the house breaking and theft on Count 3. You have heard what I have had to say about armed robbery and it is unnecessary to repeat myself. Accused No.3, you have a previous conviction for robbery.

I sentence you, Accused No.2 to 3 years imprisonment on Count 1 for robbery; and to 2 years on Count 3 for house breaking with intent to steal and theft.

Accused No. 3 I sentence you to 4 years imprisonment on Count 1 and 2 years on Count 3.

I sentence you, Accused No. 4, to 3 years imprisonment on Count 1.

D.D. WILL

CHIEF JUSTICE