IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO. /85

In the matter of:

MOSES MASUHU

VS

THE STATE

C O R A M: J. A. HASSANALI

FOR THE CROWN :

FOR THE DEFENCE: MR. NDZIMANDZE

CHARGE: HOUSE BREAKING AND THEFT

JUDGMENT

(Delivered on)

HASSANALI J.

The Appellant was charged with the offence of House breaking with the intent to steal, and Theft.

He pleaded not guilty but after trial he was found guilty and convicted.

He has now appealed against the conviction on the following grounds -

a) that the Learned Magistrate erred in convicting the Appellant in as much as the evidence was against the weight thereof.

b) the Court a quo misdirected itself as regards the rule of cross-examination

c) the Court committed an irregularity by refusing an application by the defence for an adjournment of the trial to enable the appellant to instruct his Attorneys.

d) The Court erred in fact and in law by rejecting the Appellant's version in as much as his version may be reasonably true.

However, Counsel for the Appellant abandoned the grounds of appeal (b) and confined his arguments to (a) (c) and (d).

On the grounds of Appeal (c), Mr. Ndzimandze, the Counsel for the appellant maintained that the Learned Magistrate's refusal of the application for postponement was irregular because he did not exercise his discretion judicially. He said that when the case was called on 10/4/85, Miss Palace who appeared for the Appellant withdrew from the case on the ground that she had failed to obtain proper instructions from the appellant. The case was then adjourned for a short while. When the case resumed, the appellant pleaded not guilty and he (Mr. Ndzimandze) then applied for a postponement on the ground that since he had been just engaged, the time was not sufficient for him to prepare his case. The Learned Magistrate however refused the application and proceeded to trial. But at the end of the evidence of

Assistant Superintendent Josephone Maseko, Mr. Ndzimandze applied for postponement of her cross examination for another day. The Learned Magistrate then remanded the case till the following morning.

This case had already been postponed on two previous occasions at the instance of the Crown.

It was contended that owing to the Learned Magistrate's refusal of the application for postponement, the appellant was prejudiced when submitting his defence.

It appears that Mr. Ndzimandze made a motivated application and explained the circumstances as to why he could not prepare himself to conduct the appellant's defence. The prosecutor opposed the application presumably on the following grounds -

i) that the Government mould be inconvenienced by a postponement

ii) that the reasons given by appellant's Counsel did not justify a postponement.

iii) that the Court was not informed of the nature of the misunderstanding that existed between the appellant and be his former attorney.

iv) that it was a straight forward charge of house breaking with intent to steal and Theft

The reasons far the Learned Magistrate's dis missal of application for postponement are not on record, but he seems to have reached this decision after the appellant had noted an appeal. The following are his reasons for dismissing the application -

a) that Mr. Ndzimandze, appellant's Counsel did not take the Court into confidence and tell what the misunderstanding was all about

b) that on all occasions between 20/2/85 and 10/4/85 witnesses had been attending Court and had been warned to appear on each successive postponement.

In terms of Sec. 142 of the Criminal Procedure and Evidence Act, a trial "if it is necessary or expedient" be adjourned at any periods. The discretion to grant a postponement of a trial apparently rests with the trial Court in question and the

exercise of its discretion is not interfered with on appeal unless it is shown that the court did not exercise its discretion judicially i.e. in an arbitrary manner or according to the wrong principles and not on reasonable grounds.

When a trial Court considers whether it is necessary or expedient "to postpone a trial, then it should take into consideration all the circumstances relevant thereto. After having done so and when its decision is based on very substantial grounds, then on appeal it may not be interfered with.

In R vs. Zackey 1945 A D 5D5 at 512 it is stated "before refusing relief the court will take into account the seriousness of the consequence of its refusal, and the fact that such a refusal may result in the imposition of criminal penalities is a matter which will be given clue weight".

In an English case M Evans vs Bartlett 1937 A C 473 at 487 Lord Wright states that "a discretion must be exercised according to common sense and according to justice and if there ia a miscarriage in the exercise of it, it will be reversed", when the application for postponement was made by Mr. Ndzimandze, the Learned Magistrate ought to have considered whether it was bona fide or whether it was done to obtain a tactical advantage. If the Magistrate was conviced that Mr. Ndzimandze made the application in

good faith in order to prepare his case properly - consulting the appellant regarding the facts, to consider points of low, if any and to enquire about witness etc. then why did he not deem it "necessary or expedient" to

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postpone the trial to same other date. A delay of a few days would not have mattered since the appellant had already waited nearly four months before he was brought to Court.

The reasons given by the Learned Magistrate are not substan- tial, and it is not clear as to why the postponement was refused. The Learned Magistrate should have realised that the appellant, a senior Police Officer of 19 years of service was faring a serious criminal charge end as such should have considered a postponement also remembering the fact that on two previous occasions the case had been postponed at the instance of the Crown.

It appears to me that the application for postponement was made bona fide in order to give the appellant the opportunity to prepare his defence with the assistance of Mr. Ndzlmonrtze. Although the appellant was notified about the trial, data, it was not his fault that he was not prepared on the first date of trial. Mr. Ndzimandze was evidently not at fault either. Consideraing the gravity of the offence, it would not be fair to consider this as a decissive factor against the appellant.

Seeing the circumstances of this case, the irregularity in question affects the basis of the appellants conviction end it cannot stand. Because of the irregularity justice has not in fact been done.

On the next ground of appeal Mr. Ndzimandze took up the position that the Learned Magistrate had failed to give his reasons -

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1) as to why he found appellant guilty;

2) as to why he accepted the evidence of the Crown witness in preference to that of the appellant.

No reasons are given in this case for the rejection of the evidence of the appellant as false and I strongly suspect that his evidence was rejected merely because the learned Magistrate thought that the evidence of Matsebula and Dludlu were reliable. it is an improper approach. Furthermore no where on the record the Magistrate had given his reasons as to why he found the appellant guilty.

In 1911 TPD 401, it is stated that "this Court as a Court of appeal expects the Court below not only to give its findings on the facts, but also its reasons for those findings. it is not sufficient for a Magistrate to say 'I believe this witness, and I did not believe that witness'. The Court of appeal expects the Magistrate, when he finds that he cannot believe a witness, to s state his reasons why he does not believe him. If the reasons are, because of inherent improbabilities, or because of contradictions in the evidence of the witness or because of his being contradicted by more trustworthy, the Court expects the Magistrate to say so. If the reasons is the demeanour of the witnesses, the Court expects the Magistrate to say that, and particularly in the latter case the Court will not lightly upset the Magistrate's findings on such point.".

Again in R vs Singh 1975 (1) 227, it was held that in a Criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused it is quite impermissible to approach such a case thus: because the XXX

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the Court is satisfied as to the reliability and the credibility of the State witness that, therefore, the defence witness including the accused, must be rejected. The proper approach in such a case is for the Court to apply its mind not only to the merits and demerits of the state and the defence witnesses but also to the

probabilities of the cose. It is only after so applying its mind that a Court would be justified in reaching a conclusion as to whether the guilty of an accused has been established beyond all reasonable doubt. The best indication that a Court has applied its mind in the proper manner is to be found in its reason for judgment including its reasons for the acceptance and the rejection of the respective witnesses.

Taking the above factors into consideration, I have came to the conclusion that the Learned Magistrate committed irregularities in that -

i) he failed to grant a postponement in order that the Appellant Counsel could prepare his case properly;

ii) he failed to give reasons as to why he accepted the evidence of the Crown witnesses in preference to that of the Appellant.

Therefore it follows that the appeal must be allowed. In the circumstances the conviction and sentence set aside.

J. A. HASSANLI

JUDGE