IN THE HIGH COURT OF SWAZILAND

In the matter of

THE KING

vs

CHARLES GININDZA

EPHRAEM GININDZA

STANLEY LUCKY NDLANGAMANDLA

DISTRICT OF MANZINI

REVIEW CASE NO.170/87

17th September, 1987

JUDGMENT ON REVIEW

(23/09/87)

Hannah, C.J.

These three accused stood trial at the Manzini Magistrate's Court on four counts of armed robbery. The first two accused were convicted on three of the four counts and the third accused on the other. On perusing the record submitted for review it seemed to me that there were a number of serious misdirections in the judgment of the learned trial magistrate and when the Director of Public Prosecutions was asked for his observations his Deputy stated that he was unable to argue that the convictions should be upheld.

It was a serious and difficult case and I am perturbed that it was not seen fit to have it tried by a Senior Magistrate. It seems to me that greater care should be taken in the allocation of judicial work at this Court. The case involved accomplice evidence, identification evidence, pointing-out evidence and confessions and the correct approach thereto. Unfortunately, when dealing with each of these matters the learned magistrate fell into error.

The correct approach to pointing-out evidence was dealt with at some length by this Court in R v Magungwane Shongwe and Others

(Crim. Case 5 of 86) and although the learned magistrate referred to that case in his judgment he does not appear to have fully grasped the principles involved. Section 227 (2) of the Criminal Procedure and Evidence Act provides that:

"Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."

This subsection makes the fact or thing discovered in consequence of the pointing-out admissible even though the pointing-out forms part of an inadmissible confession. For example, an accused points out to a police officer a particular place and says that this is where I buried the jewellery which I stole from C's

house. What he says amounts to a confession and as it is made to a police officer it is rendered inadmissible by the proviso to section 226 (1) of the Act unless confirmed and reduced to writing in the presence of a magistrate. But the police officer can give evidence that as a result of the pointing-out he dug up the place in question and discovered the stolen jewellery. That is a "fact or thing" which he discovered in consequence of the pointing-out and the Court may feel justified in drawing an inference from the fact that the accused pointed to the place where the jewellery was found that he knew that the jewellery was buried there and was involved in its theft. However, as I had occasion to say in R v Magungwane Shongwe and Others (Supra), citing certain remarks of Schreiner J.A. in R v Tebetha 1959 (2) S.A. 337 at p 345, section 227 (2) obviously refers to the pointing-out of corporeals or tangibles and it is the element of finding those

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corporeals that is inherent in the words "point-out". It is not sufficient that the police officer merely discovered that the accused had knowledge of a particular place because he pointed-out that place. In such circumstances the police officer does not discover anything tangible.

I will give another illustration. An accused admits to a police officer that he has stolen and killed C's goat. He is then asked to point out that place to the police and C confirms that that is indeed the place where he discovered the remains of the carcass. The police therefore discovered that the accused had knowledge of the exact position of an implicatory spot. The discovery is one of the knowledge of the accused and not of a corporeal and if the pointing-out forms part of an inadmissible confession it is not admissible. The position would be different under the corresponding provision of the South African legislation because their section permits evidence to be given "that anything was pointed out by an accused".

I will give yet a further illustration. An accused admits to a police officer that he broke into a certain house and stole goods from a safe- The police then take him to the house and he demonstrates how he gained entry and how he managed to open the safe. Again, all that is discovered is that the accused has knowledge of how the crime was committed. Nothing tangible is discovered and if the demonstration or pointing-out forms part of an inadmissible confession it is not admissible. It is tantamount to saying to an accused "We cannot give evidence of what you have just told us so please mime what you have just said and we will describe your performance to the Court."

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I have dealt with this matter at some length once again because there still seems to be a fairly wide and general misconception of the effect of section 227 (2) and it is highly desirable that that subsection is properly understood and applied. It may, of course, be said, and said with some force, that the situation created by the subsection is highly artificial but the answer to that is that so long as the proviso to section 226 (1) remains on the statute book and police officers cannot give evidence of confess sions made to them by an accused then, for good reason or bad, there is bound to be artificiality in this area of our law of evidence.

In the present case the learned magistrate wrongly admitted and relied on evidence of pointing out by each of the accused and in considering the case against the accused in these review proceedings that evidence must be ignored.

Once the pointing-out evidence is excluded the only evidence against the accused on count one was the evidence of the victim of the robbery as to the circumstances of the robbery itself - he was unable to identify any of his assailants - and the evidence of an accomplice witness that he participated in the robbery with the first and second accused. If this Court could be satisfied that the learned magistrate fully appreciated the danger inherent in the evidence of an accomplice and was nonetheless for good reason convinced of the truthfulness and reliability of the accomplice's testimony there would be no difficulty in confirming the conviction of the first and second accused. However, the learned magistrate made no express finding as to the credibility of the accomplice simply accepting what he had to say, made no real

analysis of his evidence and failed to make any reference whatever to the cautionary rule. A trial court must be alive to the dangers inherent in the evidence of an accomplice and the only way in which an appellate or reviewing court can be certain that it is is if some mention of the

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Cautionary rule is made. To mention it only is, of course, not enough because it must also be apparent that the rule was in fact applied but some reference to the rule seems to me an essential step in the process of judicial reasoning when dealing with such evidence. In the foregoing circumstances it would be unsafe to allow the convictions on count one to stand.

The Crown case on the second count depended in the main on the identification by the victim of the robbery of the first two accused while in the dock as being two of the three men who attacked him one night and stole goods from the shop which he was guarding. There was also some evidence that a year or so later the first accused brought some goods into his own shop which were similar in number and make to certain of the stolen goods but in view of the lapse of time this evidence carried little probative value. The only other evidence was of admissions allegedly made by the first accused in the presence of the shop owner and for reasons which I shall now give I am of the opinion that this evidence was wrongly admitted.

In Nsibandze v R 1979/81 SLR 10 Cohen J. held that a statement made by an accused to a third party in the presence of a police officer was admissible in that it did not fall within the proviso to section 226 (1) as it was not made to a police officer. The learned judge referred to R v Hans Veren and Others 1918 TPD 218 and R v De Souza 1955 (1) S.A. 32 in support of this finding.

In R v Hans Veren and Others (Supra) Wessels J. was highly critical of the proviso to the section of the South African Criminal Procedure Code which corresponds to the proviso to section 226 (1) of our Criminal Procedure and Evidence Act and which reads:

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" Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a police officer." The learned judge described it as:

"an unusual proviso, with very far-reaching consequences, and one which is entirely opposed to the common law and to many of the principles of this very Criminal Procedure Code."

He was of the view that the proviso should be very strictly interpreted and that not only should the statement by the accused be an absolute confession of guilt but it must be made directly to the police officer. He said:

"It must be addressed to him; he must be the person who is singled out by the accused to receive the confession. If the confession is made to some other person, even though in the presence of a police officer, it doessnot fall within the proviso."

Gregorowski J., with whom Wessels J. sat, agreed that the conviction in that case should be confirmed but I do not understand him to have been quite so categorical as Wessels J. when dealing with a confession made to a third party in the presence of a police officer. The learned judge said:

"It would be going very far to hold that a confession of the commission of an offence,

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made to a third person, when the accused entirely addressed themselves to that third person and the policeman was only casually present, should require the particular form of confirmation which is laid down

by sec.272."

In R v De Souza (Supra) Blackwell J. said:

"What is the position if a confession is made to an employer in the presence of the police? If a servant is charged with stealing from his master and the police are called in and, when interrogated by the master, the servant says to the master in the presence of the police "Yes, I did steal; I am guilty", it seems to me that in such a case the confession is made not to the police but to the master, and the mischief which sec. 273 was intended to prevent so far as confessions to the police are concerned did not occur."

The illustration given by the learned judge closely resembles the facts in R v Hans Veren and Others (supra).

However, the decisions in South Africa on this point do not all go one way. In R v De Waal 1958 (2) S.A. 109 the accused was taken by the police to the complainant and while the police officer was having a cup of tea in one room the accused made a confession to the complainant in another. Diemont J. had this to say:

"When an accused person is brought before a magistrate or justice warnings and assurances are given which tend to remove

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the effect of any undue influence which may be operating upon such person's mind and questions are asked which are designed to reveal the existence of any such influence. When an accused is taken to the complainant instead, as was done in this case, the safeguards introduced by the Legislature are avoided, and where pressure has been brought to bear upon such an accused the fact that he is temporarily parted from the offending officer will be offset by the knowledge that this officer is waiting in the vicinity to take him into custody again as soon as his interview with the complainant has ended.

This practice is very prevalent in and appears to be growing in this Division. It is one which, in my opinion, should be strongly discouraged because it is in conflict with the spirit of the enactment referred to and because it so obviously lends itself to abuse. I am not suggesting that evidence of this nature must necessarily be rejected in every case merely because the Court disapproves of this type of conduct and wishes to prevent its repetition. If this were the Court's attitude it would, in the words of Innes C.J., in R v Barlin 1926 A.D. 459, "be sacrificing legal principle to administrative reform". But it is also a trite rule that the facts which render a confession admissible must be proved beyond a reasonable doubt. Where in

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addition to the obstacle provided by this onus the Crown labours under the disadvantage of such equivocal conduct on the part of a police officer, its difficulties are greatly increased."

The learned judge then referred to R v De Souza (supra) and other cases and pointed out that the question for decision in those cases was whether the presence of the policeman per se rendered the confession inadmissible. The learned judge further pointed out that in those cases it did not appear that the accused was deliberately taken or left by the police with the third person in order that he should confess. Where that occurs it seems to me, as I think it seemed to the learned judge, that a new and important factor is introduced and has to be taken account of if only because it is in conflict with the spirit of the proviso and lends itself to abuse. It can be regarded as an indication of the unwillingness of the police to expose the accused to the safeguards inherent in bringing him before a magistrate and may cause doubt as to whether the confession was freely and voluntarily made.

In my opinion, and with all due respect, I am not convinced that the position is as clear cut as stated in Nsibandze v R (supra).

Each case must be judged on its own merits. Where an accused entirely and directly addresses himself to a third person and a police officer happens only to be casually present there is justification for holding that a confession thus made is admissible. But where the evidence suggests that the accused was taken by the police to the complainant for the express purpose of describing to the complainant how he committed the crime and the description is given to the complainant at the behest of the police, reason exists for holding such confession to be inadmissible.

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In the present case the evidence discloses that the accused were taken to the complainant's shop where they were asked to describe how they gained entry and what they did thereafter and their replies were addressed not only to the complainant but to the police. In these circumstances I have no doubt that the confessions made were inadmissible.

1 therefore come to the identification of the two accused by the witness. In the leading English case of R v Turnbull 1976 (3) All E.R. 549 the Court stressed the special need for caution before convicting in reliance on the correctness of an identification and laid down certain guide lines. Cases abound in which the Courts have dealt with this topic and trial courts should have no difficulty in finding guidance and advice. In R v Mamba 1979/81 SLR 154 Nathan C.J. cited at length from the judgment of Williamson J.A. in State v Mehlape 1963 (2) S.A. 29 and I can really do no better than reproduce the passage in question once again.

"It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification; see for example the remarks of Ramsbottom A. J. P., in R v Mokoena, 1958 (2) S.A. 215. The nature of the opportunity of observation which may be required to confer on an indentification

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in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors: for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc. connected with the person observed, and so on, may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely bona fide and honest. The necessity for a court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really require to be stressed; it appears from such a considerable number of prior decisions; see for example the apprehension expressed by Van Den Heever J.A. in Rex v Masemang, 1950 (2) S.A. 488 (A.D.), after reference to the cases of wrongly convicted persons cited in Wills Principles of Circumstantial Evidence, 7th ed. p.193. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever the snare to the judicial officer who does not

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constantly remind himself of the necessity of dissipating any danger of error in such evidence .... If, in regard to a question of identification, any reasonable possibility of error in identity has not been eliminated by the end of a criminal case, it could quite clearly not be said that the State has proved its case beyond reasonable doubt."

In the instant case, setting aside for one moment the fact that the identification of the two accused was a dock identifications there can be little doubt that the circumstances in which the victim observed his assailants were far from statisfactory. He had never seen the accused before so no question of

recognition arose, he was warned by his assailants not to look at them and it is reasonable to assume that he heeded this warning at least to some extent and the attack took place at night. He said he was able to see the two men as it was a clear, moonlit night but was unable to point to anything about the features of either accused which enabled him to identify them. In cross-examination he said that he "heard" the first accused by his voice, but there is nothing in the record to suggest that he ever heard the first accused speaking after the event. This was, in my view, one of the weakest cases of identification it is possible to find.

There are, of course, some cases where a dock identification can carry some weight and some cases where such an identification may be unavoidable as where the accused refuses to take part in an identification parade. But generally the practice of inviting a witness to identify an accused for the first time when the accused is in the dock is undesirable and unfair and will carry with it little, if any weight. (R v Cartwright 1914 10 Cr. App. R.219;

R v Caird and Others 1970 Crim. L.R. 656. In a case such as the present where the opportunities for observing those who committed the crime were so poor it is almost impossible to escape the conclusion that the accused were picked out more on the basis that seated in the dock they were the most likely candidates than for any other reason. In my opinion, the evidence of identification should have been treated as unreliable and should certainly not have been acted upon in the absence of any other cogent evidence against the accused.

In all the circumstances, I am driven to the conclusion that the accused should not have been convicted on the second count.

On the third count the third accused alone was convicted. The evidence against him was solely that of the identification evidence of two witnesses and, of course, the principles already referred to regarding identification evidence applied. This robbery took place in at bus atme time when it was getting dark although the bus interior lights were on. Two bus conductors identified the third accused as being one of the three armed robbers but their evidence was contradictory. One said that he had had a beard on the day in question while the other said he had been clean shaven. This was a major discrepancy and when account is also taken of the fact that neither knew the third accused previously and both made dock identifications it seems to me that the learned magistrate should have regarded the identification as unsatisfactory. In fact in his judgment the learned magistrate failed even to note the discrepancy referred to saying instead that the evidence of the two conductors was "highly corroborative" of each other. In my judgment it would be unsafe to allow this conviction to stand.

On the fourth count the second accused alone was identified by the victim of the robbery as being one of his assailants. It was dark at the time of the attack and he was unable to see his

features or clothing but claimed to have been able to recognise him by his height and voice as a person he had once worked with. This evidence, by itself was, of course, of some value but the value was diminished when the witness admitted in cross-examination that he had not thought to tell the police that he knew one of the assailants when he gave a statement to them. When asked why he replied, rather lamely, that he had not thought of it. The accomplice also gave evidence on this count but once again the learned magistrate fell into the grave error of failing to make any reference to the cautionary rule and although he considered that the accomplice's evidence was corroborated by certain "pointing-out" it is clear that the pointing-out was no more admissible than on the other counts. Again, I do not consider it would be safe to allow this conviction to stand.

For the foregoing reasons the convictions and sentences are set aside.

N.R. HANNAH

CHIEF JUSTICE