



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No: 124/12

In the matter between:

REX

v

SIKHUMBUZO THULANI MAKHANYA

1ST ACCUSED

ASIF PATEL

2ND ACCUSED

Neutral Citation : Rex v Sikhumbuzo Thulani Makhanya, Asif Patel (124/12)
[2015] SZSC 98 (1 JULY 2015)

Coram : Q.M. MABU

Delivered : 1 JULY 2015

SUMMARY

APPLICATION FOR DISCHARGE IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT NO. 67/1938. APPLICATION REFUSED. ACCUSED PERSONS HAVE A PRIMA FACIE CASE TO ANSWER.

JUDGMENT

MABUZA –J

[1] On the 10 August 20013 the charges herein were put to the accused persons and they pleaded as follows:

Count 1	-	Accused 1 pleaded not guilty
Count 2	-	Accused 2 pleaded not guilty
Count 3	-	Accused 2 pleaded not guilty
Count 4	-	Accused 1 pleaded not guilty
Count 5	-	Accused 1 pleaded not guilty

[2] The charge sheet that the accused pleaded to was dated 21 June 2013. It is crucial to mention that at this time Mr. B. Magagula was prosecuting counsel.

[3] The Crown continued leading evidence using the above charge. It is after PW6 had given her evidence that the Crown decided to amend the charge

sheet. The charge sheet had initially read that the stolen items were the property or in the lawful possession of PW6. She however, denied that they were in her possession. That meant that the Crown had to amend their charge sheet to reflect another owner or possessor.

[4] After contacting PW10 to take responsibility over the Vice-Presidents lost items, the Crown amended the charge sheet to read that the property was the lawful property or in the lawful possession of PW6 or PW10. This charge sheet was dated 16 April 2014. The value of the goods remained at E2,975,618.04 (Two Million nine hundred and seventy five thousand six hundred and eighteen Emalangeni four cents). PW10 gave his evidence on the 17 April 2014.

[5] After PW10 concluded his evidence the matter was postponed to the 9/7/2014. The last witness for the day was PW13 whose evidence was not concluded. The matter was postponed to the 2/12/14 when the matter resumed on the 2/12/14 Mr. Magagula was no longer prosecuting. In his place was Mr. T. Dlamini, Mr. M. Nxumalo and Miss N. Masuku. They advised the Court that Mr. Magagula had been appointed judge and could no longer continue with the prosecution.

[6] The new Crown Counsel continued with the evidence. PW13 was cross-examined by the two defence counsel. After the evidence of PW17 and on 26/01/2015 the charge sheet was again amended and defence counsel had no objection to this amendment. The amended charge sheet dated 26/01/2015 reads as follows:

COUNT FOUR

Accused 1 is guilty of CONTRAVENING SECTION 96 (14) (a) (i) AS READ WITH SECTION 96 (14) (d) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT 37/1938 AS AMENDED.

In that upon or about 30th March 2012 and at or near Mbabane, the said accused person did unlawfully and intentionally furnish the High Court of Swaziland with false information in his bail application – Case No. 124/2012 that he has never been convicted of any offence yet he was convicted by the Magistrate Court under Case No. L160/2005 and did thereby contravene the said Act.

COUNT FIVE

Accused 1 is guilty of CONTRAVENING SECTION 3(1) AS READ WITH SECTION 23 OF THE EXCHANGE CONTROL REGULATIONS OF 1975 as contained in the Kings Order in Council No. 40 of 1974.

In that during the period 31st August 2011 and 27th March 2012 at or near Lomahasha in the Lubombo Region, he said accused not being an authorized dealer, did unlawfully sell foreign currency in the form of Euros and United States Dollars amounting to E20,000.00 and did thereby contravene the said Act.

[7] The count against Accused 1 in respect of contravening section 96 (14) (a) (i) as read with section 96 (14) (d) of the Criminal Procedure and Evidence Act 37/1938 as amended (furnishing false information) was abandoned. The counts were reduced to four.

[8] The background *in casu* is that the current Vice President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangwe visited Swaziland during August 2011. At the time of his visit he was the Minister of Finance in his

country. He was accompanied by Mr. Juan-Antonia Bibang Nchuchuma (PW10) who is currently the Minister of Security in the office of the Presidency. They both stayed out at the Royal Villas at Ezulwini.

[9] On the morning of the 31st August 2011 the Vice President informed PW10 that his briefcase was lost. PW10 was the head of Security for the Vice-President. After discovery of the loss, the Vice President immediately left Swaziland for home. PW10 remained behind for three days in order to continue investigations with the local police.

[10] He stated that the Vice-President returned two times to Swaziland after the loss of his things. He accompanied the Vice-President. During one of these visits the local police had arrested suspects and had retrieved the Vice-President's things. The Vice-President identified these things in his presence on the 13th April 2012 when PW1 and PW6 were also present. He identified a piaget diamond watch but one gold watch remained unrecovered; a vitton suitcase, Brazilian money, Jamaican dollars, Singapore dollars, Euros, US dollars, French currency, Malaysian currency, Zambian currency, a rosary and some personal documents and a purse inscribed with Jesus Christ, some Rands and Emalangeneni.

[11] PW10 was able to identify the above items in Court.

[12] I may mention at this point that when the Crown indicated that it would be difficult to secure the attendance of the Vice President due to protocol and duties related to his current office, the defence had no objection when told that PW10 would replace the Vice-President as the person in whose possession the items that were stolen were. I agree with the Crown that Mr. Mkhwanazi cannot be heard to now say that there is no complainant.

[13] Ms. Alma Anrade (PW6) confirmed the testimony of PW10 that on the morning of the 31st August 2011 when she went to bid farewell to the Vice President at Room 5, Royal Villas she found that the vice-President's briefcase was missing. They looked for it and could not find it and called the police. She testified that the Vice-President next visited during April 2012. The police were informed and they arrived at the Royal Villas on the 13th April 2012.

[14] The police requested PW6 and Jabulane Khanyile (PW1) to remain and witness the identification of his things by the Vice-President. The things

had been recovered by the police. She stated that the police presented a black suitcase, a watch and many foreign currencies some of which she could not recall but which include Euros and US Dollars. There was a brown necklace and a second necklace. The police also showed him lots of Rands and Emalangi which were recovered from the suspects. The Vice President identified these things as belonging to him.

[15] She stated that she recorded a statement with the police in which she recorded her observations. She also identified the items in Court as the black briefcase, 1 beaded necklace, 1 black beaded necklace, 1 diamond piaget watch, 100 US Dollars, 500 Euros, Singapore Dollars in various denominations, Moroccan currency, Rands and Emalangi. She stated that there was no break in but the window below which the briefcase had been placed was open.

[16] PW1 confirmed her story. He too was present when the Vice-President identified his things on the 13th April 2012.

[17] Save for the briefcase, PW8, PW9 and PW13 informed the Court that all the other items belonging to the Vice-President were found on Accused 1 who

led them to his home area, on the 26/3/12 and 28/3/12 where he pointed out from different areas: a piaget diamond watch, money totalling to E531,820.20 in Emalangeneni and Rands as well as foreign currency. PW13 was also present on the 13th April 2012 when the Vice-President identified items that were stolen from him.

[18] PW2 Lucas Phengu confirmed that Accused 1 went to him twice at Lomahasha where he changed foreign currency. The first time he changed 100 Euros and the second time 1000 US Dollars.

[19] Busisiwe Calile Mlambo (PW16) testified that she rented out two rooms at Kwaluseni to Accused 1. The rental was E500.00 and E1000.00 respectively per month. She said that Accused 1 carried out a lucrative business in the sale of eggs. Zandile Gcebile Mhlanga-Hlophe (PW17) testified that she too let out a room to Accused 1 for the sum of E1000.00 per month.

[20] The Court carried out an inspection in loco of all three shops on the 15/12/2014. They were very small shops and could not have generated the money disclosed as exhibits in Court which was retrieved from Accused 1.

Accused 1 has stated that the foreign currency belonged to him but he has not stated how it came to be in his possession or how he is the legal owner of it. He has stated that the piaget diamond watch belongs to him as he purchased it from a Mozambican national at Manzini. The Vice-President identified it as belonging to him.

[21] The facts which I have set out above support all of the indictments (as amended) in respect of Accused 1 and establish a prima facie against him.

[22] Mr. Mkhwanazi is critical of the amended indictment that was filed by the Crown on the 26th January 2015 for the following reasons:

- (a) he says that none of the accused persons before Court has been charged with the offence in Count 1 or conversely the indictment does not state who amongst the accused persons faces count one and
- (b) that the indictment is vague and embarrassing in that it does not disclose the person or complainant in whose possession or custody the allegedly stolen items were.

[23] The complaints in respect of Count 1 in this last amended indictment are easily cured in terms of section 154 (4) of the Procedure and Evidence Act No. 67/1938 which provides that:

“The fact that an indictment or summons has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, after the validity of the proceedings thereunder”.

[24] An application has been made by the Crown that this Court allows an amendment of the indictment to reflect that Accused 1 is facing Count 1 and that Antonia Bihang Nchunchuma is the complainant and lawful possessor. The application is hereby granted. There is no prejudice to any of the accused persons occasioned by this amendment. As explained by Mr. Dlamini the omissions are typographical errors.

[25] Furthermore Accused 1 is well aware of the charges that he is facing. Initially the complainant was the Vice-President. Through an amendment to which there was no objection, the complainant became PW10. This amendment included that of the amount of money from E2,931,618.04 to E6,000,000.00.

[26] Mr. Mkhwanazi's further submission is that in respect of Count 4 wherein Accused 1 is charged with contravening the exchange control regulation i.e. section 3(1) as read together with section 23 of the exchange control regulations of 1975 as contained in the Kings Order in Council No. 40 of 1974.

Section 23 of the regulations is the penalty clause section 3 (1) states as follows:

“Except with the permission granted by the Minister and in accordance with such conditions as the Minister may impose, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorized dealer”. (My underlining)”.

[27] Mr. Mkhwanazi's argument is that there is no evidence that Accused 1 bought, borrowed, sold or lent foreign currency. He says that the act does not make it an offence to change currency.

[28] In my view this argument is incorrect. Accused 1 travelled all the way from Kwaluseni to Lomahasha in order to “change” Euros and US Dollars from PW2. He left several licenced banks behind in order to “change” foreign

currency with an unlicensed street vendor. In fact he bought Emalangeni with the Euros and US Dollars or in the language used in the act and commercial parlance he “exchanged” foreign currency from PW2 who was not an “authorized dealer” in terms of the act.

[29] A further submissions by Mr. Mkhwanazi relates to the credibility of the Crown witnesses for example:

- PW8 says that the money retrieved from the safe belonging to Accused 1 amounted to E3,000.00 plus a further R600.00 totalling E3600.00. On the other hand PW13 says that the amount was E32000.71.
- PW8 testified that the police came to Zondwako twice; on the 26th March 2015 and on the 28th March 2015 whilst PW9 and PW13 said that they went there on the 28th March 2015 in the morning and in the afternoon.
- PW8 testified that the money that was counted on the rocks amounted to E200,000.00 South African currency while PW13 stated that it amounted to E289,700.00 local currency. The photographs taken by PW9 show Emalangeni, South African currency and other foreign currency which are not legal tender in Swaziland.

[30] I agree with Mr. Dlamini that the inconsistencies in the evidence of the Crown witnesses are not of a material nature as to prove fatal to the Crown's case.

PW15 confirmed that the police went to Zondwako on the 26th March 2015, thus corroborating PW8. Furthermore the photographs of the scenes pointed out by Accused 1 cure any inconsistencies that the evidence of the Crown may have. See **State v Gogannekgosi** [1989] B.L.R. 133 HC AT 140 B – C and that of **Kenneth Gamedze and Others v The King Criminal Appeal** No. 1 of 2005 both cited in the High Court case of **Rex v Malangeni Raphael Dlamini** Criminal Case No. 02/2014.

[31] It is my considered opinion that a prima facie case has been made out against Accused 1. He must explain how he came to be in possession of the items belonging to the Vice-President as identified by PW10. The shops at Kwaluseni do not seem to be ones that can generate the amounts of local and South African money found on him. The story that the piaget watch was sold to him by a Mozambican in Manzini sounds incredible without further information. The foreign currency found on him is not legal tender in Swaziland and on a balance of probabilities is more likely to be owned by the Vice-President than a small shop owner at Kwaluseni. He has to answer

PW2 who says that he went twice to change Euros and US Dollars at Lomahasha.

re: Accused 2

[32] PW3 (Sive Matsaba) and PW4 (Alexander Rafael) were co-workers at Adil Electronics in Manzini. They stated that Accused 2 was their supervisor. PW3 testified that towards the end of 2011 Accused 2 used to send him with a bill of 500.00 Euros to change it for him at Africa Cash and Carry. Accused 2 instructed PW3 to buzz him when he arrived there. PW3 would buzz him and Accused 2 would call PW3 back and Accused 2 would instruct PW3 to give the phone to Juned Farook (PW14). After the conversation PW14 would then ask PW3 for the Euros that Accused 2 had given him. PW3 would hand the Euros over to PW14 who would then give him not less than E4500.00 for Accused 2. PW3 testified that he performed this errand for Accused 2 not more than ten times.

[33] PW3 further testified that he also saw Accused 1 in the shop on three occasions. On the first occasion he purchased a medium sized generator but later returned it on a second occasion for a bigger one. On the third occasion he purchased a radio. On all these occasions he dealt directly with Accused

1 but PW3 never witnessed what currency Accused 1 used whenever he paid for his purchases.

[34] This was a chance for Accused 1 to give Accused 2 Euros and Singapore Dollars. PW4 testified Accused 2 sent him to PW5 to change 500 Euros for which PW5 gave him E4850.00 in exchange therefore as evidenced by Exhibit "A". PW5 corroborated the evidence of PW4.

[35] PW14 corroborated the evidence of PW3. He testified that the Euros that he changed for Accused 2 totalled 4000 Euros and that the said Euros ended up with the police.

[36] 3788 Detective Sergeant Mpendulo Dlamini (PW7) testified that he recorded statements from PW3 and PW4. He called Accused 2 to the Manzini police station. Ultimately Accused 2 led the police to his flat where he pointed out 10,200 Singapore Dollars stored behind the television set. The place of storage raises suspicion as to why a television set instead of a bank and why change the Euros on a black market instead of a bank.

[37] According to **R v Makins Motors (Pty) Ltd and Another** 1959 (3) SA 508 (AD):

“the mental element of the offence of receiving stolen property is satisfied where it is proved that the Accused actually (subjectively) suspected the goods to be stolen and then deliberately abstained from making inquiries in order to avoid the confirmation of his suspicions”.

[38] Section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 states:

“If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.”

[40] In my view the Crown has led sufficient evidence that shows that the accused persons committed the offence charged and consequently a *prima facie* case has been made against them which calls for them to answer and I so hold. The application in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 is hereby dismissed.

Q.M. MABUZA -J
JUDGE OF THE HIGH COURT

For the Crown : Mr. T. Dlamini
For the 1st Accused : Mr. M. Mkhwanazi
For the 2nd Accused : Mr. B. Dlamini