THE HIGH COURT OF SWAZILAND
CRIM. CASE NO.41/00

In the matter between:

REX

VS

OBERT SITHEMBISO CHIKANE
MUZI RICHARD DLAMINI

CORAM	**: MASUKU J.**
For the Crown	**: Mrs M. Dlamini**
For 1st Accused	**: Mr B. Sigwane**
For 2nd Accused	**: Mr M.D. Mamba**

RULING ON APPLICATION IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE & EVIDENCE ACT, 67/1938
16/07/02

Indictment

The accused stand before me indicted on fifteen Counts as follows:-

COUNT ONE

Accused No.1 and No.2 are guilty of the crime of **MURDER.**

In that upon or about 26th August 1999 at or near Nkoyoyo area, Hhohho region, the said accused persons, each or both of them, acting jointly with a common purpose did unlawfully and intentionally kill **GEORGE MASHWAMA.**

COUNT TWO

Accused No.1 and No.2 are guilty of the crime of **ROBBERY.**

In that upon or about 26th August 1999 at or near Nkoyoyo area, Hhohho region the said Accused persons each or both of them acting jointly with common purpose did unlawfully and with intent of inducing submission by **GEORGE MASHWAMA** to the taking of property which was a Toyota Venture registered SD 534 and valued at E80.000.00, threatened the said **GEORGE MASHWAMA** that unless he consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot him and did then and thereupon take and steal from the said **GEORGE MASHWAMA** the said property which was his property of or in his lawful possession, and did rob him of the same.

COUNT THREE

Accused No.1 and No.2 are guilty of the crime of **ROBBERY.**

In that upon or about 3rd September 1999 at or near Nkhungu area, Hhohho region, the said accused persons each or both of them acting jointly with common purpose did unlawfully and with the intention of inducing submission by **WESTON MANDLA PHIRI** to the taking of property, a Toyota Corrola 1.6. valued at E 40,000.00, threatened the said **WESTEN MANDLA PHIRI** that, unless he consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot him and did then and thereupon take and steal from the said **WESTON MANDLA PHIRI** or in his lawful possession and did rob him of the same.

COUNT FOUR

Accused No.1 and No.2 are guilty of the crime of **ROBBERY**.

In that upon or about 7th September 1999 at or near the Mbabane Market, Hhohho region, the accused persons each or both of them acting jointly with a common purpose, did unlawfully and with the intention of inducing submission by **CYPRIAN SENZO MASUKU** to the taking of property, which was money valued at E69,997.15, threatened the said **CYPRIAN SENZO MASUKU** that, unless he consented to the taking by accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot him and did then and thereupon take and steal from the said **CYPRIAN SENZO MASUKU**

the said property which was the property or in the lawful possession of **CYPRIAN SENZO MASUKU** and did rob him of the same.

COUNT FIVE

Accused No.1 and No.2 are guilty of the crime of **CONTRAVENING SECTION 11 (1) OF THE ARMS AND AMMUNITION ACT 24/1964 AS AMENDED BY ACT 6/1988 AND ACT 5/1990.**

In that upon or about 7th September 1999 at or near Piggs Peak, Hhohho region, the said accused persons not being holders of a permit or licence to possess a firearm each or both of them acting jointly with common purpose, did unlawfully possess one 9mm vector pistol model 288 with serial number obliterated.

COUNT SIX

Accused No.1 is guilty of the crime of **FRAUD.**

In that upon or about 2nd August 1999 at or near Mbabane City in the Hhohho Region, the said accused person unlawfully and with intent to defraud, misrepresent to Tsenjwako Maseko that a certified copy of birth certificate numbered 273924 which he then and there produced and exhibited to the said Tsenjwako Maseko was a copy of a birth certificate belonging to them and that according to the said birth certificate was entitled to be issued with Swaziland travel document and id by means of the said misrepresentation induce the said Tsenjwako Maseko to the prejudice of Swaziland Government to issue him with a Swaziland travel document whereas at the time he made the aforesaid misrepresentation well knew that the said copy of birth certificate did not belong to him and that he was not entitled to the said document.

COUNT SEVEN

Accused No.2 is guilty of the crime of **FRAUD.**

In that upon or about 2nd August 1999 at or near Mbabane City in the Hhohho Region, the said accused person unlawfully and with intent to defraud, misrepresent to Tsenjwako Maseko that a certified copy of birth certificate numbered 273924 which he then and there produced and exhibited to the said Tsenjwako Maseko was a copy of a birth certificate belonging to them and that according to the said birth certificate was entitled to be issued with Swaziland travel document and

id by means of the said misrepresentation induce the said Tsenjwako Maseko to the prejudice of Swaziland Government to issue him with a Swaziland travel document whereas at the time he made the aforesaid misrepresentation well knew that the said copy of birth certificate did not belong to him and that he was not entitled to the said document.

COUNT EIGHT

Accused No.1 is guilty of the crime of **FORGERY.**

In that upon or about 2nd August 1999 at or near Mbabane City, in the region of Hhohho, the said accused person, did unlawfully, falsely and with intent thereby to defraud and to the prejudice of Swaziland Government, forge an instrument in writing, to wit, one immigration form marked Form 01/109 purporting to be signed by Richard M. Dlamini for the issuance of Swaziland travel document.

COUNT NINE

Accused No.2 is guilty of the crime of **FORGERY.**

In that upon or about 2nd August 1999 at or near Mbabane City, in the region of Hhohho, the said accused person, did unlawfully, falsely and with intent thereby to defraud and to the prejudice of Swaziland Government, forge an instrument in writing, to wit, one immigration form marked Form 01/109 purporting to be signed by Muzi Dlamini for the
issuance of Swaziland travel document.

COUNT TEN

Accused No. 1 is guilty of the crime of **UTTERING.**

In that upon or about 2nd August 1999 at or near Mbabane City in the Hhohho region, the said accused person did unlawfully and with intent to defraud and to the prejudice of the Swaziland Government, offer, utter and put of application form for Swaziland travel document to Tsenjiwe Maseko, he, the accused person, when he so offered, uttered and put off the aforesaid instrument well knowing it to have been forged.

AND/ALTERNATIVELY

COUNT TWELVE

Accused No.1 is guilty of **CONTRAVENING SECTION 5 OF THE PASSPORT ACT 1971 READ WITH SECTION 14.**

In that upon or about 2nd August 1999 the said accused person did unlawfully, intentionally and knowingly make a false representation that he was Richard M. Dlamini and to Tsenjiwe Maseko and that as a result of the false representation he obtained a Swaziland passport and thereby contravened the said Act.

COUNT THIRTEEN

Accused No.2 is guilty of **CONTRAVENING SECTION 5 OF THE PASSPORT 1971 READ WITH SECTION 14.**

In that upon or about 2nd August 1999 the said accused person did unlawfully, intentionally and knowingly make a false representation that he was Muzi Dlamini and to Tsenjiwe Maseko and that as a result of the false representation he obtained a Swaziland passport and thereby contravened the said Act.

COUNT FOURTEEN

Accused No.1 is guilty of **CONTRAVENING SECTION 5 READ WITH SECTION 35 OF THE IMMIGRATION REGULATION 6/1987.**

In that upon or about 26th August 1999 at or near Oshoek the said accused person did unlawfully and intentionally enter and remain in Swaziland and thereby contravene the said regulations.

COUNT FIFTEEN

Accused No.2 is guilty of **CONTRAVENING SECTION 5 READ WITH SECTION 35 OF THE IMMIGRATION REGULATION 6/1987.**

In that upon or about 26th August 1999 at or near Oshoek the said accused person did unlawfully and intentionally enter and remain in Swaziland and thereby contravene the said regulations.

Both accused persons pleaded not guilty to all the Counts and their respective pleas were confirmed by their respective attorneys.

During the course of the Crown's case, Mrs Dlamini, indicated that she wished to withdraw certain of the charges and proceeded to do so. These are Counts 6,7,8,9,10,11,12 and thirteen to which a plea of not guilty had been entered. I therefor acquit and discharge the accused persons on these and no further reference to them will be made in the course of this ruling.

At the close of the Crown's case, the defence moved an application in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act, 67/1938, as amended, (hereinafter referred to as "the Act"), for the acquittal and discharge of the accused persons on Counts 1,2,3,4,5, and 14 in respect of Accused 1. In respect of Accused 2, the application was moved for acquittal and discharge for Counts 1,2,5, and 15. I reserved judgement, after listening to an address by all Counsel and I indicated that reasons would be handed down in due course. These now follow.

The law applicable to Section 174 (4) of the Act.

Section 174 (4) of the Act as amended provides the following:-

> *"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."*

An analysis of the application of this Section in our jurisdiction was undertaken by Dunn J. in **THE KING VS DUNCAN MAGAGULA AND 10 0THERS, CRIM. CASE NO.43/96** (unreported). He came to the following conclusion at page 8 of the judgement:-

> *'This section is similar in effect to section 174 of the South African Criminal Procedure Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict."*

From the legislative nomenclature employed, it is clear that the decision to refuse a discharge is a matter that lies within the discretion of the trial Court. The use of the word "may" is indicative of this. In the case of **GEORGE LUKHELE AND 5 OTHERS VS REX C.A. CASE NO.12/95** (unreported), it was held that no appeal lies against the refusal of a trial Court to discharge an accused at the conclusion of the prosecution's case. It is however important to mention that this discretion must be exercised judicially and whether in any case the application will be granted is dependant upon the particular circumstances of the matter before Court.

There are two primary issues for determination in this matter, namely, the question of the admissibility of certain computer printouts and the question of whether or not the application for a discharge ought to be granted. I propose to deal with the former question first.

(i) Admissibility of computer printouts.

In a quest to bolster its case, particularly on the charges relating to contraventions of the Immigration Regulations, and also possibly, to a lesser extent, the presence of the accused in the country in relation to the murder and robbery counts, the Crown called Superintendent Jacobus Pietrus Johannes Botha of the South African Police Services (SAPS), who featured as PW 17.

He testified that he is a member of the South African Police Services and a Commanding Officer of the movement and control and keeps record of all travellers. He handed into Court certain documents which he said he extracted from a computer in his department and which contained detailed information relating to the use of passports and travel documents which according, to the Crown, were found in the accused persons' possession on the date of their arrest in Pigg's Peak. According to PW 17, the information is obtained from travellers by the South African immigration officials and then transmitted to the traveller's record system in Pretoria, from which he extracted the information provisionally marked A1, A2, A3 and A4.

The attack on the admissibility of these documents by the defence is on the ground that the said documents constitute hearsay evidence as computer evidence is not admissible at

common law, in the absence of statutory exceptions in Swaziland. A further ground was that according to PW 17, the information is punched into the computer by the Immigration officials and it is then relayed at the end of the day to the movement and control bureau of the SAPS in Pretoria and that is where the information was extracted by PW 17. As it is, it was argued and conceded PW 17 that he cannot vouch for the accuracy of the information he extracted from the computer.

In the case of **S VS HARPER AND ANOTHER 1981 (1) SA 88 (D & DLC)**, Milne J. considered the question whether computer print-outs are admissible in evidence and whether a computer falls to be regarded as a document for purposes of Section 221 of Act 51/1977. It is important to hasten to point out that we have no equivalent of this Section, in our C.P. & E., which stipulates certain prerequisites for accepting computer evidence.

At page 95 E – F, the learned Judge stated the following:-

> *"The extended definition of 'document' is clearly not wide enough to cover a computer, at any rate, where the operations carried out by it are more than the mere storage or recording of information. Quite apart from that, however, how would the document, that is in this case the computer, be produced?"*

At page 97 E – F, the learned Judge summed the position as follows:-

> *"It seems to me necessarily envisaged that, because of the development of modern commerce and the necessity to store records relating to large sums of money and large numbers of people, special provisions would need to be made making evidence admissible that would not be able to be subject to the ordinary vigorous test of cross-examination."*

It is clear that the documentary evidence tendered in this case is inadmissible as it offends against the hearsay rule. In the absence of statutory enactment altering the present legislative position, it is my view that this evidence must be regarded as inadmissible. PW 17 is not the one who fed the information to the machine and cannot vouch for its correctness. He appears to have received the information 3rd hand as it were since it is

collected at the border and transmitted from the border to Pretoria, where it is updated and it is from these updates that he extracted the documents before Court.

I am also of the view that even if we had similar provisions to Section 221, there are some insuperable difficulties facing the Crown. There is no evidence to show that the computer used was operating correctly and there was no evidence as to the precise nature of the processes involved in producing the final document. *In casu* it clear *ex facie* the documents filed that on some occasions, and in relation to the accused person's movements, the computer was operating incorrectly. It ascribed more than sixty minutes to an hour in some cases and further reflected the borders to open at 02h00 when according to the evidence, the border closes at 20h00. There is also information reflecting the use of A1's expired passport for flying to Singapore from the Johannesburg International Airport at a time when the accused were already in custody and the passport already in the hands of the RSP. I accordingly rule the computer printouts are inadmissible.

As a matter of comment, the failure by our Legislature to update our legislation in order to keep abreast of technological, commercial, scientific and legal developments is worrying. It is high time that these and other deficiencies, particularly in the CP & E, which affect daily activities of the Courts should receive attention as a matter of priority and urgency. In this way, evidence that would otherwise be useful to the determination of the *lis* must be jettisoned because of our failure or refusal change. I refer in this regard to some comments I made in **R VS ELIZABETH MATIMBA H.CT. CRIM.CASE NO. 184/98** at page 39 to 40.

(ii) Application for discharge.

For purposes of convenience and easy reading, I intend to consider this application in relation to each Count in respect of which the application has been moved.

(a) **Count 1 – murder of Rev. George Mashwama.**

The evidence, which is largely undisputed in this regard is that on the 26th August 1999, Reverend Mashwama, the deceased entered Ngwenya border Post from the Republic of South Africa at or about 20h41. He was driving a vehicle bearing registration number SD

534 D.N. He was shot and killed by the use of a firearm and his corpse was found at or near Nkoyoyo inside Swaziland the following day. During the autopsy, a bullet was extracted from his skull and it was sent to a forensic laboratory in South Africa for tests.

It was sent together with a bullet cartridge, which the Police say was found at the scene of the deceased's death, about three metres away from the spot where the deceased's body lay. There are some curious features about the discovery of this cartridge. Firstly, the first officers who attended the scene searched in vain for this cartridge. Some three weeks later, this cartridge was then found. The scene had not been preserved and dogs which had been essayed to find the bullet failed allegedly because the ground was wet. I do not accept the reason for the dogs being unable to search for the cartridge as given by PW 19 Supt. Aaron T. Mavuso because although he claimed to be knowledgeable about Police dogs, for which he was not trained, he failed to answer a simple question relating to the breed of dogs used by the RSP. A shoulder to shoulder search ensued and the cartridge was found clearly not hidden under the grass. Furthermore, the accused, from whose possession a firearm had been obtained a few days earlier, were not called when this discovery was made, neither were any dispassionate and independent witnesses called who could testify as to the circumstances surrounding the discovery of the cartridge.

According to the forensic report filed by PW 14 Christiaan Mangena and marked Exhibit "T2" after a microscopic examination, he found that the cartridge case referred to above had been fired from the pistol pointed out by one or both accused persons. Mangena further found from his examination that the spent bullet jacket retrieved from the deceased's head was not fired from the said 9 mm parabellum pistol obtained from the accused persons.

Can it be said, in view of the above evidence that it is the accused persons, one or both of them who shot and killed the deceased? There was no eyewitness to this sombre and I may add senseless and brutal murder. From the entry/departure cards submitted by the Crown marked Exhibits "J" and "K", respectively, it would appear that on the 26th August, 1999, the day of the deceased's demise, both accused persons left Swaziland, using the Ngwenya border post at 18h45 and 18h50 respectively. The deceased, from Exhibit "N" entered Swaziland through the same border post at 20h41. I may hasten to add that there is no

evidence that the accused persons, particularly, A1 re-entered Swaziland at any border which could connect them with the deceased's death.

The expert testimony of Mangena, as hitherto stated, states that the bullet found in the deceased's brain was not fired from the firearm recovered from the accused persons motor vehicle. Had it been otherwise, it would have been necessary for them to explain. Mrs Dlamini however argued that according to Captain Amos Steven Mona (PW 18) of the SAPS, A1 owned a licensed 9mm pistol which could have been used to kill the deceased. There is no evidence that the said accused person, when entering Swaziland brought that firearm with him. It is common cause that South African citizens are ordinarily not allowed to bring firearms into Swaziland. The mere fact that A1 owns such a firearm, in the absence of any other evidence is not sufficient to lead to an inference that he shot the deceased, assuming he did bring the firearm into Swaziland. Furthermore, he is not the only person who owns a 9mm pistol such that it can be said he was the only person who could have shot and killed the deceased.

I have raised concern about the curious circumstances surrounding the finding of the cartridge. For there to be a direct link, it was necessary to bring the accused persons or at the least adduce the evidence of impartial witnesses on the discovery. As it is, the firearm was with the RSP from the 14th September, 1999, when it was found and the cartridge was only found on the 18th in circumstances hardly suggesting that it was concealed, also having regard to the search carried out by the officers who removed the deceased's body. More importantly, the bullet used to kill the deceased, according to Mangena, is not one that was fired from the firearm pointed by the accused persons.

In view of the foregoing, it is my view that there is no evidence before Court that the accused persons committed this offence or any other of which they might be convicted. I accordingly acquit and discharge both accused persons in respect of Count 1.

(ii) **Count 2. Robbery of Rev. Mashwama.**

Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of the said property from another. All the

elements enumerated above must be proved by the Crown in order for the Court to return a verdict of guilty.

As observed in respect of Count 1, it is common cause that there was no eyewitness to the deceased's death. Furthermore, there was no eyewitness to the alleged robbery. There is therefor, no evidence regarding the chronology of events, namely, whether there was any violence before the taking of the vehicle or the deceased was just killed and a person, who may not have shot him drove away his vehicle. There is in this case no concrete evidence and all that the Court is left to rely on is conjectural.

In respect of this offence or other competent verdict, it is my view that there is no evidence linking A1 with the deceased motor vehicle. His brother's name was mentioned in a cursory manner regarding the discovery and possession of the vehicle in Nelspruit. I cannot even assume that it was A1 who was with A2 at Mashobeni on the 27th August, 1999, because both Crown witness, PW 2 and PW 6 stated that they did not know A2's companion who was driving the vehicle which answers the description of the accused's vehicle. The person with A2 was described as, slim, tall and dark in complexion. He was seen in broad daylight but could not be identified by both witnesses. Even when seeing him in Court (which would clearly not suffice), their memory could not be jogged to a position where they could confirm that he was with A2. I therefor acquit and discharge A1 on this Count. There is no evidence upon which a reasonable man, acting carefully can convict him in the circumstances.

Different considerations however apply in my view regarding A2. According to the evidence of PW 2 and PW 6, he came to PW 2's homestead in the early hours of the 26th August 1999, the day of the deceased's death in the company of another man who was driving a motor vehicle that answers the description of the deceased's vehicle. Although A2 was driving a white Jetta sedan, it is clear from the evidence that he and his colleague were on a similar mission, which was given as transporting people to a funeral at Vusweni. Considering the time when the deceased's vehicle must have been taken and the time when A2 and his companion came to PW 2's home, it is in my view reasonable to infer some connection with the deceased's vehicle and that A2 should be called to his defence in this regard. It would be difficult to contemplate a situation where two people who are carrying mourners can meet at such a time at night and the other be unaware of circumstances

surrounding the other's mode of transport. According to PW 6, A2's companion was checking both vehicles suggesting they were not people who had just met fortuitously.

It is my view that A2 must be called to his defence on this count, although in my view, he would have to answer in relation to a charge of theft being, a competent verdict, as I indicated in the preface to this Count that it cannot in the circumstances be stated that the charge of robbery has been proved by the Crown. I shall however have no regard for the accused's arrest in the Republic of South Africa on charges of theft of what appears have been the deceased's motor vehicle from the Police Station as no competent evidence was led in regard to that charge before this Court.

(iii) Counts 3 and 4 – Robbery of Phiri and Masuku

These Counts shall be considered only in relation to Accused 2. Mr Mamba wisely and properly did not move an application in respect of his client. I had occasion, in the case of **R VS JUSTICE TEYA MAVIMBELA HIGH COURT CASE NO. 115/98** at page 14 to 15 to consider the duties of the defence Counsel at the close of the Crown's case, considering in particular, his ethical duties as an officer of the Court at this stage of the proceedings.

The evidence in these Counts is somewhat inter-linked. In Count 3, Weston Mandla Phiri testified that on the 3rd September 1999, he was travelling to Swaziland in the company of Glorine Mbuyisa and some children. They were travelling in a white Toyota Corolla 1.6, sedan, bearing registration number JJH 296 GP. He testified that they entered the Ngwenya border at around 21h30 and when they were near a level crossing inside Swaziland, the motor vehicle sustained a puncture to which he attended. Two men came and offered assistance which he declined as he was almost through with replacing the punctured tyre.

These men then came back shortly thereafter and one fired a gun next to PW 12 whilst the other fired next to Glorine (PW 13). One put a firearm to PW 11's head and the other to Glorine's ribs and they were led to the bush and shoved to the ground. They eventually took all the belongings and drove away in the vehicle.

PW 11 was later called to identify certain items which had been recovered by the Police. He identified certain car mats, a first aid kit which was in the vehicle on the fateful night, some wheel caps, which he said were peculiar in that they had some scratches which he explained. Glorine also identified certain items, including some money in the Botswana currency, which she was robbed of. PW 11 proceeded to identify the vehicle, which now bears a false registration number BVT 066 MP as the one he was driving on the night in question.

This vehicle, according to Supt. Aaron Thabo Mavuso (PW 19) was pointed out by the accused persons after they were arrested in Pigg's Peak. It was parked at the parking lot of the Ministry of Justice. The keys of this vehicle were found in the possession of the accused persons when they were arrested in Piggs Peak on 7th September, 1999 and according to the Crown's evidence, some of the items allegedly taken from PW 11 were found in that vehicle in which the accused were travelling on that day, namely, a white BMW registered BNN 243 MP. Toyota rubber and carpet mats which were identified by PW 11 were found in that vehicle. Furthermore some speakers were removed from the Toyota and were found at A2's home in Mpolonjeni by the R.S.P.

Furthermore, when the accused persons were arrested as aforesaid, according to PW 12 Constable Mfanasibili Dlamini, some items which were subsequently identified by Glorine, including the money in the Pula currency, some marking pens and a key were found in the BMW motor vehicle. All these items in my view link the accused persons to the robbery in Count 3 necessitating that they be called to their defence and this Mr Mamba realised.

In respect of Count 4, PW 10 Cyprian Senzo Masuku told the Court that he was robbed of some money in a leather bag. He had parked the vehicle at the Mbabane market, as he was heading for Standard Bank along the Allister Miller Street. He testified that as he came out of the vehicle, intending to lock it, somebody hit him on the back and as he turned around, somebody was holding the bag and a firearm was pointed at him. They took the bag away and speeded off in a white Toyota Corolla with the last letters reading MP in the registration plate.

A similar car was pointed out by the accused persons as stated above. Furthermore, PW 10 described the moneybag in which the money he was robbed of was contained. It was from

Nedbank and was inscribed in a marking pen "E500" and E"1". He told the Court that he was once sent to Barclays Bank to get change for E500 which was to be in E1 coins. This bag was also described by PW 9 Dumsile Bonisile Dlamini, who had prepared the money and cheques for banking by PW 10. She testified that the collections totalled E69 997.15, comprising of cheques in the amount of E39,174.50 and cash in the amount of E30 822.65.

The accused persons were arrested by PW 12 on the 7th September and he found the moneybag described above placed in the boot of the BMW. Accused 1 was the driver of that vehicle and Accused 2 a passenger. The amount in cash found in that moneybag was E29 682.65. This, in my view also connects the accused persons to the offence as the robbery of PW 10 occurred on the 7th September, 1999 and the accused persons were arrested a few hours later in Piggs Peak, carrying a large amount of money and in a money bag which answers fully to the description given by PW 9 and PW 10. It is for these reasons that I find that Accused 2 must be put to his defence in respect of this count as well.

(iv) Count 5 – firearm possession

According to PW 19, on the 12th September 1999, both accused persons were cautioned and interviewed. After the interview and having been cautioned again, the accused persons led him and other officers to the aforesaid BMW motor vehicle at the Mbabane Police Station. Above the accelerator pedal, there is a secret compartment in which the accused persons pointed out a 9mm verto with fourteen (14) live rounds of ammunition. Its serial number had been removed. During an *inspectio in loco*, the Court was shown this compartment.

From the cross-examination of this witness, it was denied on A1's behalf that he was present during the pointing out. PW 19 however maintained that both accused persons were present. In respect of A2, it was put to PW 18 that the pointing out was not made freely and voluntarily as the said accused person had been subjected to torture immediately before the pointing out. This PW 18 vehemently denied, stating that the accused persons were cautioned and that their pointing out of the firearm was done freely and voluntarily.

It was urged on A2's behalf that the pointing out itself only proved knowledge and not possession, regard had to the fact that A2 was a passenger in that motor vehicle. Furthermore, the location of the firearm in the vehicle was far from A2's seat but in front of the driver suggesting that A2 may have known about it but was not its possessor.

In evidence, it has been shown, but not denied that the BMW belonged to Accused 1 and the firearm was found in that vehicle in front of the driver, in a concealed compartment. If accused 2's story is to be believed, he pointed out the firearm (and I do not venture an opinion at this stage as to whether the pointing out was done freely and voluntarily), from that concealed closet. Although he was a passenger, he was not a mere passenger divorced from the vehicles owner, if he as a passenger would be privy to the presence and location of dangerous items like a firearm, which, more importantly, was concealed in a place in which a supposed thorough search by the RSP failed to find. In my view, both accused persons must be called to their defence in respect of this Count. As an aside, it is interesting to note that notwithstanding the evidence of PW 19 that there were fourteen (14) live rounds of ammunition and thirteen of which were exhibited in Court, the accused persons were not charged with the possession thereof.

(v) Count 14 – Accused 1 only and Count 15 (Accused 2)

The allegations in respect of this Count is that this accused persons wrongfully and unlawfully entered and remained in Swaziland on the 26th August 1999 in contravention of Section 5 read with Section 35 of the Immigration Regulation 6/1987.

I will preface my remarks by saying, as it was agreed by all counsel involved that the accused persons were charged with contravening the Immigration Regulations, 1987. Regulation 5, in terms of which the charge has been laid reads as follows:-

> *"Any person other than an exempted person, who enters or departs from, or attempts to enter or depart from Swaziland at any place or at any time other than a place or at a time specified in relation to such place in the Third Schedule hereto shall be guilty of an offence."*

Section 2 interprets an "exempted person" as a person of a class or description of person who is exempted by the Minister (for Home Affairs) under the Act from obtaining an entry permit or pass; from reporting entry into or departure from Swaziland.

There is, on the evidence before me no indication or intimation that the accused persons are to be regarded as exempted persons. I shall, in view of that deal with them as un-exempted persons. Regulation 35 on the other hand is a penal provision, stipulating the sentence or fine to be meted to a person adjudged guilty of contravening the Regulations.

In respect of Accused 1, the evidence which was tendered by Philemon Zion Shongwe, shows that Accused 1 left Swaziland on the 26th August 1999 through Ngwenya Border Post at 18h45. There is no indication that A1 returned to Swaziland on that day, re-entering through the legalised entry points or otherwise. There is also no evidence before Court that he was seen inside Swaziland later on that day. In my view, Accused 1 stands to be acquitted and discharged on this offence as I hereby order.

With regards to Accused 2, the evidence is that he arrived in Swaziland through Ngwenya border using travel document No.C26428. He arrived at 16h35. He then left Swaziland the same day, using travel document No.C403760, leaving through Ngwenya border at 18h50. There is no indication from the Immigration Officials that he re-entered Swaziland legally. There is however evidence that he arrived at the home of PW 2 during the night of the 26th and was seen on the 27th by PW 2 and PW 6 at Mashobeni. This has not been disputed by the defence.

Being a person who does not fall in the catergory of exempted persons within the meaning of Section 2, it is my view that the accused has a case to answer as he was seen in Swaziland without any evidence in the Crown's possession of his re-entry through a recognised border and at a designated time. The assertion by his attorney that he is a Swazi and is therefor entitled to enter and remain in Swaziland does not assist him if there is evidence that he departed through a recognised entry point but was later seen within the Swazi territory the same night, leading to the following day, without any endorsement or indication that he re-entered through a recognised entry point listed in the Third Schedule.

I order that Accused 2 be and is hereby called to his defence on Count 15.

In conclusion and in relation to the conclusions to which I have arrived, it is apposite that I refer to an article by A. St Skeen, entitled, "The Decision to Discharge an Accused at the Conclusion of the State case: A Critical Analysis", South African Law Journal Vol.102 part II, May 1985, page 286 at 287, where the author reasoned as follows:-

> *"If a **prima facie** case is established the accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence, the **prima facie** case will then become a case proved beyond a reasonable doubt. This may or may not take place. It sometimes happens that a court, after refusing the application for discharge at the conclusion of the State case, will acquit the accused where he closes his case without leading any evidence."*

I whole-heartedly embrace this remarks as being reflective of possibilities in our jurisdiction as well.

In sum, Accused 1 is acquitted and discharged on Counts 1,2 and 15. I find that he has a case to answer in respect of Counts 3,4 and 5.

Accused 2 on the other is acquitted and discharged only in respect of Count 1. He has a case to answer in respect of Counts 2,3,4,5 and 15.

T.S. MASUKU
JUDGE