CRIMINAL CASE NO. 118/97

IN THE MATTER BETWEEN

REX

VS

MOSES PAULOS DUBE
RUSSEL DUBE
GIDEON DLAMINI

CORAM **S.B. MAPHALALA - AJ**
FOR CROWN **MR J. MASEKO**
FOR DEFENCE **MR D. MNGOMEZULU**

JUDGEMENT

The accused person is the third accused person who was co-joined with accused no. 1 and accused no. 2. The latter accused persons were discharged at the close of the crown case in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) The accused are charged with armed robbery. The accused are alleged to have been acting in furtherance of a common purpose in committing the armed robbery at Kalanga Bricks on the 25th June, 1997 and robbed one Sipho Zikalala at gunpoint a sum of E500,000-00. The accused persons all pleaded not guilty. Accused no.1 was represented by Mr K. Vilakati, accused no2 was represented by Mr M. Manzini and accused no 3 was represented by Mr D. Mngomezulu. The crown was represented by Mr J. Maseko. The crown proceeded to call witnesses to prove its case. During the hearing of the crown's evidence the crown intimated to produce a judicial statement made by accused no.3 in the absence of the Judicial Officer Mr J. Sibanyoni who has since died. The court at that point expressed its reservations to the admissibility of such a statement in the absence of the officer who recorded the statement. The court went to the extent of soliciting legal authority from the crown and the defence of whether or not that such practice was acceptable.

It emerged from the crown and Mr Mngomezulu that there was common ground that the

accused made such a statement to the late Magistrate and that issue was not disputed the only bone of contention appeared to be that the defence was challenging that statement on the ground that it was not made freely and voluntarily in conformity with section 226 of the Criminal Procedure and Evidence Act. The usual practice of having a magistrate to read out the statement as I was led to believe by both parties was not necessary and thus academic. To that extent the statement was entered by consent on the caveat that it is shown to have been freely and voluntarily made. A trial then proceed to determine the efficacy of the statement in view of the requirements of section 226 (supra).

The court heard evidence of the crown as well as that of the accused (accused 3) for and against the admissibility of this statement. The court subsequently handed down its ruling on the 18th May, 1998 where in a reasoned judgement it held that the statement was freely and voluntarily made to conform with the requirements of section 226.

The case there after proceeded where at the close of the crown case accused no.1 and accused no. 2 launched their applications in terms of section 174 (4) of the Act. Mr Mngomezulu rightly conceded that accused no. 3 had a case to answer. Accused no. 1 and accused no. 2 were then discharged in terms of the section and a reasoned ruling was handed down in open court.

On the 25th May, 1998 the case proceeded with accused no. 3 as the remaining accused person in this matter. On that day accused took the witness stand and gave evidence under oath led by his attorney and was subsequently cross-examined by the crown. The accused persons again gave a lenghtly account on his version of event in his defence. The long and short of his story is that the confessions he made to the late Magistrate was not made freely and voluntarily as he was subjected to assaults and torture by the police who were investigating this case. That the whole confessions is a mere fiction concocted by Sergeant Nhlabatsi who was heading the investigating team in this case. He was made to tell the magistrate this story, lest he is subjected to further torture if he were to depart from it. He further deposed to a new element which surprisingly was not suggested to crown witnesses by his attorney (see S vs P 1974 (1) S.A. 581 (RA) and Rex vs Dominic Mngomezulu and others Criminal Case No. 36/94 (unreported) at page 12) was also not mentioned by him in chief when he was giving his evidence in the trial within a trial that Sergeant Nhlabatsi when he was being tortured he was forced to say that he knew accused no. 1.

The accused further told the court that the money that was found at his home was proceeds from his illicit dagga business (if one may be permitted to call it that).

The accused was subjected to pointed cross-examination where he made a bad impression to the court in that he could not reconcile what he said in the trial within a trial and what he said after the close of evidence. He was evasive and pretended to be a person of subnormal

intellect. I cannot accept that in view of the fact that he was employed by the complaint company which was robbed of the E500,000-00 as a gunner and he was described as a Crew Commander. He is a man with leadership qualities to earn that kind of appellation. He is no fool. I wish to reject Mr Mngomezulu's pleas on behalf of the accused that the reason he could not answer questions was that he was a mere simpliton who finds himself in a court of law for the first time in his life and this fact gave him the jitters, to me this does not wash.

The court then entertained submissions from Mr Maseko for the crown and Mr Mngomezulu for the accused.

I have listened to their evidence and have also considered the evidence before me in its totality.

I do reject again accused story that the confession made to the late magistrate was not made freely and voluntarily as prescribed by section 226 of the Act. As I have ruled earlier on after the trial within a trial that Mr Mngomezulu did not put crucial questions to the crown witnesses who were the police officers who are purported to have tortured the accused to lead him to make the confessions (I refer again to S vs P (supra) and Rex vs Dominic Mngomezulu (supra). Accused told the court two versions on the same issues. When he was giving his evidence in the trial within a trial he gave a graphic account of the methods of torture he was subjected to and that during the taking of the confession by the magistrate a piece of paper was handed to the magistrate . The magistrate would refer to it from time to time as he was writing the confession. Surprisingly this was never put to Constable Simelane that he was the one who took the paper to the magistrate. It came again as a complete surprise that accused was forced to say that he knew accused no. 1. When he gave his evidence towards the end of evidence one wonders why this crucial fact was never put to Sergeant Nhlabatsi who is said to be the one who was forcing the accused to confirm this falsehood. The only conclusions that one is left to draw in the circumstances is that accused no.3 story is nothing but a pack of lies put forward in a bid to run away from the confession he made freely and voluntarily to the magistrate. The submission by Mr Mngomezulu that the confession is not admissible in that the magistrate was not called to testify on it. The defence cannot be allowed to blow hot and cold. Mr Mngomezulu right at the commencement of trial despite the courts inquiry on this confirmed what the crown submission that the body of the confession is not challenged but entered by consent. I do not think, therefore that I am wrong in admitting the confession in view of this fact.

The confession made by the accused to the late magistrate Mr J. Sibanyoni places the case on accused door steps and there is no way he can avoid it. He told the magistrate in a 20 odd page confession of the part he played in the commission of this offence which resulted in Elite Security Company being robbed of the sum of E500,000-00. To paraphrase what the accused told the magistrate. The accused told the magistrate that he was approached by one

man named Japhet Ndlovu who used to work for the same security firm who told him that he with others wanted to rob money which was conveyed by his company. He was approached on four occasions with this proposition that his role was to furnish them (robbers) with information on when the money was collected at Siteki. He refused to tell them on these occasions until on the fifth occasion he relented and gave them the days of the week they collected money from Siteki. At that time a third man by the name of Malume was introduced to him who was part of the gang. He was promised money in return for his information. The robbery was carried out on the 25th June, 1997 in the manner as deposed by Sipho Zikalala (PW1). He further told the magistrate that the said Ndlovu and Malume were travelling in a green Toyota Corolla prior to the robbery. The same motor vehicle was the one described by PW1 as the one which blocked their way and its occupants robbed them the money at gun point. Accused No.3 was subsequently given E20,000-00 for his pains and this money was later taken by the police at his home. But he had used part of the money as it was E13,000-00. The police also took E480-00 which was part of his wages.

Now assuming the accused story is correct that he made this confession under duress one would expect him to have mentioned accused no. 1 in the statement. As according to his evidence he was told by Sergeant Nhlabatsi to say that he knew accused no. 1. But accused no. 1 is not mentioned in the statement instead three men are mentioned one Ndlovu, Ngwenya and Malume. There is no mention of Paulos Dube who seemed to fixture prominently in the case of the crown against accused no. 1 and accused no. 2. To me this lends more credence to the view that accused judicial statement was made freely and voluntarily in conformity with section 226 of the Act.

It is clear therefore, that the accused was the “inside man” who gave the robbers vital information on which the robbers acted to commit this offence. The accused played a passive role in the whole saga, however, he is equally liable as the other robbers who took active roles. According to the doctrine of common purpose on which accused is charged with in furtherance of which the robbery was carried out where two or more people agreed to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their member which falls within their common design. Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequence, provided that it is established that one of the group brought the result (refer to S vs Safatsa 1988 (1) S.A. 1 at page 14 e - f)

a:Dube
5

a: Dube3
6

For the reasons outlined above I find that accused No. 3 is guilty of the crime of armed robbery which was carried on the 25th June, 1997 at Langa Bricks where a sum of E500,000-00 was stolen at gun point in the lawful possession of one Sipho Zikalala.

S.B. MAPHALALA
ACTING JUDGE

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CORAM		**S.B. MAPHALALA - AJ**
FOR CROWN		**MR J. MASEKO**
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	ACCUSED NO. 2	**MR M. MANZINI**
ACCUSED NO. 3	**MR D. MNGOMEZULU**	

RULING ON APPLICATION AT THE CLOSE OF THE CROWN'S CASE
(20/05/98)

Accused No. 1 to 3 are jointly charged with armed robbery. The accused are alleged to have been acting in furtherance of a common purpose in committing the armed robbery at Kalanga Bricks on the 25th June, 1997 and robbed one Sipho Zikalala at gunpoint a sum of E500,000-00. The crown led a number of witnesses in support of the charges. At the conclusion of the crown's case applications were made in respect of accused no. 1 and accused no.2 in

terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 (as amended) for the discharge of the two accused persons on the grounds that the crown had failed to establish a prima facie case to place the accused on their defence. Mr Mngomezulu for accused no. 3 rightly conceded that a prima facie has been made in respect of his client accused no. 3 after a bid to render a confession made by accused no.2 inadmissible failed. However, on that point the court ruled that the statement made to the Judicial Officer was made freely and voluntarily in conformity with section 226 (1) of the Criminal Procedure and Evidence Act.

Mr Maseko, for the crown opposed the applications made on behalf of accused no. 1 by Mr Vilakati and accused no. 2 by Mr Manzini.

Mr Vilakati on behalf of accused no. 1 contended that there is no evidence before court that accused no. 1 was present when the robbery took place at Kalanga Bricks on the day in question. The evidence that attempts to link accused no. 1 with the commission of the offence is the evidence of two crown witnesses Logwaja Dlamini and Charles Ginindza. This evidence does not assist the court at all because the two crown witnesses gave contradictory accounts of what they knew concerning the matter. Mr Vilakati applied that their evidence be taken as that of accomplice witnesses who according to them they have been invited to participate in the heist. The cautionary rule should be applied. The court has to ask itself if they have not. After the court had addressed to that question the court will not be required to look any further.

The only evidence, Mr Vilakati continued would be the money itself that was found in the possession of the accused and perhaps the motor vehicle which accused no. 1 was found driving. On the question of the money found in the possession of the accused was it the one which was taken at gunpoint from the lawful possession of Zikalala. If there was some mark of identification like serial numbers or special ink marks the accused no. 1 has to go to the witness stand to explain how the money came to his possession. There may be an argument that the E5,000-00 found in accused no.1 when he was arrested in Nhlangano was part of the E500,000-00 stolen by the robbers at Kalanga Bricks. The question of the motor vehicle which accused no. 1 was found driving in Nhlangano the Toyota Cressida has nothing to do with the robbery. Thus that evidence is irrelevant for the purposes of this case. The motor vehicle is not connected with the robbery all the crown evidence showed that the getaway car which was used by the robbers was a Toyota Corolla.

Mr Manzini for accused no. 2 also moved a similar application holding the view that there is no evidence before court which places accused no.2 at the scene of the crime on the date and time of the robbery. In fact the evidence of Nhlabatsi who was leading the investigating team in this case confirms that on the date and time of the robbery he (Nhlabatsi) established that accused no. 2 was at work here in Mbabane when the robbery took place. The crown bears the onus to prove either directly or by circumstantial evidence that accused no. 2 was

involved in the common purpose alleged in the indictment. On the evidence before court there is no single proven fact for the court to infer common purpose. Nhlabatsi told the court that on the 8th August, 1997 he approached accused no. 2 and told him that he was investigating an armed robbery case and cautioned the accused. He said on the 9th August, 1997 accused no. 2 took him to his home in Malkerns where accused no. 2 produced a sum of E6,020-00 in E20 notes. What is significant is that the officer does not say that he was taken there pursuant to his investigations he merely says he was taken there. Nhlabatsi does not tell the court if accused no. 2 displayed any knowledge of the robbery and the money that was taken. It is not in dispute that accused no. 2 took Nhlabatsi there but the investigating officer wants the court to assume that it was part of the investigations. When Nhlabatsi was cross-examined on the specific notes which he tendered as evidence he admitted that these notes were not identified by anyone from First National Bank to positively say to the court that these notes were the same notes that were dispatched on the day of the robbery. On further cross-examination Nhlabatsi admitted that he himself cannot positively say that the money before court was the same money that was taken in the robbery. He mentioned that the money taken from accused no. 2 as "loot". The fact that he decided to refer the money as "loot" does not take the crown case any further. It was his own conclusion. The fact that he decided to refer to it as "loot" does not impute knowledge on the part of accused no. 2 the investigating officer does not give the court the factual basis on which he came to the conclusion that the money was "loot".

Even a verdict of receiving stolen property knowing it to be stolen cannot be returned. The first requirement which the crown has to prove in that instance, is whether the money was stolen. Mr Manzini referred the court to The South African Law of Evidence by Hoffmann and Zefferit (3rd ed) at page 474 in support of that contention. The crown has not proved that the money presented before court as an exhibit was stolen. Nhlabatsi told the court that he could not say whether the money before court was the one that was stolen. That admission on its own cast a reasonable doubt on whether the money before court was the money stolen from PW1.

The crown as represented by Mr Maseko made a spirited effort to show that the crown has proved a "prima facie". The evidence as it stands is that Sipho Zikalala was robbed of money to the tune of E500,000-00 and that he cannot identify these people who robbed him. After the police have received certain information they went about investigating and came along the three accused before court. The accused were informed why they were being arrested and cautioned in terms of the judge's rules and the accused took the police to various places where they produced money. Accused no.1 upon being asked after he was handed over to the Manzini Police Station by the Nhlangano Police gave an explanation which explanation cannot be reasonable true. He informed the police that the car belonged to his sister Thoko Dube. However, when Thoko Dube came to testify she said she does not know anything about the car in question. Accused no. 1 on the day of the robbery crossed the border at Oshoek Border Post to R.S.A. on foot and on the same day he bought the motor

vehicle on the 25th June, 1997 he then came back to Swaziland and when he is asked about it he tell lies. Mr Maseko invited the court to infer that the motor vehicle bought by the accused had something to do with the robbery at Kalanga Bricks.

The crown went further to state that Logwaja and Ginindza cannot by any stretch of the imagination be called accomplice witnesses. That an accomplice witness is a person who had a hand in the commission of the offence. These witnesses did not associate themselves with the commission of this offence. The crown argued that the accused persons had a common purpose based on the fact that the whole case relies on circumstantial evidence. He referred the court to the cases of S vs Safatsa 1988 (1) S.A. 868 and S vs Khoza 1982 (3) S.A. 1019 in support of that proposition. He argued on that it was important that accused no. 2 must give an explanation of how he received the money. To support this view he cited the case of Rex vs Duncan Magagula and 10 others Criminal Case No. 43/96. All in all the crown submitted that the two accused persons have a case to answer.

The court then heard the defence in reply on points of law which I will deal with as I proceed with my ruling.

I have listened to the impressive arguments on both sides and have looked carefully at the evidence of the crown witnesses to determine whether the crown has made a prima facie case in terms of the section.
There is a standard which the court ought to apply. Justice J. Matsebula in the case of Rex vs Thabsile Mhlambo Criminal Case No. 81/95 (unreported) succinctly articulated the standard to be applied by the court, thus:

> "It is appropriate at the stage to deal briefly with the standard the court applies at the end of the crown case when dealing with whether or not there is a prima facie case. That standard is to consider whether or not there is a prima facie case made out against an accused person, and the court has got a discretion if that discretion is exercised judicially the application is granted or refused then the next stage is another standard to be applied, that is whether the crown at the close of the defence case the crown has proved the case beyond any reasonable doubt...."

In the case in casu it is doubtful that the crown has proved a prima facie case in respect of both accused no. 1 and accused no. 2.

I will start with accused no. 1 he is found with a sum of E5,000-00 which the police suspects was stolen from Kalanga Bricks. But there is no tangible evidence before the court that the E5,000-00 found in his possession is part of the loot of E500,000-00 robbed at Kalanga Bricks. Nhlabatsi himself when giving evidence in fact admitted that he could not say that the money found in the possession of the accused is part of the loot. The evidence of the motor vehicle which he was found driving is irrelevant. It does not in any way connect the

accused with the crime it would have been a different matter if he was found driving the Toyota Corolla which was used in the heist. Then surely, he would have a case to answer. I agree with the submissions made by Mr Vilakati in this respect. Now I come to the evidence of Logwaja and Ginindza and agree with Mr Vilakati that they may be termed quasi-accomplice witnesses. To this end Mr Vilakati referred the court to The South African Law of Evidence by Hoffmann and Zefferit (3rd ed) where the learned authors described the term "quasi - accomplices" and they stated that this term has been used to describe persons who are not accomplices but appear to know good deal about the offence and have some purpose of their own to serve in giving evidence. The reasons for the cationary rule equally applies to such persons and similar circumspection ought therefore to be shown in dealing with their evidence. The learned authors gave examples of such people e.g. fellow members of an illegal organization (refer E Dutoit and other Commentary on Criminal Procedure Act 24 - 5). They go further at page 576 of the 4th edition that:"

> "There is some dispute over whether in such cases the cautionary rule applies as a requisite of procedural law or whether caution is simply dictated by common sense (S V Ganie 1967 (4) S.A. 203 (n), but the point is somewhat academic since, as we have seen, the cautionary rule is itself no more than an admonition to use common sense (see the remarks of Van Winsen J in S V Xoswa 1965 (1) S. A. 267 © at page 269 h).

These two witnesses were the only crucial witnesses to the crown case to put the accused no. 1 into the spotlight as according to the summary of evidence he seem to be the mastermind behind this robbery. The crown case stands or falls on their evidence. However, they failed both the police who took their statements and the crown who put up a valiant fight to have them to testify. The crown even applied to court in terms of section 200 to have Ginindza incarcerated for four days as he was blatantly refusing to testify. Even after his brief sojourn at His Majesty's pleasure he sidelined the issues. He together with Logwaja can be described as quasi - accomplice witnesses.

It appear that they had a fear to tell on accused no. 1 in court lest they be killed. They followed the infamous motto of the members of the underworld that "hear not, see not and say not" they are both by their own admissions criminals who have been in and out of prison for similar offences most of their adult lives. They both departed drastically from what their statement given to the police and reflected to in the summary of evidence. This turn of events was described by Mr Vilakati in referring to the "dicta" in the case of Rex vs Duncan Mngomezulu (supra) where the learned Justice Dunn articulated the courts approach to such evidence at the close of the crown case where the credibility of the witness becomes an issue in determining a prima facie case where the learned judge in that case stated that section 174 (4) of the Criminal Procedure and Evidence Act is similar in effect to section 174 of the South African Criminal Procedure Act 81 of 1977. The South African decisions on the question as to whether or not the credibility of the crown witnesses should be taken into

account in deciding whether or not the credibility of the crown witnesses should be taken into account in deciding whether or not to grant a discharge have not always been harmonious observed the learned judge after making an exhaustive study of South African decisions touching on the matter. The learned judge went further to consider cases in other jurisdictions. This involved a study of the High Court of Lesotho decision of Rex vs Pabilone Nalawa and others Criminal/T/51/69 (unreported) and in the later case also emanating from the High Court of Lesotho in the case at the close of the crown case.

Rex vs Teboho Tamati Romakatsane 1978 (1) s.i.r. 70 Contran CJ stated at page 73-4.

> " In Lesotho, however, our system is such that the judge (though he cites with assessors is not bound to accept their opinion) is the final arbitrator on law and fact so that he is justified, if he feels that credibility of the crown witnesses has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence"

Dunn J in Duncan stated as follows after reviewing these decisions thus:

> "The position of a trial judge in Swaziland is the same as that in Lesotho and I am persuaded that a similar approach should be followed by the courts in Swaziland. It must however, be always borne in mind that the section in question confers a discretion, to be properly exercised and that it may vary from one case to another depending on the circumstances of each particular case".

The evidence of Logwaja and Ginindza in the case in casu is totally devoid of credit. Their evidence differs materially from what is reflected in the summary of evidence. They even contradict each other on material aspects of this case. As I have pointed out that the crown case as it pertains to accused no. 1 stands or falls of the evidence of the witnesses. These two witnesses betrayed both the police who painstakingly investigated the case and the crown, despite Mr Maseko spirited opposition to the application. I thus rule that the crown has not made a prima facie case against accused no. 1 in the face of the reasons I have outlined he is therefore discharged in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended). If I were to call him to answer what tangible evidence is there connecting him with the robbery? The answer to this question would be in the negative.

Now I come to accused no. 2 . The only evidence which attempts to connect him with the offence is the evidence that he led the police to his home at Malkerns and he handed to Nhlabatsi a sum of E6,020-00 and Nhlabatsi concluded that it was part of the "loot" that was robbed at Kalanga Bricks. There is no factual basis which led Nhlabatsi to come to this conclusion. Nhlabatsi himself in cross-examination admitted that he cannot say that the money exhibited in court forms part of the "loot" robbed from Kalanga Bricks. He admitted that he cannot say that the money was stolen. Further, and of more significance, Nhlabatsi himself the head of the investigating team admitted that accused no. 2 was in Mbabane at his

place of employment when the robbery was taking place at Kalanga Bricks a distance of about 70 kilometres away. He cannot by any stretch of imagination be one of the robbers and consequently answer in his defence for the crime of robbery. The least he can be called upon to answer for is receiving stolen property knowing it to have been stolen. But even here as Mr Manzini rightly argued that the money before court was not proved to have been stolen. Mr Manzini referred me to the case of R vs Charlston 1955 (3) S.A. 168 where the head notes in that case state, thus:

> "In circumstances where property has been stolen and is found in the possession of the accused not long afterwards and accused gives an unsatisfactory or false explanation the court may infer his guilt. But before the question of any explanation arises or a need for an explanation, there must be sufficient proof (my emphasis) that the property is stolen property, whether from a specific person or some person unknown"

For theses reasons I also hold that the crown has not made a prima facie to put accused no. 2 to his defence.

In conclusion, I wish to point out that it is a great pity especially in the case of accused no.1 that he is discharged as a result of crown witnesses who either refuse to testify or even when they testify they evade the real issues which brought them to court and state their own versions which totally does not link accused no. 1 with the robbery at Kalanga Bricks. However, one cannot expect much from people of their ilk who had most of their adult lives have been involved in robberies and have been in and out of prison where they met. Outside prison they kept on their nefarious close-knit organization. The crown and the police are not to be blamed for this state of affairs. Accused no. 3 now remains to come to his defence.

S.B. MAPHALALA
ACTING JUDGE

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	ACCUSED NO. 2	**MR M. MANZINI**
ACCUSED NO. 3		**MR D. MNGOMEZULU**

RULING IN TERMS OF SECTION 226 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT OF 1928 - TRIAL WITHIN A TRIAL

Section 226 of the Criminal Procedure and Evidence Act of 1938 (as amended) provides in subsection 1 as follows:

"Any confession of the commissioner of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:

provided that such confession is proved to have been (freely and voluntarily) made by such person in his sound and sober senses and without having been unduly influenced thereto....."

The accused persons are jointly charged with the crime of armed robbery in that upon or about the 25th June 1997 and at or near Kalanga Bricks in the Lubombo District the said accused acting in common purpose did unlawfully with intention of inducing submission by Lucky Sipho Zikalala to the taking by the accused of the sum of E500,000-00 in cash plus two pump action shot guns, threatened the said Lucky Sipho Zikalala that, unless he consented to the taking the accused persons of the said sum or refraised from offering any resistance to them to the taking of the sum they would there and there shoot him and did then and thereupon take and steal from the person of the said Lucky Sipho Zikalala the sum, with which was the property or in the lawful possession of Lucky Sipho Zikalala and did rob him of the same.

All the accused pleaded not guilty to the offence. Accused no. 1 represented by Mr Vilakati, accused no. 2 is represented by Mr Manzini and accused no. 3 is represented by Mr Mngomezulu. Mr Maseko is appearing for the crown.

The crown proceeded to lead a number of witnesses to prove its case against the accused persons. In the course of the crown case Mr Maseko submitted from the bar a statement purporting to be a confession made by accused no. 3 to the late Magistrate Mr J. Sibanyoni. I expressed some reservations to this in that in the normal way a magistrate is to hand in the statement under oath. However, it seem not to be in dispute that the accused no. 3 made such a statement but that Mr Mngomezulu for accused no. 3 challenged the confession that was not made in conformity with the proviso to section 226 (1) of the above mention act. Thus, that it was not made freely and voluntarily. A trial within a trial then proceeded to determine the admissibility of the said confession.

The crown called a number of police officers who were investigating the case led by 1807 D/Sergeant E.H.. Nhlabatsi who gave a similar account when led by the crown in-chief of how he proceeded to investigate the robbery at Langa Bricks up to the time the accused no. 3 went to magistrate Mr Sibanyoni to make a confession. It seems to me to be common

ground that the accused no. 3 was arrested several times and each time released after he was interrogated. On the last occasion it came to the knowledge of the investigating team that accused no. 3 had been buying people drinks at the shebeens and had large sums of money. The police officers smelt a rat and proceeded to arrest accused no. 3 and placed in custody at Siteki Police Station where he slept the whole day in the cells. At around 10.00pm on the day he was arrested he was taken out by Nhlabatsi to his office where he was interrogated by a group of police officers led by Nhlabatsi. The crowns version is that accused no. 3 led them to his home where a sum of E13,000-00 was found and also a sum of E400-00 plus. He was then taken to Sidvokodvo Police Station and later elected to clear his conscious and went to make a confession before the magistrate at Simunye Magistrate Court accompanied by a Constable who answers to the name of Simelane.

This is the version given by the crown witnesses. Each of these witnesses was cross-examined by Mr Mngomezulu for accused no. 3. The tenor of Mr Mngomezulu's cross-examination was that accused was tortured and assaulted. The torture method was the infamous tube method. All the crown witnesses denied these allegations of torture and assault and stated that the accused chose to go to the magistrate to make this statement and that he did so freely and voluntarily, that the allegation that accused was deprived of sleep for the night was one method of exerting undue pressure on the accused to make this confession. This therefore is the case for the crown.

The court is well alive that it is trite law that the onus rests on the crown that a confession was made freely and voluntarily.
The accused at the close of the crown case in the trial within a trial gave evidence under oath led by his attorney. The accused gave a lengthly account on how he was subjected to various types
of torture. He described in detail how these acts of torture were perpetrated by the police investigating this case. He came out with crucial facts which were not suggested to the crown witnesses by his attorney in cross examination of the crown witnesses. He revealed and the court heard for the first time that there was a certain officer by Vallis who placed a plastic bag over his head and a car tube was pressed around his mouth and nose so that he could not breath. An iron rod had prior been placed between his knees and he was tightly handcuffed that he later bled on both wrists. He told the police officer that he did not know this offence and later led the police to his home where a sum of E13,000-00 was retrieved which money he said was earned from his illegal dagga business and that the E400-00 plus was part of wages as he was employed by Elite Security Company guard firm which concindentally was conveying the stolen money that day and he a gunner for the crew which conveyed the money on the day of the robbery. It came for the first in-chief by the accused that in fact Nhlabatsi was together with Constable Simelane when he was taken to the magistrate and it is not true that Simelane said in his evidence that he (Simelane) personally handed the accused to the Magistrate and was later excused to stand a distance away from the

magistrate's chambers.

His version of event, which came for the first time in-chief was that he was handed to another man who they found outside and he was told was an interpreter. It also emerged for the first time in-chief that whilst he was with the magistrate, Simelane came in and handed to the magistrate a piece of paper and left. The magistrate kept on referring to this piece of paper when writing the confession. I must say here that I do not believe this no magistrate worth his salt will do such patently irregular thing. I think the accused is not entirely correct in this regard. The accused said what he told the magistrate was what Nhlabatsi said and he to say it clear he be subjected to the torture he had experienced prior to him going to the magistrate. He said for the first time that as the magistrate was writing what purported to be his confession he could hear Nhlabatsi and Simelane's voices near the door talking loudly and laughing. This placed him under great stress not to depart from the version he was schooled by Nhlabatsi.

The accused was cross-examined by the crown at length and I must say he did not impress me at all he was evasive and contradicted himself in a number of important points.

The court then heard submissions from the crown and from Mr Mngomezulu. From the onset I must point out that the defence conducted its case in a very shoddy manner, one would have expected Mr Mngomezulu to put the vital points revealed by his client in chief in cross-examination of the crown witnesses for defence story to have some degree of credence. I doubt very much what the accused said that he had fully briefed Mr Mngomezulu about them, if he had then Mr Mngomezulu bungled his clients case. Mr Mngomezulu as an experienced trial lawyer is well aware of the need for the defence to put as much of its case by way of cross-examination. I would refer to the dicta by S vs P 1974 (1) S.A. 581 (A) by Macdonald JP at page 582 where the learned Judge President stated as follows:

> "It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial, so important is the duty to put the defence case that practioners were in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court"

Further Hannah CJ in the case of The King vs Dominic Mngomezulu and others Criminal Case No. 96/94 (unreported) at page 17 had this to say on this point:

> "It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of the prosecution witnesses testimony may place the defence at risk of adverse aspects being made and adversed being drawn. If he

does not challenge a particular item of evidence then an adverse may be made
that at the time of cross-examination his instructions were that the unchallenged
item was not disputed by the accused, and if the accused subsequently goes to the
witness box and denies the evidence in question the court may infer that he has
changed his story in their intervening period of time. It is also important that
counsel should put the defence case accurately. If he does not and accused
subsequently gives evidence at variance with what was put, the court may again
infer that there has been a change in the accused's story".

In the present case counsel failed to put the defence case. Mr Mngomezulu made a hollow submission that he was challenging the allegations of torture generally as matter of tactics. I must say this has proved to be very dangerous tactics Mr Mngomezulu adopted. When one challenges a confession that it was not made freely and voluntarily counsel has to go deeper than he did in his probe in the present case. There are glaring facts which came only as a complete surprise when accused was giving evidence. It is very difficult, if not, impossible to believe the accused story and I thus reject it as an after thought. The crown witnesses testimony stood the test of cross-examination and I have no reason to disbelieve them. Supposing the torture and the assault took place why did the accused wait for five days from the date of assault to go to a magistrate. In my view I agree with the crown that the one night sleep deprivation was necessitated by the nature of the police investigations where time was of the essence.

I reject Mr Mngomezulu's submission that if accused wanted to make a confession he would have done so when the police used to arrest and release him on a number of occassions. That would have shown that it was freely and voluntarily made. I disagree with this line of reasoning in that at that time the accused had not given the game away (so to speak) by being a spendthrift and went about buying liquor to whoever took his fancy in the shebeens.
I rule that the confession made by accused no. 3 on the day in question to the late magistrate Mr J. Sibanyoni was made in conformity with section 226 of The Criminal Procedure and Evidence Act of 1938 (as amended) and thus admissible.

S.B. MAPHALALA
ACTING JUDGE

SENTENCE

(13/08/98)

Before proceeding in considering accused mitigating factors as advanced by Mr. Mnisi from the bar I wish to echo the sentiments of Hannah CJ in the case of ***The King vs Richard Mduduzi Mthembu and others Criminal Case No. 88/90*** (unreported) where the learned Chief Justice stated, thus;

> "*Robbery is a wicked crime. Unfortunately, it is a crime which is often committed in Swaziland these days. Lethal weapons are too easily come by and there are those who, having armed themselves with such weapons, prey on and terrorize unfortunate shopkeepers, bank staff and the like. The only protection which the courts can give is to pass swingeing sentences on those who embark upon such evil and dangerous ventures. In passing sentences in respect of such crimes deterrence must be one of the major objectives".*

This is the sentencing framework the court is to operate within. I have considered the mitigating factors as advanced by Mr. Mnisi on behalf of the accused. Accused is a first offender and is 47 years old, which shows that in all those years he never had any brush with the law until now. Accused is a family man with five minor children who look up on him for support. Mr. Mnisi also submitted that the accused only got a meager sum of E20,000-00 out of the whole illicit enterprise and that a substantial portion was recovered from him. He also pointed out to the court that the fact that accused succumbed to the robbery's request for information after the fifth occasion shows that he is a man of character and he had an interest in keeping his job. That all in all the accused is only a "scapegoat" in this case.

I have considered these factors very carefully being guided by the famous dicta in the often cited case of State ***vs Zin*** where the learned judge in that case stated that in sentencing the court should be guided by a triad, to wit, the gravity of the offence, the interest of the accused and the interest of society. I have done this balancing act but I am of the view that the interest of society far outweigh that of the accused. Also here we are dealing with serious money, a sum of E500,000-00 is a lot of money by any standards. The accused abused a position of trust in that he was a gunner and a crew commander that day, he sold trade secrets, as it were for gain. I am not persuaded by the argument that he is a mere "scapegoat". Each participant is a criminal enterprise falls to be punished according to his own role in the affair, and having regard too to his own personal circumstances. The fact that one offender has escaped does not mean that the other should not be dealt with in a way appropriate to his own role.

I agree with the crown that a deterrent sentence should be meted in this case. There are numerous cases like this one where cash-in-transit heists are carried out with the assistance of security officers themselves. Surely, the security companies need to be protected by the law from such people. In passing sentence I took guidance in the case of ***King vs Richard Mduduzi Mthembu and others (supra)*** where Hannah CJ cited his own decision in the case of ***King vs Clement Mabaso and others Criminal Case No. 31/87*** where he expressed the view that this court should adopt the policy of the courts in the United Kingdom and regard 15 years imprisonment as a starting point for a sentence for anyone taking part in the armed robbery of a bank or the like. The learned Chief Justice however, stated in that case that sentences in these cases should be 12 years imprisonment as a starting point instead of 15 years.

It is my considered view that an appropriate sentence in this case would be 12 years imprisonment with the hope that it will have the desired deterrent effect.

I thus sentence the accused to 12 years imprisonment backdated to the day of arrest.

S.B. MAPHALALA
JUDGE