



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 460/10

In the matter between:

REX

VS

MOHAMED KALID AYOOB

Neutral citation: *Rex v Mohamed Kalid Ayoob (460/10) [2012] SZHC 106*
(30 April 2012)

Coram: **M.C.B. MAPHALALA, J**

For Crown Principal Crown Counsel Sikhumbuzo Fakudze

For Defence Attorney Mduduzi Mabila

Heard: 7th, 21st, 22nd, 23rd, 28th, 29th and 31st March 2011

Delivered: 30th April 2012

Summary

Criminal Law – Accused charged with contravening Section 81 of the Customs and Excise Act 1971 – Crown proves accused failed to declare foreign currency knowingly – importation and exportation of foreign currency restricted goods under the Exchange Control Regulations of 1975.

JUDGMENT

[1] The accused is charged with contravening section 81 of the Customs and Excise Act No. 21 of 1971. The Crown alleges that on the 1st December 2010 at the Matsapha International Airport, the accused unlawfully failed to declare \$2 666 300.00 (Two million six hundred and sixty six thousand three hundred US Dollars) or E18 754 229.94 (Eighteen million seven hundred and fifty four thousand two hundred and twenty nine emalangeni ninety four cents) in local currency; the Crown further alleged that the exportation of the money from Swaziland is prohibited and/or restricted in terms of the Act. The accused was further charged with contravening section 4 (3a and 3b) as read together with section 23 of the Exchange Control Regulations of 1975 as contained in the King's Order In Council No. 40 of 1975 in that he unlawfully failed to declare and produce the foreign currency in his possession when requested to do so by a police officer. He pleaded not guilty to both counts.

[2] The defence made four admissions in terms of section 272 of the Criminal Procedure and Evidence Act No. 67 of 1938 in the following respects:

(a) That on the 1st December 2012 the accused was at the Matsapha International Airport.

- (b) That the accused was found in possession of \$2 666 300.00 or E18 754 229.94 (Eighteen million seven hundred and fifty four thousand two hundred and twenty nine emalangeneni ninety four cents) in local currency.
- (c) That the accused informed the police at the Matsapha International Airport that his destination was Dubai via Oliver Tambo International Airport in South Africa.
- (d) That the accused was issued with two boarding passes at Matsapha International Airport to Dubai via Oliver Tambo International Airport; and that he would not enter South Africa but would be on transit at the Oliver Tambo International Airport.
- [3] PW1, Khetsiwe Vilakati, a Security Officer at the Matsapha International Airport and employed by the Aviation department, testified that she was on duty on the 1st December 2010; at about 3.30pm, whilst she was patrolling the terminal, she saw two Asian men and a child at the check-point. She knew the older man because he was a constant traveller at the airport; this man greeted her. The other man was busy checking out with an employee of Airlink. The older man asked her the procedure for transporting money out of the country, and, she directed him to the Customs Office for more

information. The second man then joined them and she was seeing him for the first time; she went with them to the Customs Office; along the way, she asked the second man if they wanted to declare something and, he said they had nothing to declare. The second man was speaking in English.

[4] PW1 introduced them to Stanley Mashaba at the Customs Office, and, she further explained to him that the men wanted to know the procedure for exporting money out of the country; then she left them with the Customs Officer and went to her office. Later, two security officers Nonhlanhla Dlamini and Mxolisi Mhlanga came to her with the accused, the second man; she was with two police officers Gilbert Dlamini and Samukelisiwe Masilela.

[5] The accused was carrying two black bags, and Nonhlanhla Dlamini asked to conduct a physical search on the accused because their machine did not reveal the contents inside the bags. The police officer Gilbert Dlamini asked the accused if he was the owner of the two bags and he agreed; and, he asked him what was in the bags and he said it was money in excess of one million US Dollars. The conversation was in English and the accused was responding in English. One bag was opened in her presence, and the contents were wrapped in gift covers; then she left to attend other duties. When the covers were opened, she had left and did not see the contents.

The defence admitted that it was the money which was wrapped in gift covers.

[6] Under cross-examination PW1 reiterated that she took the two Asian men to the Customs Office; she was walking with the older man she knew and the accused was following them from behind, and she introduced the two men to Stanley Mashaba and left them in his office. She further reiterated that she explained to Stanley Mashaba that the Asian men wanted to know the procedure for exporting money out of the country.

[7] PW2 Stanley Mashaba, employed by the Swaziland Revenue Authority as the Principal Customs officer and responsible for the incoming and outgoing of goods as well as ensuring that people declare goods when leaving or entering the country; he further told the court that his duties also involve advising people on exporting and importing goods. He also told the court that there is a board outside the Customs Department which has information on declaring goods at the Matsapha International airport detailing the procedure for declaring goods; and a sign outside his office marked “declaration of goods”. He explained that a person taking goods in or out of the country has to complete a certain prescribed form; and that goods subject to declaration includes bank notes, personal effects and commercial goods. This declaration form is called SAD 500, also called

the Single Administrative Declaration Form; he said the form is used in all SACU countries.

[8] The defence admitted that the accused did not complete the prescribed SAD500 form at the Matsapha International Airport. PW2 emphasised that all goods for import and export are declared, and that no goods are exempted from declaration. The same form is used for both departures and arrivals. He stated that besides the Board on the Customs Office giving information to travellers, there is also a sign at the door to his office which has the necessary information about declaration of goods. In addition, travellers may also make inquiries from the police and immigration office at the airport on the declaration of goods.

[9] PW2 told the court that he was on duty on the 1st December 2010, and, at about 15:30 hours a female security officer Khetsiwe Vilakati came to his office accompanied by two Asian men, one of them stood by the door and the other was talking to him; the security officer said the two men needed information. The men asked him about the procedure that has to be followed when taking money out of the country. He explained the procedure to them and the prescribed form that has to be completed; in addition, permission was also required from the Central Bank to take money out of the country. He further explained to them that when bringing

money into the country, they have to declare the money at the point of entry together with documents from their bank as proof that the bank issued the currency. The two men thanked him and said in future they want to take money from Swaziland to Dubai; they left his office.

[10] A few minutes later PW2 was called by the police based at the airport; and, when he entered their office, they told him that they have caught a man trying to take money out of the country. It turned out that the man is one of the two men who were in his office and standing by the door. The man was sitting on a chair and he recognised him instantly.

[11] PW2 asked him if he had declared the money and he admitted that he had not declared it; the man further told him that the money was one million US Dollars. The money was on a table and sealed. He told him to open one of the bundles of the wrapped money; he gave him his car keys to open the bundle. However, the police cautioned the accused before opening the bag. The accused told him that he was going to Dubai; he understood and spoke in English, and he answered all questions. Present in the office was PW2, the accused, Gilbert Dlamini, as well as a security officer.

[12] The older Asian man who had spoken with him earlier entered the police office as the accused was opening the wrapped money. The money was in

two bags but it was put in one bag and the other bag was used to put his clothes and other personal items. Police from the Fraud Department at the Manzini Police Regional Headquarters arrived as the accused was still opening the money parcels; PW2, the police and the accused then proceeded to the Matsapha Police Station where the money was locked in a safe. On the next day the money was taken to the Central Bank by PW2, the accused and the Police in order to ascertain if it was genuine as well as to count the money.

[13] During cross-examination PW2 admitted that in the statement which he subsequently recorded with the police, he did not mention that they were two men who came to his office, one talked to him and the other stood by the door; in the statement, he only mentioned the other man who spoke to him. However, he denied that he was seeing the accused for the first time at the airport police office. He further told the court that a person importing goods into the country required an import permit and that the main reason for declaring goods is to control the flow of goods in and out of the country.

[14] PW2 reiterated that the accused was present in his office at the Matsapha International Airport when he explained to the other Asian man the procedure of exporting money out of the country. He denied that the accused was not conversant with English because he answered all questions

asked but conceded that he was slow in answering and not fluent; he denied that the accused needed a Portuguese interpreter to assist him understand English.

[15] PW2 reiterated that the accused required authority to export the money from Swaziland. When the defence counsel put to him that the money was handed to the accused by Abdul Rehwan, from Zimbabwe, he denied knowledge of that fact but insisted that the authority was required to enter the country with the money and to leave the country with the money.

[16] During re-examination PW2 told the court that his statement was recorded by a police officer in English, and, that he made it in Siswati. He reiterated that declaration is done by completing the SAD500 form.

[17] PW3, Nonhlanhla Dlamini, employed by the Swaziland Aviation Authority as a Security Officer and based at the Matsapha International Airport was the Duty Leader of her shift; their responsibility is to screen passengers and their luggage at the airport. She explained that before a passenger boards a plane, he goes through a metal detector to check what he is carrying.

[18] She told the court that she was on duty on the 1st December 2010, and, that she received information that there was a passenger who was about to board

a plane; the passenger was coming for screening. She notified the other officers who were working with her. She positioned herself behind the screen. There was an x-ray machine and a screen showing the image from the x-ray.

[19] When the passenger loaded his bags on the x-ray, a dark image appeared on the monitor and they could not ascertain and verify the contents of the bags; hence, the bags became “search bags”, and she instructed her officer Mxolisi Mhlanga to conduct a physical search on the bags. She also talked to the passenger and asked for permission to search the bags; he agreed but asked for a private search in the office. They went to the police office with the passenger and Mxolisi Mhlanga where they found Gilbert Dlamini and Khetsiwe Vilakati. She asked him what was in the two bags and he told them that it was money in excess of one million US Dollars.

[20] When asked for his “declaration form”, he said he did not have it. He was asked to open his bags and there was money wrapped in gift covers. The defence counsel conceded that the money was in two bags and that this was not in dispute. They handed the passenger to the police because he had not completed the declaration form. The police officer Gilbert Dlamini went with the passenger to the Customs Office to fetch Stanley Mashaba.

[21] The accused was subsequently taken by the police to the Matsapha Police Station together with the money. PW3 also accompanied them to the police station; she recorded a statement with the police. She narrated what happened in Siswati and the police officer wrote it down in English. Another Asian man entered the police station and assisted the accused in answering questions from the police. PW3 maintained her evidence under cross-examination; she further confirmed that the accused understood English even though he had difficulty conversing.

[22] PW4 Gilbert Dlamini, a police officer based at the Matsapha International Airport, testified that he was on duty on the 1st December 2010; he was working with Constable Samukelisiwe Masilela. Whilst he was in his office, two security officers from the Aviation Department entered his office; they were Precious Nonhlanhla Dlamini and Mxolisi Mhlanga. They were in the company of an Asian man who was carrying two bags; they requested to use their office to conduct a private search, and, the search was done in the presence of PW4. When he asked the accused what was in the bag, he told him that it was One million US Dollars.

[23] After they had finished with the private search, they handed the accused over to the police. PW4 introduced himself to the accused and further cautioned him since he was to commence investigations. He asked the

accused if he was the owner of the bags and he agreed; and when he asked him the contents of the bags, he said it was One million US dollars.

[24] Stanley Mashaba was also called to the police office, and, the accused was asked to open the bags and money in US dollars was found wrapped in gift covers. The Customs Officer confirmed that the money had not been declared. They were subsequently joined by police officers from the Fraud department in Manzini; and, the accused was eventually taken together with the money to the Matsapha Police Station. The money was locked in a safe and the accused was detained.

[25] PW4 further told the court that on the 2nd December 2010 the accused was shown that the money was still intact; PW4 was with PW2 and D/Sgt Mpendulo Dlamini. From the Matsapha Police Station, they travelled to the Central Bank in Mbabane where the money was counted and found to be \$2 666 300.00; the accused was also present when the money was counted by the Central Bank employees. PW4 maintained his evidence under cross-examination.

[26] PW5 Gilbert Nonhlanhla Beverly (nee Mavuso), employed by the Central Bank as Manager Exchange Control Division, testified that the Exchange Control monitors foreign currency coming into the country and leaving the

country in accordance with the Exchange Control Order of 1974; and that the Central Bank in turn delegates dealers to deal with foreign exchange being First National Bank, Nedbank, Standard Bank and Swazibank. She further told the court that foreign currency is controlled and restricted and that you can only buy and sell it through the banks; and that upon return, the same bank will buy the foreign currency. She told the court that the law applies to both residents and non-residents.

[27] PW5 further told the Court that if you have been in Swaziland for less than twelve months you can be allowed to leave with the foreign currency provided that there is proof that you brought the foreign currency into the country; a non-resident would have to produce a document of the bank where the foreign currency was purchased. What is required of the non-resident is the source of the foreign currency or purchase order as well as proof of declaration at the Point of Entry into Swaziland.

[28] She told the court that on the 2nd December 2010 she was on duty at her place of employment, and, the police came with the accused who was in possession of money in US dollars; the money was counted using a counting machine by Thokozani Ndlangamandla and it was \$2 666 300.00.

[29] Under cross-examination, she reiterated that foreigners are permitted to bring foreign currency into the country but should have documentary proof of source of the foreign currency as well as proof of declaration at the Point of Entry at the Customs Control.

[30] PW6 D/Sgt Mpendulo Dlamini, stationed at the Manzini Fraud Department and the investigating officer in the case, testified that on the 1st December 2010, he was on duty at the Manzini Police Regional Headquarters; and that he received a call from the Matsapha International Airport. He went there accompanied by two police officers. They found PW2, PW4 and the accused. They interviewed PW2 and PW4 and established that the accused had failed to declare foreign currency in US dollars and that the money was in two suitcases; they further established that the accused was travelling to Dubai via Oliver Tambo International Airport, and that the money was detected in his luggage by security officers of the Aviation department.

[31] PW6 and the two police officers accompanying him went to Matsapha Police Station together with the accused, PW1, PW2, PW3 and PW4 where the four crown witnesses recorded statements. Thereafter, he introduced himself to the accused as the investigating officer in the case of contravening section 81 of the Customs and Excise Act No. 21 of 1971; thereafter, he cautioned the accused according to the Judges Rules. The accused told him something which led him to charge the accused; thereafter, the accused was detained in custody.

[32] On the 2nd December 2010, PW6 and other police officers together with PW2, PW4 and accused went to the Central Bank in Mbabane to count the money and further ascertain whether it was genuine. At the bank they were assisted by PW5 and Thokozani Ndlangamandla. The money was found to be \$2 666 300.00; and it was genuine. For security reasons, the police requested the money to be kept at the Central Bank. At the bank they communicated with the accused in English. After counting the money, they went back to the Matsapha Police Station where PW6 charged the accused.

[33] The money was brought into court during the trial in one suitcase; it was counted by Thokozani Ndlangamandla from the Central Bank. The money was handed into court by PW6 and admitted as exhibit 2; the gift covers wrapping the money were also handed into court by PW6 and admitted as exhibit 1.

[34] Under cross-examination PW6 admitted that the accused was co-operative with the police during investigations. He denied that the accused was not conversant with English; he told the court that the accused was conversant with English, understood it and answered all questions put to him in English.

[35] The accused elected to give evidence in his defence; and, he told the court that he was a businessman in Mozambique and Dubai where he has

business associates. He further told the court that he trades worldwide and that his trading offices were based in Dubai.

[36] He told the court that on the 1st December 2010, he arrived in Swaziland from Mozambique via Goba Border post; and, that he had received a call from his business associates whilst in Mozambique that he would receive money on his arrival in Swaziland. He told the court that there was an arrangement for him to meet Abdul from Zimbabwe at the Matsapha International Airport: who was his business associate from Zimbabwe and a client of their office in Dubai. He met Abdul Rehwan at the airport and he gave him the money; after receiving a boarding pass, he checked in at the airport. At the screening section, he placed the bags on the screening machine, and the security lady called him and asked him what he was carrying and he told her that it was money. She asked him to open the bag and he agreed but requested to do so in private in an office; they found another man in the office who asked what was in the bag, and he told him that he was carrying money and was travelling to Dubai. They asked him to open the bag, and he opened one bundle and showed them the money; he told them he was carrying US dollars in excess of One million.

[37] The man left the office and came back with another man who asked him the same questions and he answered them; thereafter, the police came and took him to Matsapha Police Station. He told the court that it was not his first

time to use Matsapha International Airport, and that he had used the airport two or three times before; in all the previous occasions there were no seats in the flights between Mozambique and Oliver Tambo International Airport.

[38] He conceded that in all his flights using Matsapha International Airport, it was the normal procedure to declare goods that he was carrying; and, that every traveller worldwide declares the goods he is carrying. He further told the court that the screening procedure at the Matsapha International Airport was the same as in other airports worldwide; and that even in the three previous occasions at the Matsapha International Airport, his bags were subjected to the screening procedure. He reiterated that it was his evidence that every traveller is subjected to a screening procedure worldwide and that he has to declare his goods.

[39] He further told the court that the reason he met Abdul Rehwan in Swaziland and not in South Africa was because the flight from Maputo to O.R. Tambo International Airport was full; and, that he was issued with two boarding passes at Matsapha International Airport and that he would be in transit in South Africa.

[40] He told the court that nobody assisted him at the Matsapha International Airport by availing the declaration forms to him; however, this is not borne out by the evidence before this court. The evidence of PW1 is to the effect that the accused came to her with an older Asian man whom she knew as a constant traveller at the Matsapha International Airport; the older man asked her to explain the procedure for exporting money out of the country. Thereafter, she led them to the Customs Office where she introduced them to PW2, the Principal Customs officer at the airport. Along the way, she asked the accused if they wanted to declare anything, and he said they had nothing to declare. Before she left the two men with PW2, she explained to him the information which they required.

[41] PW2 further told the Court that he had explained to the accused and his companion the procedure to be followed when taking money out of the country as well as the prescribed form that has to be completed in declaring the money; PW2 confirmed that he explained to them that in addition to completing the prescribed form, they required permission from the Central Bank to export the money. They told PW2 that in future they would like to take money to Dubai; they told PW2 that when the time comes, they would complete the prescribed form before taking the money out of the country.

[42] Under cross-examination, the accused told the court that he would not call Abdul Rehwan to give evidence on his behalf and verify his story. He further confirmed that there were no documents accompanying the money, that is the source of the foreign currency from the bank which issued the currency as well as proof of declaration at the Point of Entry in Swaziland. He further told the court that since Abdul Rehwan would not come from Zimbabwe to verify his story, an officer from Dubai would do so; however, this never happened.

[43] He further conceded that when he deposed to an affidavit in support of his bail application, he did not say that he received the money from Abdul Rehwan; but he had said that the money was paid to him by his customers in Mozambique.

[44] Section 81 of the Customs and Excise Act No. 21 of 1971 provides the following:

“any person who fails to declare any dutiable goods or goods the importation or exportation of which is prohibited or restricted under any law and which he has upon his person or in his possession, or makes any statement for customs or excise purposes as to any dutiable goods upon his person or in his possession from which any dutiable goods or prohibited or restricted goods are omitted, shall, if any such goods are discovered to be or to have been upon his person or in his possession at the time of the failure or of the statement, be guilty of an

offence and liable on conviction to a fine of five thousand emalangeni or treble the value of the goods in question, whichever is the greater, or imprisonment for two years, or to both and the goods in question and any other goods contained in the same package as well as the package itself shall be liable to forfeiture.”

[45] It is apparent from the provisions of the Exchange Control Regulations of 1975 made in terms of the Exchange Control Order No. 40 of 1974 that the exportation and importation of foreign currency is restricted in Swaziland. Section 81 of the Customs and Excise Act No. 21 of 1971 imposes a duty to declare goods the exportation of which is restricted by law; this section further penalises failure to declare goods which are restricted by law.

[46] The preceding paragraphs indicate that the accused did not declare the foreign currency at the Customs Office at the Matsapha International Airport. Furthermore, the evidence shows that the accused knew that he had to declare the money. He conceded during his evidence in-chief that he had previously used the Matsapha International Airport on at least two or three times, and, that in all these instances he had declared his goods. He further told the court that it was normal procedure for every traveller worldwide to declare his goods; and that the screening process was a standard procedure worldwide. Similarly, he claimed that he trades worldwide with a trading office in Dubai and businesses in Mozambique and Dubai.

[47] He told the court that he was given the money at the airport by Abdul Rehwan from Zimbabwe; however, he confirmed under cross-examination that he would not call Abdul to his defence to verify his story. He further conceded that there were no documents accompanying the foreign currency in respect of the source of the currency and proof of declaration. The accused was taking the money to Dubai which is a country outside the Common Monetary Area. The failure of Abdul to testify and the absence of source documents cast doubt that the money originated from Zimbabwe but from Mozambique. He conceded under cross-examination that he deposed to an affidavit in support of his bail application where he stated under oath that he received the money from his customers in Mozambique.

[48] The evidence of PW1 and PW2 is conclusive evidence that the accused and his companion sought and was advised of the procedure for exporting foreign currency; PW2 explained the procedure in detail including the declaration Form SAD500 which is completed in declaring the foreign currency. The accused and his companion eventually informed PW2 that the information they required on exporting foreign currency was for future use. They also told PW1 that they did not have anything to declare on that day.

[49] PW2 told the court that there is a board outside the offices of the Customs Department at the airport where the procedure relating to declaration of goods is clearly outlined; in addition there is a sign at the door to his offices which has information to travellers on the declaration of goods. PW2 further told the court that travellers can also obtain information on declaration of goods from the police and the immigration office situated within the airport. It is common cause that the money was wrapped in gift covers, and the screening machine could not detect the goods in the two suitcases; this leads to the inference that the intention was to obfuscate the screening machine from detecting the contents of the luggage.

[50] The Crown has proved the first count beyond reasonable doubt that the accused is guilty of contravening section 81 of the Customs and Excise Act No. 21 of 1971.

[51] I agree with the defence that the Crown has not proved the second count beyond reasonable doubt. The essence of this offence is that the accused must fail to declare and produce foreign currency in his possession when requested to do so by a police officer. The Crown has not adduced such evidence at all. It is my considered view that the second count should have been an alternative count to the first count. He is acquitted and discharged on the second count.

[52] In the circumstances the accused is guilty of the first count of contravening section 81 of the Customs and Excise Act No. 21 of 1971.

[53] There is further written evidence from Mozambique that the accused died on the 20th April 2012. These documents have been confirmed by the Court's Sworn Interpreter, Daniel Cacachal, as being authentic evidence that the accused has died. One of the documents is said to be a Death Certificate.

[54] The Death of the accused brings to an end the matter since there is no need to consider the question of sentencing and mitigation of sentence in the absence of the accused. However, a conviction of an accused person under section 81 of the Customs and Excise Act No. 21 of 1971 is accompanied by a forfeiture clause which is mandatory in nature; it provides that "the goods in question and any other goods contained in the same package as well as the package itself shall be liable to forfeiture".

[55] In view of the Conviction of the accused person in terms of section 81 of the Customs and Excise Act No. 21 of 1971, the amount of \$2 666 300.00 (Two million six hundred and sixty six thousand three hundred US Dollars) which the accused failed to declare on the 1st December 2010 at the

Matsapha International Airport in Contravention of Section 31 of the Act is forfeited to the State.

[56] In coming to this conclusion, I am aware of section 21 (3) and (15) of the constitution which state the following:

“(3) Except with the free consent of the person concerned and for purposes of subsection (2), the trial shall not take place in the absence of that person unless that person acts so as to render the continuance of the proceedings in the presence of that person impracticable and the court has ordered that the person to be removed and the trial to proceed in the absence of that person....

(15) In this section “criminal of offence” means a criminal offence under the law of Swaziland, and “proceedings” in relation to a court or adjudicating authority includes the announcement of the decision of the court or adjudicating authority.”

[57] However, a reading of these provisions means that a criminal trial should proceed in the presence of the accused; however, it would be absurd to suggest that a judgment should not be pronounced where the accused is not present in court by virtue of his death, particularly where there is a forfeiture clause. If the accused is convicted of the offence, the court

should proceed and pronounce the judgment for purposes of the forfeiture clause. The accused was present in court during the criminal proceedings until they were finalised in 2011; what remained was the judgment on his guilt or otherwise which in turn would determine the forfeiture clause.

[58] In the circumstances I make the following orders:

- (a) The accused is guilty of contravening section 81 of the Customs and Excise Act No. 21 of 1971.
- (b) The accused is acquitted and discharged of contravening section 4 (3a and 3b) as read together with section 23 of the Exchange Control Regulations of 1975 as contained in the Kings Order In-Council No. 40 of 1975.
- (c) The amount of \$2 666 300.00 (Two million six hundred and sixty six thousand three hundred US Dollars) which the accused failed to declare at the Matsapha International Airport on the 1st December 2010 in contravention of Section 31 of the Act is forfeited to the State.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

