IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE CASE NO. 174/2017

In the matter between

REX

And

LUCKY MATSENJWA

Neutral Citation: *REX vs LUCKY MATSENJWA (174/2017) [2017] SZHC 268 (02 December 2020)*

Coram : MAMBA J.

Delivered : 02 DECEMBER 2020

[1] When the trial started, the accused faced 11 counts. At the close of the prosecution case, he applied to be acquitted and discharged on all those counts. Judgment was handed down on 04 February, 2020 on that application and the result thereof was that the application was

successful in respect of seven of those charges. These were the following counts, namely:

(a) Count 1 (Murder)
(b) Count 2 (Defeating the Ends of Justice)
(c) Count 3 (Theft)
(d) Count 4 (Contempt of Court)
(e) Count 7 (Defeating the Ends of Justice)
(f) Count 10 (Attempt to Defeat the Ends of Justice)
(g) Count 11 (Attempt to Defeat the Ends of Justice)

[2] The application for the acquittal and discharge of the accused, in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended), was dismissed in respect of counts 5, 6, 8 and 9 as set out in the indictment. In essence the Court held that there was evidence implicating the accused on these counts. This dismissal meant in effect that there was evidence against the accused upon which a Court acting reasonably and judicially or carefully may convict. Following that order by the court, the accused presented his case or evidence. He testified on his own behalf and also led the evidence of Vusani Thulilwempi Dlamini in support of his alibi regarding the events of the 12th day of May 2017.

[3] It is noted herein that the evidence of Vusani T. Dlamini was led after the accused had closed his case and had subsequently applied to reopen it in order to lead the evidence of the said witness. This is of course permissible in law. (See *SV Felthun 1999 (1) SACR 481*). This application was also not opposed by the crown. Also to be noted is the fact that, initially the accused was represented by Counsel, but was not so represented after the ruling in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938.

[4] On count 5, it is alleged that on or about the month of April 2017 and at or near Garage Bar, Mbabane in the Hhohho Region, [he] unlawfully [and] with intent to defeat or obstruct the course of justice, requested one Ngcebo Vermaak to convince – Mduduzi Sichaza Matsebula not to give evidence against the accused person in the trial of the Prevention of Corruption charges' the accused had been charged with before this Court.

[5] Count 6 charges that the accused is guilty of Attempting to Defeat or Obstruct the Course of Justice

'In that upon or about the 19th day of May 2017 the said accused did unlawfully and with intent to defeat or obstruct the course of justice requested one Ngcebo Vermaak whom he (the accused) foresaw was a potential witness in the investigation of the circumstances leading to the death of one Mduduzi Sichaza Matsebula to lie to the investigators that he (the accused person) was not in Mbabane on the 12th May 2017, whereas this information was to the knowledge of the accused false and he (the accused) having been in Mbabane on the said 12th May 2017.

[6] In simple terms, on Count 5 the crown alleges that whilst the accused was facing a charge under the Prevention of Corruption Act, he, the accused, then urged or requested Ngcebo Vermaak to 'convince Sichaza Matsebula not to give evidence against him in or during that trial. It is further alleged that when the accused made this request to Vermaak, he knew that the said Matsebula was a potential witness for the crown in that case.

[7] Count 6 is, I think, linked with count 5. The crown alleges that the accused was in Mbabane on 12 May 2017 and he knew that this fact was known to Vermaak. He was also aware that the Police

(investigators) in the circumstances leading to the death of Mr Matsebula were due to interrogate or interview Mr Vermaak, and Mr Vermaak was aware that the accused person was in Mbabane on 12 May 2017. The accused then, on or about the 19th day of May, 2017 unlawfully and deliberately or intentionally requested Mr Vermaak to lie to the investigators that he was not in Mbabane on 12 May 2017.' So, on count 5, the allegation is that the accused solicited, unlawfully, the help of Mr Vermaak to persuade Mr Matsebula not to testify against the accused in the criminal trial he was facing whilst on count 6, the accused is said to have urged Mr Vermaak to tell the Police investigators who were investigating the circumstances leading to the death of Mr Matsebula, that he, the accused, had not been in Mbabane on 12 May, 2017 whereas in truth and in fact he, the accused, had been in Mbabane on the said date.

[8] The evidence of Mr Vermaak, who gave evidence as PW7, is relevant in respect of both count 5 and count 6 and I shall deal with these counts simultaneously herein when I examine the evidence of PW7, but first, I think it is convenient at this stage to examine, briefly, the relevant law in this connection.

[9] It is observed that whilst it may be easy to imagine instances where there has been an attempt to interfere with or corrupt or obstruct the course or administration of justice, it is generally, accepted that it is not easy to say, notionally, that a particular set of facts or acts may be an actual Defeating of the Ends of Justice. However, I take the view, and I take it very strongly, that this is a far cry from saying that the course of justice may never be defeated or obstructed.

[10] 'Defeating or obstructing the Course of Justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.' (P.M.A. Hunt, South African Criminal Law and Procedure, Vo.II, 1970 ed. at 141). And at 155, the Learned author states that:

'(1) Just as the actus reus may consist in the unlawful endeavour to influence a witness so it may consist in trying to bribe or otherwise improperly influence the judge or the investigating officer or the public prosecutor. Such conduct might be charged as an attempt to defeat or obstruct the course of justice or as bribery *eo nomine* or as contempt of Court or as a statutory contravention.

(2) Another way of committing this crime is by procuring the escape of an awaiting trial prisoner.'

(Footnotes have been omitted by me).

The essential elements of this crime are:

(a) Mens rea (in the form of actual or legal intention),

(b) An act which defeats or corrupts the due course of justice.

Where the act or conduct complained of does not actually achieve its intended purpose, an attempt is nonetheless committed. The conduct complained of must, of course be such that it is not mere preparation but 'the commencement or the consummation thereof. Thus, in *RV Port Shepstone Investments (Pty) Ltd 1950 (4) SA 629 (AD),* the Court came to the conclusion or held that when an accused persuades someone to agree to approach a witness in order to induce that witness to give false evidence at a pending trial, the accused is guilty of an attempt. Where, however, the middle man refuses to approach the potential witness, 'that would be no more than an incitement. On the other hand if X himself approached Y directly, that would be an attempt, even if Y indignantly refused to cooperate.' (Hunt ditto at 150).

[11] In *Port Shepstone Hoexter JA* referred with approval the following statement by De Villiers AJA in *Rex v Zackon 1919 AD 175 at 182*:

"There is no dispute about the law. The late Chief Justice in *Rex v Foye and Carlin (2 B.A.C. 121)* stated it in this way: 'The important questions in each case are whether it was a necessary consequence of the prisoners' acts to prevent (? pervert) the due administration of justice and whether the prisoner committed them knowingly and wilfully.' Thereafter the present Chief Justice in the case of *Rex v Cowan and Davies (1903, T.S 798)* formulated it as follows: 'any corrupt dealing with testimony so as to pervert the ordinary and true course which it should take does in my opinion amount to an attempt to defeat the ends of justice.' And finally De Villiers, C.J., in the case of *Fein and Cohen v Colonial Government (23 S.C. 750)* summed up the law thus: 'The principle underlying these and other statement of the law made by *Voet* in this-that the public interest requires that no one shall be allowed with impunity to wilfully impede or obstruct or otherwise interfere with the due course of justice, or to bring the administration of justice into contempt.' Although differently stated, it all comes to this that any tampering with evidence which is to be used before a Court of law is an interference with the course of justice, and

therefore an attempt to pervert or obstruct or defeat the ends of justice, and as such punishable under the *lex Cornelia de falsis.* Now to constitute the *crimen falsi* there must be in the first place *dolus* or the *mens rea*. And I quite agree with counsel for the applicant that there must be proof that the act was not done in error or in ignorance, knowledge being essential to constitute the offence. But upon the facts as found by the Magistrate (and there is no reason to differ from him) it is clear that the accused knew that the girl, who was not 14 at the time, was under the age of 16. The argument that the mother had not been subpoenaed may be of importance when there is a question of contempt of Court, but is irrelevant here. I agree that the mother was a material witness, and therefore it is necessary to consider whether materiality is necessary in a charge of this nature. But the contention that in any case the mother would not have been believed and therefore that her evidence could not have had the effect of defeating the ends of justice is based upon the misconception that the law regards the ultimate result of the act. That is no so. It is the attempt to induce the witness to give false evidence which constitutes the offence."

Destroying or tampering with evidence may be another form of attempting to

> Defeat or obstruct the ends of justice. (*Vide Oosthuizen and another v The State 180/2018) [2019] ZASCA 182 (02 December 2019)* at para 23 where evidence in the form of a coffin was destroyed by the

appellants). Vide also *R v Shiba and 2 Others, 1982-1986 (1) SLR140*.

[12] In the judgment delivered by this Court on 04 February 2020, I summarised the relevant evidence tendered by PW7 as follows:

> '[16] PW7 testified that sometime in April 2017, whilst at Garage Bar he was approached by the accused who requested him to speak to the deceased on his behalf regarding the case, he, the accused was facing and wherein the deceased was a witness. The accused informed PW7 that he had unsuccessfully enlisted the help of several persons, including one Chippa in an attempt to talk to the deceased and urge him not to give evidence against him in the pending case. PW7 said he was reluctant to intercede on behalf of the accused and thus advised the accused to approach him whenever he was in the company of the deceased. This was on the 05 May 2017. Before then, the accused had telephoned PW7 and alleged that the deceased was ferrying or transporting dagga in the official motor vehicle that he used as part of the convoy of the Chief Justice.

[17] Vermaak also gave evidence that on 12 May 2017, the accused telephoned him and informed him that he was coming to Mbabane that evening and he requested him to arrange that the two of them meet with the deceased over drinks. PW7 agreed to set up this meeting at Solanis bar at about 8 pm. The accused, according to PW7, agreed to this arrangement. PW7 met the accused at Solanis at about 9 pm and the accused requested him to invite the deceased to join them there. About 30 Minutes later, PW7 called the deceased who agreed to join him at Solanis. When the deceased stated that he had no transport to travel to the bar, Vermaak advised him that he would hire a taxi to fetch him from the gate at the Police Camp where he stayed. The accused, according to Vermaak then offered that his brother who was at Galp Filling Station and was driving in a black VW Golf could collect the deceased rather than a taxi. This offer was conveyed by Vermaak to the deceased. However, Vermaak did not say that the driver in the black golf was a brother to the accused. He said the occupants of the car were his friends. The deceased

related to him that a black golf car had just gone past the gate where he was. The deceased was then advised to wait at the gate near mater Dorolosa School. Thereafter the accused left the bar saying he was going to see his girlfriend at a place known as Corporation. Before departing, he gave Vermaak E200.00 to buy drinks for himself and the deceased whilst he, the accused was away.

18] Vermaak told the court that after waiting for about 15 minutes in vain for the deceased, the accused and his brother, he telephoned the accused. In response, the accused promised to call him within five minutes, which he did. The accused is reported to have told PW7 that the people in the golf car had lied to him, presumably about offering to transport the deceased from the Police Camp to the bar. He told PW7 that the people had told him that they were then at Ezulwini not in Mbabane. PW7 left the bar at around 1:30 am and went to his house.

[19] It was the evidence of PW7 that on Saturday i.e. 13 May 2017 at 9:00 am, the accused telephoned him using a South African mobile telephone number to find out if PW7 had met with the deceased the previous night. The accused further related to this witness that he had had to convey his sister to Nelspruit hospital as a matter of urgency and that is why he had not returned to the bar the previous night. PW7 informed him that the deceased had not shown up at the bar. Later that day at around 3 pm the accused called PW7 again to enquire if the witness had met with the deceased. At his time PW7 was on duty in the Hlathikhulu Area. He said he became worried and suspicious of what might have happened to the deceased. He then decided to relay his fears to his superior in Nhlangano, a Mr Shabangu. This was after failing to speak to Mr Solomon Mavuso

[20] PW7 testified further that, using a local mobile cellular telephone number, the accused called him that evening and told him that he must, on being questioned about his whereabouts by the police, deny that the two had met at Solanis the previous night. The conversation between

the two was followed by yet another telephone call by the accused the next day (Sunday). The accused enquired if there were any reports concerning the deceased. The next day i.e. Monday, PW7 was summoned to the Mbabane Police Station where he was interviewed and recorded a statement by the police. That was after he had advised PW4 to report the disappearance of her husband to the police. At about 5 pm on that day, the accused telephoned him to find out why he had been called to the Police Station. PW7 informed the accused that he had been asked about the whereabouts of the deceased. In response the accused advised him to deny that the two of them had met in Mbabane on 12 May 2017.

[21] After the discovery of the body of the deceased, the accused, again using a South African mobile telephone number called PW7 and advised this witness to maintain the denial referred to above. This prompted PW7 to ask

the accused as to what had actually happened to the deceased. The accused said he did not know anything.

[22] According to PW7, the accused called him on the 19th day of May 2017 and told him he was in Nelspruit 'to cleanse' himself in connection with the matter involving the deceased. When this occurred, Vermaak was in the company of Fikile Masilela. He had his telephone on loudspeaker as he spoke with the accused. Fikile revealed to PW7 that she had been asked by the accused to find out from PW7 why he had been questioned by the police. The accused repeated the allegation that the deceased had been transporting dagga using the official police vehicle. The last time Vermaak spoke to the accused was 25 May 2017, according to him (PW7).'

I pose here to state that the last sentence in the above except is not correct. This was pointed out to the Court by the accused during submissions. This Court is indebted to him for this. The error is mine and not Mr. Vermaak. The correct evidence by PW7 is that he stopped communicating (telephonically) with the accused on 22 May, 2017. He stated as follows:

'On 22 May 2017, I was taken to my father at Our Lady of Sorrows for safety. The accused frequently called using a South African mobile telephone number and asked me to meet with him. He also told me that Mavuso was looking for him and he was returning to Swaziland. That's the last time I spoke to him as I then changed to a South African mobile number too.'

[13] Under cross examination, by Counsel for the accused, it was denied that the accused ever asked or requested PW7 to urge Mr. Matsebula not to give evidence against the accused. It was denied further that the accused was in Mbabane on 12 May 2017. PW7 however, maintained his evidence in chief that he met him at Solanis (in Mbabane), by arrangement, at about 9 pm on that day. PW7 said he could not remember the date he had the conversation with the accused at the Garage bar. He said it was in April of 2017. It was specifically put to PW7 that the accused was at his house in kaShali or Ngwane Park on 12 May 2017, entertaining his friends which included Vusani Dlamini, who left his house at about 11:30 pm.

[14] Another witness who testified about the presence of the accused at Solanis on the 12th day of May 2017 is Derrick Masilela. In the judgment on the application for the acquittal and discharge of the accused at the close of the case for the crown, his evidence is captured as follows:

'[25] PW13 Bhekumuzi Masilela (Derrick) testified that he knew both Vermaak and the accused at the relevant time and that he saw them both together at Solanis Bar on the night of 12 May 2017. He said the time was around 8-9 pm. He operated a taxi service on the night and he left the bar after being hired by a certain lady to drive her away. On his return to the bar that night, he did not see either of them at the bar. Towards day break, however, he saw PW7 talking to one of the taxi man outside the bar.

[26] PW13 denied that he was fabricating the version or story that he saw the accused at Solanis on the night in question.'

[15] The presence of PW7 at the bar in question on 12 May 2017 is confirmed by PW10; Police Officer Detective Constable Sihle Dlamini. He also corroborated the evidence of PW7 that he left the

bar around 1.00 am on 13 May 2017. PW7 also testified that he was in the bar with Ntokozo Msibi when PW7 requested the use of his motor vehicle to go and transport his girlfriend to the bar that night. He, however, did not mention seeing the accused in the bar that night, despite the fact that he said he arrived at the bar almost at the same time as PW7; which was around 8.30 pm. He said PW7 set at a table next to that which was occupied by him and his companion, Ntokozo Msibi.

[16] The evidence of Nhlakanipho Mongi Simelane (PW9) is relevant in respect of counts 8 and 9. First, on count 8, the crown alleges that on the 14th day of May, 2017 the accused 'unlawfully and with intent to defeat or obstruct the course of justice, requested [PW9], whom he foresaw as a potential witness in the investigation of the circumstances leading to the death of [Mr Matsebula] to lie to the investigators that he, the accused was not in Mbabane on 12 May, 2017, whereas this information was to the knowledge of the accused

false and he, the accused, having been in Mbabane on the said 12th May 2017.'

[17] On count 9, the accused is said to have told PW9 'to deny knowledge of any information regarding him and [Mr Matsebula] to the investigators of the murder of [Mr Matsebula] whereas this information was to the knowledge of the accused false---.' It is, I suppose, the denial of any knowledge about the accused and Mr Matsebula, that was or would be false. This offence was allegedly committed on 15 May 2017.

[18] PW9 testified as follows:

'[43] --- he used to drive PW8 around and that is how he got used to or became acquainted with the accused who would occasionally telephone him or PW8 and ask him about the whereabouts of the deceased. In the course of one such calls, he asked the accused why the accused was not calling and speaking directly to the deceased because they were both Police Officers. In response the accused told PW9 that the deceased was not taking his calls.

[44] According to PW9, the accused called him on his mobile telephone at about 8 pm and agreed to meet him and PW8 at the Garage Bar in Msunduza but he, the accused, never came there. On the following day, i.e, 13 May 2017, the accused telephoned this witness to say that if asked if the accused had been in Mbabane the previous day i.e. 12 May 2017, PW9 must say that the accused had called to say that he was held up somewhere and was not in Mbabane. Again, according to this witness, the accused telephoned him on Monday and told him that he must deny that he, the accused, had said anything concerning the deceased.

[45] Whilst it is clear from the evidence of PW9 that the accused did not honour the appointment to meet him at the Garage Bar on 12 May 2017, it is not evident that he was not in Mbabane on the said night. Similarly, it is crystal clear from this evidence that the accused did not telephone PW9 to tell him that he was held up somewhere and he would not be in Mbabane on 12 May 2017. Therefore to ask PW9 to relate this information to the police was to mislead the police. The same is true of his request that PW9 must not tell the Police that he had said anything concerning the deceased, because he

had *inter alia*, told PW9 that the deceased was not taking or was refusing to take his telephone calls. Basically, the evidence of PW9 is that the accused told him to lie about him to the police investigators. That is an attempt to defeat or obstruct the course of Justice. That being the case, the application for the discharge of the accused on Count 8 and 9 is refused. There is evidence implicating him on those Counts.'

[19] The accused in his defence testified that he never went to Mbabane on the 12th day of May 2017. He informed the Court that he was at his house at Ngwane Park in Manzini and his guests included Vusani Dlamini: This evidence was also confirmed by Vusani Dlamini. The accused denied that he told PW7 to deny his presence in Mbabane to the police investigators. He denied telling PW7 that he had been to Nelspruit to cleanse himself. He stated that he went to Nelspruit on 19 May 2017 for medical purposes or examination and he had reported this to the relevant police officers.

[20] The accused informed the Court that at the material time he was running or operating a Private Investigation business. One of his

employees in the said business was Musa Dlamini who was using mobile telephone number 76025381 on 12 May 2017. This telephone number, it is common cause, is registered in the name of the accused with the relevant service provider; MTN Eswatini.

[21] The accused denied having spoken to PW9 on the 14th day of May 2017. He stated that, he had no reason to speak to him inasmuch as he was not even aware that PW9 would be questioned by the police on any matter or issue.

[22] According to the evidence of PW9, although the accused had promised to meet him and PW8 at the Garage Bar on 12 May 2017, he never honoured that appointment. PW8 and PW9 finally left that bar and went to Timele Bar. The Garage Pub is situated at Msunduza in Mbabane. The evidence of PW9 is substantially corroborated by PW8 as far as the accused failing to show up at the Garage Bar on the day in question. Again, neither of these two witnesses was able to say that the accused was in Mbabane on the 12 May 2017.

[23] In the final analysis, both PW7 and PW9 are single witnesses in respect of whatever was said between them and the accused person. For this reason, the Court has to assess and evaluate their respective evidence as such single witnesses. This does not mean, however, that corroboration of their evidence is, as a matter of law, required. Caution only is required in the assessment of their evidence on the issues they testify on.

[24] Section 236 of the Criminal Procedure and Evidence Act 67 of 1938 provides in part as follows:

'The Court by which any person prosecuted for any offence is tried, may convict him of any offence alleged against him in the indictment or summons on the single evidence of a competent and credible witness---'

In *Oosthuizen (*supra), the Court had this to say on a similar legal issue:

'[13] In criminal proceedings the State bears the onus to prove the guilt of the accused beyond a reasonable doubt. The accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the explanation is false beyond reasonable doubt. 1 The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.2 The appellant's conviction can therefore only be sustained after consideration of

all the evidence and their version of the events is found to be false beyond reasonable doubt.

[14] Before us, it was contended that the complainants did not pass the litmus test for the evidence of a single witness in terms of s 208 of the Criminal Procedure Act 51 of 1977 (the CPA) as laid down in R v Mokoena3 and succinctly set out in S v Sauls & others:4 '[T]he absence of the word "credible" is of no significance; the single witness must still be credible, but there are . . . "indefinite degrees in this character we call credibility". There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is

satisfied that the truth has been told.'

[25] PW21 Ntokozo Mngomezulu gave evidence regarding the call records extracted from the MTN Eswatini mobile system. His evidence is contained in Exhibit H- which is an affidavit which he compiled on the information retrieved from their mobile telephone system records.

During questioning (in cross examination) he stated that the last call made by PW7 (76065095) to 76025381 on 12 May, 2017 was at 6.45 pm. This information is captured in exhibit I(a) – I(d). According to I(a), the last call made by 76025381 to 76065095 on that date was at 8:18.57 pm and lasted for 26 seconds. The caller was around Mbabane SBIS.

[26] Mr Matsebula's mobile telephone number was, at the material time, 76242855. The last call made to and from this number on 12 May, appears to have been at 19:42:12 and was made to 76071965. This is reflected in exhibit S4 and the call lasted for 31 seconds.

[27] From the above mobile telephone records, there is evidence that the gadget (mobile telephone) using number 76025381 was last used in Mbabane at 9:02:50 pm on 12 May 2017, and thereafter at kaShali/Ngwane Park the next day (13 May 2017) at 5:45:12 am. The accused has stated that Musa Dlamini was using this mobile telephone on 12 May 2017. Musa did not testify in this case and the accused stated that his whereabouts were unknown to him; since his interrogation by the police in connection with this matter.

[28] I have carefully considered the evidence of PW13 on what he allegedly saw at Solani's on 12 May 2017. He recorded a statement on this on 27 June 2017 and that is when he first related his observations to the police. He knew both the accused and PW7. He did not, however, inform the Court what was so particular about him observing the accused and PW7 talking at the relevant time. He was a mere taxi man and he said he left the scene after being hired by Ntombi. He returned to the bar and did not notice whether the accused and PW7 were still in the bar, until he saw PW7 talking to one of the taxi drivers outside the bar. This was during the morning hours, he said. This is, however, not confirmed by PW7 who testified that he was seated inside the bar with his girlfriend and left the bar driving Sihle's motor vehicle. Neither Ntokozo Msibi nor Sihle Dlamini have testified about the presence of the accused at the bar on the night in question. PW13 also denied many things appearing in his statement to the police, saying that it was incorrectly recorded. His evidence is not reliable in my judgment.

[29] The crown bears the onus to satisfy this Court or establish its case against the accused beyond a reasonable doubt. The accused has no onus or burden to convince the Court that he is innocent of the charges against him.

[30] In *Rex v Phumelele Lindiwe Dlamini and 3 Others (320/2007) [2016] SZHC 204 (13 October 2016)*, this Court stated the following:

In *S v Sithole and others 1999 (1) SACR 585* the headnote reads as follows:

> '[67] There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false of

> mistaken. Whichever way one phrases the test, it is to be applied upon an assessment of all the evidence, and not by a process of piecemeal reasoning. In other words, it cannot be applied by looking only at the evidence of the state, or the accused, in isolation. It may be that the evidence of the state is such that the conflicting evidence of the accused must, by process of logical reasoning, be untrue; or it may be that the evidence of the accused is such that a possibility that it may be true cannot be excluded by the state's evidence; but in either event a court must bear in mind all the evidence when reaching the appropriate conclusion."

And in *S v Van der Meyden 1999 (1) SASV 447 (W), 1999 (2) SA 79 (W)* the court stated as follows:

> "It is difficult to see how a defence can possibly be true if at the same time the state's case with which it is irreconcilable is "completely acceptable and unshaken." The passage seems to suggest that the evidence is to be separated into compartments, and the defence case examine in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the

accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or acquit, only part of the evidence. The conclusion which it arrives at must account for all the evidence. …

I am not sure that elaboration upon a well established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the

conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might found to be unreliable; and some of it might be found to be only

possibly false or unreliable; but none of it might simply be ignored."

[31] PW 9 Mongi Simelane, did not see the accused in Mbabane on 12 May 2017 – although the accused had promised to meet with him at the Garage bar that night. The accused did not honour that undertaking made to PW9. Because of this fact, this Court cannot in my judgment conclude that the crown has established beyond any reasonable doubt that the accused would have been guilty of telling PW9 to lie that he had not been in Mbabane on the relevant day. Mongi never saw him in Mbabane anyway. For this reason alone, the crown has failed to prove its case beyond any reasonable doubt against the accused in respect of Count 8. He is accordingly found not guilty and acquitted and discharged on this count.

[32] Count 9 alleges that the accused requested Mongi 'to deny knowledge of any information regarding him and [Mr Matsebula] to the investigators.

This is said to have occurred in April 2017. The information that Mongi had about the accused and Mr Matsebula was that

(a) Matsebula was a witness in a criminal case against the accused.

(b) The accused informed Mongi that Matsebula was not taking his telephone calls and

(c) The accused wished that Matsebula had died in the motor vehicle he had been involved in.

The question that immediately arises from this is how would withholding this information from the police, defeat or obstruct the due administration of justice? The crown has not provided the answer to this question. In any event, other than this allegation by Mongi, there is no cogent, reliable or credible evidence to establish this allegation. It is also not insignificant that Mongi was unable to state under what circumstances this allegation was made by the accused. The telephone records between him and the accused do not seem to support him either on this. Mongi was, in my judgment, not a credible witness. Consequently, the accused is found not guilty and is acquitted on count 9.

[33] It was the evidence of PW7 that the accused used to telephone him about 4 times a day after the 12th day of May 2017. This went on, he

said, until the 22nd day of May 2017 when the accused was arrested and taken into custody and PW7 changed his local telephone number and began using a South African one. There is however, no evidence of this from the information handed in in this case. I have also referred to the exhibits showing the telephone calls that were made by PW7 on 12 May 2017. Contrary to his evidence that he telephoned Mr Matsebula at least twice that evening whilst at Solani's, this is not confirmed by any of the exhibits. This is also true of the telephone recordings between himself and the accused. There is no record of any calls between them that were made after 9.00 pm that day. I am mindful of course, of the fact that PW7 did testify that at times the accused would call him using a South African telephone number. That, however, is no reason for the want or lack of any recording on his own mobile telephone. That telephone number 76025381 was used in Mbabane at the relevant time; that is, on 12 May 2017, has been established by the crown. The accused has offered the explanation that this gadget was at the relevant time being used by Musa Dlamini, an employee of his Private Investigating business.

The accused told the Court further that he supplied this information to the police during their investigation and this led to the Police interrogation of Musa and, perhaps his disappearance.

[34] The accused has further testified that he was not in Mbabane on the 12th May 2017 but was at his house at kaShali Ngwane Park. His evidence in this regard has been corroborated or confirmed by Vusani T. Dlamini. Both the accused and Vusani were closely cross-examined by the crown and both were unshaken by such cross-examination.

[35] The only persons who allegedly saw the accused in Mbabane on 12 May 2017 are PW7 and PW13. Their evidence is nonetheless bland and not supported by the other witnesses, one would have expected to confirm such evidence. In the final analysis the accused has no onus to satisfy the Court that his version of what took place or did not take place, is true. His duty is to satisfy the Court that his version or story could, in the circumstances of the case, be reasonably possibly true.

[36] It is common cause that it was common knowledge amongst the members of the Eswatini Royal Police Service that there was bad blood between the accused and Mr Matsebula. Both were police officers. The source of the said bad blood was that the accused was facing a criminal charge under the Prevention of Corruption Act and Mr Matsebula was perceived by the accused as a key witness for the crown in that matter. Additionally, when Mr Matsebula disappeared and his lifeless body was found, his close associates started pointing accusing fingers in the direction of PW7. This worried him. After all, he had, according to him lured Mr. Matsebula out of his house that night. He was therefore expected to supply the answers or solution to the puzzle.

[37] In passing, I record that I have referred above to the *Port Shepstone* case which is authority for the view that where X solicits the help of Y to influence Z to unlawfully change his evidence, that is not a crime of attempting to Defeat the due administration of Justice. It could be the crime of incitement and if all the essential elements of

the crime are satisfied then Section 194 of the Criminal Procedure and Evidence Act would be invoked.

[38] From the above facts and analysis of the applicable law, I am not satisfied that the crown has, beyond any reasonable doubt proven its case against the accused on counts 5 and 6. The crown has failed to establish that the accused was in Mbabane on the day in question or that the accused did ask PW7 to lie to the police investigators and say that he was not in Mbabane on 12 May 2017.

[39] In summary, the accused is found not guilty and is acquitted on counts 5, 6, 8, and 9.

FOR THE CROWN: **MR. M. NXUMALO**

FOR THE ACCUSED: **IN PERSON**