

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

APPEAL NO: A294/10

In the matter between:

ALBERTO MAKWAKWA	1 ST APPELLANT
ANGELO MONDLANI	2 ND APPELLANT
MANGANI MALENGE	3 RD APPELLANT
ABEL NHATSAVE	4 TH APPELLANT
GEORGE THOMAS	5 TH APPELLANT
FRANCISCO ALBERTO MANDLATE	6 TH APPELLANT
ROCKY ANTONY MASINGA	7 TH APPELLANT

And

THE STATE	RESPONDENT
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CORAM: VAN DER MERWE, J et CJ MUSI, J

JUDGMENT BY: C.J. MUSI, J

HEARD ON: 31 JANUARY 2011

DELIVERED ON: 11 FEBRUARY 2011

[1] On the 22nd of April 2009 millions of eligible South Africans exercised their democratic right to vote for their respective political parties and leaders. Ironically, on the same day, in the neighbouring Kingdom of Lesotho, a constitutional monarchy, a group of armed men attempted to seize political power by violent means.

[2] The appellants were arrested at Ladybrand, on the 22nd of April

2009, for being illegal immigrants and it was subsequently alleged that they participated in the failed *coup d'état* in the Kingdom of Lesotho.

- [3] The Minister of Law & Constitutional Affairs of the Kingdom of Lesotho applied to the Minister of Justice and Constitutional Development of the Republic of South Africa for their extradition, in terms of section 4 (1) of the Extradition Act (the Act).¹ They were properly brought before a magistrate, in terms of section 9 (1) of the Act, to hold an enquiry with a view to surrender them to the Kingdom of Lesotho.² It is alleged that they committed the following offences in the Kingdom of Lesotho *viz*, murder, attempted murder, robbery, kidnapping, illegal possession of fire arms, contravention of the Internal Security Act of the Kingdom of Lesotho, contravention of the criminal Procedure and Evidence Act of the Kingdom of Lesotho *viz*, conspiracy to kill the Prime Minister of the Kingdom of Lesotho.
- [4] The magistrate held an enquiry, in terms of section 10 of the Act, and found that there is *prima facie* evidence to warrant a prosecution for the above mentioned offences in the Kingdom of Lesotho and issued an order committing the appellants to prison to await the Minister of Justice and Constitutional Development's

¹ Section 4 (1) of the Extradition Act 67 of 1962 reads as follows:

“Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State.”

² Section 9(1) of the Act reads as follows:

“Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.”

decision with regard to their surrender.³ This appeal is against that order.

- [5] Numerous witnesses testified at the enquiry. Their evidence can be summarised as follows. On the 22nd of April 2009 at approximately 01H30 Sergeant Motsoto (Motsoto) and his colleagues were on duty at the Makoanyane Military Barracks. A group of armed men led by Mr Makotoko Lerotholi (a former Warrant Officer in the Lesotho Defence Force) accosted them, robbed them off their personal possessions and official firearms whereafter they were forcefully taken to the offices of the Special Forces where firearms and ammunition were stolen by their assailants.

- [6] Motsoto was instructed by Lerotholi to drive an armoured vehicle to State House, the official residence of the Prime Minister.

- [7] On their arrival at State House a gun battle ensued between Lerotholi's men and soldiers who guard State House. The guards won the battle and Lerotholi's men retreated back to Makoanyane Military Barracks. When they tried to leave the barracks the exit gate was blocked by soldiers who shot at them. They managed to

³ Section 10 (1) and (2) of the Act reads as follows:

- “(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) and (b) (i) the magistrate find that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
- 2) For purpose of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.”

drive past the soldiers. At Ha Mosalla, Motsoto drove the armoured vehicle over a culvert rendering it immobile. He managed to escape while Lerotholi and his men joined their co-conspirators in a Land Rover, which was also stolen from the barracks.

- [8] At approximately 04H30 the *coup* plotters hijacked a minibus taxi with registration letter and numbers A4928 at Ha Tsolo, on the outskirts of Maseru. Members of the Special Support Unit saw the minibus at Selakhapane and stopped it. Another gun battle ensued and some of the assailants fled. Subsequently three dead bodies and various firearms and ammunition were found in and near the minibus. Another assailant was later found dead at Ha Makebe near the border between the Kingdom of Lesotho and the Republic of South Africa. Two of the assailants were arrested in the Kingdom of Lesotho and are already arraigned in that State.

- [9] On the 22nd of April 2009 at approximately 08H15 Warrant Officer Phaphang was called to Mr Dirk Du Toit's farm, in the Ladybrand district, where he found the fifth appellant who identified himself as George Thomas from Maputo. The fifth appellant was bleeding profusely from a gunshot wound on his left upper torso. He was arrested for being an illegal immigrant and taken to Mantsopa Hospital for medical treatment.

- [10] On the same morning at approximately 09H30 Warrant Officer Masimong stopped the first appellant near the farm Middlekraal, in the district of Ladybrand. His left middle finger was injured and he was barefoot. He told Masimong that he is from Mozambique and speaks Portuguese and a little bit of Sesotho. When he was asked

how he sustained the injury he told Masimong about the shooting that occurred in the Kingdom of Lesotho during the early hours of the morning. He was arrested for being an illegal immigrant.

- [11] Meanwhile at approximately the same time (09H30) Sergeant Motete arrested the fourth appellant in Ladybrand town. He said that he was from Mozambique and that his identity document is with his employer, Jeff. He was also arrested for being an illegal immigrant.
- [12] The same evening at 19H30 Warrant Officer Finger did border patrol duty in the district of Ladybrand when he happened upon the second, third, sixth and seventh appellants while they were walking on a gravel road near the border. Three of them were bare feet. They had no documents allowing them to be legally in the Republic of South Africa. They informed him that they were from Mozambique. Only the seventh appellant could speak Sesotho. He could not communicate properly with the other three appellants. He arrested them for being illegal immigrants.
- [13] Mr Simon Mnguni (Mnguni) - a South African citizen - testified that he was recruited in Gauteng by a person named Jesse to assist in overthrowing the government of the Kingdom of Lesotho. He confirmed that he, the seven appellants and other persons went to Kingdom of Lesotho. He further confirmed that they all participated in the attempted *coup*. He escaped after the foiled attempt to enter State House and was arrested at Ladybrand on the 22nd of April 2009. He was promised immunity from prosecution if he spoke the truth.

- [14] Captain Letseleha confirmed that on 22 April 2009 he went to the Mantsopa Hospital where he met Inspector Phaphang and the fifth appellant, who presented a gunshot wound. He could not communicate with the fifth appellant because he spoke Portuguese. At 09H30 he went to the Ladybrand Police Station where he interviewed the first appellant, who presented an injury on his left hand. The first appellant told him that he sustained the injury after being shot by members of Lesotho Defence Force during the attempted *coup*. The first appellant related the whole incident to him, which he wrote down.
- [15] At 19H30 he interviewed the seventh appellant who told him that they were contractors in the employ of the one Jezi Ramakatane. The other three men that were with the seventh appellant could only speak Shangaan and Portuguese. The seventh appellant could not tell him where they were coming from or where they were going to. At some stage the seventh appellant said he was a South African from Katlehong.
- [16] On 23 April 2009 at approximately 00H30 he interviewed Simon Mnguni. Mnguni informed him that he was recruited by Jezi Ramakatane. He further informed him that he and other Mozambican men travelled to the Kingdom of Lesotho where they kidnapped soldiers, stole firearms and ammunition and attempted to enter State House in order to kidnap the Prime Minister of the Kingdom of Lesotho.
- [17] Captain Letseleha could not identify the persons who he

interviewed.

- [18] Motsoto identified the first, second, fifth and seventh appellants as being part of the group of men that accosted him and his colleagues. Corporal Sekonyela, who was stationed at State House, identified the first, fifth and seventh appellants as being part of the group of armed men that were involved in the shoot-out at State House.
- [19] Mr Leaba Linus Thetsane the Director of Public Prosecutor of the Kingdom of Lesotho confirmed that the appellants are sought in the Kingdom of Lesotho for the crimes mentioned in paragraph three of this judgment and that warrants for their respective arrests have already been issued in the Kingdom of Lesotho. He confirmed that the Minister of Law & Constitutional Affairs of the Kingdom of Lesotho has given an unequivocal assurance that the death penalty will not be carried out should it be imposed for the murder counts. He also confirmed that all those offences carry penalties of more than six months imprisonment. He further confirmed his certificate to the effect that there is a *prima facie* case against the appellants in respect of the offences for which extradition is sought. He stated that Jesse Ramakatane who is currently in the Republic of South Africa is a permanent resident of the Kingdom of Lesotho and wanted in that country for crimes allegedly committed between 10 and 17 June 2007.
- [20] The appellants denied that they participated in the attempted *coup*. None of them testified.

[21] Mr Nel on behalf of all the appellants argued that the words, “sufficient evidence to warrant a prosecution” in section 10(1) and (2) of the Act mean that the magistrate must find that there is evidence beyond reasonable doubt that the appellants committed the alleged offences. Allied to and intertwined therewith he argued that the evidence before the magistrate was not sufficient to warrant the conclusion that it established beyond a reasonable doubt that the appellants committed the alleged offences because the magistrate:

- 21.1 admitted inadmissible evidence;
- 21.2 made an adverse inference from the appellants’ failure to give evidence during the injury;
- 21.3 failed to attach sufficient weight to the contradictions in the version presented by the State;
- 21.4 did not properly consider the circumstantial evidence.

[22] Mr Botha on behalf of the respondent supported the magistrate’s findings.

[23] Extradition is deemed a sovereign act. It is a process, initiated by an adequately founded, formal request from one sovereign State to another, based on treaty, reciprocity or comity, by means of which one or more person/s accused or convicted of the commission of a serious crime within the jurisdiction of the requesting State, is surrendered to competent courts in the territory of that State for trial or sentence.⁴ The Act and, where applicable, an extradition agreement regulates and governs extradition from the Republic of South Africa. Extradition proceedings are *sui generis*. The purpose

⁴ See NJ Botha in *The Law of South Africa*, 2nd Ed 10 part 1 at 185 par 219

of such proceedings is not to determine the person's guilt or innocence but rather to ascertain whether the person is liable to be surrendered to the foreign State concerned for the imposition or enforcement of a sentence or because, like in this case, the person is accused of committing a serious offence in the foreign State.⁵

[24] In considering whether the appellants are liable to be surrendered the magistrate had to be satisfied that:

- 24.1 appellants are the persons sought by the Kingdom of Lesotho;
- 24.2 there is an extradition agreement between the Republic of South Africa and the Kingdom of Lesotho;
- 24.3 the offences for which the appellants are sought are an extraditable offences;⁶
- 24.4 there is sufficient evidence to warrant a prosecution for the offences in the Kingdom of Lesotho – whether by way of evidence or a certificate in terms of section 10 (2) of the Act;⁷
- 24.5 if a section 10 (2) certificate is relied on, that it was issued by an appropriate authority in charge of the prosecution in the Kingdom of Lesotho and that it states that there is sufficient evidence to warrant a prosecution in that State.

⁵ See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) at paragraph 26 and paragraph 50.

⁶ Extraditable offence is defined in section 1 of the Act as:

“Any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of Republic and of such foreign State;”

⁷ See *Geuking* at paragraph 37

[25] It is not in dispute that:

25.1. warrants for the arrest of the appellants were issued in the Kingdom of Lesotho and they are therefore sought in that country.

25.2. there is an extradition agreement between the Republic of South Africa and the Kingdom of Lesotho

25.3. the common law offences (murder, kidnapping, robbery) and the statutory offences (possession of firearms an ammunition, conspiracy to commit an offence) for which they are sought are also offences in the Republic of South Africa.

25.3.1 The offences are not exclusively military law offences.

25.3.2 The offences are punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six month or more.

25.4 That the certificate, in terms of section 10 (2), was issued by an appropriate authority in charge of the prosecution in the Kingdom of Lesotho.

[26] As indicated above the contentious point is whether the magistrate's finding that there is *prima facie* evidence to warrant a prosecution for the offences means that there is sufficient evidence warranting a prosecution. The appellants, by implication, also dispute that the certificate complies with the prescripts of the Act.

[27] It is clear from the Act and the extradition treaty between the Republic of South Africa and the Kingdom of Lesotho that where a certificate in terms of section 10(2) is relied upon the prosecuting

authority in charge of the prosecution of the case in the Kingdom of Lesotho must certify that there is sufficient evidence under the law of the Kingdom of Lesotho to warrant the prosecution of the fugitive.⁸

[28] In this matter the certificate contains a summary of the available evidence and a statement that “there is a *prima-facie* case against the suspects on the offences for which extradition is sought.”

[29] The deviation, by the prosecutor of the Kingdom of Lesotho, from the words used in the Act and the treaty is part of the problem because it necessitates an inquiry into whether a *prima facie* case or *prima facie* evidence is tantamount to sufficient evidence to warrant a prosecution.

[30] In order to discern what sufficient evidence to warrant a prosecution in section 10 of the Act means, the starting point is the plain language of the statute. **In Adampol (Pty) Ltd v Administrator, Transvaal** it was put thus:

“The Plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal

⁸ See section 10 (2) of the Act and Article 7 (1) (e) of the extradition treaty between the Republic of South Africa and the Kingdom of Lesotho, signed on 19 April 2001 and ratified on 15 November 2001 by the Parliament of the Republic of South Africa as published in Government Gazette No 26375, Vol 467 dated 28 May 2004 states that:

“The following documents shall be submitted in support of a request for extradition in the case of a request submitted by the Kingdom of Lesotho, a certificate issued by the prosecutor in charge of the prosecution of the case containing a summary of the available evidence and a statement that the evidence is sufficient under the law of the Requesting State to warrant the prosecution of the person sought.”

construction falls within one of those exceptional cases in which it would be permissible for a court of law to part from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.”⁹

[31] Sufficient is defined as “legally satisfactory. Adequate to satisfy an – argument, situation etc, satisfactory. Especially in sufficient condition, reasons. (2) Adequate (especially in quantity or extent) for a certain purpose, enough (for a person or thing, to do something)...Achieving an object; effective. Possession talent or ability; competent, capable...”¹⁰ Evidence is defined in the same dictionary as follows “serve as or give evidence for, attest Establish by evidence, demonstrate, prove...”

[32] Proof beyond reasonable doubt in adversarial systems such as ours and that of the Kingdom of Lesotho is the highest standard of proof but the minimum standard required for a conviction.¹¹ This stage is normally reached after the court has listened to all the evidence adduced by the prosecution and the accused. That being the case, it is inconceivable that the Legislator would have intended to require the Kingdom of Lesotho’s prosecutor to produce proof beyond reasonable doubt as sufficient evidence to warrant a prosecution in that State. It would in any event be impossible to produce such proof before the merits of the matter has been finalised. The appellants’ argument is without merit.

9 1989 (3) SA 800 AD at 804 A-C.

10 See The New Shorter Oxford English Dictionary Volume 2. Glarendon Press Oxford, Edited by Lesley Brown.

11 The standard of proof required in criminal matters in the Kingdom of Lesotho was inter alia set out by the erstwhile Chief Justice of the Kingdom of Lesotho Kheola CJ in Rex v Tefo Khemi case number CRI/T/80/91 judgment delivered on 29 March 1996. See also Maboka v R (2000-2004) LAC 1 at 15 J to 16 A. I may take judicial notice of the law of the Kingdom of Lesotho because it can be ascertained readily and with sufficient certainty. See section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

[33] An enquiry in terms of section 9 of the Act is not a criminal trial. Its purpose is to enable the magistrate to determine whether there is sufficient evidence to warrant a prosecution for the offence in the foreign State. It is not necessary for the prosecutor to place all the evidence needed to prove the guilt of the person beyond reasonable doubt before the magistrate. The prosecutor need only place admissible and reliable evidence before the magistrate during the enquiry which if accepted at the subsequent trial may be enough to prove that the person has committed the offences for which s/he is sought. Conversely if the evidence is of such poor quality or unreliable that it is obvious to the magistrate that there are no reasonable prospects that the evidence would be accepted at the subsequent trial the magistrate may find that there is insufficient evidence to warrant a prosecution.¹²

[34] It is therefore clear that what is required by the section is adequate admissible proof to warrant a prosecution. The evidence must be sufficient for the purpose of instituting a prosecution and not sufficient to prove the guilt of the person.

[35] The decision to institute a prosecution rests with the prosecuting authority or prosecutor of the foreign State. The question whether there is sufficient evidence must therefore be viewed through the prism of the prosecutor.

[36] The magistrate would look at the totality of the evidence presented before him/her in order to make a fair and dispassionate assessment thereof. S/He will ask himself/herself whether there is admissible

¹² See *IN RE GONIWE AND OTHERS (INQUEST)* 1994 (3) SA 877 (SECLD) at 879

and reliable evidence which if accepted at the trial would provide a realistic or reasonable prospect of a conviction, for the offences that the person would be charged with.

[37] If a section 10(2) certificate is relied upon the prosecutor in South Africa need not prove that there is sufficient evidence to warrant a prosecution. The prosecutor of the foreign State decides, based on the law of that State, whether there is sufficient evidence to warrant a prosecution for the offence in that State. If s/he is so satisfied s/he issues a certificate to that effect. The certificate becomes conclusive proof of that fact and obviates the need for the South African prosecutor to prove that there is, in terms of the foreign State's law, sufficient evidence to prosecute the fugitive. Does *prima facie* evidence referred to, by the Director of Public Prosecution in his certificate and the magistrate in his judgment, constitute sufficient evidence to warrant a prosecution?

[38] In *Ex Parte The Minister of Justice: In Re Rex v Jacobson & Levy*¹³ Stratford JA defined *prima facie* evidence as follows:

“*Prima facie*” evidence in its usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls for an answer” then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from

¹³ 1931 AD 466 at 468

the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof.”¹⁴

[39] The above definition of *prima facie* evidence refers to *prima facie* evidence adduced during a criminal or civil trial. At the trial stage the question of *prima facie* evidence will normally arise at the end of the State’s case, in criminal proceedings, or at the end of the case of the party upon whom the burden of proof lies in a civil matter. It therefore presupposes that the one side’s evidence was tested or left unchallenged by the other side. *Prima facie* evidence to warrant a prosecution for purposes of the Act is not, in my view, *prima facie* evidence in the “usual sense.” As indicated above the magistrate conducting an enquiry in terms of section 10 must ask whether the evidence presented before him/her, if presented and accepted at the trial, may be enough to prove that the person has committed the offence. The question is whether the evidence provides a realistic and reasonable prospect of a conviction.¹⁵

[40] There are varying degrees of *prima facie* evidence. *Prima facie* evidence can consist of incomplete evidence, for example a single piece of circumstantial evidence (a fingerprint) which will easily dissipate in the face of a plausible explanation. On the other hand it may be a strong *prima facie* case (eg. eye witnesses, forensic

14 See also *S v Boesak* 2000 (3) SA 361 (SCA) at paragraph [46] and [47].

15 Part 4 A2 of the National Director of Public Prosecutions’ policy directives issued in terms of section 21(1)(b) of the National Prosecuting Authority Act 32 of 1998 reads as follows: “... no final decision to proceed with the prosecution should be taken unless, upon a thorough assessment of all the available facts, evidence and circumstances, there is a reasonable prospect of a successful prosecution.” In my view successful prosecution in this context means a conviction.

evidence and a confession).¹⁶ *Prima facie* evidence at its weakest is sufficient evidence to institute a prosecution. *Prima facie* evidence to warrant a prosecution in all its manifestations, weak or strong, will therefore constitute sufficient evidence to warrant a prosecution. Insufficient evidence to warrant a prosecution can never be a *prima facie* case or constitute *prima facie* evidence to warrant a prosecution. A *prima facie* case or *prima facie* evidence against a person encapsulates the notion of sufficient evidence to warrant a prosecution. In my view the words used by the Director of Public Prosecutions, of the Kingdom of Lesotho, convey nothing less than there is sufficient evidence against the appellants to warrant prosecuting them for the offences for which they are sought in the Kingdom of Lesotho. The Director of Public Prosecutions probably used the phrase *prima facie* case because that is the standard required in the Kingdom of Lesotho to institute a prosecution.¹⁷ The certificate therefore substantially complies with the prescripts of the Act. It is conclusive proof that the Director of Public Prosecutions of the Kingdom of Lesotho has sufficient evidence to prosecute the appellants.

- [41] The fact that the magistrate did not hold a trial within a trial to consider the evidence of Captain Letseleha is in my view not fatal for three interlinked reasons. Firstly, the magistrate was not called upon to decide, beyond reasonable doubt, whether the evidence is admissible but whether that evidence in conjunction with the other evidence would more likely than not be admitted at the trial.

16 See *S v Ali* 2011 SACR 34 (ECP) at paragraphs 8 and 12 where the term strong *prima facie* evidence was used.

17 See *Rantlali Nkeane v DPP* High Court of Lesotho case number CRI/APN/506/2005 judgment by Mahase AJ delivered on 16/11/2005; *Phenyeke Tuoane v DPP* High Court of Lesotho case number CRI/APN/ 499/04 judgment by Monapathi J delivered on 8/11/2004.

Secondly, the magistrate was not called upon to determine the guilt of the appellants. Thirdly the magistrate was not called upon to adjudge the credibility of the witnesses at this stage. That is the task of the trial court. The credibility of the witnesses plays a very limited role during such an inquiry. When, for instance, it is clear that the witnesses' evidence would in all probability not be believed at the subsequent trial then the credibility of the witness would be of importance.

[42] The argument that the magistrate did not evaluate the evidence properly is also without merit. The Director of Public Prosecutions testified that there is a *prima facie* case against all the appellants. His evidence was left unchallenged because, according to the appellants, it was of a technical nature and did not affect their version. He was not even asked why he says that there is a *prima facie* case against the appellants. Well, the appellants are wrong. It did affect their version!

[43] Mnguni identified all the appellants as persons with whom he went to the Kingdom of Lesotho to try and overthrow the legitimate government of that State. His evidence may not be flawless but it cannot be said that there is no reasonable prospect that it might be accepted during the subsequent trial. His evidence is supported by Motsoto who identified the first, second, fifth and seventh appellants as some of the persons who accosted them. Sekonyela identified the first, fifth and seventh appellants as the persons who tried to enter State House on that evening. The seventh appellant and Mnguni mention a person by the name of Jesse or Jezi who happens to be known by the authorities in the Kingdom of Lesotho

as a fugitive from justice. Six of the seven appellants were from Mozambique and illegally in the Republic of South Africa. They were all arrested on the same day at a town next to the border and none of them could give an acceptable explanation for their presence thereat. Two of the appellants presented gunshot wounds and they explained that they were injured in the Kingdom of Lesotho. The evidence is not only sufficient but overwhelming.

[44] I do not think that it is necessary to decide whether the magistrate was right or wrong in finding that the appellants' election not to testify prejudiced them. This finding does not vitiate the proceedings. It is clear that this was said as an afterthought, after he came to the conclusion that the evidence implicating the seven appellants was "very damning."

[45] In my view, the magistrate's finding that there is *prima facie* evidence to warrant a prosecution of the appellants cannot be faulted. This appeal ought to be dismissed.

[46] I accordingly make the following order:

(a) The appeal is dismissed.

C J Musi, J

I agree.

Van der Merwe, J