IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 21/1998

In the matter between

MANDLA MAPHALALA **First Appellant**
and

GUGU PATIENCE HLOPHE Second Appellant

vs

REX Respondent

Coram LEON, JP
STEYN, JA
ZIETSMAN, JA

For Appellants
For Respondent

JUDGMENT

LEON, JP

The appellants were accused Nos. 1 and 2 respectively in the High Court. They will hereinafter be referred to as the accused. They were both

charged on four counts, namely, the murder of Alfred Mthupha on 21st November 1997 at or near the Treasury Department, Mbabane, (Count 1), the murder of Elias Mthethwa at the same time and place (Count 2), the contravention of section 181(5)(a) of the Criminal Procedure and Evidence Act 67 of 1938 as amended, namely, conspiracy to procure the commission of, or to commit robbery upon the staff of the Treasury Department, Revenue Office, Mbabane, who were involved in the carrying of money to the Central Bank of Swaziland (Count 3), robbery on Count 4 it being alleged that the two accused , acting in common purpose, did unlawfully and intentionally assault the aforesaid deceased persons by intentionally using force and violence to induce submission by the two deceased and did take from them cash and cheques to the sum of E93 989,50. On Counts 5 and 6 accused No. 1 was charged alone. Count 5 alleged a contravention of section 11(8) of the Arms and Ammunitions Act 24 of 1964 (as amended) in that on or about the 22nd November 1997 and at or near Fonteyn the first accused unlawfully possessed a firearm, namely, a 9mm Taurus pistol serial number PT 92 AF loaded with five rounds of ammunition without being the holder of a valid permit or licence to possess a firearm. On Count 6 the first accused was charged with contravening Section 11(2) read with section 11(8) of the said Act, it being alleged that at the same time and place as alleged in Count 5 he unlawfully possessed six live rounds of ammunition without being the valid holder of the requisite permit or licence.

Both accused pleaded not guilty to all the counts on which they were charged. Although it does not emerge from the record, it appears from the judgment that accused No. 2 was acquitted on Counts 1 and 2 and 4 at the end of the Crown case and convicted on Count 3 at the end of the

whole case. For that conviction she was sentenced to seven years' imprisonment.

Accused No. 1 was convicted on Counts 1,2,4,5 and 6 and apparently acquitted on Count 3. The Court, having found that extenuating circumstances were not present, sentenced him to death on each of Counts 1 and 2. I pause to say that there is no appeal by accused No. 1 against the finding that there were no extenuating circumstances. On Count 4 the first accused was sentenced to 20 years' imprisonment. On Counts 5 and 6 he was sentenced to five years imprisonment and two years' imprisonment respectively which were ordered to run concurrently with the sentence imposed on Count 4.

In the case of accused No. 1 the sentence was not back-dated. In the case of accused No. 2, her sentence was deemed to have commenced from the date of her arrest on the 23rd November 1997.

Both of the accused have appealed against their convictions. Accused No. 1 has appealed only against the sentence on Count 4 claiming that it induces a sense of shock. The Notice of Appeal is dated the 8th day of November 1998. In a subsequent letter from prison accused No. 1 writes;

"I am hereby forwarding my application to conquer (*sic)* my sentences to run concurrently."

Accused No. 2, in the Notice of appeal filed on her behalf, has averred that the Court *a quo* erred in not suspending a portion of her sentence in view of the fact that she is a first offender who had not received any benefit from the robbery.

Although the record does not reveal this, it appears from the judgment that the defence admitted the post-mortem reports which were handed in by consent and that the deceased died as a result of bullet wounds.

The circumstances under which the deceased met their deaths appear from the evidence of Des du Toit (PW14) who lives in Cape Town but visits Swaziland for about two months every year. On the day of the killings he was in the foyer of the Ministry of Deeds right opposite the Treasury Department when he heard the first shot. He ran outside and saw an old man running around from the front of a vehicle trying to escape the attacker by opening the door of the vehicle. But the attacker shot him in the chest, took a bag of money and ran in the direction of the hospital up the stairs. He ran after the attacker who had his gun in one hand and the bag, which he had stolen, in the other. The attacker climbed into a blue Toyota taxi and disappeared. He also saw the first man who had been shot sitting in an upright position in front of the car but making no movement. He had unsuccessfully tried to apprehend the attacker but, having failed, he returned to the scene finding the man who had been shot in the chest lying down while the deceased who had been shot first was still sitting upright in the vehicle. He was not able to identify the person who fired the shots other than to say that he was a young black man aged between 26 and 28.

A perusal of the judgment makes it clear, I think, that the Court *a quo* in finding the accused guilty did not rely upon the police evidence. I interpolate to say that, in a trial within a trial, the trial Court found that it had not been proved that a certain pointing out had been made freely and voluntarily. What the trial Court relied upon was the evidence of three accomplices, Sifiso Albert Soko (PW1), Sibaya Ray Hlope (PW3), and Sifiso Johannes Kunene (PW4) whose evidence was supported in material respects by the evidence of Gladys Shabalala (PW5) and Elliot Chico Kunene (PW6) who was referred to in the evidence as Chico Kunene.

The Court cautioned itself against the danger of relying on accomplice evidence and in particular referred to the fact that an accomplice, because he is such a person, will have intimate knowledge of the details of the offence. It cannot follow that on that ground he is to be believed. To do so would be to fall into a trap for the unwary. The learned trial Judge (the Chief Justice) also referred to recent authorities on this subject. It is clear from the judgment that he was fully alive to the dangers inherent in

the evidence of accomplices. Nevertheless he found them to be satisfactory witnesses whose evidence was supported, as I have said, by PW5 and PW6. With regard to the evidence of accused No. 1 the learned Chief Justice fairly held that he was not broken in cross-examination nor were there any inherent contradictions in his evidence. But his evidence was found to be highly improbable and in conflict with the Crown evidence. He was also satisfied that accused No. 2 played a part in the planning of the offence and was therefore guilty on Count 3.

With that prelude I turn now to give a brief account of the evidence which was led.

The post mortem report on the deceased Elias Mthethwa showed one wound; a circular wound 1 centimetre in diameter situated over the left side of the front of the abdomen, the bullet piercing through the descending colon, the transverse colon and other parts of the body.

The post-mortem report on the deceased Alfred Mthupha also reflected only one wound: an oval wound 1 centimetre in diameter situated over the upper part of the left side of the chest in the mid clavicular line; the bullet perforating through the left lung, heart, diaphragm and spleen.

It is clear from the above post-mortem reports that only two shots were fired and only two bullets involved. On the direct evidence there is clear evidence that the shots were fired from a gun or pistol not from a rifle. If one were to hold that the deceased was shot by a rifle one would be flying in the face of all the direct and acceptable evidence. According to the post-mortem reports the cause of death in both cases was “shock and haemorrhage consequent upon rifle arm injury”.

This finding gave rise to an argument raised in the Heads of Argument (and supported by Counsel for the Appellant in his argument before us) that the Court should not rely upon the evidence of Des Du Toit (PW14) as people miss targets and he was furthermore mistaken about the time of the killing and precise part of the body where one of the deceased was shot. The suggestion inherent in this argument is that the two deceased were shot by an unknown gunman using a rifle. In my view such a possibility is conjectural but not a reasonable one. On the evidence Des Du Toit saw a young black man carrying a bag in one hand and a pistol in the other running away towards the very spot where Accused No. 1 entered a vehicle armed with a pistol and carrying a bag. On other evidence (to which I shall later refer) accused No. 1 entered a house armed with a pistol which he placed on top of a wardrobe and there is

further evidence that accused No. 1 admitted firing shots at people on the day in question.

In my judgment the court *a quo* was fully justified in holding that the pathologist was not an expert in firearms and that his evidence about a rifle must yield to the direct and acceptable evidence. The evidence of PW4 was confirmed in material respects by the evidence of David Mkhwanazi (PW2) who is a member of the Royal Swaziland Police although there is a difference between them as to the time when the event occurred. On the day of the killings PW2 heard two gunshots inside the revenue offices. He then saw a white man chasing a black man. The latter was running towards the Government Hospital. There was a motor vehicle parked next to the stop sign. The black man opened the rear door on the driver's side, entered the back of the car and the vehicle, which was light green, drove away. The black man was carrying a khaki envelope in one hand and a firearm in his right hand.

Sibaya Ray Hlope is the uncle of the second accused. He testified as PW3. Some days before the robbery PW3, who was at the Treasury offices in Mbabane, was called by accused No. 2 who informed him that she needed some people to commit a robbery at her place of employment and who would take money from the Treasury. She also asked him to enlist Sifiso Kunene (PW4). He did so the following day when they both returned to see her at the Treasury. PW4 said that she should leave everything to him asking her where the money was kept. They then brought accused No. 1 into the scheme and the three of them returned to the Treasury to see accused No. 2. PW4 informed her that accused No. 1 would be the person who would commit the robbery as he was not known in Mbabane. Accused No. 2 ultimately supplied the information as to

who took the money to the bank and what motor vehicles were used for that purpose.

On the day before the robbery PW3, PW4 and accused No. 1 followed the motor vehicle from the Treasury which was taking money to the bank in order to witness the procedure. It was then that PW4 (Sifiso) informed PW3 that the latter would have to drive the getaway car. PW3 refused and took no part in the robbery which took place on the following day.

Because of PW3's refusal it was necessary to find someone to replace him. They found Sifiso Soko (PW1). Soko agreed to drive the getaway car for a fee of E100. He was aware that he was assisting in the getaway from a robbery. On the day of the robbery he heard a gunshot. PW4 had instructed him where to park but before he could reach the junction of the stop heading to the hospital accused No. 1 came running; he had an envelope in one hand and a pistol in the other. He dropped him off at a bus stop. PW1 then went to report to the police that he had been hijacked; that was part of the plan but he broke down under questioning and told the police the truth. He was recruited on the morning of the robbery which took place on a Friday. The evidence of PW1 fits in with the description of the events given by Des du Toit (PW14).

PW4 (Kunene) grew up with accused No. 1 and they were on good terms. He lives with Gladys Shabalala (PW5) and his brother is Chico Kunene (PW6). He confirmed the evidence of the other accomplices. While he was in the vicinity of the Treasury he heard a gunshot. At a bus stop the first accused jumped into his car throwing a brown envelope on the seat. PW4 asked him about the gunshot. Accused No. 1 said that he was scaring those people away because they wanted to hold him. They drove to the house of PW4. At the house accused No. 1 changed his clothes and asked PW4 to burn the envelope which PW4 instructed his wife to do. Accused No. 1 placed his pistol on top of the wardrobe and asked the witness to drop him off at Mhlaleni.

On the way they stopped at Chico Kunene's house where Accused No. 1 recounted to Chico what had happened. Later he was arrested and he then took the police to PW4's house where he produced a Taurus pistol which was on top of a wardrobe. PW4 had already informed the police that he believed that the pistol used in the robbery was in his house. In

cross-examination PW4 alleged that PW3 was the instigator of the robbery. He denied accused No. 1's allegation that he (accused No. 1) had pulled out of the robbery after consulting an inyanga.

Gladys Shabalala (PW5) supported the evidence of PW4. She confirmed that accused No. 1 often stayed at their house and that on the day of the robbery, the first accused was in possession of a pistol which he placed on top of the wardrobe under a bag in the bedroom which he used. He also changed his clothing. She was instructed by PW4 to burn the envelope which she did. The envelope contained documents, cheques and bank bags.

Chico Kunene (PW6) confirmed the evidence of his brother that he had come to his house with accused No. 1 on the day of the robbery. The latter informed him that he had gone to a place at Mbabane where he had tried to obtain some money illegally. He had also fired a shot to scare people who were trying to get hold of him.

The police took possession of the clothing which accused No. 1 had left behind in PW4's house and the pistol which he had placed on top of the wardrobe. The clothing was identified at least by PW4 and PW5. There was forensic evidence that the clothing had chemical traces showing that someone wearing that clothing had discharged a firearm.

There were also cartridges found at the scene of the crime which the Crown endeavoured to show were fired from a pistol which had been kept on top of the wardrobe by accused No. 2. The trial Court was not impressed by the lack of clarity between the time the cartridges were picked up until cartridges were examined by the experts. I see no reason to disagree with this conclusion and the cartridges cannot be used to connect accused No. 1 with this offence. But it matters not because there is a great deal of evidence which does.

Accused No. 1 gave evidence under oath. His evidence is to the effect that initially he was willing to participate in the planned robbery. However, two days before the robbery he, together with PW4, went to see the inyanga of PW4 in order to ascertain whether the robbery would be successful. He was informed by a "calabash" that it would not. Accused No. 1 thereupon withdrew from the operation informing PW4 that he would have no part in it. He went home and was at home both on the Thursday and the following day which was the day of the robbery.

With regard to the involvement of accused No. 2, accused No. 1 was

asked the following question by the trial judge.:

"JUDGE: The prosecution says that she assisted in the robbery because she had inside information which she made known to the robbers. Is that so?"

Accused No. 1 replied: "that is correct my Lord."

On behalf of the appellants it is contended that the learned Chief Justice entered the arena by cross-examining accused No. 1. He did ask accused No. 1 some questions both about his would-be participation in the robbery as well as the involvement of accused No. 2. But the questions were not unfair and do not amount to cross-examination. By way of example, accused No. 1 could have replied in the negative to the question which I have quoted. Nor am I persuaded that the further criticisms of the behaviour of the Court *a quo* are well founded.

In my view the defence of accused No. 1 is far fetched: the notion that he received advice from a calabash boggles the mind. The story told by the accomplices is inherently probable, particularly the involvement of accused No. 1 as he was from out of town and would not be recognised. I see no reason to differ from the conclusions of the trial Court with regard to the credibility of the witnesses despite the arguments which have been advanced on appeal. With regard to counts 5 and 6 there is clear evidence that accused No. 1 was in possession of a firearm and ammunition. In my view the case against accused No. 1 is overwhelming.

In so far as accused No. 2 is concerned she is involved not only by the accomplice evidence but by accused No. 1 himself. Her evidence does not read well. She admitted that PW3 told her that they were planning to take money from the Treasury but that she did not report him to the police. Her reply was: "I never took note of it My Lord." Yet on her evidence she was approached to assist in the robbery which she refused to do. If she thought that the approach to her was not serious one would have expected her to laugh it off which she did not. There does not seem

to be any proper basis for holding that her evidence should not have been rejected.

On the evidence as a whole I am of the view that both the accused were correctly convicted.

With regard to the sentence of 20 years on Count 4 for accused No. 1 that indeed is a heavy sentence for robbery. But, not only was it an armed robbery, accused No. 1 has two relevant previous convictions, one for murder for which he was sentenced to 10 years' imprisonment and one for fraud.

Accused No. 2 is a first offender and she played a pivotal part in the robbery by pointing out her fellow officials who would be carrying the money. She was guilty of breaching the trust which her employer had placed in her. The trial Court took into account that she was a first offender with three children but also that she had shown no remorse. Counsel for the appellant did not in his argument before us, raise the question of the severity of her sentence.

In any event I do not consider that the trial Court misdirected itself in any way, nor am I able to say that there is a striking or startling discrepancy between the sentence which I would have imposed and that which the Court *a quo* imposed.

On the case as a whole it is my view that the appeals should be dismissed and the convictions and sentences confirmed.

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LEON, JP

I AGREE

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STEYN, JA

I AGREE

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ZIETSMAN, JA

DATED at Mbabane the 27th day of November, 2001