

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal No. 31/2002

In the matter between

MPHUMELELO VAYELA MAGONGO Appellant

Vs

REX Respondent

Coram BROWDE, JA

BECK, JA

ZIETSMAN, JA

For Appellant In Person

For Respondent Mr. Magagula

JUDGMENT

BROWDE, JA

The appellant was indicted before the High court on 2 counts of attempted murder; 2 counts of attempted robbery and 1 count of being in possession of a revolver without being licenced thereto. The charges arose from the following:-

On 16 November 1999 and in the evening, Joseph Sponono Mamba (PW1) and his son Justice Mfanufikile (PW2) arrived at their home at eKutsimleni by taxi. They heard someone say "here they are", the cocking of a firearm was then heard and they were thereupon accosted

2

by two men. Several shots were fired by one or both of the men. As will appear below the one assailant was carrying a revolver and the other "a bigger gun." A struggle ensued between PW2 and one of the men. In the struggle PW2 wrested the revolver from his adversary and in coming to the assistance of PW2 PW1, thinking he was striking the attacker in the dark, struck his son with a bottle. When the shots were fired PW1 had sought refuge behind a pillar of their home. He stated in evidence that the shots were fired at him. After the firearm had been taken from the men in the struggle the attackers ran off and disappeared into the darkness.

The other relevant evidence was directed towards proving that the revolver which was wrested from his assailant by PW2 was, shortly before the event, in the possession of the appellant. On the strength of the available evidence linking the appellant to the revolver and the recovery by the police of that revolver at the scene of the shooting described above, the appellant was charged with the two counts of attempted murder and two counts of attempted robbery of the two complainants. His alleged possession of the revolver led to the charge of contravening Section 11(1) read with 11(2) of the Arms and Ammunition Act, No. 24 of 1964 (as amended).

The appellant pleaded not guilty to all the charges but the court (Masuku J) found him guilty of the attempted murder charges but acquitted him on the attempted robbery charges and the charge relating to the unlawful possession of the firearm. He was sentenced to 5 years imprisonment in respect of each count, and the sentences were ordered to run concurrently, backdated to 2nd December 1999 i.e. the date of

3

appellant's arrest. His appeal before us is against both his conviction and sentence.

With regard to the appellant's alleged possession of the revolver the Crown led the evidence of several witnesses in order to trace the history of the weapon prior to its alleged sale to the appellant. Despite several contradictions in that evidence, evidence which did not impress him, the learned judge found it proved beyond reasonable doubt that the appellant bought the firearm shortly before the events of 16 November 1999. Because of the view I take of the evidence of PW1 and PW2 and its effect on the guilt or otherwise of the appellant, it is not necessary to analyse in detail the evidence relating to the movement of the firearm from one person to another prior to its purchase by the appellant. I am prepared to assume that Masuku J. was justified in finding it established that the appellant was one of the persons at the scene and that he had in his possession the revolver which was recovered by the police. The evidence of PW2 was to the effect that each of the assailants was armed, the one with a small firearm (which is clearly that possessed by the appellant) and the other with "a bigger gun". It was the man with the bigger gun who fired the shots allegedly at PW1. With regard to those shots it is observed that when they were fired PW1 was taking refuge behind a column of the house. If those shots were fired at him, one would have expected to see marks caused by the bullets on the wall of the house or the column. The police reported finding no such marks. It is a reasonable possibility, therefore, that the shots were fired in the air merely to frighten the complainants and in my view it follows that there was insufficient evidence to prove an intention to kill. Apart from that however, the man with the revolver, who on the Crown evidence must have been the appellant, was tackled from the rear by PW2 and there is

4

no evidence that he fired in the direction of anyone, if he fired at all. Although one empty cartridge was found at the scene it was not explained by either complainant how that came about, and it is reasonably possible that it fell from the chamber of the revolver either during or after the struggle. What is clear is that the revolver was in the possession of the man who wrestled with PW2 and as that, on the Crown evidence, must have been the appellant, there was insufficient evidence to prove that the appellant had the requisite intention to kill to warrant the verdict that he was guilty of attempting to murder either of the complainants. As the appellant was acquitted on the other counts I say nothing about them. The appeal is upheld and the conviction and sentence in the High Court are set aside.

BROWDE, JA

I agree

BECK, JA

I agree

ZIETSMAN, JA

GIVEN AT MBABANE this ... 15th. .day of November, 2002