SUPREME COURT OF SWAZILAND

CRIMINAL APPEAL *NO.6/06*

HELD AT MBABANE

In the matter between:

CELANI MAPONINGUBANE 1st APPELLANT

JABULANI BHEMBE 2nd APPELLANT

MBONGISENISANDILE BHEMBE 3rd APPELLANT

VS

REX

CORAM BROWDE JA

ZIETSMAN JA

RAMODIBEDI JA

JUDGMENT

Browde JA

In the period of December 2001 to March 2002 various serious crimes were committed in the districts of Shiselweni and Manzini. The police originally attributed the commission of those crimes to seven persons of whom two became witnesses for the Crown and one died. In the result four were indicted in the High Court where each was charged with one or more of the crimes which affected the districts referred to. At the commencement of the trial, which was heard by Masuku J, the three appellants were accused 1, 2 and 3 respectively and one Nhlanhla Vilakati was accused 4. The latter was discharged at the end of the defence case, while the three appellants were each convicted on various counts and sentenced to terms of imprisonment. The three appellants have brought individual appeals to this court both against their convictions and the sentences which were imposed by the High Court.

The first appellant's attorney Mr. Mabila provided us with his heads of argument. It appears that he relied entirely on submissions regarding the adequacy of the record. This is not the first time that this matter has come before us. In fact on two previous occasions the case was postponed in order to give the legal representatives of the Crown and the appellants an opportunity to reconstruct the record to the best of their ability and if necessary to consult Masuku J who heard the matter, and to obtain from the learned Judge such notes as he might still have

preserved. In this regard it must be said that the judgment of Masuku J was considered and produced in fine detail by the learned Judge and reveals a careful analysis of all the evidence that was placed before the court.

To a certain extent the record has been reconstructed and the various tape recordings arranged in their proper order. The sole question therefore is whether the record which we now have is adequate to enable us to come to the conclusion that in relation to some, if not all, of the counts on which the appellants were convicted, the record is sufficiently comprehensive for justice to be done.

The criticism leveled at the record by Mr. Mabila on behalf of the 1st appellant is the following:-

(i) The record is "very disjointed and may not be relied upon for any just decision". This is a generalization which is not helpful. There are a few instances where the transcription contains passages such as:~

> "This section has been inserted in here by transcriber as it was on a different tape but is the evidence of this witness".
>
> OR
>
> "The evidence the tape appears to be the continuation of PW6 (although it is at this juncture on this tape!!) Transcriber has taken it and fitted it where she thought it was appropriate".

Despite these obvious shortcomings, they are not sufficiently material in my judgment to warrant the conclusion that the record cannot be relied upon for a just conclusion, as contended for by Mr. Mabila.

(ii) The next criticism is that the Registrar has not certified that the record is a true and correct transcription of the proceedings recorded by a mechanical recorder in the matter. That, of course, is the customary wording of the registrar's certificate but it is not surprising that the registrar was not in a position ***in casu*** to provide it. The question remains, however, whether the acts of reconstruction and the placing into their correct order of the tapes of the recordings are sufficient to ensure that their acceptance by this Court will not prejudice the appellants or the Crown. In order to decide this question one must consider the precise points of criticism relied on by the first appellant. They are worded as follows:

> ***. . the said record does not contain material evidence in particular the cross-examination (or lack thereof) by 1st Appellant's counsel at least in so far as the evidence ofFW1, PW2, PW3, PW4, FW5 and FW6 are concerned".***

During the course of argument it was put to Mr. Mabila that not only does the record show that counsel was given ample opportunity to cross-examine the said witnesses but that, where it appears to have been necessary in counsel's opinion to conduct such cross-examination, it is adequately and indeed fully recorded and transcribed.

The other criticisms of the record on which Mr. Mabila relied are of a general nature. In essence they are that the record is "disjointed" and "hard to follow", that it does not "reflect the evidence as was supposed to be" (sic) presented in the court ***a quo,*** and that some of the portions of the record do not appear in their correct order.

These submissions have some foundation in fact, but nevertheless the question remains whether there is a sufficiently full and adequate record on which to base decisions in favour of or against the appellants with the necessary degree of certainty.

In reply to the defence submission that the record was sufficiently defective to warrant the acquittal of the appellant, Mr. N.M. Maseko, who appeared for the Crown, submitted that the defence submission would be valid only if the record was so defective that no reliance could be placed on it, and when such facts as could be gleaned from the transcript were insufficient to justify the conviction of the appellant. Mr. Maseko, in support of his submission, referred us to **SIPHO COMPUTER DLAMINI v REX (APPEAL CASE NO.20/2000)** and **S v PPHUKUNGWANA 1981 (4) SA 209$)**

In the present case, so the Crown's argument went, there was a substantial amount of evidence in the record as it stands which incriminates the appellants and that it sufficiently provides a body of evidence which warrants the conviction of the appellants. In this regard we were referred to **BENEDICT SIBANDZE v REX (APPEAL CASE NO.10/2002).**

In the latter case Beck JA said:

> ***"The record that has been transcribed is, as I have said, fairly lengthy and no criticism can be leveled at the accuracy of the transcription that is before us. More importantly, there is substantial amount of evidence in the record as it stands which does incriminate the Appellant and which, arguably, might well be sufficient to support the convictions. Under these circumstances I do not consider that justice requires us to set aside the convictions at this stage".***

That demonstrates that the mere fact that a record is defective does not ***ipso facto*** have to result in the acquittal of the appellant. It depends on the extent of the defects and whether or not it is reasonable to rely on the record as it stands to warrant a finding that it provides sufficient evidence on which to base a verdict one way or the other.

See, too, the subsequent judgment of this Court in Benedict Sibandze in which the dictum of Beck JA was considered and applied. When the appeal was argued before us and Mr. Mabila's attention was drawn to the reconstructed passages which recorded the cross-examination of the witnesses he had referred to, Mr. Mabila, quite correctly in my opinion, withdrew his objection to the record and proceeded to argue the merits of the case.

Before I turn to deal with the evidence I must again refer to the meticulous manner in which the facts relating to each of the counts were dealt with by Masuku J in his judgment. The learned judge not only set out fully what the witness deposed to in respect of each count but did so fairly and in detail. In several of the counts the crucial issue was the question of the identification of the accused as the alleged perpetrators of the crime in question. Normally the police hold identification parades by which witnesses are properly tested in regard to their evidence of identity. In this case however the police did not mount such parades because the persons suspected of the crimes were wanted by the police for some time, were at large and were considered dangerous. Consequently, the police caused photographs of the wanted persons to be published widely in the police gazette, the print and the electronic media. The photographs were accompanied by warnings emanating from the police that the persons were dangerous and that they were wanted by the police in connection with serious offences. In view of the widespread publicity given to the wanted persons and the publication of their

photographs the police took the view that it would be unfair to them to hold identification parades at which complainants might well be assisted in identifying suspects by having previously seen their photographs. This could lead to the pointing out of the accused appearing to be completely reliable, whereas without the previous publication of the photographs the pointing out may have been much more difficult for the complainants to make. This could be prejudicial to the accused.

The attitude of the police in not holding the parades in the circumstances met with the approval of Masuku J and, for the reason referred to, I agree with that. The holding of identification parades is usually an important aspect of a case in which identity is in dispute, but that does not mean that such parades are a ***sine qua non*** for proper identification. It depends on the circumstances of the case and the evidence *aliunde* which the Crown is able to place before the Court. Masuku J clearly appreciated this and as I have said he carefully referred to all the evidence led by the Crown in respect of each count faced by the accused before him. I now turn to consider the judgment in reference to those counts.

It will be convenient to deal at first with all the counts in which the first appellant is concerned. This merely means that count 2 will be left to be the last count considered.

COUNT 1

The first and second appellants were charged with murder, the allegation being that on or about 2nd February 2002 and at or near Nhlangano town in the district of Shiselweni, they acted jointly and in furtherance of a common purpose in the unlawful and intentional killing of Mark Mordaunt. They both pleaded not guilty.

It was not disputed by the appellants that on the date and at the place alleged in the indictment the deceased met his death as a result of a bullet entering his body in the vicinity of his left shoulder and after tracking through several vital organs, becoming lodged in his right upper arm. It was further not disputed that this occurred on 22nd February 2002 at the place and time alleged by the Crown witnesses, i.e. in the immediate vicinity of the grocery shop run by PW4 Rudolph Diamond and at or about 2000 hours. Nor could it be seriously disputed, since the defence of the appellants was that they were not there, that the account of the robbery given by the witnesses concerned was proved beyond reasonable doubt. PW4 told the court how he had been confronted in his shop by a man with a pistol, and how he poured his drink over the man and wrestled with him. While that was happening two more men appeared, one of whom jumped over the counter in the shop while the other "stood on the side with a long rifle in his jacket". During the wrestling that went on between PW4 and the intruder, PW4 heard a shot followed by the man (he who had the long rifle and who had gone out of the shop) coming back and shouting, "I have hit the dog". The men then

all left the shop, said PW4, and he went out to see who it was that had been "hit". It turned out to be the deceased who was rushed to the hospital but died on arrival there.

PW5 was the son of PW4 and was behind the counter when the intruders arrived. He deposed to having seen the man pointing a gun at his father, and that one man jumped over the counter. It then became clear what the purpose of the attack on the witnesses was, since PW5 stated that the man who jumped over the counter demanded money from him. He handed over what was available there in cash.

The importance of PW5's evidence, apart from the corroboration it lent to the evidence of PW4 was -

(i) He stated that the man who had the "long" firearm under his coat and who produced it was seen by him clearly as there was an electric light in the shop.

(ii) He gave a description of the man who, he said, had a long face with a coffee-coloured complexion and a gap in his upper teeth. This was seen by him when the man talked, and talk he did. His evidence was that the man said to the persons in the shop words to the effect that they (the intruders) were not playing games and that anyone who "thought he was clever would be put down".

(iii) He recognised the first appellant in the dock as being that man.

(iv) He stated that the green strap on the AK47, which was exhibit 11, was similar to the strap he had seen on the firearm carried by the

man he identified as first appellant. This is of material significance since that firearm was found by the police, during their investigations, in the room rented by the first appellant.

The witness Sanele Nkonyane (PW14) stated that he was helping PW5 in the shop that night. He identified the second appellant (who was in the dock as accused 2) as the man who pointed the firearm at PW4. This appeared from the original transcript of the evidence which was furnished to me on the first occasion this matter came before us. He was cross-examined to little effect on behalf of first appellant but was pressed on behalf of second appellant in an effort to make him concede that the second appellant was not the person who confronted PW4 because, so it was put to him, second appellant was not there at all but was on the relevant date visiting his girlfriend Ntombikayise Mkhonta. The witness, however, made no concession and was adamant that second appellant was the man on the scene at the time that the crimes were committed. He said he had looked at him "for some time" and that "there was ample light" in the shop in which the electric light was on.

Masuku J dealt in detail with the evidence of PW8 Sifiso Aubrey Dlamini. He was introduced by the Crown as an accomplice. It is not necessary for the purposes of this judgment to analyse PW8's evidence in the detailed manner in which the learned judge ***a quo*** did. There is no valid reason for rejecting the evidence of the witness who gave a circumstantial account of his association with 1st and 2nd appellants before and soon after the

fatal shooting. He was found to be an impressive witness despite having testified to having been assaulted by the police whilst he was in custody and obviously being reluctant to testify about it. The assaults were designed to force the witness to disclose the whereabouts of the two appellants whom he knew well, and had nothing to do with his version of the events.

In brief PW8's evidence was to the effect that on Friday 1st February 2002 he was approached by the first appellant and asked whether he (PW8) would give him and two friends a lift to Nhlangano. As PW8 was that evening intending to drive to that vicinity, he acceded to the request. When he picked up the three, he observed they were first appellant, second appellant and one Njini and that they "were helping each other to carry a big heavy bag". He duly dropped them off in Nhlangano, after being told that they would probably spend a week in Nhlangano. On Sunday 3rd February, however, PW8 received a phone call from first appellant asking him to fetch them in Nhlangano and further told him "that he had actually had had an accident and a person had actually died on (sic) his hands". PW8 was unable to fetch them that day and, he said, he read in the local newspapers on the Monday that a man had died in Nhlangano. PW8 inferred that that was the man who was mentioned by first appellant as having died at his hands. On Wednesday 6th first appellant phoned again and this time PW8 agreed to pick them up near Manzini and to take them to a bus stop called Ngomeni on his way to

Mbabane. Once again first appellant was together with second appellant and they were, between them, carrying a big heavy bag.

On the way first appellant, who was sitting in front of PW8's van, told PW8 the full story of the robbery at the grocery store on the night of February and how he had shot the person who, he thought, was going to shoot his friends in the store.

While the confession of first appellant is not evidence against the second appellant it is beyond reasonable doubt that the two were in each other's company at the crucial period and that PW14 was correct in saying that the second appellant was in the store of PW4 with the first appellant when the murder was committed.

The second appellant's denial that he was involved in the robbery and murder at the store of PW4 was coupled with the defence of alibi. He stated in evidence that on the night in question he was together with his girl friend Ntombikayise Mkhonta at her home.

In approaching this evidence it must be borne in mind what was said for example by Holmes AJA (as he then was) in **REX vs HLONGWANE** 1959(3) SA337 (A) at 340-341.

The learned judge of appeal put it thus:-

"*The legal position with regard to an alibi is that there is no onus on the accused to establish it, and if it might reasonably be true he must be acquitted... but it is important to point out that in applying this test, the alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the court's impressions of the witnesses*".

In order to apply that test I turn to the totality of the evidence as it affects the second appellant. Apart from the positive identification and the close association with the first appellant at the crucial time to which I have already alluded, these are the circumstances in which the alibi defence first came to light in the case. At the time of his arrest and after he was warned by the police officer that he was not obliged to say anything the appellant decided to say nothing. It is a well established principle that the accused must raise the defence at the earliest opportunity, but that cannot include the immediate response to his warning on arrest. At that time he is not only told that he need say nothing, but it is his accepted privilege to remain silent. However, the position alters when he comes to trial. He cannot then maintain silence regarding the alibi since the onus is on the Crown to prove the falsity thereof if it wishes to do so; and in order to do that it must obviously be appraised of it so as to give the police an opportunity to investigate it. An accused cannot expect the court to place too much reliance on the

evidence of the alibi if the accused chooses not to mention it until late in the trial.

m casu it was not until PW14 gave his evidence identifying the second appellant that the alibi was mentioned, and one is entitled to express surprise that the second appellant was prepared to endure a long incarceration and evidence over a period of months without disclosing that he was not at the scene of the alleged crime at the time of its perpetration.

The tardiness of accused persons in disclosing alibis has received judicial attention. In Hoffman and Zeffert's The South African Law of Evidence Fourth Edition at page 179 the learned authors, in discussing the circumstances in which inferences against an accused can be drawn from his silence state:

> "*... it is permissible for a court to take into account the fact that a defence such as an alibi may be considerably weakened if it was disclosed too late to give the police an opportunity for checking it*"

See in this regard **REX vs MASHALELE & ANOTHER 1944 AD 571** at 585. In **MOGATLA v THE STATE 2001 (1) BLR 192 (CA) KORSAH JA** stated:

"According to the law of evidence the onus of proving that an alibi is false rests on the prosecution. In England and Zimbabwe there are statutory provisions to the effect that when an alibi is relied on as defence, the accused must furnish to the prosecutor within a specified time, or within a reasonable time, or in court before the commencement of proceedings, particulars of any alibi the accused person wishes to raise as a defence. In Botswana, except for section 145 of the CRIMINAL PROCEDURE AND EVIDENCE ACT (Cap. 08:02), there is no provision regulating the raising of an alibi. But the onus cast on the prosecution to prove falsity of an alibi makes it imperative that when an accused person relies on an alibi as a defence, some notice of it must be given before or at the commencement of the trial in order to afford the State the opportunity to verify the truth or falsity of the alibi.

Although in the instant case the police did check the alibi, it was nevertheless only disclosed after several Crown witnesses had identified the first appellant as being at the shop of PW4 on the fateful evening, which alone would tend to weaken the defence. When that is coupled with the denial under oath of the girlfriend referred to by the accused, the defence of alibi is not only weakened but was properly rejected as false.

There remains the question whether the second appellant should be found guilty of murder by virtue of the doctrine of common purpose. First appellant did the shooting and the second appellant's guilt depends upon whether, on the evidence, the others carrying out the robbery were also ready to deal violently with any interference in their planned design. As far as second appellant is concerned he was armed and pointed his firearm at PW4; but for PW4's quick reaction in coming to grips with him after dousing him with his drink, second appellant may well have fired his weapon. The robbery was obviously planned and each of the miscreants had a role to play. First appellant's remark "I have hit the dog" is illustrative of contempt for other people which they all must have known could lead to the use of a firearm by one or other in the commission of what was an armed robbery.

In the case of **MATTHYS AND ANOTHER v THE STATE (2005) 1 BLR 69** at

76H-77A Korsah JA stated the following:

> ***"It seems to me, that whenever a group of persons agree to embark on a criminal enterprise, and they are all aware that a firearm is to be used in the commission, or to facilitate the commission, of the crime, each and every member of the group must be regarded as foreseeing the***

possibility that in the event of their attempted apprehension the firearm maybe used to facilitate their escape or to prevent their apprehension".

In that case Zietsman JA expressed the view that Korsah JA's statement was too widely stated and went too far. He stated that it would depend in each case upon the type of criminal enterprise the persons had agreed to embark upon. If that enterprise involved a crime that was unlikely to involve harm being done to another human being (the criminal enterprise in that case was an agreement to hunt illegally) the shooting by one of the persons at the police who endeavoured to arrest them was not necessarily something that the other members of the group would have foreseen. Zietsman JA stated, however, that if the criminal enterprise agreed upon involved armed robbery, for example the statement made by Korsah JA would, in his opinion, hold good.

As I have indicated, however, on the facts of this case second appellant's conduct shows clearly his preparedness to use a firearm himself let alone foreseeing that the first appellant might use one. The fact that he did not use it probably came about as a result of PW4's quick reaction to his confrontation.

The appeals of the two appellants on this count are dismissed and their convictions by Masuku J are confirmed.

It remains only to say this. Police must learn that the ill-treatment of prisoners or prospective witnesses by them for any reason whatsoever will not be tolerated by the courts of this country. I agree wholeheartedly with Masuku J who said in his judgment ***a quo.***

> ***"No matter how difficult, unyielding and dangerous the crimes being investigated are or how violent the suspects may be perceived to be, the route of torture is most unwelcome and uncilivized. It is my hope that the human rights ethos encapsulated in the Constitution will take root in the poHce force and that allegations of torture in order to extract information will be rendered an outmoded tool and will become a fossil of an old dispensation".***

The time has come for serious thought to be given by the courts to consider, as a matter of policy, whether no evidence of whatsoever nature, including a pointing out and what was found as a result of a pointing out, should be admissible if it is tainted by having been elicited by ill-treatment of a person in police custody.

COUNTS 3 AND 4

Counts 3 and 4 must be considered as one count. It is common cause that to treat them separately would be an improper splitting since they both arose from one incident at the home in which Themba Mazibuko (PW2) and his wife Sindisiwe Juliet Mazibuko (FW3) lived. They were alleged by

the Crown to have been robbed, at their home, on 1st December 2001, by the first and third appellants acting in furtherance of a common purpose.

Briefly put, the facts are as follows:

On the night in question, FW2 arrived home in his green Corsa motor vehicle SD 743 MG. On his arrival three men jumped out of a tree where they had been hiding, apparently anticipating his arrival. They attacked him, dragged him from the car, stripped him of his cell phone and wallet and hit him and forced him towards the front door of his dwelling. They then took his dress ring from his right little finger, and his watch. They also dispossessed him of the keys of his car and one of them tested whether he could start the car, which he did. They then forced him into the house where his wife (FW3) was waiting for him together with her 17 days-old baby. Two of the assailants were armed with hand guns and they threatened to shoot FW2 if FW3 (who had by this time locked herself and her baby in the bedroom) did not open the door.

For fear of her husband being harmed PW3 opened the door and, according to her evidence, she saw three men, one of whom was carrying a gun. Two of them took PW2 into another room while one remained with her. He demanded her cell phone and her wallet both of which she gave him. He then proceeded to disconnect appliances in the bedroom, namely a video record, a hi~fi set and a Phillips CD player. While this was going

on, the one who was carrying a firearm and who had gone into the other room with PW2 searched the house and among other things found a bag containing PW3's rings and other jewelry.

After telling the court that the lights were on in the house PW3 positively identified the first appellant in the dock as the man who had remained with her while the others were with her husband. She justified her identification by relating how well she could see him when she handed over the various articles to him; that she had observed him for about seven minutes while he was in the fully lit room with her. PW3's identification would, by itself, have been sufficient to convict the first appellant. What followed made it clear beyond any doubt.

Taking all the loot with them, the three drove off in PW2's car.

Constable Mpendulo Dlamini testified (PW23) that on the 1st December 2001 (that is the night of the robbery) while he was on patrol, he received information on the police radio that a vehicle had been taken at gun-point by armed men. It was described as a blue Corsa van. Shortly after 20H00 he and his colleague saw a vehicle which he thought might be the stolen one - it answered to the description given on the radio. The vehicle was parked and a man was sitting behind the steering wheel. The number on the number-plate was different from that which was broadcast. The police were suspicious, however, and accordingly asked

the man to drive the vehicle to the nearby police-post and said they would follow him.

At that stage the man drove off at great speed but on being followed he ultimately stopped and alighted from the vehicle. As PW23 was about to place him under arrest he ran off leaving the vehicle behind but not before he had been identified by PW23 as a man whose photograph had been published as a wanted man in the police gazette. His description of the man as having dreadlocks and a gap in his front teeth tallied with that given by PW3 of the robber, and the licence disc on the windscreen of the vehicle bore the number of the vehicle deposed to by PW2. The police also recovered from the vehicle PW2's travel document, a jewellery and ladies handbag - all of which were identified by the complainants as the property of which they were robbed.

In the light of all the above evidence Masuku J was undoubtedly justified in finding, as he did, that the identification of the first appellant was unassailable and proved beyond reasonable doubt that it was he who was the man described by PW3 as one of the robbers. It would have required a deep-laid conspiracy between the complainants and the police to spin a web of evidence which so clearly enveloped the first appellant. There cannot reasonably be such suggestion and the appeal of first appellant against his conviction on these counts must be dismissed.

COUNT 5

The charge on this count against the first appellant was that on 17th April 2001 Dudu Mkhabela (PW10) and Themba Bhembe were robbed by him in broad daylight of a vehicle and a large amount of money.

PWlO's evidence was briefly the following. She stated that she was employed by a firm called Industrial Motors. On 17th April 2001 she was preparing to go to the bank to deposit about E89000-00 in cash and cheques in the amount of *£90000-00.* She was to be conveyed to the bank in the firm's vehicle with one Bhembe driving. Just as they were about to leave the firm's garage - it was about 1pm - an armed man approached, pulled Bhembe out of the driver's seat, got into the vehicle and drove off with PW10 in the passenger seat. There followed a period of about 4 hours during which she was able to observe the robber uninterruptedly. She described him as having plaited hair and a gap in his upper teeth, being "coffee-coloured" and wearing a long black jacket. She pointed out the first appellant in court as being the robber.

Her identification of the appellant cannot seriously be contested. It is supported by the evidence of Mfanzile Sigudla (PW9) who stated that he knew the first appellant for some years and that they reside together. He saw him at close quarters on the day in question at the garage where the robbery took place. He saw the appellant take out a firearm and hi-jack the car before driving off, "with the lady who worked at the garage" in the vehicle.

William Edwards (PW13) stated in evidence that he owned the garage. This vehicle alleged to have been taken by first appellant was described by him as being a white Mazda Magnum with stripes on the side and registration number SD 813 EN. He had a spare set of keys which were proved to fit the car and also the car's manual.

It is unnecessary for me to set out in detail the harrowing experience which the complainant underwent - that has been fully canvassed in the judgment of Masuku J. It was put to PW10 and PW9 in cross-examination that they were mistaken in identifying the first appellant as the robber, because as the first appellant would have the court believe, he was nowhere near Industrial Motors that day. He also said that the reason PW9 lied about his presence at the scene was because he had had a land dispute with the appellant. This was not put to the witness when he was cross-examined and is obviously a contrived attempt to discredit the witness and so escape the consequences of his identification. Even if there were some reason for PW9 to have identified the appellant dishonestly, which there is not, it would have left unscathed the identification of the appellant by PW10. The circumstantial account of the four hours she spent in the company of the appellant is unassailable, and would have been, on its own, sufficient to prove appellant's guilt beyond reasonable doubt. Coupled, however, as it must be, with the evidence of PW9, PWlO's identification of the appellant cannot, and indeed was not, seriously contested.

There is no substance whatever in the appeal against first appellant's conviction on this count.

COUNT 6

This count concerns a robbery which took place at the home of Busisiwe Gamedze in the Mathendele Township, Nhlangano on 3rd February 2002. First and second appellant were indicted on this in the High Court in Mbabane.

The evidence of the complainant PW6 was to the effect that three persons entered her home between midnight and lam and two of them went through the house in a most threatening manner collecting what they wanted to take away with them. While this was going on the third robber stood guard over her and other family members who were ushered into one room. This man, whom she had ample opportunity to observe as the room was well lit and his face was not covered, she identified in the dock as first appellant. She said he was carrying a "big firearm", had a not very dark complexion and a gap in his front teeth. The robbers spent about an hour in the house and among other things they took meat from the refrigerator and the children's watches. First appellant was brazen enough to have his face uncovered while he kept close to PW6 while "guarding" her.

Among the items they stole was a JVC car radio which became Exhibit 12 and which was positively identified in the court ***a. quo*** as her radio by the complainant. There can be no doubt about the identification of the radio since the complainant demonstrated that the number on the radio coincided with the number on the purchase documents.

On 28th February 2002 the police, according to the uncontradicted evidence of Constable Airport Dlamini (PW26), arrived at the homestead of PW11 i.e. Thomas Johnson in which the first appellant had hired a flat with the assistance of PW8. When they approached, two men, identified by the witness as first appellant and second appellant, were seen each carrying an object. On seeing the arrival of the police the two ran off dropping the objects they were carrying, which turned out to be Exhibit 12 (dropped by first appellant) and a battery dropped by second appellant. Despite dropping the battery the second appellant was acquitted by Masuku J so no more need be said about him on this count.

As far as the identification of first appellant as being one of the robbers is concerned, the learned judge remarked on the emotion displayed by PW6 in court when she pointed out Al as the person who had subjected her to what must have been a prolonged and terrifying experience, and there can be no reasonable doubt that the identification of first appellant was correct. The appeal on this count is without substance and is accordingly dismissed.

COUNT 9

On 3rd February 2002 and in the same township as the robbery described in count 6 (and on the same night) a robbery occurred at the home of the complainant Patrick Mangaliso Gamedze. Appellants one and two were charged on this count. The complainant (PW7) gave evidence of an entry into his home of three men who forced him and his wife to lie in their bed, to cover themselves and not to look at the men. They (PW7 and his wife) were threatened with being shot if they looked.

The men then proceeded to take what they wanted and then left. Among the items they stole were a green jacket belonging to PW7, denim jeans and several pairs of trousers.

As I have already recounted in connection with Count 6 the investigation of that crime brought the police to the homestead of the witness Johnson to whom the first appellant had been introduced under a false name. Johnson was present and he led the police to the room that had been rented from him by the first appellant. In a suitcase in the room the police found the green jacket which was identified by PW7 as his jacket by a burn at its edge next to a seam. It was exhibit 13.

The first appellant stated that the jacket must have been in the possession of Lindiwe Gama who was living with him at the time,

because, so he said, the suitcase in which it was found belonged to her. He did not deny that the jacket was that of PW7 nor did he contest the robbery. The suggestion, therefore, that it might have been his girlfriend who was involved in the crime is, in the circumstances, not worthy of consideration. The complainant said three males entered his house which was situated in Nhlangano - and we know that that is where the first appellant was on 3rd February 2002. Also it was proved in regard to count 6 that the first appellant was a robber that very night. He was obviously on the rampage and his conviction on this count was fully justified. The appeal on this count is dismissed.

COUNTS 10, 11 AND 12

These counts all related to the unlawful possession by first appellant (it was alleged in the indictment that the possession was in furtherance of a common purpose with the then accused No.5) of arms and ammunition in contravention of various provisions of the Arms and Ammunition Act No.24 of 1964 as amended.

Because the evidence regarding these counts was largely repetitive the learned judge ***a quo*** dealt with them together. I shall do the same.

PW28 Detective Constable Solomon Mavuso described a police operation under the command of the late Superintendent Mavuso, which was carried out on 28th February 2002. Armed police surrounded the Johnson

homestead, previously referred to, with the intention of arresting the first and second appellants. It was then that the appellants appeared carrying the radio and battery described above in relation to count 6. After an unsuccessful chase after the two appellants (shots were fired by the police in calling upon the appellants to give themselves up) the police went to the room rented from and pointed out by Johnson who was on the scene. In Johnson's presence the room was searched and under a mattress the police found an AK47 rifle. The police also found three rounds of ammunition in the room. The firearm had a strap which, it is recalled, was the description of first appellant'ls rifle when described by the witness in the first count which arose from the fatal shooting in PW4's store.

The first appellant denied knowledge of the rifle in his room and stated that he did not know if his girlfriend Lindiwe owned such a weapon. He also maintained that as his room was open anyone may have put the rifle under the mattress. As correctly observed by Masuku J, it is difficult to imagine who would possess that dangerous rifle, and choose to hide it in first appellant's room under his mattress. There was other evidence leading to the conclusion that possession by the first appellant of the AK47 and the ammunition was proved beyond reasonable doubt. I refer particularly to the evidence of PW8 who stated in evidence that first appellant told him, when he (PW8) came to collect him after the telephone calls for "help" which I have already referred to, that the police had taken his firearm away, and that it was an AK47 rifle. As pointed out

by Masuku J in his judgment, this evidence of PW8 was not challenged in cross-examination of the Crown witness.

It is noted that only one AK47 appears to have been discovered in first appellant's room. Masuku J convicted him on all three of the counts under the Arms and Ammunition and on a perusal of the record I found justification for those counts i.e. counts 10,11 and 12 since apart from the rifle and ammunition there was also a magazine for the rifle possession of which contravenes Section 11 (3) of the Act.
Despite the efforts of the first appellant to escape the clear inferences of his guilt, he had no defence to these counts and his appeals against these convictions also fall to be dismissed.

It must be remembered in regard to all the evidence led and the verdicts of guilty pronounced by Masuku J that -

> ***"Proof of guilt beyond a reasonable doubt does not necessitate proof of guilt beyond all doubt. Where the facts are staring you in the face, to indulge in extravagant excuses for their occurrences is to take an excursion in futile mental exercise".***

per Korsah JA in **NDLOVU v THE STATE 2000(2) B.L.R.** at page 161.

It sho uld also be remembered that the first appellant's false evidence may be taken into account as a factor in assessing the degree of proof furnished by the Crown evidence. As was observed by Lord Devlin in **BROADHURST v R 1964 AC 441** at 457 "such false evidence by the appellant can properly be taken into account by the trier of fact as strengthening the guilt of the accused".

That brings to an end the examination of all the counts involving the first appellant. I must now consider the third appellant's appeal against his conviction by Masuku J on count 2.

THE CONVICTION OF THIRD APPELLANT

The third appellant was convicted on count 2, and on counts 3 and 4 taken together.

I turn now to consider count 2 in which the Crown alleged that the third appellant, in furtherance of a common purpose with the then 4th accused, committed the crime of robbery on 20th November 2001 at Ngwane Park Manzini. The details of the robbery alleged were that by using force and violence the two "induced submission by [one Patrick Motsa]," and stole from him an Isuzu Bakkie SD 289 JG and other household items valued at E128 *000-00.*

The complainant, who was PW1 in the court ***a quo,*** described how, on the night in question, "some people" broke into his house, assaulted him and threatened to shoot him. He pointed out, after a good deal of hesitation, accused 4 as being one of the assailants. The learned judge found however that the accused's alibi had not been proved false beyond reasonable doubt and acquitted him, leaving only the third appellant's case to be considered by the court ***a quo.*** The acquittal of the accused involved an acceptance of the dictum of the learned judge in **S v KUBEKA 1982(1) SA 534 (T)** at 537 F~G which was the following:-

> ***"Whether I subjectively believe him is, however, not the test. I need not even reject the State case in order to acquit him....I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State".***

I cite this dictum because it is also relevant in considering the defence of the third appellant to the charge against him. The learned judge found that PWl's evidence did not in any way link the third appellant with the offence. That followed from PWl's failure to identify him as one of the robbers.

The evidence which the Crown led against the third appellant was briefly the following. Firstly, there was the evidence of his girlfriend Philile Fortunate Mkhonta (PW19), who was originally indicted but charges against her were subsequently dropped. She said in evidence that she

was asleep on a mattress in the room rented by third appellant when the police arrived to conduct a search. Under the mattress on which PW19 had been lying, they found a firearm - a shotgun with pump-action and 3 rounds of ammunition (exhibit 23). The third appellant was present and gave the police a false name i.e. Simelane in place of his real name Bhembe. The appellant also did not reply when the police asked who owned the firearm. The police also took possession of a floral blanket, a radio and some cell chargers. The blanket was later identified by PW1 as being one of the articles which were stolen in the robbery at his house.

In his evidence under oath third appellant stated that on 4th December 2001 i.e. about two weeks after the robbery in this count, he met one Mfanasibili Dlamini who was carrying a bag containing the radio, the blanket referred to above and the firearm. When they met, Dlamini asked the appellant, and he agreed, to keep the bag and contents for him as he had been reported to the police for an assault he had perpetrated on his girlfriend during a dispute he had had with her. The appellant denied having been a party to the robbery. In assessing this evidence, which of course tended to exonerate the appellant on this count Masuku J said:-

> ***"It was put on A3's behalf to PW28 Constable Mavuso that the items were kept by the said Mfanasibili because he knew that the police were hot on his trails. In his evidence, however, A3 testified that he was asked to keep the items because Mfanasibili had had some***

misunderstandings with his girlfriend There is an element of the accused's story not being put to some witnesses on the one hand and a disparity between what the attorney put to the Crown's witnesses on behalf of A3 and what A3 himself testified to under oath. Only an adverse inference can be drawn from the foregoing".

The learned judge drew the adverse inference from the apparent difference between what was put to PW28 and his evidence that his female companion had reported Mfanasibili Dlamini to the police and that that is why he (Dlamini) had asked him (third appellant) to keep the bag and contents for him.

It was argued by the third appellant's counsel that the inference was wrongly drawn since it was clear from his statement, he submitted, that Dlamini knew that he had been reported to the police and therefore it was reasonable for him to tell the third appellant that the police could be after him.

In regard to this explanation of the appellant the question is whether it was reasonably possibly true. If it was, the adverse inference should not have been drawn.

In the oft-cited judgment of Greenberg JA in **R v DIFFORD 1937 AD 370** at 373 the eminent judge said:-

"... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

We have it from the evidence that Mfanasibili Dlamini was wanted and subsequently shot by the police in connection with these matters, and consequently the explanation of his possession by the third appellant of the items in his room cannot, in my judgment, be described as so undoubtedly false that it fell to be rejected.

The learned judge ***a quo*** also seemed to have placed emphasis on the failure by the third appellant to give the explanation to PW22, when he saw the items in third appellant's room, that they belonged to Mfanasibili. Elsewhere in this judgment **I** have referred to the accused's right to remain silent when questioned by the police and consequently I do not think the Crown's case is assisted by the third appellant's failure to explain his possession there and then.

Finally, Masuku J also regarded as a sign of his guilt that the third appellant pleaded guilty to possession of the firearm. Mr. Bhembe who appeared for the third appellant both in the trial and this appeal, submitted that the fact that he pleaded guilty to possession does not

mean he was claiming ownership of the firearm. On his version as to how the firearm came to be in his room, so the argument went, he was in possession of it but the ownership would still have vested in Mfanasibili Dlamini. **I** agree with that submission.

The third appellant was found guilty on count 2 solely by reason of his possession of the duvet which was identified as having been taken from PWl's home when he was robbed.

The evidence in respect of counts 3 and 4, as far as the third appellant is concerned, is similar to the evidence on count 2. Counts 3 and 4 concern the robbery of Themba Magoba and Sandisiwe Kunene. Here again the third appellant was not identified by the complainants. He was, however, found in possession of a radio or CD player taken from the complainants. His explanation in respect of this radio also was that he had obtained it from Mfanasibili Dlamini.

The third appellant was, as I have said, not identified by any witness who deposed to the facts in counts 2, 3 and 4 and his convictions, therefore, were based purely on his possession of stolen articles. As I have said his explanation of such possession may reasonably possibly be true and consequently he is entitled to the benefit of the doubt.

On a general conspectus of all the evidence, in my view, the Crown failed to prove beyond reasonable doubt that the third appellant was guilty of the charges against him.

In the result, the appeal of third appellant succeeds and the convictions and sentences of the third appellant are set aside.

THE SENTENCES

The first and second appellants also directed their appeals against the sentences imposed on them by Masuku J. It is hardly necessary to repeat that this court will only interfere with the exercise of the discretion vested in the trial court, if the judge in that court has misdirected himself in a material respect, or if the sentence of the trial judge is so far in excess of what this Court considers should have been imposed, that the interests of the appellant and society in general require this Court to impose sentence afresh.

Many admonitions regarding sentence have fallen from judges in various jurisdictions. Masuku J referred, ***inter alia,*** to two such judgments which I think should be repeated herein. Masuku J said:-

"It was in recognition of this enormous difficulty and challenge that RamodibediJA found it appropriate to throw a word of caution that should always serve as a beacon to judicial officers at this crucial time in the trial. In a yet unreported judgment in the Appeal Court of Botswana in MADISAOTSLLE BOGOSINYANA v THE STATE CRIMINAL APPEAL 048/04 at page 6, the learned Judge of Appeal said the following:-

> *It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safeguarding the interests of society. It is thus a delicate balance which should be undertaken with utmost care. In this regard it is important to remember the age-old caution not to approach punishment in a spirit of anger. The justification for such a caution, as one seems to have read, lies in the fact that he who comes to punishment in wrath will never hold the middle course which lies between too much and too little'.*

In yet another judgment in Botswana Moore JA stated the following in THAPELO MOTOUTOU MOSILWA CRIMINAL APPEAL NO.0124/05regarding the question of sentence-It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public maybe satisfied that the court has taken adequate measures within the law to

protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated".

The offences in the present case were carried out with a ruthless disregard for the terror they must have inspired in the victims. First appellant was obviously involved in an orgy of crime which he carried out in large measure in close association with the second appellant. Their contempt for other human beings is illustrated by the reference to the deceased in

count 1 as "a dog", and the threat to shoot an infant in its mother's arms if the infant made a noise in counts 3 and 4. This is certainly not an exhaustive list of the callous conduct of the appellants.

Masuku J gave every point regarding sentence his anxious consideration and no misdirection can be observed in his reasoning leading to his decisions. The sentences imposed by him on the two appellants were heavy, but not heavier than is justified in the circumstances. This Court will not interfere with those sentences and the appeal against them is dismissed.

In the result the appeals of the first and second appellants are dismissed and the convictions and sentences imposed upon them in the High Court are confirmed.

The appeals of the third appellant are upheld and his convictions and sentences imposed by the High Court are set aside.

J BROWDE
Judge of Appeal

I AGREE

N.W. ZIETSMAN

Judge of Appeal

I AGREE

M.M RAMODIBEDI

Judge of Appeal

DELIVERED IN OPEN COURT ON THIS *14* DAY OF NOVEMBER 2007._