

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. T. NO. 4/95

In the matter between:

SIFISO NKOSI

VS

THE KING

CORAM:

A.F. M. THWALA

FOR THE CROWN:

MR. NSIBANDE

FOR DEFENDANT:

MR. SIMELANE

JUDGMENT

16/11/95

The accused is charged in count 1 with the murder of Norman Springle on the 11th April 1994 at Ezindwendweni in the Shiselweni District.

In count 2, with the robbery of Norman Springle on the same day.

In count 3, he is charged with the unlawful possession of a 7.63 mm pistol no. 722732 in contravention of Act 24 of 1964 as amended by Act 6 of 1988 on 13th April, 1993 at Gege in the Shiselweni region.

In count 4, he is charged with unlawfully possessing eight rounds of ammunition in contravention of Act 24 of 1964 as amended by Act 6 of 1988 at Gege in the Shiselweni Region.

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The Crown called Dr. Berson who conducted the post-mortem on the 14th April, 1994. He said the cause of death was gunshot wound of abdomen with extensive bowel involvement. He summarises his findings at page 2 and paragraph 20 of the report.

The Crown then called Sonto Gumedze who stayed and worked with the deceased. She stated that they were in the process of closing the shop. She saw a person entering the gate. She told the nightwatchman to tell the person that the shop was closed. The person then fired a shot in the air. She ran into the shop and hid under the counter. The person came into the shop with the night-watchman. He then shot at the ceiling. The deceased came from the store room. The deceased then went out. The man followed him. He fired a shot and the deceased raised an alarm. They came back into the shop. The deceased took a till and put it on the counter. He said he was going to shoot the deceased on the head. He then took a torch and batteries. He also took sweets. He looked at the night watchman who was lying down. The deceased had left the shop. She heard the deceased crying next to the priest's house who was their neighbour. She went to the deceased. The priest took them to the clinic because the deceased was shot and injured. They were then transferred to the R.F.M. hospital where the deceased died. She did not recognise the assailant. He only took the torch batteries and sweets. She did not know how much money was taken. The man wore a jacket like a shirt.. It

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had zippers. It was blue. The jacket before the court looked like the one he wore. The gun used was a small gun.

He was not cross-examined by the defence.

The next witness was Mbekwa Mathenjwa who was introduced as an accomplice witness. He stated that the accused came to his home. He wanted his father. He told him that his father was not present. He then asked him to direct him to the local shop called Sitofu. He then asked him to accompany him to the shop. He said if he did not accompany him, he would kill him and his family. He then tied him with a white rope. He was a hundred metres from the shop. He then went to the shop to kill. He heard gun shots. He came back. He put his foot on his head. He then untied him. They then went to his home. He said he would not leave. When they returned home, it was dark. He was then carrying a torch. When they went to the shop the accused carried an umbrella. He did not carry a torch. They entered the hut and slept until morning. He did not report the incident. At sun rise he went to the dipping tank. He left the accused his home. He went to a certain kraal to report but did not find any body. When he returned home, he found the accused standing outside. He asked him to accompany him to another shop where they bought fish. They returned home. He gave his sister-in-law the fish to cook.

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The relatives of deceased came. They told him to call the accused. He called him. He came out. They shot at him. He ran into the bush. The people came with the Chief's Runner. He then gave the relatives accused's belongings. He gave them a torch, a jacket and an umbrella. They took them and went to Lavumisa police station. He did not know if the jacket was searched.

In cross-examination, he said there were five people at his home. They were his sister-in-law, two children and he. His father is a traditional healer. He did not know where he was that day. He accompanied the accused to the shop because he said, he was going to kill him. He did not do anything when the accused tied him. He said when he was tied he was with Nhlanhla that the accused was forcing him to the shop. The accused spoke to Nhlanhla. Nhlanhla's sent him to buy cigarettes. He bought cigarettes and came back. Nhlanhla did not help him when the accused tied him. He said he made a statement to the police. The police did not read the statement back to him. He did not take an oath. He told the police that the accused counted money in the morning. The accused kept watch over him for the whole night. He feared that the accused was going to kill him.

The next witness was Nhlanhla Mngomezulu. He said he saw the accused on the path on the day of the killing. He again saw him the same day and he was with pw3. He was coming from the shop. He greeted them. They told him that they

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were going to the shop. He told them to go and buy so that they can return home together. Pw3 asked for tobacco. He gave him money to go and buy at the shop. He went and came back. He then enquired from the accused where he was coming from. He told him where he came from but could not understand him. The accused told him he was going to pw3's home. He then told him that he had come to work he must wait for him. He told him that he was in a hurry. He then waited for him. He then produced a gun. He smeared something on his face. He then went to the shop. Pw3 was standing at a distance from him. He then followed the accused to the shop because he wanted to see what he was going to do at the shop. He heard about three gun shots. After sometime the accused came running. He then joined accused and

pw3. Accused was carrying a torch and sweets. He said he shot the person he found at the shop. He said the person produced a revolver. He then went to his home. Pw3 and the accused went to pw3's home.

In cross-examination he said when the accused left for the shop he was standing with pw3. He did not see pw3 being tied with a rope. There were many people at his home because his brother and sister had died. He did not report to anyone at his home because it was late. He told his brother in the morning after the deceased's relatives had come to enquire about the robbery. He said he did not report because the accused would find him and kill him. He went to the dipping tank and found pw3. There were many

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people at the dipping tank. He did not report to them.

The Crown then called William Burns, the uncle of the deceased who stated that his nephew was shot at his shop. He was taken to R.F.M. hospital. He asked him to go to the shop. He drove to the shop. He found the Chief's Runner and the neighbours at the shop. He found an empty cartridge at the gate. He found another one at the verander. In the shop he found two. On the other side of the counter he found blood. He then went to the home of pw3 with the Chief's Runner spoke to pw3. The accused got out and produced a gun and told them to lift up their hands. He then fired a warning shot at the accused. The accused ran into the bush. He then demanded accused's articles from pw3. He gave him a jacket, a torch and an umbrella. He handed the items to Lavumisa police. They looked for the accused but did not find him. He also handed the empty cartridges to the Lavumisa police.

In cross-examination he said he was scared when the person produced the gun. He said he recognised the accused because he saw his face and said hands up. He took a short time to look at him. He had not seen him before.

The following witness was Constable Danger Dlamini who stated that he was at a road block at Gege. A red taxi came. He stopped it at the road block. He searched it and its occupants. He found the revolver on the accused. It

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was no. 22732. He asked him for the license and he failed to produce it. He then arrested the accused. He handed the revolver and bullets as exhibits. He later gave the revolver and bullets to pw7 Inspector Thomas Simelane.

In cross-examination he stated that the accused placed the revolver between his legs.

Sub-Inspector Jeremiah Nxumalo tested the revolver and found that it was serviceable.

Inspector Thomas Simelane said on 11th April, 1994 he received a report about the robbery. He went to the deceased at Matsanjeni clinic. The deceased made a report to him. He went to the scene. The following day pw5 arrived Lavumisa police station. He handed the exhibits to him. The item handed by pw3 and the empty cartridges, he picked at the scene. He sent the revolver and cartridges to Pretoria for expert testing.

The ballistic report exhibit B was handed in by consent. It is confirmed that the empty cartridges were fired from the revolver found in possession of the accused. That also confirms that the deceased was killed by the same revolver.

The Crown closed its case.

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The accused chose to give evidence on oath. He said he went to the home of pw3 on 10th April, 1994. He spent two nights. On 11th April, 1994 pw3 and pw4 went to their girl-friends. He remained sleeping at pw3's home. They came back with money. They then played records. On the following day pw3 came and said there were people who wanted him outside. The people fired a gun at him. He then ran away. He denied robbing and killing the deceased. He said pw3 was telling lies that he tied him. He denied that the gun was found on him. He said he did not speak to pw4. He saw him at a distance. Pw4's evidence is a lie.

In cross-examination, he said he was doing From III in R.S.A. He had relatives at Zombodze. He did not tell the police that he was twenty two years. He was born on 20th June 1979. He told Inspector Simelane that he was 17 years old. He told him that he was from R.S.A. not from Zombodze under Chief Matsenjwa. (It must be observed here that this is the information which was recorded by the police on the docket when asked his particulars). On the 11th April, 1994 he was at the kraal of pw3. He said he had no passport although he stayed in R.S.A. He repeated that the revolver was not found on him. The police was telling lies. The police arrested all the people in the taxi. They then decided to charge him under the Arms and Ammunition because he was a foreigner. He also denied killing the deceased.

The Defence then closed its case.

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The Crown addressed the court that it has proved its case. The Defence did not address the court.

The evidence is clear that a person came in the evening and shot and robbed the deceased's shop. Sonto Gamedze gave this evidence. Pw3 and pw4 confirm that the accused went to the shop although their evidence showed that they were accomplices. William Burns picked empty cartridges at the scene.

The accused was arrested at the road block and found in possession of the revolver. The torch which the accused robbed from the shop was identified by Sonto Gamedze.

The ballistic expert report confirm that the cartridges were fired from the revolver found in possession of the accused.

With this evidence, I have no hesitation in finding the accused guilty of murder in count 1, guilty of robbery in count 2, guilty under the Arms and Ammunition Act in count 3 and 4.

A.F.M. THWALA

JUDGE

JUDGMENT ON EXTENUATING CIRCUMSTANCES

The accused chose to give evidence on oath in proving that there were extenuating circumstances. He said he did not know the shop but was shown by pw3. He gave him information about the shop. He entered the shop when it was dark. He asked the inmates to lift their hands up. The deceased did not raise his hands up. He fired one shot on the ground which hit him. The person attempted to draw his pistol. He then fired another shot. He had not taken any alcohol and dagga.

In cross-examination he said he bought the gun from Shongwe. He carried the gun to the shop to scare

the people. He planned the robbery with pw3 and pw4.

To me the accused looked to be more than twenty. I did not want to accept what he was denying that he told the police that he was 22 years old. In order to satisfy myself about his age I ordered him to be examined by the doctor. The doctor gave evidence that they took a bone x-ray which showed that the accused was more than twenty. He also said that by appearance, the accused looked more than twenty. He ruled out that the accused could be sixteen or seventeen. I shall deal with him as a person who is twenty or more than twenty.

I shall also consider whether his age can be taken as an extenuating although he is more than twenty. Youth alone cannot be an extenuating circumstance. It may be if when

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combined with other factors, it had an effect on accused's state of mind and emotion. In the present case, I do not see any factors which had a bearing on accused's state of mind and emotion. In the case of S.V. LEHNBBERG AND OTHERS 1975 4 SA 553, the headnote reads as follows:-

"The death sentence ought only to be imposed on a teenager, who has committed a murder, if it actually appears that he killed out of inherent wickedness. Such an approach does not mean in such a case no onus rests on the accused with regard to extenuating circumstances. It only means that a teenager is prima facie regarded as immature and on that ground extenuating circumstances can be found unless it appears that the wickedness of his deed rules out immaturity. The youthfulness of a teenager will serve as extenuating especially if other factors influenced his personality on account of his youthfulness. It also means that a person of 20 years of age or older can show by acceptable evidence, that he was psychologically immature to the extent that his immaturity could serve extenuation".

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This was a planned robbery and the accused was aware that death could result. He started shooting at the gate up to the shop. His aim was to do wickedness Act of armed robbery. I am unable to find that there are extenuating circumstances in this case. The accused has failed to discharge the onus that rests on him.

A.F.M. THWALA

JUDGE