

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.95/87

In the matter of

THE KING

vs

HOSES DVUBE

SIPHO ZUNGU

JOSEPH THEMBA SIMELANE

CORAM: HANNAH, C.J.

FOR THE CROWN: MR. A. TWALA

FOR THE DEFENCE: MR. D. LUKHELE FOR ACCUSED NO.2

ACCUSED NO. 1 IN PERSON

JUDGMENT

(13/11/87)

Hannah, C.J.

The first accused has pleaded not guilty to an indictment which charges him with the robbery on 9th April 1987 of E338,700 and a motor car, the property of the Bank of Credit and Commerce International Ltd. and at the time of the robbery in the lawful custody of Eve Dunn and Nkosinathi Nxumalo. A further unconnected count alleging theft was withdrawn by the Crown before a plea was taken. A co-accused, Siphon Zungu, was acquitted at the close of the Crown case as the only evidence linking him to the alleged robbery was ruled inadmissible and the Court is, therefore, concerned solely with the question whether the Crown has established the guilt of the first accused (who I shall refer to simply as "the accused") beyond reasonable doubt.

That the alleged robbery took place has been established beyond any shadow of a doubt. The unchallenged evidence of Mrs. Dunn was that on the morning of 9th April 1987 she was about to set off from the bank premises in Manzini in a white Ford Granada motor car registration number SD 030 KM with the sum of

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E338,700 which had been placed in trunks in the boot of the car when two hooded men armed with handguns leapt at the car. One of the men sprang across the bonnet to the driver's side while the other pointed his gun at her and indicated by signs that she should get out. She screamed and was so frightened that she was frozen to her seat but was manhandled out of the car and thrown against a wall. Still screaming she ran back into the bank where she reported the matter to the management. The men drove off in the car with the money still in the boot. Because of the hoods Mrs. Dunn was unable to identify either of the robbers and all she could say was that the man who assaulted her was quite tall.

The Crown case is that one of the two men was the accused and its principal witness was John Madlopha (PW6) who was presented to the Court as an accomplice. I will dwell at some length on his evidence. Madlopha was tried on the same charge of robbery earlier this year and although he was acquitted of

robbery he was convicted of receiving part of the stolen money knowing it to be stolen. No question arises, therefore, of him seeking immunity from prosecution although his evidence must still be approached with the great caution required when dealing with an accomplice witness.

Madlopha has a son called Mbabane who is nicknamed Differ and he is also well acquainted with the accused. He is by trade a panel beater and carries on his business at his homestead in the Shiselweni District not far from Nhlanguano. On 6th April, 1987 he said he received a message that the accused and Differ wished to see him and after lunch he went into Nhlanguano where he found both men at the house of a cousin. The accused, he said, explained that they wanted to obtain a gun and when he asked why the accused told him that he should not worry too much but then went on to say that they had a friend who had offered them some money and when they took it they did not want to be disturbed. Madlopha said he became angry at hearing such nonsense and admonished both men. He then went back to his homestead.

Madlopha was inclined to ramble in his evidence but the next event of any real relevance described by him took place on 9th April, the day of the robbery.

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In the evening of that day he said he saw the accused and Differ standing at the gate to his yard and they told him they were looking for a vehicle to take them to Mahlalini where their own vehicle had got stuck. Differ said that the ignition kept cutting out. A taxi then approached driven by Gweje Ndlangamandla (PW3), some passengers alighted and the accused ran to it and asked the driver to convey them to Mahlalini. He was not interested as he still had passengers but a short while later the taxi returned and stopped by the gate. Differ and the accused again asked to be taken to Mahlalini but, said the witness, the driver showed some reluctance. The upshot was, he said, that he was asked to join them for the journey and he made some comment about the accused and Differ looking like crooks - not a very charitable statement by a father about his son, if it was said - and the three of them set off in the taxi together.

The driver took a long route as it was raining and at a place called Mdabuia's the witness alighted and enquired after one Khumalo who had a vehicle but he wasn't there. At a certain spot the accused ordered the taxi to stop as the road was slippery and it would not reach its destination and Differ was told to go and fetch the car. The car then arrived driven by Differ, the witness ascertained there was nothing wrong with it, and they returned to Madlopha's homestead.

Madlopha said he went into his house and while inside heard the car being driven into the yard. He then saw the accused carrying a grey suitcase and Differ carrying a yellow trunk-type box into the dining room and place them on a table. They then went out again and dragged in a sack. Madlopha asked what they were doing and, he said, the accused asked him not to say anything. The accused added that only himself and Differ were involved and that they did not want a third party although a third person, the driver, was not there. The witness said their eyes were shining and if this be true there was good reason for, he said, they then proceeded to open the containers and to count a large amount of money into three lots: one for each of the two men and one for the driver. While counting there was an argument but Differ reminded the accused that a bundle of E1,000 had been given to his sister in Manzini and that reminder

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apparently settled the dispute. There was then a further discussion about buying BMW motor cars in South Africa and a further division was made putting all rand notes to one side. When they finished the driver's share was put in the yellow box and the accused and Differ each put a small bundle of notes on the table for Madlopha. The accused then put his money in the grey suitcase and Differ put his in a brown bag. Some money was left in the sack and they said that they were going to bury both the money in the yellow box and that in the suitcase. Differ warned the accused that the driver should get his share. The sack was left in Differ's bedroom and they left with the other money locking the house door behind them saying that they did not want to worry Madlopha on their return.

Madlopha said he watched them leave in the car and although he did not at that time recognise the make when he saw it again at a police station he saw that it was a white Ford Granada. He then went to sleep. In the morning he found Differ in his room calculating South African currency. He then went to his yard and started worrying about the situation. He obtained a lift to Nhlanguano in a police van to look for Differ but did not find them. Later he went to the police station and reported the matter and the police accompanied him to his house where he showed them the money. The impression he gave, or wanted to give, was that by that time he was acting the part of the upright citizen. He was kept at the police station overnight and the next day was taken back to his house where a further search was carried out. In a claypot behind Differ's bed a further E2000 was found and in a kist or chest another E790 in coins. A gun was also found in a bookcase.

The only other evidence given in chief by Madlopha concerned an incident which he said occurred at a magistrate's court when he and the accused appeared on remand. When he was refused bail the accused said "serves you right that you have been refused bail like us. I say this because you gave our money to the police." A fight then ensued.

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The evidence of the taxi driver (PW3) did not tally with that of Madlopha in all respects. He said that it was Madlopha who first endeavoured to hire him, not the accused. It was the accused, however, who ultimately hired him and who accompanied him in the taxi to Madlopha's homestead to pick up Madlopha and Differ. It does not seem to me that this is a particularly important discrepancy and can be satisfactorily accounted for by a desire on the part of Madlopha to keep his role to a minimum. PW3 also said that it was Madlopha who gave the directions and who told him where to stop but he did add that before doing so Madlopha asked the two men seated in the back whether they should stop there. Again, all this indicates to me is that Madlopha was more involved with his two companions and what they were doing than he is prepared to admit.

The evidence of Madlopha that the purpose of the taxi journey was to fetch a white Ford Granada also finds support in the testimony of other Crown witnesses. Madlopha said that the point where they were dropped off by PW3 was near the homestead of Longongo Simelane and there was evidence that Differ had left a white Ford Granada at that homestead earlier that day. Mrs. Simelane (PW5) said that they had had a bereavement on 8th April and at about that time Differ arrived with a white sedan and left the car, the keys and E100 with her. Later the car and the keys disappeared. James Hlatshwayo (PW4) was one of the mourners at the homestead and he said that on arrival at the Simelane homestead he saw a white car parked behind one of the houses. He identified the car when it was produced to the Court at Madlopha's trial and other evidence establishes that the car so produced was the bank Ford Granada SD 030 KM. He saw the car between 10a.m. and 11a.m. and, having regard to the evidence that the bereavement occurred on the evening of 8th April, the day in question must have been the 9th April. PW4 said the car left the homestead in the evening after they had taken the body of the deceased to the hospital at Hlatikulu. I accept the evidence of PW4 and PW5 and what it comes to is that Differ must have left the bank car at the Simelane homestead at Mahlalini in the morning of 9th April and that it was removed during the evening of that day.

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Madlopha's evidence that a substantial sum of money was found at his house was confirmed by D/I Themba Dlamini. Ouring his first search he found the sum of E35,000 in notes and coins and it is quite clear from the manner in which the notes were wrapped and labelled and from the bags in which the coins were sealed that the money was part of the proceeds of the bank robbery. This was confirmed by Mrs. Dunn who identified the packaging. A second search by the police officer uncovered a further sum of E2000 in a claypot and E790 in coins.

Madlopha's evidence that part of the money was brought into his homestead in a yellow trunk-type box and that part left in the same box also receives confirmation in other evidence. He identified the box when

it was shown to him during his testimony but what is particularly telling is the evidence of where the box was found. According to D/I Mbhamali, (PW11) he went to the homestead of the accused's father, Amos Dube, and the father showed him a hole which had been dug and lined with concrete in a hut on the site of the old homestead some 200 metres from the homestead currently in use. The hole was empty but on searching the area in the immediate vicinity of the hole the officer found the yellow box covered with cut grass. It was some 20 metres from the hole and contained notes to the value of E57,000 in plastic wrappings and labelled with BCCI labels. The money was identified by firs. Dunn by its packaging as being part of the proceeds of the robbery.

Further evidence placing the accused together with Differ at about the time of the robbery was given by Mkhekwa Msibi (PW7) another taxi driver in Nhlanguano. He recalled a day when he took the accused and Differ to Jobha to the homestead of one Simelane and then to Gege. At Gege the accused went to the police station. Before leaving them Differ paid him E850 for the hire of his taxi and to take him to Johannesburg. However, while waiting for them in Nhlanguano later that day the police detained him. The witness said all this took place the day after he had heard about the BCCI robbery and had read about it in the paper. It could, therefore, have been either Friday 10th April or Saturday 11th April.

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Two other pieces of prosecution evidence are worthy of mention. The first is that some time prior to the robbery the accused gave his sister, Kate Dube (PW8), E400 and told her that should he be arrested she should use it to bail him. The second is that after the robbery a sum of E2,300 was handed to the accused's father by one of his relatives. I shall deal further with this when I come to the evidence of the accused which I now do.

The accused denied having anything to do with the robbery. On 9th April he was repaid E3000 owing to him by a Maputo businessman and having given E100 to one Sarah Olamini at about 1p.m. in Mbabane he then took a bus to Nhlanguano. At Mhlaleni he met a police constable, Eric Dlamini, who boarded the bus and he arrived in Nhlanguano in the late afternoon. From there he went to Madlopha's homestead to retrieve a screwdriver and a spanner which belonged to his brother but Madlopha was not in. He returned to town where he found Madlopha and a little later Madlopha was joined by Differ. The accused told Madlopha that he wanted the tools as he was going to Zinyane's scrapyard and by coincidence discovered that Madlopha was also going to that area to a funeral. Madlopha suggested they should hire one car and when Gweje's taxi drove by Madlopha stopped it. It was still engaged and while Madlopha went off to fetch the tools and Differ went to fetch his coat the accused waited. The taxi returned as did Madlopha and Differ and they then set off eventually arriving at Mhlaleni. The accused paid the E25 fare and he made his way to the scrapyard while Madlopha and Differ set off for the funeral. The accused said that it was his intention to steal something from the scrapyard - in cross-examination it emerged that he was after a chassis number plate from a bus - but he was unsuccessful. He then walked back to Nhlanguano where he spent the night with his girl-friend.

The next day he met Differ by chance and Differ told him he was unwell and wanted to see an Inyanga. He knew of an Inyanga named Simelane and that is how it came about that he was in Msibi's taxi with Differ. Simelane and Differ did not understand one another, he said, and so they drove on to Gege to see one Dlamini but he was not at home. While there he reported to the police station as he was on bail. He then decided to go home. He knew nothing about the

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yellow box containing E57,000 found at his parental homestead and the E2300 found at his uncle's home was his. It was the balance of the money repaid to him by the Maputo businessman.

Madlopha's evidence is, of course, central to the prosecution's case and much turns on the view the Court takes of him as a witness. In an able address the accused, who has conducted his own defence, has argued that his evidence should be dismissed out of hand as a tissue of lies insofar as it implicates him. The Director of Public Prosecutions, on the other hand, submits that his evidence, at least insofar as it

implicates the accused, is well corroborated and eminently credible.

One major point made by the accused when dealing with Madlopha concerns his conduct on 10th April. Madlopha claimed to have been shocked at what happened at his house and said that he decided to report the matter to the police. And yet, says the accused, he allowed opportunity after opportunity to pass before he says he did anything to bring what had occurred to the attention of the authorities. Such conduct is not consistent with the innocence which Madlopha claims. Further, D/I Themba Dlamini testified that it was only after he had picked up Madlopha and taken him to the police station that he made a report as a result of which he went to his homestead. There are other difficulties which present themselves when considering Madlopha's own involvement in the crime, difficulties which I have no doubt were recognised by the judge who tried him and which ultimately led to his conviction of receiving part of the proceeds of the robbery, and the conclusion cannot be escaped that he has not been totally frank with the Court. However, that is not an uncommon characteristic in the evidence of an accomplice, even a convicted one. Frequently, there is an almost irresistible urge to place himself in a better light. The question I have to consider is whether, despite such shortcomings in Madlopha's evidence, his evidence of the accused's alleged activities can be relied upon as truthful and accurate and in deciding this question the Court must be ever alert to the danger inherent in an accomplice's evidence and approach it with great caution.

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Nothing in Madlopha's demeanour when describing the accused's alleged activities suggested that he was lying and his account of the initial meeting with his son and the accused, the taxi journey to pick up the car and the sharing of the money all carried conviction. Also, there was nothing which could be said to be improbable in this part of his evidence. Indeed, on the contrary, the improbabilities all lie in the evidence of the accused. If the accused's account be right then father and son, both involved in a huge robbery and intent upon getting hold of the car in which money amounting to over E800,000 was being kept, took along with them an innocent man who knew nothing of the robbery simply in order to save themselves a taxi fare of E25. This seems to me most unlikely conduct. It also seems to me most unlikely that the accused, who admitted to having the sum of E2900 in his pocket, would have gone to the lengths he said he did to obtain a couple of tools to commit a crime when he could have purchased what was required with ease. He said he purchased a torch that afternoon, a transaction which was omitted from his narrative of events given in evidence-in-chief, and the purchase of tools at the same time should have presented no difficulty. Then there is the fact that having obtained a taxi to take himself to the area of the scrapyards the accused left himself with no transport to return to Nhlanguano. He said he walked back on this dark wet night but the obtaining of transport one way only is, in my view, far more consistent with Madlopha's account that a vehicle was available for the return journey. Then there is the fact that having become involved with those who were concerned with the robbery on the evening of 9th April by chance he became involved once again the following day to the extent of spending a large part of that day with Differ. I agree with the Director of Public Prosecutions that these and other small details in the accused's account show that it is a most improbable one and it strengthens that of Madlopha. After careful consideration I find Madlopha to be a credible witness insofar as his evidence implicates the accused.

Turning to the question of corroboration the most telling piece of corroborative evidence is the discovery of the yellow bank box containing

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E57,000 at the old homestead of the accused's father. Madlopha said that the two men told him that they were going to bury the money in the yellow box and the concrete lined hole in a hut at a homestead with which the accused has close links with the box itself concealed some twenty metres away cannot be dismissed as coincidence. It must be regarded, in my view, as strong corroboration of Madlopha's evidence. Next, there is the evidence of Gweje (PW3). I have already dealt with the accused's explanation for his presence in the taxi and highlighted what are, in my view, the improbabilities in that account. Gweje's evidence can properly be regarded as corroborative of Madlopha's evidence. Then there is the evidence that the accused was anticipating the possibility of arrest by providing his sister with

E400 for bail. Too much weight cannot be attached to this as the accused may have had another crime in mind but it must be thrown into the balance for what it is worth. Then there is the fact that E2300 was found in the house of the accused's uncle, a sum which he admitted he had left there and which is consistent with the accused having access to a sizeable amount of money. Then there is the fact that the accused spent the day following the robbery in the company of the other man who, according to Madiopha's evidence, must have been involved in the robbery. In my judgment, the totality of these matters constitutes strong corroboration.

Apart from his own evidence, the accused called two witnesses in his defence. One was the policeman he claimed was a fellow passenger on the bus to Nhlanguano on 9th April, Eric Dlamini, and the other was Sarah Dlamini who he said saw in Mbabane at about 1p.m. on 9th April. Eric Dlamini agreed that he had met the accused on a bus but he was of the view that this was a Friday and not a Thursday. 9th April was a Thursday. Sarah Dlamini agreed that she had met the accused on a weekday during the lunch hour in about early April but could not fix the date any closer than that. Mr. Twala submits that these two witnesses were speaking of an occasion other than 9th April and that may be so. However, even if the day when they met the accused was 9th April their evidence does not provide the accused with an alibi. According to Sarah the accused told her he had come from Manzini and it would have been perfectly possible for the accused

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to have participated in the robbery at Manzini at 9a.m. to 9.30a.m., to have accompanied the other robber in the bank car to the Nhlanguano turn-off which is on the Mbabane side of Manzini and then to have travelled to Mbabane well before midday with a view to meeting up with Differ later in the day. It is also noteworthy that Selina Simelane (PW5) only saw Differ when he left the bank car at her homestead.

At the end of the day I am satisfied that Madlopha was telling the truth when he said that the accused was one of the two men who came to his homestead with the proceeds of the bank robbery. The only inference which can reasonably be drawn from his evidence and the other evidence which I have reviewed is that the accused was one of the two men who carried out the robbery. Accordingly, I convict him of robbery as charged.

N.R. HANNAH

CHIEF JUSTICE

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SENTENCE

Moses Dube you have been convicted of a bank robbery involving E338,700 in which bank officials were threatened with a firearm. As I had occasion to say in the recent case of *The King v Clement Mabaso and Others (31/87)* there has, in recent times, been an unfortunate acceleration in the rate at which such crimes are being committed in the Kingdom. This has been confirmed by Supt. Masango who gave evidence before me this morning. When I first came to this country two years ago one could go into a bank and see no more than a uniformed attendant at the door. Nowadays when one goes into a bank one often sees an armed soldier or policeman and armed soldiers and policemen are frequently to be seen in shopping precincts. I feel most uncomfortable when I see these armed men, as do most members of the public, but their presence has been made necessary by the criminal activities of people such as yourself. The Courts have a duty to reflect in their sentences the public concern and outrage with this situation and, as I said in the case mentioned, to impose on those who are prepared to terrorise innocent citizens going about their everyday tasks swingeing sentences

In the United Kingdom, faced with an increase in cases of armed robbery of banks and the like, the Courts now regard 15 years imprisonment as a starting point for a sentence (see *R v Turner (1975) 61 Cr. App. R 67 at 91*) although in some cases there may be sufficiently strong mitigating factors which would

enable the Court to reduce the term. In Mabaso's case I stated that it was my view that the only realistic way in which the Courts of this country can endeavour to stamp out this wave of crime was to adopt a similar policy and I see no reason to alter that view.

The most serious features of this case are that the robbery was planned, you were armed and it seems likely that you still have a large sum of money cached away. However, as against that, the gun was not fired and such violence as was used was minimal. Also you are a man of previous good character. It seems to me that in these circumstances the Court need not go beyond the 15 years starting point I have mentioned and the sentence is one of fifteen years imprisonment to commence from 14th April, 1987.

N.R. HANNAH

CHIEF JUSTICE