



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. T. NO. 38/1993

In the matter between:

REX

VS

1. PATRICK MAVUSO
2. DOUGLAS MABUZA
3. RONNIE CASPAR

CORAM : A.F.M. THWALA
FOR THE CROWN : MR. NDZIMANDZE
FOR THE DEFENCE : MR. SIBANDZE

JUDGMENT

24/05/95

The accused are charged in count 1 with attempted murder and in count 2 and 3 with robbery. No. 2 in count 4 and 5 with possession of arms and ammunition.

The Crown led the evidence of Gibson Nkumane the complainant. He told the court that on the 12th January, 1993 he was from Mahlangatsha. Before he reached his home, he found big stones placed on the road. He drove through the fields and rejoined the road. He drove past his home because he wanted to go to Mankayane first. When he was about to join the Mankayane road, he saw a white sedan parked. There was a person looking at its bonnet. The registration of the car was SD 192 M. He did not notice the other letter. On the way back he found that the car and its bonnet was closed.

When he arrived home, his wife told him that there was a place where the fence was cut. He took a torch and went to look at the fence. Before he could get out, he heard gun shots. There was confusion of the gun fire. The shots shattered the windows. He then heard people saying "produce money, or we are going to burn the buses". He stood in the passage. While they were firing into the house, his wife and children threw money bags outside. They then left. They shouted saying that they would come back next time. His son Melusi was shot in the forehead during the shooting. He was taken to hospital the same night. He was then transferred to R.S.A. In the morning, he collected empty cartridges and gave them to the police. He then identified the white car outside the court. The car belonged to accomplice witness PW1. It was SD 192 XM.

The Crown then called Gladys Nkumane PW5, the wife of the complainant. She stated that on the 12th December 1992, she heard a noise at her bedroom window. She saw a person wearing a baraclava. He tried to remove the curtain. He then produced a firearm. There was money which she was counting in her room. She left the room and the money was left in the room. When she returned to the room, she found the money missing. The amount was E11,000. Her handbag and the keys were also missing. She identified her handbag and the keys. Her evidence of December, 1992, relates to count 3. She further stated that on 12th January, 1993, she noticed that the fence had been cut at a certain place. it was about 7:00 p.m. When her husband arrived, she reported to him. He took a torch to inspect the place. They then heard gun fire. She ran to her husband. She found him in the passage. She heard Bongani her son crying outside.

Mduduzi, another son was shot inside the house. She then heard the robbers shouting saying "bring the money, we shall burn the buses". The kitchen door was forced open. The crockery and windows were broken. She then took the money from the safe. It was then thrown outside. The money was in white bags. She normally used Standard Bank bags. She was then shown two money bags in court. One plain and the other written Standard Bank on the side. She could not say whether they were from her place. Her records show that the money was E10,000. She then took the son who was shot to hospital.

Bongani Nkumane was also called as a witness. He told the court that he lived in a separate house from the main house. He heard a window of his room being broken. He ran to the kitchen. The person entered and proceeded to the kitchen. He had a long fire-arm. He pushed him with the gun. He told him to stand up as he was lying down. He forced him outside. He found another person outside. They assaulted him with their fists. They took him to the main house. When they reached the main house, they told him to break the window. They forced him into the house through the window. They ordered him to give them money. He asked his mother to give him the money, which she did. He thought his mother gave him three bags. After they were given the money, they left. They shouted that they would come back. He saw three people. Mduduzi did not see anything. He was shot on the forehead and became unconscious. The doctor's report states that he was in a comma with a gun shot wound which entered above the left eye and went out behind the right ear.

Detective Christopher Dlamini visited the scene the following day. He found the kitchen door hinges destroyed by bullets. The handles were on the ground. He saw bullet holes on the window. Several windows were broken. Nkumane gave him thirteen empty cartridges. He saw two bullet holes above the door. He handed the cartridges to Asst. Supt. Ndlangamandla. Ndlangamandla interrogated the accused. He obtained a number of exhibits which relate to count 1 from accomplice witness pwl. Ndlangamandla stated that on 19th January, 1993 he interrogated no.1. No. 1 told his mother to give him the money. Her mother gave him the money. His money produced E16.000 in coins, and E22.00 in notes. He then led him outside the house. He gave him two white money bags which were hidden under the blocks. No. 1 also led him to his house where he produced and gave him a blue track suite.

On the same day, no. 2 after interrogation led him to a bush at Mhobodleni next to where he stayed. He showed him a place where an AK 47 was buried. It was wrapped in cement bags. About 4 paces from the AK 47, he showed him a place where a magazine was buried. He found nineteen live rounds in the magazine. He then led him to his house where he gave him a baraclava which was hidden under the blocks next to the toilet. The baraclava had holes on the sides resembling where the eyes and mouth are placed. He also gave him an overall, brown overcoat, puma soccer boots and a blue purse containing E84.23. The other witnesses did not advance the crown case anywhere. They were all accomplices although the crown only introduced Enock Motsa pwl as the only accomplice witness. His evidence demonstrated that he was present.

The gun referred to as AK 47 in Ndlangamandla's evidence is described by Warrant Officer Victor Jacobus Van Der Merwe, a Ballistics Expert SA Police as 7.62 x 39 mm CALIBRE MPI KMS-72 LIGHT AUTOMATIC RIFFLE. It was sent for testing with the six 7.62 x 39 mm fired cartridge cases found at the scene of crime. These were found to have been fired from the gun pointed by no.2. This indicates that no.2 was present at the scene as the fired cartridges were fired from the firearm he pointed to the police. He gave exhibits taken from the 1992 robbery. His car was identified by the complainant near the scene of the second robbery in 1993. He helped Ndlangamandla identify the accused. His evidence standing alone does not help the crown case. He was a defence witness in disguise. I do not know why the crown used him as an accomplice witness.

Ndlangamandla is the only witness who connects the accused with the crimes, especially no. 1 and no. 2. In some points his evidence showed that there are people who were not charged with the crimes who should have been charged. He gave no valid reasons why Dlamini was released by the Magistrate.

At the end of the crown case, I refused the applications for the discharge of no.1 and 2 because there was evidence to call them to their defence. I allowed no. 3's application because there was nothing found in his possession, and I could not rely on the evidence of Enock Motsa and other witnesses.

No. 1 gave evidence on oath. He said he was arrested on 18th January 1993. He was in police custody for three days. Ndlangamandla then took him to his home. He told him to produce money. He told his mother to produce the money and his mother produced it. Ndlangamandla searched his house. He took a track suite from the wardrobe. He did not give Ndlangamandla the two white bags which he alleged he produced from the blocks where they were hidden. He said he applied for bail and it was opposed by Ndlangamandla who said he was still looking for Dan Shiba. The name was found in Ndlangamandla's affidavit. Ndlangamandla said he told the crown counsel that he was looking for Dan Shabangu. This explanation is not convincing because Ndlangamandla read the affidavit before he signed it.

In cross-examination the accused farewelled. He said he did not tell his attorney that the money bags were not found at his home because he did not think that they were important for his defence. He said he told his mother to give the money to the police because he was badly handcuffed and felt pain. He said he told his counsel but counsel did not cross-examine the police about that. He said he did not tell the court in his evidence in chief because he did not think it was important and he was not asked about it. His evidence is not true because he had an able counsel. He could not have left these aspects in his cross-examination. I accept the evidence of Ndlangamandla that he pointed the exhibits to him.

No. 2 also gave sworn evidence. Most of his evidence describes the torture meted by the police to him. It is hard to believe this. Some of the scenes he describes, if they happened he would have died. He denies that he pointed the gun and Magazine to the police. He said he was led by the police to the scene. They stopped at the place where the gun and Magazine were pointed to him after they had asked him where John hid his gun. He told them that he did not know.

They then went to search his house. Ndlangamandla took the exhibits he described in his evidence. He was then cross-examined by crown-counsel. He said he was afraid of the police. He did not lay a charge of assault. He said he told his counsel that his face was covered with a tube, but his counsel did not cross-examine the police about the torture. Counsel could have cross-examined the police about the torture. He cross-examined the crown witnesses extensively.

The two accused have pointed out various exhibits which link them up with the offences. There is no evidence acceptable that they were forced to produce the exhibits. Section 227 of Act 67 of 1938 empowers the court to admit evidence discovered as a result of information given by an accused. The exhibits pointed or discovered as a result of information given by the accused to Ndlangamandla are admissible as evidence.

In the result, I find accused no. 1 guilty of counts 1 and 2, and no. 2 guilty of counts 1,2,4 and 5. Both accused are found not guilty on count 3.


A.F.M. THWALA

JUDGE