

CRIM. CASE NO. 62/98

In the matter between

REX

And

ROY VUSIE DLAMINI

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. J. MASEKO
MR. C. NTIWANE

JUDGEMENT
(24/05/99)

Maphalala J:

The accused person is charged with two counts. On the first count the accused is charged with the crime of robbery in that upon or about the 31st January 1998 and at or near Mlawula area in the Lubombo district the accused did unlawfully assault Jose Ferreira Da Silva and by intentionally using force and violence to induce submission by Jose Ferreira Da Silva, did take and steal in his presence out of his immediate care and protection a motor vehicle SD 063 PM Honda Ballade, his property or in his lawful possession, and did rob him of the same. On the second count the accused person is charged with the crime of contravening *Section 11 (2) read with Section 11 (8) of the Arms and Ammunition Act 24 of 1964 as amended by the Arms and Ammunition (amended) Act 6/1988 and Act 5/1990* in that upon or about the 8th February 1998, and at or near Ngwane Park Manzini in the district of Manzini, the accused not being a holder of a current licence or permit to possess a firearm for which ammunition is intended to be used did unlawfully possess 40 live rounds of ammunition.

The accused person pleaded not guilty to the first count and pleaded guilty to the second count. The 40 rounds of ammunition were entered by consent as exhibit "1" collectively and the medical report of the doctor who examined complainant in count one was also entered by consent as exhibit "A". The doctor in exhibit "A" remarked that the wounds on the complainant was "a penetrating wound consistent with a bullet wound passing right through". The complainant had a cut on the back of the head

and a penetrating wound under his right eye through the cheek emerging next to the right ear lobe. At the time he examined him the complainant was bleeding profusely and his clothes were completely blood soaked. There was also bruises on his knees.

The crown proceeded to call witnesses to prove its case.

The first witness called by the crown was PW1 Futhi Tenele Mncina who told that she was employed by Simunye Filing Station which is owned by the complainant. She is employed there as a petrol attendant. On the 31st January 1998 she was on duty having reported at 6.00 am. She told the court that she knows the accused person as he used to frequent the filing station. The accused person arrived at the filing station on the 31st January 1998 in the morning and the accused greeted her. The time then was about 8.00am. The accused went to the office of the complainant. He entered the office and came out again. This witness told the court that the accused person had on previous occasions visited the complainant in this manner. The complainant then left at about 12.00 noon and told her that the accused person will come back as he wanted to buy the car. Accused person wanted to test-drive the car. The accused person then came back after lunch and waited for the complainant. The complainant then arrived and they both boarded the motor vehicle, which was for sale. After they had left Simunye police officer Shiba came and asked about the description of the motor vehicle the two had used. The officer also informed her that that the complainant had met up with an accident that the complainant had been shot.

Thereafter officer Shiba left her. On the 8th February 1998, the police came and collected her and asked her if she could identify the assailant. They took her to some people who were wearing similar clothes and she was asked to pick the assailant. This was an identification parade. She told the court that she pointed out the accused person as the one who left with the complainant on the 31st January 1998. This fact is shown in the picture of the identification parade entered as exhibit "B (i)".

This is the extent of PW1's testimony.

She was subjected to lengthy and relentless cross-examination by the defence. She was asked to explain the discrepancy in her evidence that in her evidence-in-chief she told the court that she reported for work at 6.00am yet in the Summary of Evidence prepared by the crown it is stated that she was going to tell the court that she reported for duty at 8.00am that day. She replied that she appreciated the difference but said she did not tell the police who recorded her statement that she arrived at work at exactly 8.00am but she said she arrived at about 8.00am. However, when pressed further by the defence on this point she conceded that she was not telling the court the truth in her evidence-in-chief. It was also put to her that accused person was putting up a defence of alibi that he was in Manzini attending to repairs of a motor vehicle belonging to a certain Dlamini. The witness was firm that she saw the accused person that day and that accused left with the complainant in the Honda Ballade. PW1 was also cross-examined at great length on what transpired at the identification parade. She maintained that it was the accused person who came to the Filing Station that day and she was able to identify him in the parade that was mounted by the police at Simunye Magistrate Court.

The crown then called PW2 Sibusiso Mkhathshwa his evidence is similar to that of PW1 in a all of material respects. He also told the court that he knew the accused person prior to this incident. He saw the accused person on the 31st January 1998, at his place of work. PW1 works with PW2. The accused came to buy a motor vehicle which was being sold at the garage. He saw the accused at about 9.00am and thought that as usual the accused had come in connection with the motor vehicle which was on sale. The accused came back a bit later for the second time and he alighted the said motor vehicle with the complainant and they drove off in the direction of Maphiveni. Later in the afternoon he received a message that the complainant had been injured.

This is the extent of PW2's evidence.

He was also cross-examined at length by the defence and the cross-examination followed that which was directed at PW1. His replies were similar to that given by PW1 save that he told the court that it was the complainant who was waiting for the accused yet PW1 had deposed that it was the accused person who waited for the complainant. He maintained under relentless cross-examination that he did see the accused person that day and accused left with the complainant in the Honda Ballade taking the direction towards Maphiveni. He also deposed in cross-examination that the reason he did not participate in the identification parade is that the motor vehicle which took the people to the parade left him as he was late.

The crown then called PW3 Dr. T. Lapidos. He told the court that he was employed by Simunye Health Services. On the 31st January 1998, he was on duty and he examined the complainant. After the examination he compiled a report viz, exhibit "A". The witness was cross-examined briefly and nothing of substance came out of it.

The crown then called PW4 2418 Sergeant Jabulane Gamedze who is a force armourer stationed at the Police College at Matsapha. He told the court that he was handed a box with ammunition. He deposed that according to his training and expertise the ammunition were live and could fit a 9mm pistol.

The crown then called PW5 Jose Ferreira DaSilva the complainant in this matter. He gave a lengthy account on the sequence of events leading to him being shot and dispossessed of the Honda Ballade.

He told the court that on the 31st January 1998, he was at his garage at about 9.00am. The accused approached him. He knew the accused as Roy. The accused asked him if the motor vehicle he wanted to buy was ready. The motor vehicle belonged to his son who had on a prior occasion discussed the sale with the accused. The motor vehicle was going for E20, 000-00. Accused told him that he had with him half of the purchase price and was going to borrow the rest from his relatives at Ngomane. Accused also told him that the rest was to come from his boss but his boss needed to see the motor vehicle. It is then that they decided to go together in the motor vehicle. They then left together and accused suggested that they drive to Mlawula to talk to his brother. As they were proceeding to Mhlume PW5 felt some object touching him behind his earlobe. The accused ordered him to stop. He asked him if he was

joking. The accused responded that he was not. He forced him to stop and ordered him to put his hands together. He stopped the motor vehicle. He saw a pistol in accused hand. The accused was seated in the front passenger seat. He complied with accused orders. The accused then produced handcuffs from his pockets and handcuffed him. After that he ordered him to get out of the car. Outside the car the accused ordered him to get inside the boot. The complainant refused to get into the boot. The accused threatened to kill him. That is when the accused shot him on the cheek. The complainant fell down and that is when the accused started to stomp on him and hitting him with the butt of the gun on the head. The accused also kicked him on the collarbone which got broken. The complainant then fainted and does not know what happened thereafter. After some time he regained consciousness and he then stood up and started to walk. A certain motor vehicle approached from Mlawula direction and he stopped it. The motor vehicle belonged to a game ranger who took him to the Simunye Clinic. He was then treated there for his injuries. The witness told the court that he knew the accused very well.

This is about the extent of this witness's evidence.

He was cross-examined at length by the defence. The thrust of the defence cross-examination is that the story given by the complainant in chief was different from what is reflected in the crown's summary of evidence. However, the complainant maintained that he was telling the court the truth in -chief and cannot comment on what is reflected in the summary of evidence. When confronted with accused alibi the complainant maintained that he knew the accused very well and that it was the accused who shot at him and took the Honda Ballade from him. He also revealed that accused wife worked for Barclays Bank branch in Simunye.

The crown then called PW6 Dumisa Mahlalela who is employed as a game ranger at Mbuluzi Game Reserve. He is the one who found the complainant after he was injured and conveyed him to Simunye Clinic for treatment. He was not cross-examined by the defence.

The crown then called PW7 2277 Detective Sergeant Aaron Methula who is the investigating officer in this case. He told the court that on the 4th February 1998, acting on certain information he together with 2265 Sergeant Shiba and 3141 Constable Mamba proceeded to Ngwane Park in Manzini and came across the accused driving a lorry (a 3 tonner). They stopped him and introduced themselves as police officers and cautioned him in terms of the Judges Rules. They then arrested the accused and took him to his house where they conducted a search. They found a red box with 40 live rounds of ammunition. The accused failed to produce a permit to possess same. The motor vehicle which was taken from the complainant at gunpoint was never recovered. They were led by the accused to a place in South Africa called Nhlazatshe.

This is about the extent of this witness testimony.

This witness was cross-examined at great length by the defence. The tenor of the defence cross-examination is that the accused was assaulted by the police such that the Magistrate ordered that he be taken to hospital for treatment. That the accused did not take the police to South Africa freely and voluntarily. The officer denied that

the accused person was ever tortured by them whilst in their custody. He further denied that the accused statement which he made was made under duress.

The crown then called PW8 Sergeant H. Hlophe who is the officer who conducted the identification parade. He was cross-examined briefly by the defence.

The crown then called PW9 2079 who was also involved in the conduct of the identification parade.

The crown then called PW10 1447 Assistant Superintendent R. Mkhweli. He told the court that the accused was known to him prior to his arrest. He deposed that the accused was never assaulted by the police to induce him to take them to South Africa and that there was nothing out of order in the conduct of the identification parade.

The crown then called PW11 Phillip Mkhwanazi who is a game ranger at Mbuluzi Game Reserve. He told the court that he got a report from another game ranger who was posted at the gate that he had heard gunshots. He went on to investigate and along the way he found a white man towards Mlawula direction. The white man had been injured and was bleeding profusely. They then took him to the clinic for medical treatment.

At this stage the crown recalled PW3 Dr. Lapidos he deposed that when he examined the accused he had red eyes and that this according to his experience was consistent with a person who had been suffocated. In fact, he went further to state that there were other patients he examined who exhibited the same malady. He was concerned about this and called the Station Commander at Simunye about his concern.

The crown then closed its case.

The accused then gave evidence under oath being led by his attorney Mr. Ntiwane. He gave a lengthy account relating his own version of events. The long and short of his testimony is that he does not deny that he was found in possession of the live rounds of ammunition and gave an explanation to that effect. He further told the court that he was arrested by Simunye Police on suspicion that he had robbed the complainant of his motor vehicle at gunpoint. He described how he was tortured by the police whilst he was in their custody. His defence is that of alibi that when this occurrence was taking place at Simunye he was in Manzini helping a friend Alarm Dlamini to tow his motor vehicle which was at his homestead at Ngwane Park. He told the court as a result of the torture he was subjected to by the police in desperation led them to South Africa so that they may stop assaulting him.

The accused was subjected to lengthy cross-examination by the crown where it was put to him that a number of material aspects of his evidence were not put to police officer especially officer Methula to test the credibility of his evidence. The accused stated that he could not answer that.

The defence then called DW2 Alarm Dlamini who is the friend mentioned by the accused to buttress his defence of alibi. He related a long story on how he was with the accused on the day in question. However, under cross-examination his evidence of time was not the same as that of the accused person. He could not even tell the

court what was the date when all this was taking place.

The defence then closed its case.

The court heard submissions from both sides. I have listened to the arguments very carefully and also scrutinized the evidence brought before me in its totality. I have also availed myself to legal authorities referred to me by counsel in the course of their submissions. It is trite law that the burden of proof lies with the crown in a criminal trial to prove its case beyond a reasonable doubt. The issue which the court is to believe, is whether or not the accused person was in Manzini on the day in question. My view of the matter is that the accused story is not true. The evidence of PW1, Sydney Mkhathswa and the complainant is crucial to this case. All these witnesses told the court that they knew the accused prior to the incident. That on the day in question the accused came to the filing station and met with the complainant. I do not see how these people can fabricate a story against the accused who lived kilometres away from Simunye at Ngwane Park. The evidence of these three witnesses corroborates each other on all material respects. Though there are variation in their evidence these do not disturb the core of their evidence. These crown witnesses gave the police after the incident the description of the accused and that is how he got arrested. The accused was well known in that area and the complainant even said that he knew that accused wife worked at the Barclays Bank at Simunye. This point was confirmed by the accused himself. How would complainant know this a white man unless there was prior association between the two of them.

I am also of the view that DW2 the witness called by the defence was not candid to this court when asked where the accused was on the 31st January 1998, he could not come out with a straight answer. Here we are dealing with a man who is portrayed as a Manager of Kentucky Fried Chicken chain of stores. His evidence is not credible at all on matters where time is of the essence. He failed to assist the court as regards the times he was with the accused. His version clashed with that of the accused.

Further the arrest and interrogation of the accused is purely collateral and does not enhance the case of the defence at all. Further more there were a number of material issues which were not put to the crown witnesses. It is trite law that it is imperative for the defence to put as much of its case to the crown witnesses for his evidence to have a semblance of credibility. To support this proposition recourse can be sought in the celebrated case of **R vs P 1974 (1) S.A. (AD) 581** where MacDonald JP had this to say:

“It would be difficult to over-emphasize the importance of putting the defence case to the prosecution witnesses and it is certainly not a reason for not doing as that the answer will certainly be a denial, so important is the duty to put the defence case that practitioners where in doubt as to the correct course to follow, should run on the side of safety and either put the defence case, or seek guidance from the court”.

The same principle was applied by Hannah CJ in the case of **Rex vs Dominic Mngomezulu and 10 others Criminal Case No. 96/94 (unreported)**.

I reject the accused story *in toto*. Here we heard the evidence of three eye witnesses who in my considered opinion have no reason to concoct a story against the accused. His defence of alibi is nothing but a feeble attempt by the accused to extricate himself

from evidence as it has been shown is overwhelming against him.

In the result, I find that the crown has proved its case beyond a reasonable doubt in respect of the crime of robbery. On the second count the accused is found guilty as he himself pleaded guilty and the crown led evidence to prove the commission of the offence in terms of the provisions of the Criminal Procedure and Evidence Act (as amended).

S.B. MAPHALALA
JUDGE