

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 192/2005

In the matter between:

REX

vs

SAMSON DENNIS

1st ACCUSED

DANIEL KINGIPANGA

2nd ACCUSED

CORAM

FOR THE CROWN

FOR THE ACCUSED

Q.M. MABUZA -J

MR. P.L. MDLULI

MR. IN PERSON

JUDGMENT 20/03/09

Mabuza J

- [1] The accused were charged with a total of six counts to which they pleaded not guilty. During the trial Count 3

and 4 were withdrawn and the state proceeded with count 1, 2, 5 and 6. They were charged as follows:

Count 1

The accused persons are guilty of the crime of Robbery. In that upon or about the 25th December, 2004 at or near Manzini Bus Rank in the Region of Manzini the said accused each or all of them acting jointly and in furtherance of a common purpose did unlawfully assault Jethro Salema Simelane and Siphon Dlamini, and by intentionally using force and violence to induce submission by Jethro Simelane and Siphon Dlamini, did take and steal from them certain property, to wit, grey Nokia 3310 cell phone (E500.00) and Nokia cell phone 5210 (1,800.00) their property or in their lawful possession, and did thereby rob them of the same.

Count 2

The accused persons are guilty of the crime of Attempted murder. In that upon or about the 25th December 2004 and at or near Manzini bus Rank in the Manzini Region, the said accused each or all of them acting jointly and in furtherance of a common purpose, did unlawfully and with intent to kill, shoot at Richard Ndukuzezwe Sibandze.

Count 5

The accused are guilty of ROBBERY

In that upon or about the 25 December, 2004 and at or near Manzini town, in the Manzini Region, the said accused each or all of them acting jointly and in furtherance of a common purpose did unlawfully assault JAIZEL ZARMADA and by intentionally using force and violence to induce submission by the said JAIZEL ZARMADA, did take and steal from him certain property to wit

1. 28 x mixed cellphones valued	E25,000
2. 1 x gold necklace valued	E 1,800
3. Money in cash	<u>E10,000</u>
Total	<u>E36.800</u>

His property or in his lawful possession and did thereby rob him of the same.

Count 6

The accused are guilty of Attempted murder. In that upon or about the 25th December, 2004 and at or near Manzini Town in the Manzini Region, the said accused, each or all of them, acting jointly and in furtherance of a common purpose did unlawfully and with intent to kill shoot at 3438 Constable

**Jabulane Shiba and 3949 Constable Mphikeleli Mabuza with a
firearm.**

At the end of the Crown case, Mr. Mdluli conceded that counts three and four had not been proved and withdrew the said charges. The court found as follows:

Count 1: The Court found that there was a prima facie case against both accused.

Count 2: Accused 2 has a case to answer. Accused 1 was acquitted and discharged.

Count 3 and 4: Both accused acquitted and discharged.

Count 5: Both Accused had a case to answer with regard to 1 cell phone identified by PW9, Ray Ndzimandze.

Count 6: Accused 1 acquitted and discharged.

Accused 2 has a case to answer.

[3] **Count 1**

The Crown called Jethro Salema Simelane (PW1) who testified that on the 24/12/2004 he was at the Radio shop in Manzini at the bus rank. He was accompanied by Siphon Dlamini (PW 4). They had taken their mobile phones for repair when two men entered the shop carrying guns. The two men ordered them and the other occupants of the shop to lie down. Accused 2 closed the door while Accused 1 fired a shot jumped over the counter went to the till and to the owner of the shop and robbed him of his cell phones. Accused 2 ordered the people who were on the floor to handover their mobile phones. This witness had two phones which he handed over.

[4] He described the assailants as one dark in complexion and taller than the other one who was shorter and bright in complexion. The one who remained near the door was taller and darker. He identified this one as accused no. 1 and the one who jumped over the counter was shorter and lighter as accused no. 2. He

informed the court that accused no. 2 demanded a gun from the owner of the shop and some cell phones. The shop sold cell phones.

The witness was able to identify his cell phone in court, a 3310 Nokia valued at E450.00. The second cell phone was not recovered. The incident took place after lunch. The police called him later to the police station where he identified his cell phone.

[5] Both accused cross-examined PW1 but nothing much turns on this cross-examination except that they denied being the robbers. Accused 1 advanced an alibi that at the time of the robbery he was with his girlfriend at the Mozambique restaurant. Accused 2's defence was that he was at Fairview. These are the defences that they advanced when they gave their evidence. However, accused 1 was unable to call his girlfriend to testify because she was a Mozambican and had since left the country for Mozambique since his incarceration on the 25/12/2004. Accused 2 was

unable to call anybody to corroborate his story that he was at Fairview on that day. Consequently, the Court rejects their defences .

The evidence of PW1 is corroborated by Sipho Dlamini (PW4) who was also a victim of the accused at the radio shop. He was dispossessed of a cell phone worth E1800.00 which was never recovered. This witness stated that as they were leaving the shop with PW2 after PW4's mobile phone had been repaired he met the accused persons at the door. Accused 2 came into the shop jumped over the counter while accused 1 remained at the door. Accused 1 pushed him and poked him on his stomach with a gun. He testified that accused 2 shot the glass counter where the shops cell phones were. He testified that extra shots were fired resulting in some people getting hurt and there was blood in the shop.

There was confusion in the shop as the occupants were ordered to lie down. The Indians were asked to produce their guns and the robbers stole the shop's cell phones which were in the glass counter. Accused 1 came out from

behind the counter and took PW4's cell phone. He testified that the accused spoke in English but he did not pay much attention to accused 1. His attention was directed to accused 2. He identified accused 1 whom he said was dark and slim. There are some inconsistencies between the evidence of PW1 and PW4 but these do not go to the merits of the case. Both witnesses place both accused at the radio shop on the 24/12/04.

The accused cross-examined PW4 but nothing much turns on their cross examination. The accused in their defence denied that they robbed the complainants and the shop owners. They further denied being at the shop on the material day. However, I am satisfied with the complainants evidence that the accused were their assailants and that they had ample time to see them. I am satisfied with their identification. I am satisfied that PW1 properly identified his cell phone.

Count 2 and Count 6

[8] In Count 2 the accused persons are charged with the crime of attempted murder of the police officer PW3 Richard Ndukuzezwe Sibandze. PW3 gave evidence that on the 25/12/04 while riding a motor cycle he passed the radio shop in Manzini. There was an Indian man outside the shop shouting for help. He said that the accused had robbed him of his cell phones. He was the owner of the shop. The officer gave chase on his motor cycle. He told the court that accused 1 who was slow was outrun by accused 2 who was faster so he decided to follow accused 2. He overtook him but accused 2 repeatedly shot at him so much that he decided to climb off the motor cycle and to take cover behind it. Next thing he was injured on his right elbow. There is evidence from PW5; 3438 Constable Jabulani Shiba that accused 2 was carrying a gun and shooting at the police officers giving chase in the process injuring PW3. PW5 says that when he was near to PW3 he pulled out his gun and fired two shots at accused 2.

Dr. Motuma Demissie (PW2) who examined Constable Sibandze (PW3) stated that he was unsure whether or not the injury came from a bullet. He observed a laceration of the left forearm and because it was an elbow wound it was difficult to tell whether or not it was a bullet wound. The doctor examined another victim of the shooting on that day Ms. Futhi Dlamini. He was very certain that her wound was a bullet wound because the entry wound was small and the exit large and Ms. Dlamini complained of burning around the area of the wound. It was a buttock wound.

PW5, Constable Shiba stated that PW3 fell towards him together with the motor cycle. He held both PW3 and his motor cycle and lowered them onto the ground. PW3 says he decided to get off his motor cycle in order to take cover behind it because of the oncoming bullets.

There is obviously a contradiction of the evidence of the doctor and PW3. I believe the doctor that it was not a bullet wound. The officer sustained the laceration when he abruptly stopped the motor cycle got off and tried to take

shelter behind it to get out of the line of fire. Accused 2 may not have caused the wound but he certainly attempted to kill all the officers giving chase. PW3 got injured because he was trying to hide from the fusillade of bullets. Accused 2 was the cause of PW3's injury even if he did not inflict it directly.

Accused 2 denied having a gun or shooting at the officers both in examination and when he gave evidence in his defence. However, three police officers put him at the scene of the crime. The evidence of PW5 Constable Shiba (from Sidvokodvo) and PW3, Constable Sibandze (from Manzini) is corroborated by PW6 4808 Constable Sukoluhle Masuku (from Manzini). PW5 was driving along Ngwane Street at about 1.00 p.m. on the 25/12/04. Outside the radio shop he noticed two men running away from the radio shop and three Indians giving chase and pointing at the two men. He drove after them. The police motor cycle was ahead of his vehicle. He noticed that one of the men who were running along Ngwane Street turned into Siyabonga Street and headed

towards Grand Valley. PW5 gave chase in his motor vehicle. Accused 2 was ahead with accused 1 following. As they were running PW3 passed accused 1 who was slower and went after accused 2, blocked his way stopped his motor cycle and alighted in order to arrest accused 2. Before he could say anything accused 2 withdrew a pistol and shot at him about four times but missed. He took cover behind his motor cycle but 1 bullet hit him on his right elbow. He could not hold the motor cycle upright and it fell by then he was bleeding profusely. Accused 2 also fired at PW5 and PW6. PW5 stood face to face with accused 2 about four metres apart. He saw him clearly and was able to make a dock identification in court. I am satisfied with the evidence with regard to identification of accused 2. Accused 1 had in the meantime been apprehended by the Indians and the public. Some more officers from Manzini had joined the chase. Accused 1 was placed in the Manzini police care assisted by this witness who had turned back to pursue accused 1 who was taken to the police station. Accused 1 had no firearm on him. He had a plastic bag full of cell

phones. Cell phones were also retrieved from his pockets. These were handed in to the Manzini police. PW5 then rejoined the chase of accused 2 which ended at Mavuso Trade Centre where accused 2 was apprehended by the police. This place is some 2kms from the city centre. 6 mobile phones were found on accused 2 and these were taken to the Manzini police station.

When accused 1 cross-examined PW5 he put to him that he was arrested near Mozambique restaurant where he had been all along waiting for his girlfriend to knock off. Accused 1 maintained this story when he gave evidence in his defence but PW5 denied this and told the court that accused 1 was caught near Evukuzenzele shopping complex attempting to climb over a fence. He further confirms that accused 1 had cell phones in a plastic bag and in his pockets and had no gun.

[13] Accused 2 in his cross-examination challenged the identification of him made by PW5 but the latter stated that he was able to see accused 2 clearly

because each time he shot at the officers he would turn and shoot. The witness was able to see his face clearly. He saw him as well when he was being arrested near Mavuso Trade Fair as he helped handle accused 2 and had close facial contact with him.

[14] 4808 Constable Sukoluhle Masuku (PW 6) testified that he chased accused 2 along Siyabonga Street passed the Mozambique restaurant towards the bridge. At or near the bridge accused 2 left the road went to the side of the bridge in the foliage waded across the river and entered a bush. He emerged from the bush onto the road towards Grand Valley and from there to Mavuso Trade Fair. When he came out of the bush he was no longer carrying the gun. PW6 apprehended him at the parking lot at Mavuso Trade Fair. He searched him and found six cell phones in his pockets but no gun. He handed accused 2 over to the Manzini police. PW6 confirmed the evidence of PW5 and PW3 that accused 2 fired shots at the officers while running away.

This witness admitted to accused 1 during cross-examination that he did not see accused 1 but that he saw accused 2. Cross-examined by accused 2 he admitted that he did not know what type of gun accused 2 was carrying but that it was small and was a pistol or revolver. Accused 2 denied both in cross-examination and evidence in chief that he had a gun, shot at anyone or had six cell phones on him. Both accused denied being together at the radio shop and during subsequent events effectively denying any common purpose between them. On the issue of identification PW6 stated that even though he did not see accused 2 clearly he ran after him all the way, accused 2 wore the same clothes, he did not change them when he went into the bush. When he emerged running he was still wearing the same clothes. Furthermore the officers that came to his assistance at Mavuso Trade Fair were also able to identify accused 2.

[16] 3949 Constable Mphikeleli Mabuza did not give any evidence in respect of Count 6. The Crown led proof that during the skirmish there were cartridges found at the radio shop and along the route used by accused

2 when he fled from the police. 2054 Sergeant John B. Dlamini (PW7) testified that he extracted a bullet that had lodged in a shelf in a bottle store that had gone through a shattered window. 3050 Constable M. Sibandze the investigating officer, testified that a taxi had been shot at and a vendor Ms Futhi Dlamini had been shot and injured but these did not testify. There were bullet holes in the glass counter at the radio shop and some used cartridges on the floor. The firearm was never found. There were about seven empty cartridges found along the route.

The accused persons made much of the fact that there was no identification parade conducted but the police officers stated that there was no need for one as they saw them clearly on the 25/12/2004 and both accused were arrested at the scene of the crime. The officer returned all the cell phones to the Radio shop except six which he kept as exhibits.

Count 5

Save for leading evidence in respect of one nokia cell phone, the Crown did not lead evidence with regard to the other items pertaining to this charge. Mr. Mdluli did not call any of the owners of the radio shop. He called an employee, Raymond Ndzimandze (PW9). PW9 testified that he was on duty on the 25/12/2004 when the assailants struck. The assailants ordered the occupants of the shop to lie down and proceeded to rob the shop and customers. He did not see the faces of the assailants but one had a gun. They demanded cell phones and guns. They demanded cell phones from those lying down. When they left, they fired a shot onto the floor. He stated that there were many cell phones taken from the display glass counter which was shot. These cell phones were old as they had come to be repaired. He testified that whenever a cell phone came to be repaired he wrote its problem on a sticker plus the name of the shop and would stick it at the back of the phone after which it would be taken to the mechanic. The sticker was to assist the mechanic. PW9 identified in court a nokia 3510 cell phone which had a sticker on its back with the words "insert sim radio shop" on it (Exhibit C). He was unable to

identify the other cell phones as they had no stickers on them. He was cross-examined by both accused but nothing turns on their cross-examination.

PW5 testified that after accused 2 was arrested the police retrieved 6 mobile phones from his pockets. These were taken to the police station. The Sidvokodvo police submitted 10 mobile phones retrieved from the 1st accused. PW5 noticed among all 16 mobile phones that one, a nokia 3510 had the words "insert sim radio shop" on it. It is not clear from which batch of mobile phones this particular mobile phone came from: whether it was from accused 1 or accused 2.

The defence case

Accused 1 testified that he did not go to the radio shop on the 25/12/04 instead he was outside the Mozambique restaurant smoking a joint of dagga while waiting for his girlfriend to knock off. At around 1:10 - 1:15 p.m. he noticed some Indians running past Mozambique restaurant including some members of the public. The police were

around and he feared being arrested because he had a matchbox full of dagga. One of the Indians grabbed him and confronted him asking questions which he did not understand. The police arrested him and put him in the police van without asking him anything. He complained that there was no identification parade held at the police station in order for the complainants to identify him but this in my view was not necessary. As already stated above he was arrested at the scene of the crime. He denied being inside the radio shop nor that he had a firearm.

When accused 2 cross-examined him he revealed that he had seen accused 2 for the first time on the 25/12/2004 at the police station. When cross-examined by Mr. Mdluli for the Crown he revealed that he was Ugandan, 28 years old and had arrived in Swaziland during January 2004. Initially he had come to visit his uncle who sold cigarettes and he himself sold dagga for a living.

I do not believe accused's 1's story about the dagga. It was never raised during the trial, it is being raised for the first time. Had accused 1 had dagga in his pocket the police

would have found it when they searched him. I do not believe him when he says he was seeing accused 2 for the first time at the police station on the 25/12/2004. this evidence too is being raised for the first time. Consequently, I must reject both stories. I do not believe his story that he was waiting for his girlfriend outside the Mozambique restaurant. If this were true he would have told the police when they arrested him. The police would have confirmed his story by speaking to the girlfriend who was on duty at the restaurant. He would have put this evidence to the police officers who gave evidence but he did not.

Accused 2 testified that on the 25//12/2004 at 12:45 p.m. he was from Ngwane Park Township on his way to Fairview. Along the way a police van stopped and blocked his way. A police officer alighted and asked him for his passport which he produced. The officer asked him to show him his visa to be in Swaziland and he did not have any. The police arrested him for failure to produce a visa. At the police station they locked him up until the following day when

they made him meet accused 1. They asked if he knew accused 1 and he did not. The police beat him up and suffocated him. They took his fingerprints and said that they were opening a case against him. He too denied any knowledge of the charges preferred against him. He too complained about the absence of an identification parade. He denied being at the shop, he denied being with accused 1 on the 25/12/2004, he denied being found with any cell phones. He denied having a firearm and shooting at the officers. There was no firearm found on him. He challenged the police evidence of finding 7 empty cartridges at the scene saying that if this were true the police would have produced them in court. They only produced 1 empty cartridge.

[24] There is substance in the complaint of the evidence of the 7 cartridges and the court will ignore the police evidence thereon.

[25] In response to Mr. Mdluli's cross-examination he stated that he had arrived in Swaziland on the 27/12/2003 from Kenya and sold jeans for a living. He disclosed

that he did not know accused 1. He saw him for the first time on the 26/12/2004 at the police station, Manzini. He too denied being at the Radio shop, dispossessing PW1 and PW4 of their cell phones. He denied being with accused 1 nor owning a firearm or shooting at the police officers with it. He denied being in town that day or being chased by the police all the way to Mavuso Trade Fair.

Findings

[26] My findings are as

follows: **Count 1**

I am satisfied that the Crown has proved a case beyond reasonable doubt against both accused in respect of

Count 1. I am satisfied by the evidence adduced by PW1 which was corroborated by PW4. I am satisfied by the evidence of the police officers who were at the scene of the crime that both accused ran out of the Radio Shop pursued by the Indian owners and that the police who joined in the pursuit apprehended both accused soon thereafter. PW1

and PW4 identified both accused and so did the police officers PW3, PW5 and PW6 who gave chase and saw the accused persons. PW9 corroborated the evidence of PW1 and PW4 with regard to the robbery in the shop: that there was a firearm used. I find both accused guilty as charged in respect of this count.

Count 5

I have stated that the evidence is not clear as to which batch of mobile phones the nokia 3510 marked "insert sim radio shop" was found. Evidence was led that accused 1 was found with 10 mobile phones and accused 2 was found with 6 mobile phones. There was no evidence stating from which of these two batches the nokia 3510 came from. Consequently the Crown has not proved Count 5 beyond a reasonable doubt. Both accused are found not guilty of Count 5. They are acquitted and discharged.

Count 2 and 6

Accused 1 was discharged and acquitted of both Counts at the end of the Crown case. PW3 gave evidence that he

pursued accused 2 on his motor cycle and that accused 2 continuously shot at him as a result he sustained injuries on his elbow. PW5 corroborated PW3. PW5 stated that accused 2 shot at police officers who gave chase. PW5 tried shooting at accused 2 but he ran out of ammunition. PW6 corroborated both PW3 and PW5. PW6 pursued accused 2 all the way to Mavuso Trade Centre where he arrested him. By the time of his arrest he had dumped the firearm in the bushes along the way. PW7 testified that he extracted a bullet which had lodged in a shelf in a bottle store along the route that accused 2 used. There were bullet holes in the glass counter at the radio shop where the cell phones were kept. Accused 2 was properly identified.

I am satisfied that the Crown has proved its case beyond a reasonable doubt against accused 2 and I find him guilty as charged in respect of Count 2 and Count 6.


Y.M. MABUZA - J