

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 23/2006

In the matter between

REX

VS

SITHEMBISO SIMELANE

KHEHLA DLAMINI

MLUNGISI MONDLANE

CORAM

BANDA, CJ

FOR THE CROWN

Mr. Makhanya and Mr.
Simelane

FOR THE DEFENDANTS

Present in person

JUDGMENT 16
June 2009

BANDA, CJ

[1] The two accused were originally jointly charged with one Mlungisi Mondlane on an indictment which contained fifteen (15) counts. Mlungisi Mondlane was later discharged and acquitted. He was later called as a crown witness. The remaining two accused were jointly charged with twelve (12) counts of robbery. The first accused was charged alone in one count of attempted murder and one count of robbery in count 7 and on two counts of offences against the Arms and Ammunitions Act 24/1964 as amended. They pleaded not guilty to all the counts. All the offences are alleged to have taken place between the months of March and May 2005.

[2] In addition to Mlungisi Mondlane the Crown also called Sicelo Simelane as their witness. He too is an accomplice witness and I direct myself to the danger inherent in the evidence of an accomplice witness. The classic statement of the common rule practice is contained in the judgment of Schreiner JA in the South African Appellate Division case of REX VS NCANANA 1948(A) SA 399 A at pages 405-406 where the following statement appears:

"What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, if the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof of aliunde that the crime charged was committed by someone The risk that he may be convicted wrongly will be reduced and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced even in the absence of these features, if the trier of fact understands the peculiar danger inherent in the accomplice evidence and appreciates that acceptance of the accomplice and rejection of the

accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

[3] It is clear, therefore, that corroboration of an accomplice evidence must be corroboration implicating the accused person in the commission of the offence and that while

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the danger of convicting an accused person will be reduced where the latter is a lying witness, the court must appreciate that rejection of his evidence and acceptance of the accomplice evidence is only permissible where the merits of the accomplice as a witness are beyond question. The need for corroboration of an accomplice evidence is further reinforced by the provisions of S 237 of the Criminal Procedure and Evidence Act which is in the following terms :-

"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice: Provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been actually committed."

[4] This is a criminal case and I direct myself to the legal principle that it is the duty of the crown to prove their case against an accused person beyond a reasonable doubt. There is no duty cast on the accused to prove his innocence. However the degree of proof required is now settled . In the case of **Miller v Minister of Pensions**

1947(2) AER 372 at 373 where Denning J as he was then stated the required degree of proof as follows:-

"That degree is well settled. It need not reach certainty; hut it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice".

- [5] The prosecution called twenty-two (22) witnesses to prove the charges against the accused. The first witness was Mlungisi Mondlane who was introduced as an accomplice witness. He informed the court that he had known both accused for a long time because they grew together. He stated that first accused's home is at Mbulungwane in the Shiselweni region. He recalled that he was in Swaziland in 2005 and he was at Nhlanguano and had spent a night at the first accused home. He said that they had been drinking and decided to enter a bar where they continued to drink castle larger and that it was the first accused who was buying the beers. The witness said that later they

decided to go and rest at the first accused home. The time was between 1650 hours and 1700 hours. They were approximately 15 KM away from the 1st accused's house. They hired a taxi to take them home and that the first accused paid EI00-00 as hire charges for the taxi. The witness and the second accused sat in the back seat of the taxi while the first accused sat in the front passenger seat with the driver. As they were being driven the witness stated that the first accused produced a gun which he pointed at the taxi driver and ordered him to stop. He said the driver was shocked and tried to take away the gun from the first accused. After the taxi stopped the witness said that the second accused searched the taxi driver's body and took all the money that was in his pockets. The witness said that he too, participated in the robbery by insulting the driver in order to frighten him even further. He said at that moment a car approached from the opposite direction with full head lights on. The witness said that when the approaching car stopped the first accused withdrew the gun from pointing at the taxi driver and the second accused released the driver who escaped. The witness said that he went back to the taxi where he tried to start the car so that they could escape. The witness further stated that the first accused fired his gun in the air to scare away the occupants of the second car that had approached from the opposite direction. He said all the occupants ran for cover. He thought there were three occupants including a woman which he could tell from their voices. The witness said that he removed the car radio from the taxi and that the second accused went to the second car and removed all cellphones he found inside the car.

He believed the second accused removed two cellphones.

[6] The witness then stated that the first accused said that they should search the cars further and that after that they proceeded on foot to the first accused home where they spent the night. The witness stated that a sum of E130 was recovered from the taxi driver. On the following day the witness said that they bought some beers and went to Nhlanguano where they sold one of the cellphones taken from the second car. The cellphone was sold for E150-00. It was a Motorola cellphone but did not know to whom it was sold. The witness stated that after selling the cellphone they decided to go into a bar for beer drinking. Later they again hired a taxi to take them to the first accused house. The taxi charged them E150-00. While on the way home the first accused produced a gun and that they pushed out the driver from his car and had intended to put him into the boot of his car but he managed to escape. The witness stated that he drove the car and got involved in an accident on the way. He lost consciousness but his friends, the first and second accused escaped. He was arrested at the scene of the accident. He recognised the car radio which he took from the taxi. He said he was able to recognise the radio because it is an old model of car radios. The witness also identified the two cellphones which the 2nd accused took from the second car. He said the one cellphone which they did not sell was kept by the first accused.

[7] The next witness was Mjobo Nhlanhla Dlamini. He is the taxi driver. He recalled that in 2005 he was operating his father's taxi at Hlathikulu. He said that while he was in his taxi three men approached him and came and stood next to

his taxi. He said the three men instructed him to take them to Sindzendlala area. He remembered that it was about 6.30 P.M. and it was misty and raining. He said that as he climbed the Lohala Hill one of the passengers asked him to switch on the radio in the taxi. The witness stated that before he could cross the Mahonda river the person who sat next to him pointed a gun at him. He said that as he tried to grab the gun the man behind him held him and that another was searching his pockets. The witness said that he was ordered to proceed to the steep hill and that before he could comply, another car from the opposite direction approached. The witness said he tried to turn back and in the process blocked the road. The witness stated that he then got an opportunity and escaped. He said he ran towards the other car which approached from the opposite direction and after telling them what was happening he ran into a nearby forest. The witness said that one of the people who attacked him was light in complexion and that he was able to identify him. He said that the tall assailant sat next to him and that two of them sat behind him including the one with light complexion. The witness said that he had E260-00 in his pocket and that it was taken away from him. He said he was frightened and that he thought he would be killed. He said the incident happened on 22nd March 2005. The witness identified Ex. 1 as the radio which was taken from his taxi.

[8] The next witnesses to be called were PW3 and PW4. These witnesses were working as conductors on the Kamdumiseni Bus Service. They both remembered being on duty on 25th April 2005. PW3 recalled that on that particular day he was issuing tickets to passengers on that route and that PW4 was collecting

money from passengers. He was on duty on a bus plying between Manzini and Hlathikulu. He remembered that the bus left Manzini at 3.15 P.M. and that when they reached Bhambada area he heard a gunshot. He said it was from one man he had thought was a passenger. The gunshot came from inside the bus. When he looked around he saw a gentleman pointing a gun upwards and he then realised that all passengers were lying down. He then saw that his colleague PW4 was being held by a person who he thought was a passenger. He said that PW4 pockets were being searched and that the same person who searched PW4 also came to the witness and searched his pockets. The witness said that the man took E480 from him and a Nokia 3310 cellphone. The witness who had stood at the front of the bus heard the man who was pointing the gun upwards said that the driver should be killed. The witness said that the two men alighted from the bus and disappeared. The time was about 7.30 P.M. The witness said that there were lights in the bus when the incident happened. He said he could not identify the assailant because he was very frightened. He said he telephoned Hlathikulu Police who came and recorded statements. The witness recalled being invited by the Police to identify his cellphone. He said he was able to identify the cellphone although it was not in good condition. He said he identified his cellphone because of the dent it had.

[9] PW4 was a colleague of PW3 when they both worked as bus conductors with Kamdumiseni Bus Services. He knew PW3 as his colleague. The witness said that he was together with PW3 on the material day and that he

was responsible for collecting money from passengers. He remembered that when the bus reached Sigwe some people boarded the bus and they informed him that they were going to attend a funeral. When the bus reached Bhambada a number of passengers alighted from the bus. He said as they proceeded, two passengers stood up and suddenly there was a gunshot. The witness first thought it was a tyre burst and that as they began thinking about repairing the tyre he saw someone standing on the exit door of the bus and was carrying a firearm. The witness thought the man was carrying a revolver. The witness said that as this was happening someone came to him and demanded money and cellphone from him. The witness said he surrendered his money and he was told to stand so that he could be searched. The witness said that he surrendered all the money he had together with his cellphone. He said the same man went to his colleague PW3 and did the same thing to him and that after they finished with him they alighted from the bus. The witness and his colleague called the police and explained what had happened to them. He said he did not count the money which was taken from him but he thought it was between E1 000 and E2 000 and that his phone was written "FIFA 2010" and it was a Nokia 3310. It was black/greenish in colour. The witness said that he took particular note of the person who was carrying a firearm. He described him as light in complexion and not very tall and that he looked "a young man". The witness stated that he could not remember the exact time as he was in deep shock. The witness said he identified one of the assailants at the identification parade and he pointed at second accused

as one of the assailants. He also identified Ex. 4 as his cellphone which was taken from him by one of the assailants.

[10] PW5 is Ncamsile Mdluli. This is the shop assistant who was attacked in her shop on 11th May 2005. She said that she had opened her shop at about 6.30 a.m. At 4.15 P.M. she said a certain man entered her shop and she thought he was one of her customers. The witness said that she had other people with her in the shop. The witness stated that when the man entered her shop he was wearing a red shirt with a hat which had written all over it with the words "All Star". The witness said that the man stood by the door and later produced a gun and shouted "everybody lie down". The witness said that she looked at him as she lay down. The witness stated that she noticed that the man went to the other side of the counter. After taking what he wanted the man shouted at the witness and others to stand up and demanded that they all should surrender their cellphones to him. The witness further stated that the man was also carrying a black bag. The witness found that some money in the sum of E150-00 was found missing from her shop together with three packets of Peter Stuyvesant cigarettes. The incident was reported to the police. The witness was called to an identification parade where she identified first accused in the dock as the person who attacked her in her shop. The witness also identified the black bag Ex. 5, the red T-shirt Ex. 6, and the pistol Ex. 7 as the things which the assailant had when he came to her shop. She also identified Ex. 8 as the photo which shows her identifying first accused as her assailant.

[11] PW6 is Nkosinathi Ndzingane who worked as a bus conductor for Thula Bus Service. The bus service plied between Manzini and Sihlutse. He was collecting money on the bus and that there was someone else who was issuing tickets. He recalled being on duty on 6th May 2005 working on a bus that was from Manzini going to Sihlutse. They departed Manzini at 1600 hours and reached a bus stop called Sindzandlala where two men boarded the bus. The witness said that before they reached Ngololweni one of the two men approached the witness to pay for the journey and that when the witness enquired about the second person he was paying for the first person produced a gun and shot in the roof of the bus and called everybody "dog" and ordered that they all lie down. The witness said that the second man produced a bush knife which he used to hit the witness on the forehead. The witness said that he gave him all the money he had in the sum of E700.00. The witness said the second man took away a cellphone of a passenger when it rang. The passenger whose cellphone was taken away is the girlfriend of the witness who was travelling with him. Her name is Cebisile Ndlangamandla. The two men alighted from the bus and ordered it to proceed. The matter was reported to the police to whom the incident was explained. The witness said the lights in the bus were on together with the lights at Ngololweni School and that it was possible to see clearly. The witness described the man who shot in the air as a tall man with dark complexion and the second man was described as shorter than the first and that he had a lighter complexion than the first. The witness said that

he surrendered the money because he was frightened and the assailants had dangerous weapons. All passengers lay down as was ordered by the assailants. The witness said he could identify the cellphone as Nokia 3310 with a cream/white cover. The witness was called to Nhlanguano Correctional Centre where he identified the assailant who was carrying the bush knife. The witness pointed out second accused in the dock as the person who produced a bush knife. The witness also identified Ex. 10 as his cellphone,.

[12] PW2 is Paulos Mbokodvo Sibandze. He recalled that on 22nd March 2005 he was at Mahoca and was travelling in a van Mazda B22. He and his wife were passengers in the van which was being driven by a Mr. Lukhele. He said they found a vehicle that had been parked in the middle of the road. The driver of this vehicle stopped it and two men emerged from the other car and went to the side of the driver Mr. Lukhele. The witness said that he opened the door of the car and got hold of the people and that as he did this the second man fired a gunshot and Lukhele let go this other man. The witness said that he hit the man with a stone on the chest and escaped. He did not do anything else as he was sick but said the two people got to the dashboard of the car and took two Motorola cellphones. The witness said that the two people tried to drive away the car and that they found that the ignition key was not there and they left. They reported the matter to Hlathikulu Police where they recorded statements. The witness stated that the cost of the two cellphones was E1 200.00. The witness identified Ex. 11 and 12 as the phones which were taken from the car in which he was travelling. The witness could not identify the assailants.

[13] PW8 is Africa Zweli Tsabedze. He is the driver of the Kombi in which all the incidents involving PW9, PW10, PW11, and PW12 happened. He remembered the date of 21st May 2005 when he had been hired to take people who were going to attend a funeral. He took the passengers from Matsapha Logoba and proceeded with them to a new village where they alighted to buy some drinks. The witness stated that as he approached Mbulungwane he noticed that there were stones in the road blocking the road. The time was between 9 and 10 P.M. The witness stopped the vehicle and one passenger alighted from the Kombi with the intention of going to remove the stones from the road. The witness said that he immediately heard a gunshot and noticed that a bullet had gone through his right arm. The witness said that after he was shot he stopped the vehicle. He noticed a man standing on the window next to the driver's seat. The witness stated that he heard the man say to him "you are still alive I will kill you dog." The witness said that the man fired a second shot on his chest which made him fall on the seat behind him. The witness said that as the man was about to fire his second shot he removed his cap and the witness was able to see his face. The witness said that he saw the man searching the pockets of other passengers. The witness immediately thereafter lost consciousness. He regained his consciousness at Hlathikulu Hospital. The witness was later transferred to Mbabane Government Hospital. He took one and half months to recover. He still has difficulties when the weather is cold. The bullet is still embedded in his chest. The witness remembers that there was light in

the kombi at the time of the incident. The witness described one of the assailants as "tall and dark in complexion." The witness believes that there were three assailants. He remembered that one of the two assailants was light in complexion. The witness was called to an identification parade. The witness pointed at first accused as the person he identified as one of the assailants.

[14] The evidence of PW9, PW10, PW11 and PW12 all relate to the same events which occurred on the 21st May 2005 in the kombi driven by PW8 Africa Zweli Tsabedze.

[15] PW9 is Sindi Nkambule. She remembers the events of the evening of 21st May 2005. She said the events took place on a Saturday evening at about 7.00 P.M. She said they were aboard a kombi which was driven by PW8 and that they were going to Engudzeni where they were to attend a funeral of their cousin. Among the passengers with her were Bongani Nkambule, Sonnyboy Mamba, Thoko Kunene, Nomsa Nkambule, Lungile Nkambule, Sindi Nkambule, Sindi Gamedze and others. The witness said that as they ascended Mbulungwane hill they found stones put across the road. The driver stopped the vehicle and one of her cousins alighted from the kombi to go and remove the stones. As he began to remove the stones the witness heard a gunshot which they thought was a stone. The witness said that she saw somebody standing by the driver's window. The witness said that she noticed that the driver had been shot on his arm and later she further noticed that he was also shot on the chest as the man came closer to the driver. The witness said

that she was seated at the second seat from the driver's seat on the third row. The witness said that the driver, after he was shot, tried to move away from his seat to the seats behind him and fell on the second seat. It is at this point, according to this witness, when the person on the driver's window demanded that all passengers should give him money and cellphones. This witness stated that she personally gave the man money and her cellphone which was Nokia 1100 which had a black and gray face. The witness stated that there were other people outside the kombi. The witness stated that the man further demanded more money and cellphones and that he would kill them if they failed to accede to his demands. The witness said that they pleaded with the man to be lenient to them. The witness stated that some passengers from the back of the kombi threw a bag which contained some money at the man. The witness stated that the man attempted to rip off the face of the radio of the kombi and tried to start the kombi but failed. The witness said that the man continued to make demands. The witness stated that as all this was going on another man was harassing passengers at the back of the kombi. She said this man slapped Sindi Gamedze. Another person appeared who appealed to the man with a gun to show mercy to the passengers. The assailant left the passengers and went over the hill. Hlathikhulu Police were called. PW8 was then later taken to a clinic and later to a hospital. The witness said the kombi had lights on and that she was able to take note of the person who shot at the driver. She described him as tall and dark. He was a young man and was wearing a cap whose colour was yellow and blue. The witness said

that she was not able to identify those who were outside the kombi. The witness said the incident lasted 20 minutes. The witness was called to identify the assailants. She identified first accused as the person who was carrying the gun and shot at PW8, Africa Zweli Tsabedze.

[16] As already indicated the evidence of PW10, PW11 and PW12 is to the same effect except to add that PW10 is Nomsa Nkambule. She remembers that on 21st May 2005 she was one of the passengers travelling in PW8's kombi travelling to attend a funeral of their cousin who had died. She noted that when they reached Mbulungwane Hill there were stones in the middle of the road. One passenger alighted from the kombi to remove the stones. She heard a cracking noise which she thought was a stone that had hit a window near the driver's seat. She noticed that the driver had moved from his seat and had come to seat where the witness and her sister PW9 were sitting. As the witness looked to the driver's window she saw a tall and dark in complexion man with a pointed nose. The man was carrying a firearm and was standing next to the driver's seat. The witness said that she was able to see the man. The witness noted that the driver had been shot and was bleeding. The witness was covered in blood from the driver together with PW9. The witness said she heard the man with a firearm shout "you dogs I want money and cellphones". Nobody responded to the demand and that the man repeated the demand. The witness stated that she reached into her bag and took E350 and gave it to the man. She said the man stretched his hand to get the money from

the witness. The witness stated that other passengers produced money and cellphones which they gave to the man. The witness said there was another person at the back of the kombi. He too was demanding money and cellphones from passengers. The witness said that the man with the gun had threatened that if passengers did not give him money and cellphones they would die. The witness remembered of the people outside the kombi appealing to the man with a gun to forgive the passengers as we were going to attend a funeral. The witness stated that the man who was pointing a firearm had been wearing a cap with yellow/navy blue colour. She described the other man as lighter in complexion with a long jaw and small chin. Her cellphone which she gave to the man was a Nokia 1100 and was blue in colour. The witness identified Ex. 16 as her cellphone which was taken from her by the man carrying a firearm. The witness identified the first accused in the dock as the man who was carrying the firearm and the second accused as the man at the window at the back of the kombi with a lighter complexion. The witness identified Ex. 17 as the cap which the first accused was wearing when he attacked the kombi. The evidence of PW11 is similar to the evidence of PW9 and PW10. PW11 stated that she found that there was somebody outside the kombi knocking at the window at the back of the kombi. This man demanded to have the jacket of one Sindi Gamedze. She said that Gamedze gave the jacket to the man at the window after the man had slapped the face of Gamedze. The witness surrendered her Nokia cellphone No. 2650. She described the man at the window outside the kombi as light in complexion and

with a long face. The witness was called to identify the suspects and she recognised Ex. 18 as the photo which shows her identifying a suspect. She identified the second accused as the man at the window at the back of the kombi and as the person who took the jacket from Sindi Gamedze who is now deceased. The evidence of PW12 is again similar to the evidence of PW9, PW10 and PW11. She remembered surrendering a sum of E40 and a Nokia 1100 cellphone to the man who demanded money and cellphones in a Zulu voice saying "money and cellphones dogs. I said I wanted money and cellphones you dogs, you are going to die." This witness was so frightened that she never looked up but continued to look downwards and was not able to see how the driver PW8 was hurt.

[17] The next evidence which must be reviewed in the case is that of PW13. As I have already observed in this judgment this is an accomplice witness. This witness was together with the two accused when the kombi was attacked. He took part in the robbery. He knows both accused. He grew together with the first accused and they are neighbours. The witness was a miner working at Maloma Coal Mine but he had come home to spend Easter in 2005. It was the first accused who introduced him to the second accused as a friend from South Africa. Both accused had visited him at Maloma Coal Mine where he was working. The witness stated that the first accused had carried a radio when they visited him. The first accused told him that he was selling the radio for E80-00 which the witness duly paid. The witness had asked the first accused where he got the radio and was told that it came from one of the old cars at the first accused home. The witness said

that he made a speaker for the radio and used it in his house. He recognised Ex. 1 as the radio which he bought from the first accused. The witness remembered that the radio was brought to him by the first accused towards the end of April 2005. Later the police came and collected the radio. The witness remembered that on or about 21st May 2005 he left his home to go to Embelebeleni to make a phone call and while he was there he caught up with the first accused who was with the second accused. He said that after he had made his call he joined the accused in a bar. After 9.00 p.m. the witness and the accused decided to go home and they duly started off on foot. The witness said that when they reached Mbulungwane hill the first accused said that he did not see himself going home without money. They then put stones on the road and for the first time he saw a small pistol with the first accused. The witness said that he told the others that he was afraid and that he decided to hide in a ditch. When a car approached he heard a sound of gunshot. He went where he had heard the gunshot where he saw that the vehicle was a kombi which had been going up the hill. He found the first accused at the kombi pointing the pistol at the kombi. He said he tried to reduce the volume of the radio but failed and that the first accused pulled off the face of the radio and threw it at the witness. The witness went to the back of the kombi where the second accused was standing at a window. He said he tried to speak to the second accused to stop what was happening but the second accused told him to speak to the first accused. The witness stated that he also found the second accused demanding a jacket from a passenger. The witness said

that he told the first accused to stop what he was doing. The witness said that he did not see that any person had been injured. On the way home the witness said that he saw the first accused producing two cellphones and the second accused produced one cellphone. He said the two cellphones were Nokia 1100 and the third phone was Nokia 2650 but he could not remember their colour. The witness stated that the two accused did not have cellphones before they attacked the kombi. The witness said that the second accused also produced money in the sum of E130-00. The two accused told the witness they would not share him the money because he was employed and they were not. The second accused was still carrying the jacket which he had taken from a passenger in the kombi. The first accused told the witness to throw away the face of the radio they had taken from the kombi and the witness threw it away in a pit latrine at his home. The witness accompanied the police to the first accused home.

[18] PW14 is a traditional healer from whom the police recovered cellphones which the accused had given to him as payment for traditional charms which he had performed for the accused. PW15 is the paternal uncle of the first accused and he accompanied the police to the first accused home. He was present when the police recovered a pistol from a bucket with live ammunition; cellphones, and a black bag from the first accused home. The witness was also present when the police visited the home of PW13 where they recovered a radio Ex. 1 together with a speaker.

[19] PW16 is a medical doctor who prepared and presented a medical report on the injuries which PW8 suffered as a result of the gun wounds which he received when the kombi he was driving was attacked. The report refers to entry and exit wounds on the right forearm. The report shows that the wounds showed evidence of gunshot injuries on the right side of the chest and the right forearm. The doctor said that any injury to the chest was life threatening.

[20] PW17 - 20 were police witnesses who attended the identification parade and narrated their respective roles which they played. PW21 is the investigation officer who recovered the exhibits produced in court.

[21] PW 22 is the police officer who conducted and supervised the identification parade. -

[22] The accused case is one of an alibi. They both contend that they were not anywhere near where the offences were committed. The first accused stated that he was at home looking after his father's cattle and other assets. The second accused stated that he was in South Africa when the offences were being committed.

[23] The first accused has submitted that he should be discharged and acquitted because the crown had failed to prove its case against him beyond a reasonable doubt. He has requested this court to carefully scrutinize the evidence. He has argued that the crown has relied on evidence on which there had been no cross examination, that all of it is circumstantial evidence and is not corroborated, and has invited the court to accept his version of the story

as the more probable one. He has also attacked the manner in which the identification parade was conducted. He further attacked the evidence of Mlungisi, PW1 and Sicelo, PW13 and that their evidence should not be believed by the court. He has also attacked the evidence of police officers contending that their intention is always to secure convictions and that the prosecution is motivated by malice. They both complained that their girlfriends who were present when they were arrested were not called to give evidence.

[24] I have already directed myself to the legal principles which state that in criminal cases it is the duty of the prosecution to prove their case beyond reasonable doubt.

There is no duty cast on the accused to prove his innocence.

[25] I have carefully considered and reviewed the evidence of each witness. I have also considered the evidence and the submissions made by each of the accused persons. I am satisfied and I find that the evidence of both Mlungisi and Sicelo has been corroborated in material particular by the evidence of independent witnesses. The evidence of these witnesses has emphatically identified the accused as the assailants on all the charges which have been brought against each accused. The evidence clearly places both accused at the scenes of all the offences. The items which were taken away at the scenes of crime have been positively identified by the owners. All the cell phones which were taken away from the scenes of

crime have been identified. I have carefully reviewed the evidence of Mlungisi Mondlane and I am satisfied that he was a truthful witness. He was one of the passengers in the taxi which was robbed. Indeed he himself admitted that he took part in the robbery. I find further that his evidence clearly places both accused at the scene of the crime and thereby implicating them in every particular respect. And more importantly his evidence has been corroborated in many important particulars by the complainant himself Mr. Mjobo Dlamini. I am satisfied, therefore, that the prosecution have proved count one beyond reasonable doubt. I accordingly reject the accused story that they were not present when the offence was committed. Similarly I find that count 2 has been proved to the requisite standard based on the evidence of PW1 as corroborated by PW2. Indeed there is the further evidence that the two cellphones which were taken from PW2 were recovered from the accused and have been identified by Mr. Paulos Sibandze as Ex. 11 and Ex. 12. One of these cellphones was sold at Nhlangano. I also reject the accused story that they were not present when the offence was committed. I find both accused guilty and I convict them on counts 1 and 2.

[26] I have also carefully reviewed the evidence of PW13 Sicelo Simelane. He gave his evidence in a truthful manner and I accept his evidence. He was together with both accused when they attacked the Kombi which was driven by PW8. His evidence was fully corroborated by the evidence of PW8, PW9, PW10, PW11 and PW12.

[27] PW3 and PW4 are witnesses on counts 3 and 4. Both these witnesses worked as conductors on the Kamdumiseni Bus Service. They were both on duty on 25th April 2005 when their bus was attacked. PW3 was the conductor who was issuing tickets on that particular route while PW4 was collecting money from passengers. They identified both accused as the people who attacked their bus, collected money and cellphones from them. PW4 identified accused two as the person who took from him Ex. 2 and Ex. 4 and PW3 identified Ex. 4 as the cellphone which was taken from PW4 which was later recovered from PW14. There was light in the bus and there can be no mistaken identity of the assailants. I am satisfied that the prosecution have proved their case beyond reasonable doubt and I find both accused guilty as charged and I convict them both.

[28] I have carefully considered the evidence of PW5. She was attacked at her shop during the broad day light in the presence of her sister and children. She was very close to the assailant and she identified the first accused as the person who attacked her shop and that he had carried a black bag which was recovered from the first accused and has been produced in this case as Ex. 5. I find the first accused guilty alone on count 7 and I convict him. Count 6 was withdrawn by the crown and so too was count 13.

[29] PW6 is the only witness who was called on count 5. He identified both the first accused and the second accused as the people who attacked the bus in which he worked as a bus conductor. E700 was taken from

him together with a Nokia cellphone no. 3310 and has identified Ex. 10 as the cellphone which the accused took from him. I am satisfied and I find that the prosecution have proved count 5 beyond a reasonable doubt. I am further satisfied and I find that the prosecution have proved beyond reasonable doubt count 8 which charged only the first accused with the offence of attempted murder. I am satisfied that PW8 clearly identified the first accused as the person who shot at him.

[30] The medical report together with the doctor's evidence shows that the injuries the witness suffered were life threatening. PW8's evidence has been corroborated by other witnesses who witnessed the incident. I have carefully reviewed all the evidence produced by the prosecution and I have also considered and reviewed in great detail the evidence and the explanations which the accused have given. I am satisfied and find that the prosecution have proved beyond reasonable doubt all counts levelled against the first accused alone and those on which he is jointly charged with the second accused. I therefore find both accused guilty on counts 1, 2, 3, 4, 5, 9, 10, 11 and 12. The first accused is further found guilty on counts 7, 8, 14 and 15 and each of the accused is convicted accordingly.

R.A. BANDA CHIEF
JUSTICE

Makhanya: The accused are not first offenders and

seek adjournment to prove previous convictions. I seek 15 - 20 minutes adjournment.

Court: Adjourn to 12.30 P.M.

BANDA C.J.

16/6/2009

12.35 P.M.

Makhanya: I have copy of previous convictions and have given copies to the accused.

Court: Read charges to the accused.

1st accused: I was convicted of robbery with aggravating circumstances but the record shows that I am South African national but I am Swazi. I admit I was convicted of robbery and sentenced to 15 years. It was on 17 March 2005.

2nd accused: I was convicted of robbery and sentenced to 15 years on 17 March 2005. It was at Piet Retief Pongola. I was convicted together with 1st accused.

In Mitigation

1st accused: I have something to say. I ask the court to exercise leniency in passing sentence. I have 2 minor children and are dependent on me. Their mother is deceased. I have been in custody since 2005. I have considered my mistake and I have corrected. I have realised my mistakes and I will correct them. While I was in custody I now feel remorseful and would like to go and pursue my studies. I ask it to give me a sentence which will rehabilitate me and not kill. I am sickly person and if I get long sentence I will lose my life. I ask that sentence be backdated to the date of my arrest. I ask that sentence should run concurrently. Sentences were committed within a short period of time. I am 31 years and can be useful member of the community.

2nd Accused: I ask it to exercise leniency in passing sentence as I am sickly person. I have minor child aged four and he is supposed to go to school. I am a first offender in Swaziland. I also ask court that sentences run concurrently and that sentence be backdated as I have been in custody for too long. I am also remorseful of my action. That is all.

Makhanya: Accused are danger to society. They used

dangerous weapons. They committed these offences when they were already convicts.