

IN THE SWAZILAND COURT OF APPEAL

HELD AT MBABANE

CASE NO. 20/90

In the matter between

COBRA MSIBI First Appellant

KAIZER THUMDU MAMBA Second Appellant

SENZO NXUMALO Third Appellant

and

THE KING Respondent

JUDGMENT

BROWDE JA:

When this matter came before this Court at its last session it was postponed in order to allow the Second Appellant to join the other two Appellants in the appeal. At the trial in the Court a quo there were originally twelve accused; the First Appellant was accused No. 1, the Second Appellant accused No. 3 and the Third Appellant accused No. 4. In order to avoid confusion I will refer, in this judgment, to the First Appellant as Msibi, the Second Appellant as Mamba and the Third Appellant as Nxumalo.

2

In this appeal we are concerned with the following counts namely:

(i) Count 2

This related to the robbery on the 28th of October 1989 at the Fairways Supermarket at Simunya in which M41 399,00 were stolen from employees of the supermarket. On this count Msibi was found guilty and sentenced to 8 years imprisonment.

Nxumalo was also found guilty on this count and was also sentenced to imprisonment for a period of 8 years.

(ii) Count 12 (referred to in argument as count 13).

This count related to the theft on the 4th of March 1990 at Thabankulu of a red Toyota Cressida sedan with registration No. CB1758O3, the property or in the lawful possession of Malcolm Robertson. Mamba was found guilty on this count and was sentenced to a term of imprisonment

3

of 3 years.

(iii) Count 13 (referred to in argument as count 14).

This count related to a robbery on the 5th of March 1990 at or near Nhlanguano it being alleged that Mamba and Nxumalo together with one Ndluli (who was the second accused but who was acquitted), robbed certain employees of the Nhlanguano Sun Hotel of cheques and money in cash in the total value of M66 512-62. On this count both Mamba and Nxumalo were found guilty and were each sentenced in respect thereof to periods of 10 years imprisonment.

I turn now to deal with the appeal in relation to count 2, i.e. the Fairways Supermarket robbery. The fact that the robbery took place is not called into question in the grounds of appeal nor was it disputed at the trial. The evidence is clear and is very briefly as follows:-

The robbery took place at about 5.00 p.m. on the day in question which was a Saturday. The chief

4

cashier, Mrs Mwelase, was checking the takings of each of the till operators one at a time. After she had let one till operator out of her office and was waiting for the next one, she saw a man walking towards the steps of her office. He was wearing a balaclava covering his head and face and was dressed in a long-sleeved informal shirt and trousers of the same colour. This colour was referred to by various witnesses as fawn or beige or khaki and the shirt and trousers were referred to as a tycoon suit. This man entered the office and quietly ordered Mrs Mwelase to hand over the money.

She then became aware of the presence of a second man who issued a similar order. He was wearing a maroon tracksuit with a hood but, at that stage, the hood did not cover his head or face. The first man pointed a gun at Mrs Mwelase and the second man hit her, ordering her to hurry up. She opened the strongroom door and the money was handed over.

The question at issue at the trial and on appeal was the identity of the robbers. The Crown relied upon the evidence of two eye-witnesses namely Jabu Msani and Helen Magongo.

5

Msibi gave evidence under oath in order to establish an alibi and called his sister, Mrs Jabu Shabangu, to support him. Nxumalo did not give evidence on this count (or, for that matter on count 14 which I deal with below) but relied on a witness Lindiwe Dlundlu who was called by Msibi.

The learned trial judge accepted the evidence of the identifying witnesses against that of Msibi and his sister and held that the identification of both Msibi and Nxumalo was sufficiently satisfactory to warrant a conviction.

Jabu Msani was an assistant cashier who was assisting Mrs Mwelase at the supermarket. She testified that she knew Msibi well as she had first met him in 1987 when she was introduced to him by his sister, Mrs Shabangu, with whom she was staying. He was introduced as a policeman. Later she saw him from time to time when he would come to buy something from the shop at Fairways. She also knew Nxumalo when he worked as a packer at Fairways in 1983 and later she saw him from time to time when he worked for a security firm patrolling the Siminga Location.

6

On the day of the robbery, both the robbers had guns. Msani identified Nxumalo whose face was completely covered by a balaclava by his general build and his eyes. An attempt was made by counsel for the Crown to raise the question in re-examination of identification by voice as she had heard him speak, but the Court would not allow that. Her identification is, therefore, limited to build and eyes. She did not claim in evidence in chief to have identified the voice of Nxumalo although he

had spoken. She said that she did not see the colour of the balaclava that Nxumalo was wearing.

Her identification of Msibi was much stronger. She claimed to know him well and his face was uncovered. She said that she recognised him immediately. He was wearing a maroon tracksuit. It was put to her in cross-examination that Mrs Shabangu would deny that she had ever introduced Msibi to her but she denied that emphatically. She was cross-examined at length on the details of the robbery and, although there are some minor discrepancies, she stuck to her story in all material respects.

However, when she was cross-examined by the attorney for Nxumalo, she admitted that she did not recognise Nxumalo when he was

7

climbing the steps towards the office, that things happened very quickly and that she did not recognise the colour of the balaclava worn by Nxumalo as she was "full of panic".

The second identifying witness Helen Magogo did not know Nxumalo and did not claim to identify him at all. With regard to Msibi, however, she also testified that she had been introduced to him by his sister in 1986. He was introduced as someone working at the Matsapha Police College. After that she had seen him again at Fairways. She identified him as one of the robbers but, when she first saw him that day, she thought that as he was a policeman, he would assist the victims. This piece of evidence, in my view, serves to strengthen her identification of Msibi. She identified a maroon tracksuit as similar to that worn by Msibi and a brown balaclava and khaki jacket and trousers as being similar to that worn by the other robber.

There was police evidence that those items had been recovered from Msibi and Nxumalo respectively.

Msibi's evidence does not read well and I am not

8

persuaded that the learned trial judge was wrong in disbelieving Msibi's sister. Upon the acceptance of the two Crown witnesses there is no possibility of error with regard to the identification of Msibi. Ms Riba who appeared pro deo for Msibi and Mamba, and who argued their cases thoroughly and with ability, submitted that Msibi's alibi might reasonably be true. She pointed out that even where identification is based on previous knowledge of the person factors to be investigated in detail include opportunities for observation and recognition. The Court, so she submitted, should also be concerned with the accuracy and not rely only on the sincerity or honesty of identifying witnesses. The two Crown witnesses, however, both testified to knowing Msibi well and there seems to me to be no possibility of error with regard to his identification. The only other alternative is a conspiracy between the two Crown witnesses falsely to incriminate him. On the evidence as a whole, I do not think there is any reasonable possibility of that.

That brings me to the case against Nxumalo on this count. All one has is this:-

9

No identification by Helen Magongo and an identification by build and eyes by Jabu Msani (who is thus a single witness), plus the identification of similar clothes to that worn by the second robber. It was a fast moving scene and the witness was in a panic confronted by a robber whose face was almost completely covered.

There is also evidence by Lindiwe Dlodlu which was not accepted by the trial court, that Nxumalo was present at a braai on Saturday afternoon playing in the band from about 4.00 p.m. to 8.30 p.m. and which he never left.

The learned judge's comments about this evidence are not very satisfactory. This is what he said:

"There may well have been a braai and a rehearsal at accused No. 4's (Nxumalo) homestead in the evening of the day of the robbery, but that does not detract from the Crown's evidence that accused No. 1 and 4 were seen in the cashier's office".

Once the evidence of Lindiwe Dlodlu cannot be rejected it must add to the uncertainty of the identification of Nxumalo. In my view the case against Nxumalo on count 2 was not proved beyond reasonable doubt and he should have been acquitted on that count. Msibi, however, was in my judgment properly convicted on this count.

10

I turn now to consider the count relating to the theft of the Toyota Cressida from Malcolm Robertson on the 4th of March 1990. The theft itself was not placed in issue and the only question with which the trial court was confronted was whether Mamba's guilt had been proved beyond reasonable doubt. The Crown relied to some extent, in relation to this count, on the "confession" made by Mamba to Magistrate Maphalala on 2nd April 1990. In relation to this "confession" a trial within a trial was held and the learned judge found the "confession" to be admissible. There is no doubt in my mind that the learned judge was correct in finding that the statement to Mr Maphalala was made freely and voluntarily and that Mamba's protestations that he believed that he was speaking to a doctor and not to a Magistrate were correctly dismissed as false. Whether or not the statement can properly be termed a confession is, however, far from clear. As I read it there is no unequivocal admission of guilt to any of the counts with which he was charged other than the theft of the Mazda 323 from Mackson Noyame near the George Hotel in Manzini on 1 March 1990 and the attempted robbery at the Impact Construction Company on the 2nd March 1990.

11

As neither of these counts are before us on appeal nothing more need be said about the confession other than that, in relation to the theft of the Toyota Cressida, Mamba appears to concede that he is a car thief. The real evidence against Mamba on this count is that of Joshua Dlamini and Khanyaza Tsabedze. The former witness gave a circumstantial account of how the Cressida was stolen. According to him Mamba fashioned a key for the car in approximately six minutes. He identified the car as being red in colour with the registration number CB 175803. In relation to this witness' evidence Ms Riba has urged upon us the need for treating him as an accomplice, and that we should approach his evidence with great caution. She has pointed to certain discrepancies in his evidence in the Court a quo and has submitted that the trial court did not display sufficient caution in approaching the evidence in its totality. In relation to this count however, I am of the view that Tsabedze's evidence placed the matter beyond doubt. This witness, in relation to whom no ulterior motive has been suggested, said that Mamba brought the vehicle to his homestead early one morning and asked him to keep the vehicle there as it had run out of petrol. The witness said that Mamba had told him

12

that he had taken the vehicle from South Africa and brought it into Swaziland. In his evidence Mamba conceded that Tsabedze was telling the truth when he said that Mamba had brought the red vehicle "to keep it for me" but denied the remainder of the evidence. No reason whatsoever has been suggested why the evidence of Tsabedze should be rejected and in my view it was properly accepted

by the learned judge a quo. In attempting to explain his possession of the vehicle Mamba said that Dlamini had let him use it because he, Dlamini/ wanted to use Mamba's van on that day. However that suggestion was never put to Dlamini and consequently no weight can be given to it. In any event Tsabedze, in his evidence, said that Mamba claimed ownership of the vehicle and he further explained how he changed the South African registration to a Swaziland registration when he brought cars through "the fence" from South Africa. In cross-examining Tsabedze, Mamba suggested that he left the vehicle at the witness1 home because the shock absorbers were damaged. This would take the matter no further but in any event was roundly denied. The only other matter of importance in the witness1 evidence was that he identified the vehicle by a hole which it had in the boot. It was suggested by Mamba that there

13

could be other vehicles with holes in the boot but Tsabedze, after saying that vehicles are not manufactured with holes, stated that he actually asked Mamba what had caused the hole and was given no reply. It seems to me that approaching Dlamini's evidence with all the caution that is necessary there can be no reasonable doubt that Mamba stole the red Cressida as alleged in the indictment.

I turn now to consider the evidence on count 14 which affects Mamba and Nxumalo both of whom were found guilty on this count.

#### Witnesses

A Toyota panel van belonging to the Nhlngano Sun Hotel was forced off the side of the road leading to the Nhlngano town. The van was forced off the road by an unknown number of men who were travelling in a red Toyota Cressida sedan. The occupants of the panel van were threatened by two of the men from the Toyota and a metal box containing M66 512,62 in cash, some credit cards and cheques was taken into the motor vehicle.

This occurred on Monday 5 March 1990.

14

The occupants of the panel van, Simeon Motsa, Benedict Zondo and Thandi Kunene were unable to identify the robbers who wore balaclavas but the driver was able to see part of the registration number of the red vehicle namely CB and 17. There is no direct evidence involving Nxumalo in the robbery and the case against him is entirely circumstantial. The witnesses concerned are Joshua Dlamini, Phumaphi Dlamini (Nxumalo's grandmother) Patrick Dlamini, Gcinaphi Simelane, Thoko Dlamini, Inspector Mavuso, Thoko Nkonyame, Motsa, Zondo and Kunene.

A cousin of Nxumalo, Thoko Nkonyame, testified that Nxumalo, while having a drink in the bar of the Nhlngano Sun where she is the bar maid, asked her pertinent questions in detail regarding the manner in which the banking of the casino at the hotel was done. In particular he wanted to know -

- a) the time of day the banking was done;
- b) how many employees were involved;
- c) whether or not they carried guns.

She gave him the required information including

15

the fact that banking was done at 10 a.m. every day. In cross-examination, a somewhat different version was put but Nxumalo did not attempt to support it under oath.

Joshua Ace Dlamini gave detailed evidence largely relating to the involvement of Mamba and Nxumalo in the alleged robbery. Specifically with regard to Nxumalo he testified that on the day of the robbery i.e. Monday 5 March 1990 and at about 6 a.m., he heard the sound of a car in Mamba's yard. He went outside and saw a green Toyota Cressida in the yard. Nxumalo was standing there with Ndluli (accused No. 2 in the Court below) and Mamba. He then saw Nxumalo and Ndluli drive off in the green Toyota Cressida followed by Mamba driving the red Toyota. The evidence of this witness relating to Nxumalo was not challenged by his attorney, Mr Natse, in his very brief cross-examination.

Thoko Dlamini who was, at the time of the events in question, 11 years of age, was a neighbour of the late Joseph Dlamini. She testified that on Monday 5 March 1990 she saw Nxumalo driving a red vehicle from Joseph's homestead at high speed. It was after 1.00 p.m., as school closes at 1 p.m., and she was coming from school. In cross-

16

examination she was very uncertain about the days of the week.

Patrick Kisimusi Dlamini resides in the Lawuba area. On Monday 5 March 1990 he was told by Nxumalo's grandmother, Miriam Phumaphi Dlamini, that Nxumalo had been at his house that morning. As he was approaching his homestead, he saw a red Cressida sedan drive off in the direction of Hlathikulu. It was about 9.30 a.m. He also observed that a green Cressida was parked at his house. It was still there when he left his house at 12.30 but when he returned at 5.00 p.m. it was gone.

Mrs Gcinaphi Simelane resides at Hlathikulu in the Lawuba or New Heaven area. She is a school teacher. On Monday 5 March she left her work at 1.00 p.m. While she was walking home a car drove so very close to her that she fell down in a panic. The car was a red Cressida, registration No. CB1758O3. There were four occupants of the car, two in front and two in the back. The two in front wore balaclavas with white stripes and black stripes and sunshades. One of the occupants in the back wore a maroon balaclava with no stripes. The car drove past her at about 1.30 p.m. driving

17

towards Joseph's homestead.

Mrs Phulaphi is the grandmother of Nxumalo. She saw him on the day of the robbery. At the time when the children were going to school, he arrived at their home in a green car with "paper number-plates". She asked him where he had come from but he did not reply. He asked her to open the house and then changed from denim trousers into khaki trousers. While she was talking to him, she heard the noise of a motor vehicle in the vicinity. He then ran out of the homestead leaving his vehicle. Just after that Patrick Dlamini came in telling her that he had seen a red vehicle. Later that day when the school children were returning from school Nxumalo returned. She asked him where he had been but he gave her an evasive reply. He changed back into his denim trousers, gave his grandmother E20 and drove off in his car.

Nxumalo handed over two balaclavas to Sub-Inspector Mavuso which, according to Mrs Simelane, were similar to one of those worn by one of the occupants in the red Cressida CB 175803 which she saw on the day of the robbery at about 1.30 p.m. Mr Fine appeared before us for Nxumalo.

18

A great deal of his argument was based on the omission from the record of the evidence of Motsa and Zondo who were the employees of the Nhlngano Sun and who were the occupants of the hotel's motor vehicle from which the safe was taken by the robbers. Also missing from the record was the so-called confession of Mamba which is referred to above. Mr Donkoh, who appeared for the Crown, was adamant that the evidence of the two witnesses had been led in the Court a quo and that the confession had been handed in by the Magistrate. It therefore became necessary for investigations to be made into this question and, if it was possible, to put the record in order. This was done and in due course a transcript of the learned judge's notes of the evidence was handed in together with a copy of the "confession". Although it removed much of the cogency of Mr Fine's argument he very properly raised no demur to the handing in of the relevant portions of the evidence. It nevertheless is a matter of concern to the Appeal Court that records are often prepared in a slipshod manner. It must be borne in mind that justice cannot be done on appeal unless the Court is presented with a properly prepared comprehensive record including all the exhibits properly numbered and identifiable. Mr

19

Fine did, however, persist in his submission that the circumstantial evidence linking Nxumalo to the robbery was not sufficient to convict him. Putting all the evidence together, however, one has the following situation:

1. A few weeks before the robbery Nxumalo sought and obtained detailed information concerning the banking practice of Nhlngano Sun Hotel.
2. A few weeks later, the employees of the hotel involved with the banking were robbed,
3. The robbers wore balaclavas similar to two of those pointed out by Nxumalo to the police.
4. The car in which the robbers escaped was a red Toyota in which the letters CB followed by 17 were observed.
5. Early on the morning of the robbery Nxumalo left Mamba's house in his green Cressida followed by Mamba in the red Toyota.
6. Nxumalo arrived at his grandmother's house behaving in a highly suspicious manner. After changing from the denim trousers into his

20

khaki trousers he ran from the homestead. At about that time the red Toyota was seen leaving the vicinity where it had been heard hooting; the probabilities suggest that Nxumalo then got into the red Toyota.

(7) At about 1.30 p.m. Nxumalo was seen running from the main road and, at about that time, a red vehicle was seen in the vicinity. The red vehicle was in fact positively identified by Mrs Simelane as a red Cressida bearing the full registration number CB 175803 and with two hooded men as the occupants. I consider it to be a fair inference that that was the car involved in the robbery.

(8) When Nxumalo arrived at his grandmother's house the second time, the robbery had taken place and Nxumalo again behaved suspiciously evading his grandmother's questions. He then drove off in his green Cressida which he had left there that morning.

The cumulative effect of the evidence is that Nxumalo, having left his car at his grandmother's house, went off in the red Toyota which was the car used in the robbery and then returned to

collect his green Cressida. In my view, this is one of those cases of circumstantial evidence where each piece of evidence on its own may not amount to much, but when considered in its entirety, including the absence of any explanation whatever from Nxumalo, the evidence presses upon him with the weight of a millstone. In my judgment, the Crown proved the guilt of Nxumalo beyond all reasonable doubt.

As far as Mamba is concerned, the evidence which links him with the robbery is the following. He was the man who stole the red Cressida which, as I have already inferred, was the vehicle involved in the robbery. Then there is the further evidence given by Joshua Ace Dlamini that on the day in question Mamba left the house carrying the top of a blue two-piece overall. After throwing it into the red Cressida he got into the car and followed Ndluli and Nxumalo who drove off in the green car. This was between 6 and 7 a.m. Later that day Mamba arrived on foot saying that he had left the vehicle next to another homestead. He and Mamba then drove off in the van and Mamba told him that that morning "they had killed the casino". When asked to explain what he meant Mamba said they had robbed the casino. Mamba, according to Dlamini,

also said that when they wanted to throw away the safe in which the money was kept they were disturbed by passengers who were alighting from a bus at the Sikwe area. Subsequently Mamba told Dlamini that there was a person he wanted to see at Thokolawako. Before they reached that area he was instructed by Mamba to remove the safe which was in the boot of the car and to throw it away.

He says he did this. Later he identified the safe as being that which was taken from the employees of the Nhlanguano Sun. As pointed out by the learned judge a quo there is some difficulty with regard to Dlamini's evidence regarding the place where the safe was thrown. According to Dlamini this took place along the Mafutseni to Thobolwako road. According to the witness Nbingo, the safe was found along the Big Bend to Lukhula road. I think it not unreasonable for the learned judge to have found that Dlamini was probably mistaken in his evidence, because the vehicle did travel along the Big Bend to Lukhula road that night.

Ms Riba submitted that the evidence against Mamba was only that of Joshua Ace Dlamini and that for the reasons already advanced it should have been found that this was not sufficient. During the course of argument we were referred to the

judgment of Hannah CJ in the King v Charles Ginindza & Others Review Case No. 170/87 in the High Court of Swaziland. During the course of that judgment the learned Chief Justice said on review that "if this Court could be satisfied that the learned Magistrate fully appreciated the danger inherent in the evidence of an accomplice and was nonetheless for good reason convinced of the truthfulness and reliability of the accomplice's testimony there would be no difficulty in confirming the conviction of the first and second accused." It seems to me quite clear that the learned judge a quo fully appreciated the danger inherent in accepting in Dlamini's evidence but that he accepted it for good reason. One of the good reasons for its acceptance is that it cannot be seriously disputed that the red Cressida which was involved in the robbery was that stolen by Mamba and that he was driving the red Cressida in the very area in which the robbery took place on that day. Coupled with the evidence of the disposal of the safe and the statement regarding the "killing of the casino" I am satisfied beyond reasonable doubt that Mamba took part in the robbery forming the subject-matter of this count.

In the result therefore I am of the opinion that the crown proved beyond reasonable doubt that both Mamba and Nxumalo were guilty as charged on count 14.

To sum up therefore:

- i. Msibi's appeal is dismissed and his conviction and sentence on count 2 are confirmed.
- ii. Mamba's appeals against his conviction and sentence on counts 13 and 14 are dismissed and the convictions and sentences are confirmed.
- iii. Nxumalo's appeal on count 2 is upheld and the conviction and sentence in regard to this count are set aside.
- iv. Nxumalo's appeal against his conviction and sentence on count 14 is dismissed and the conviction and sentence are confirmed.

There remains only to deal with the effect of the above findings on the sentences of the various

appellants.

- i. Msibi's appeal having been dismissed his sentences remain unchanged.
- ii. Mamba's appeal having been dismissed his sentences too remain unchanged.
- iii. As far as Nxumalo is concerned he was sentenced to 8 years imprisonment for the offence in respect of which we have now upheld his appeal. However, that sentence was to run concurrently with the sentence of 10 years imprisonment which he received as a result of being found guilty on count 14. Consequently there is no change as far as his sentence is concerned. It should be pointed out, as it may well be relevant to the authorities, that Nxumalo has only the one sentence of 10 years in respect of count 14 which still stands.

HANDED DOWN THIS DAY OF 1993.

J. BROWDE

JUDGE OF APPEAL

I agree:

G.P.C. KOTZE

JUDGE OF APPEAL

I agree:

W.H.R. SCHREINER

JUDGE OF APPEAL

FOR APPELLANT NOS. 1 & 2 :

MISS V. RIBA

FOR APPELLANT NO. 3 :

MR. A. SHABANGU

: ADVOCATE FINE INSTRUCTED