

IN THE COURT OF APPEAL OF SWAZILAND

CRIM. APPEAL NO. 75/1996

In the matter between:

Mbholofidi Sonnyboy Mbhamali
Sipho Mbhamali

1st Appellant
2nd Appellant

vs

REX

Coram

Kotze, JP
Tebbutt, JA

Browde, JA

For Appellant
For Crown

In Person
Mr. L. Ngarua

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JUDGMENT

(24/09/97)

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BROWDE, JA

Two appellants were charged in the Court below on six counts.

Count 1, they were charged with the murder of John Malamlela;

Count 2, they were charged with attempted murder which was not dealt with by the Acting Chief Justice because the Crown led no evidence in regard to that count;

Count 3, 4, 5, and 6 related to robberies in which the complainants were Elmon Vilane, Sipiwe Macwele, Bellinah Nkambule and Busisiwe Mdluli

respectively. Both appellants were acquitted on counts 2, 3, 4 and 5 and nothing will be said about those counts in this judgment. The Crown case on the other counts, namely counts 2 and 6 depended almost entirely on the evidence of one Moses Mngomezulu to whom I shall refer as PW1. In his evidence PW1 recounted how he had virtually grown up in the home of the 1st appellant's father where he drove a tractor. He regarded the first appellant as a brother and he also regarded himself as being related to the 2nd appellant as they were both from the area of Mbhamali. He went on to tell the Court how on the 13th August, 1995 he was called by the 1st appellant from the latter's father's homestead and how he was led to the homestead of the 1st appellant where they joined amongst others the 2nd appellant. He was then handed a revolver and other persons who were present were also armed. The 1st appellant then explained that they were going out to commit a series of robberies in the area in a quest for money. They then followed evidence of how the deceased in count 1 met his death by shooting. The circumstantial accounts in this regard given by PW1 is to the following effect: He said that they arrived at the home of the deceased and the deceased's wife gave them money. Then after they had given us the money, he said, we went out but the deceased followed us and then he was shot buy accused 1. When asked how the deceased followed them and for what purpose, he said, he wanted to talk about the money. And then, he said, when he was just about to come out of the house, my Lord, and to the direction where accused no. 1 was standing he was shot at. But before accused no. 1 shot at him he was warned by one of the boys not to shot at the old man because he had already given us the money.

Did you see where he was hit, asked the Crown?

The answer was, No my Lord I never noticed.

PW1 then went on to say that the shoot he fired was a warning shot, he never

aimed or directed it to anybody. And went on to say, after the deceased fell we took the money and we went to appellant no. 1's homestead with the money. The appellants' defence was based on an alibi. Coupled with the suggestion that the Police had put PW1 up to concocting the story implicating the appellants who were, so it is alleged, entirely innocent, this suggestion that the Police told PW1 to implicate the appellants is unacceptable. Why the Police should pick on the two appellants as their victims to concoct a story against them is unexplained. And if the Police did that why they did not seek to corroborate the evidence of PW1 by telling PW2 that is Busisiwe Mdluli to recognise the appellants either facially or in some other way is also unexplained. After all she knew both appellants well and did not identify them as the people who robbed her that night. It therefore seems to me quite beyond belief that the Police would in the circumstances of this case school an alleged accomplice for no apparent reason merely to implicate entirely innocent people. Incidentally if they were entirely innocent they well have had alibis which were there and then would have destroyed the case and all theof the Police would have come to note. The appellants both gave evidence both denying their presence at the scene of the crime but their evidence was rejected by the Court aquo. In that regard the learned Acting Chief Justice carefully considered the evidence of the Crown witnesses and that of the appellants. In doing so he was fully conscious of the requirement to approach the evidence of the accomplice with what is referred to as caution.

In my opinion there is no valid basis for attacking the reasoning of the learned Acting Chief Justice or his approach to the evidence. Mr. Ngarua who appeared for the Crown referred us to the case of ***Rex vs Shonkwane 1959 (3) SA p337***. In that case in regard to a defence of alibi it was said that the trial of fact must have regard to all the evidence. With the advantage of course of being able to see the witnesses and assess whether everything in their account including their

.....is acceptable to the Court and in the light of all that to assess whether the alibi can be believed. This the learned Judge did. He saw the witnesses and was satisfied that the evidence of PW1 was true. He found that the appellants were unimpressive witnesses and that their evidence was false. The learned Judge was therefore in my opinion fully justified to base his findings on

the evidence of PW1 and because he found that PW1 implicated the 1st appellant in the killing on count 1 and both the appellants in the robbery on count 6 he was in my judgment correct in finding them guilty on that count.

The 1st appellant was sentenced to imprisonment for 15 years and the 2nd appellant for 10 years. These are no doubt heavy sentences but sentence is a matter to the discretion of the Judge trying the case and we will not interfere unless there has been a misdirection or the sentence in the opinion of this Court is inappropriate in the circumstances of this case. In arriving at these sentences the learned Acting Chief Justice said something which I think bears repetition. He said -

“you are on a mission of robbery, you have in your possession loaded firearm which you did not hesitate to use apparently when you saw the deceased going out of the house. I have given you the benefit of the doubt in finding that there is some doubt as to whether you aimed at him or not”. The learned Judge was here referring to the fact that he found no. 1 guilty of culpable homicide. “But your conduct in firing the pistol in those circumstances is extremely reprehensible. There is no sign of remorse, there is no sign of any compassion for the widow and you”, referring to appellant no. 1, “will receive a sentence of 15 years imprisonment.” In referring to the robbery count he said “here too this was premeditated and planned on innocent householders in the area. The fruits of your misdeeds were negligible although what you took from these people may have been important to them. But the seriousness of the effects is the attacking of people in their homes.” Not only is there no misdirection but I agree with all that was said by the learned Acting Chief Justice in regard to the sentence.

In the result therefore, the appeal both against the conviction and sentence is dismissed and the conviction and sentence are confirmed.

BROWDE, JA

J.

I AGREE

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G.P.C. KOTZE, JP

AND SO DO I

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P.H. TEBBUTT, JA