

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 33/97

IN THE MATTER BETWEEN:

1. KHISIMUSI MYENI 1st APPELLANT
2. MASINDA DLAMINI 2nd APPELLANT
3. MCHUDE SITHEBE 3rd APPELLANT
4. ELVIS MAZJBUKO 4th APPELLANT

VS

REX

RESPONDENT

CORAM : BROWDE, J.A.

VAN DEN HEEVER, A. J. A.

SHEARER, A. J. A.

FOR APPELLANT NO. 1 : IN PERSON

FOR APPELLANT NO. 2 : MRS. MATSE

FOR APPELLANT NO. 3 : IN PERSON

FOR APPELLANT NO. 4 : MR. M. MABILA

FOR RESPONDENT : MS. LANGWENYA

JUDGMENT

VAN DEN HEEVER. A. J. A.

I refer to the appellants in their capacity in the trial court: as the accused; and by the numbers allocated to them there.

They were indicted on a charge of robbery, committed on the night of 22 September 1995 near the Malolotsha Game Reserve. Eight tourists intent upon a hiking weekend there, had come into Swaziland in two cars: Mr. and Mrs. Swanepoel and Mr. and Mrs. Storm in Swanepoel's Opel Record, to which a venture trailer was attached; and Suna van Zyl, Jannie Truter, Christopher van Staden and Christie Engelbrecht in a Toyota.

For reasons not material to the outcome of the appeal, the Opel was pulled off the road where its occupants waited for those in the Toyota to go off and find the entrance to the Game Reserve, and then return and lead the Opel to that.

While they were waiting a Cressida pulled up behind the trailer. Armed men wearing balaclavas jumped out. The driver remained in the Cressida. Swanepoel was assaulted. He and Storm were ordered into the Cressida. Two of the robbers took charge of the Opel. They traveled in convoy and ultimately stopped. The robbers took possessions from the persons of

the hapless tourists, from the car itself, and the contents of the trailer. They left taking the Opel having divided their booty between the two cars, compelled their victims to get into the now empty trailer, and tried to close the lid.

At daylight the four complainants left the scene, reported to the police, and provided them with a list of the items they could remember, that had been taken. These included property belonging to the occupants of the other car which had been in the trailer.

There were five men who had taken part in the robbery. Because these events took place at night and four of the group had been disguised, none of the victims was able to identify any individual as having taken part in the robbery.

The first item recovered by the police, was Swanepoel's abandoned Opel. It had been stripped. When he came to remove it, it had no wheels, no headlamps, no front grill, no radio, and had been damaged in other respects.

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A fortnight later the police telephoned Swanepoel again. Six members of the earlier hiking party came through to Manzini. They were shown a variety of articles, which were identified as being, some unquestionably the property of one or other of the complainants, others identical to the things they had lost as a result of the robbery. Just before the trial commenced the police produced articles which had not been at the police station earlier and complainants identified further items.

The first and third accused were the first to have been arrested, No. 1 on the 10th and No. 3 on the 12th of October 1995, The other two were brought in on the 30th November. All four of the accused pleaded not guilty when the charge was put to them at the trial which commenced on the 19th of August 1996. Only No. 3 appeared in person, the others being represented each by a different lawyer.

It was not disputed that the robbery had occurred as Swanepoel testified in considerable detail. The only issue was whether the four accused had been members of the group of five who had committed that offence. The Crown sought to establish that by circumstantial evidence linking each of the accused, through possession of or dealings with items placed before court and recognized by the victims as the property taken in the course of the robbery, to that offence.

It was on four separate occasions that the police had recovered items similar to those in the lists provided to the police by the complainants. Some came from a room in a homestead belonging to the father of No. 1. This property was administered by No. 1 on his father's behalf, according to the latter. At another Myeni homestead, No. 1 had hidden three backpacks. Such items had also been found in the home of No. 2. Further goods had been attached in a room occupied according to the Crown evidence by No. 3. He had also sold Opel parts to a dealer that matched what had been removed from Swanepoel's car. No. 4 had led the police to his parental home and in a suitcase there, a bag with fibreglass tent pegs was found.

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The defence fought every inch of the way. A great deal of time was spent challenging the identification of individual articles placed before the court which corresponded to those the complainants had been deprived of. It was hardly relevant, in view of the defences raised. No. 1 testified in effect that he was unfortunate enough to have two robbers as friends. The goods found at Ngwane Park came from a room leased to a certain Masuku, and those he had hidden in his father's bedroom at the other homestead had been entrusted to him by Godfrey

Macardo also known as Jeffrey for safekeeping since Godfrey feared burglary at his own home during an impending business trip. No. 3 admitted having sold parts which matched what had been removed from Swanepoel's Opel to Blansak Motors, but he had done so on behalf of Jerry Macardo which Jerry had asked him to do, (telling him they were Chevrolet parts) because No, 1 was known to that business. The items the police alleged they had taken from No.1's house, had actually been taken from Jerry's abode, and the investigating officer PW9 was lying in his evidence to the contrary. No. 2's defence was that he had not stayed at his room, where items had been found, since he had joined his girlfriend, where he had lived for months until his arrest. The world and his wife had access to his room during his absence. No. 4 had only one item to account for, which was found at his parental homestead, where he had left it, and which is not his own place of abode, in a suitcase containing belongings he had left there for the Easter vacation. He denied any knowledge of that item or how it came to be in the suitcase.

I do not propose to give a summary of the evidence led at the trial. The record consists of 784 pages. I list merely some of the items allegedly linking each of the accused to the offence. The display of goods the police put before the complainants about a month after the robbery, was largely composed of booty from that robbery. Many items positively identified by one or other of the complainants were however not shown definitely to have come from the possession of a particular accused, such as Mrs. Storm's prescription spectacles.

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#### NO. 1

He drives a Toyota Cressida on occasion, the property of his father. At the get-together at the police station, Swanepoel had seen that Toyota filled with tyres of a special kind, not available from just any tyre dealer, which were exactly the same as those removed from his Opel. Inside the Cressida Swanepoel saw a number plate or two. The Cressida in which the robbers had conveyed him, had similar things lying on the floor.

No. 1 is according to his father (PW6) in charge of one of the two homesteads belonging to the father. Where PW6 lives, the police found three backpacks which No. 1 had hidden in his father's bedroom without having asked permission or informed him of that fact. These were exhibits 44, 32 and 21, identified by Truter, Engelbrecht and Storm respectively beyond any doubt, along with their contents.

No. 1 used to occupy a room at the other homestead of PW6, at Ngwane Park. According to PW6, No.1 is in charge of that property and the letting of rooms, PW6 receiving the money for those. No.1 had after being interrogated led the investigating officer, PW9, there, first going to his own house, also at Ngwane Park, where he first collected the house key. Inside he opened a room and pointed out a number of exhibits which PW9 took to the police station. The complainants later identified a number of them as their property, such as a sleeping bag covered in plastic as the Swanepoels had covered theirs, (exhibit 12), a sun hat specially made for Truter (exhibit 49), clothes marked with Engelbrecht's name, part of exhibit 37; Engelbrecht's sleeping bag with a new zip to which he had added a key ring (exhibit 32); sheets of which one pair were marked with Truter's name (exhibit 36); a blue down jacket Truter had received as a gift from a friend overseas which he had patched in a particular way (exhibit 59); and so on. He also pointed out tyres fitted onto a grey Cressida with registration number MYK 936 T, which was removed to the police station where it was later seen and examined by Swanepoel, as I have already said.

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#### NO.2

Inspector Ndlovu (PW10) went to the homestead of No,2 on the 10th of October 1995 (He

was unsure about the date, changed it later to the 20th of October). The father of No. 2 pointed out which was No. 2's house. He was not there. The house was locked. PW 10 asked for and received permission from the father to break in.

He found and took one AK47 assault rifle and magazine with live rounds, money -including Mozambican and German currency, 2 balaclavas, a Pentax camera, a ladies wristwatch, a set of camping cooking pots, a blue camping bag containing a green tent, motorcar number plates including one that belonged to a car used in the Ministry of Agriculture, a briefcase with documents bearing the name of No. 2 and various other things. Ndlovu took a bag with all these articles to Malkerns where PW9 and No. 2 were, the latter having been arrested by other policeman in respect of other charges. There No. 2 picked out from among the contents of the bag, articles as belonging to "the tourists." These were the Pentax camera, exhibit 16; a set of camp cooking pots (exhibit 19); a ladies watch (exhibit 8); and a blue camping bag with a green tent in it.

Cross-examined by counsel for No.2 whether he had asked the father how many people resided in that room, PW10 said he had asked. The father told him that at one stage there had been a girl friend but who and where she was at that time he did not know. No one else lived in that room. He had asked permission to break the door open because the father had no key and did not suggest that anyone else did. No. 2's counsel elicited from him that PW10 had asked the father when last No. 2 had been in that room. PW10 said the father had replied that he had seen No. 2 there a few days earlier. PW10 admitted that he may be wrong that No. 2 had pointed out the watch, when it was pointed out that that had already been earlier identified as having been among the goods removed from the Ngwane Park Myeni complex.

6.

NO.3

He led PW 9 to his rented house at Ngwane Park where he pointed out a number of articles corresponding to the description of items in the lists of goods taken during the night of the robbery, including purple socks, sunglasses, brown boots. These were taken to the police station at Malkerns, where he also handed over a tracksuit he was actually wearing (exhibit 28). From there he and the police went to a dealer in secondhand spares who when asked about any dealings he may have had with No.3, produced 5 rims, 2 headlights and a grill - Opel parts, which he had bought from No.3. Items identified by the complainants as theirs from among the articles he pointed out to PW9, are a drymack jacket (exhibit 5), hiking mattresses (exhibit 6), 2 cushions (exhibit 4), a Backpacker poncho (exhibit 17), all articles of the kind mentioned in Swanepoel's list of taken goods; Mrs. Storm's hiking boots (exhibit 25); sunglasses identical to Mr. Storm's (exhibit 26); a pair of his wife's socks (exhibit 29); and a blue hat (exhibit 33), an item featured in Engelbrecht's list.

NO.4

PW9 interrogated him on 30 November. He had already been arrested at Manzini. He led PW9 to his parental home where he handed over a blue tent cover, a green tent with cover, and a blue bag containing tent pegs. Swanepoel identified the latter positively as his property, made of fibreglass and fitting his tent (exhibit 15).

His counsel did No.4 more harm than good by his cross-examination challenging the credibility of PW9. The bag of tent pegs (exhibit 15) was the only relevant item the investigating officer removed from the parental home, on the strength of which he had charged No.4. Counsel asked why PW9 was then so confident that Swanepoel would identify the pegs positively. He answered "because of the statement by the accused's co-accused to say that he was also involved and he could not deny that himself. Despite being warned by the presiding judge of the dangers inherent in his line of attack, counsel

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persisted: "... did No.4 ever confess to you of having committed this crime?" (emphasis added) to which PW9 replied "He confessed My Lord when I filled up Form RSP 218." The trial court rejected the evidence of the accused. They were convicted and sentenced to eight years apiece, backdated to the date of the arrest of each.

Hence the present appeal, against both conviction and sentence.

There was an unfortunate comment by the trial judge that the accused had not tried to call Masuku and Jerry, which he seemed to regard as weighing against the accused involved. They bore no onus, and calling them would have been an exercise in futility for the accused. To expect Masuku and/or Jerry alias Godfrey to confess to their own complicity to save the skins of others is hardly realistic. What was important, is that they had not been mentioned to PW9. The defence seemed to require the Crown to prove a negative: that the world and his wife had NOT had access to the properties where the goods had been found.

The conviction of the first three accused was in my view inevitable.

No. 4's position is different. The other three are linked, as appears from what has been said above, by various factors - abode, goods found, and a common friend/acquaintance, the ubiquitous Jerry. The latter may well have been one of the robbers, but that would not alleviate the guilt of his associates in any way. But No. 4 was taken to his parental home only on the 9th of December. It was not disputed that many people had access to the room where the suitcase was. Where I earlier accentuated the word "this" in the "confession" he is alleged to have made to PW6, it was premature to do so. No. 4 himself denied having done anything of the kind, and PW9 was not nor could he be further questioned or cross-examined on the content of the alleged confession. The answer of PW9 was in any event ambiguous: merely "he confessed". One cannot infer as an inevitable conclusion from that, that he confessed to participating in the robbery.

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The trial judge gave no reasons for rejecting the evidence of No. 4 as false, merely tarred No. 4 with the same brush as the other three. Though No. 4 may well have participated in the robbery - in which event he would on the evidence adduced have received very little from the proceeds - or perhaps be guilty of receiving, in my view the evidence adduced by the Crown falls short of establishing his guilt beyond reasonable doubt.

As far as sentences are concerned, it cannot be said that the trial court erred in the exercise of the discretion which was its own prerogative. It was urged that there were mitigating factors, for example that a good deal of the booty had been recovered: not correct, when one has regard to the damage to the Opel and the items listed as having been taken which were not found. Moreover, I myself do not consider the fact that stolen goods are recovered as a matter to be held to the credit of the thief but solely to the credit of the police - unless of course a remorseful thief of his own accord makes such recovery possible. The trial Judge was unimpressed, apparently, by the evidence of Dr. Malepe, a psychiatrist, on behalf of no. 2. Her instructions had been to assess no. 2 "to determine what an appropriate sentence would be that would benefit the accused."

Presenting evidence about the criminal and his psychological makeup may assist the court in the sentencing process. But the court is obliged to take account also of the crime committed, and the interests of society.

The appeal is dismissed as regards the first, second and third appellants.

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The appeal of the fourth appellant succeeds. His conviction and sentence are set aside.

VAN DEN HEEVER, A. J. A.

I agree BROWDE, J. R

I agree SHEARER, A. J. A.

Delivered in open court on the June 1999