IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.32/97

In the matter between:

JOSEPH TINDLEBE MNGOMEZULU

VS

THE KING

CORAM : TEBBUTT J A

: BROWDE J A

: LEON J A

FOR APPELLANT : MR. T. NKAMBULE

FOR THE CROWN : MS. M. LANGWENYA

JUDGEMENT

Tebbutt J A

The appellant was charged in the High Court with three other persons. There was a separation of trials as far as two of those accused persons were concerned. The case proceeded against the appellant and one other. The second person who was charged with him was convicted of robbery and rape and has not appeared on appeal in this Court. Only the appellant has done so.

The appellant was charged with, and convicted of, firstly murder, secondly theft of a shotgun. On the murder count the trial court found that there were no extenuating circumstances and the appellant was sentenced to death. On the theft count the appellant was sentenced to two years' imprisonment backdated to the 14th December 1994, the day of his arrest.

The appellant now comes on appeal to this Court against both his conviction and sentence on both of these counts. When the matter was called this morning the appellant's counsel, Mr. Nkambule, did not proceed with the appeal on the theft count and quite rightly so. The evidence on the theft

count was overwhelming against the appellant.

On the murder count the facts are briefly that on the 27th April 1994 there was an armed robbery at Mhlume involving two armed robbers. During this robbery a security guard Johannes Dlamini the deceased was shot and killed. Neither of the robbers was identified by any of the witnesses.

It is common cause that it was not the appellant who fired the fatal shot that killed the deceased. The appellant was convicted on the evidence, and only on that evidence, of a statement that he

made to his girlfriend, Busisiwe Sifundza, who was PW1 at the trial and on the basis of the appellant having acted in furtherance of a common purpose with the robber who shot the deceased. The learned Judge found the following:

"The court finds that the accused was present when Johannes Dlamini was killed by the colleague and the court finds that in furtherance of a common purpose, he is guilty."

The learned Judge found that the evidence of PW1 should be accepted. He said.

"If the court accepts that accused no. 1 had in fact told his girlfriend that he and his companion had gone together and the companion had shot and killed another person then if the court finds that that piece of evidence will place accused no. 1 squarely into the scene of the crime."

That, however, was not the evidence of PW1. She said that on the afternoon of the robbery she saw the appellant together with another person. She said, "I saw them breaking something but I did not see what it is they put it inside a bag." She then said, "They gave it to the other boy who then left first." She said that she and the appellant had walked for a long distance and he had then bade her farewell and had proceeded on his way and she had returned home. The appellant was clearly then not with the other man. She said that later that night the appellant returned to her home and said the following: "Something bad has taken place." She said he then told me that the boy who was accompanying him had shot a person. He also said that the person who had been shot was the boyfriend of one Tobi. This was the man Johannes Dlamini. She said that the man whom she had seen with him earlier that afternoon was also with the appellant that night. She said, "This boy who was accompanying him said I should not point at him. If I pointed at him I will be putting myself in trouble."

The learned Judge a quo made two misdirections on the evidence. He said that the appellant told

PW1 not to point out the other man to the police. Appellant did not do so. It was as I quoted the other man himself who did so. Secondly, it is clear from her evidence that I have quoted that the appellant did not tell PW1 that he and his companion had gone together as the learned thiral judge stated. The statement made by her, "does not clearly place the appellant at the scene of the crime," as the learned trial Judge found. Miss Langwenya, who appeared for the Crown at the appeal today very fairly conceded that this was in fact the position and she agreed that the evidence of PW1 did not place the appellant at the scene of the crime. That being the only basis upon which the appellant was convicted, his conviction cannot stand.

In the result therefore, the appeal against the appellant's conviction on the count of murder succeeds and the conviction and the sentence are set aside. The appeal against the conviction on the count of theft fails and the conviction and sentence are confirmed.

P.H. TEBBUTT J A

I agree:

J. BROWDE J A

I agree:

R.N. LEON J A

Delivered on 15th April 1998.