

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 5/1998

In the matter between

Phineas Masilela 1st Appellant

Enock Hadzebe 2nd Appellant

vs

Rex Respondent

Coram Kotzé, J P

Tebbutt, J A

Browde, J A

For Appellant IN PERSON

For Crown MR. LANGWENYA

JUDGMENT

(17/04/98)

TEBBUTT, J A

This is an application for leave to appeal to this court brought by the applicant, as I will refer to him as Enock Hadzebe. The applicant and one Pheneas Masilela were convicted by the Acting Senior Magistrate of Mbabane on the 26th of November 1995 of Armed Robbery and being in possession of an unlicensed firearm. They were each sentenced to two years imprisonment on the count of armed robbery and on the count of being in possession of an unlicensed firearm they were each sentenced to a fine of E2 000.00 or in default of payment 2 years imprisonment. It was also ordered that the sentences of imprisonment should run

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consecutively. Both appealed against their convictions and sentences. The High Court dismissed the appeals against the conviction and also against the sentence of 2 years imprisonment in respect of the armed robbery. On the charge of possession of an unlicensed firearm the Court pointed out that there is a minimum statutory sentence of a fine of E5 000.00 or in default of payment 5 years imprisonment. This the Acting Senior Magistrate has failed to impose and the High Court accordingly corrected his sentence to read as follows:-

"On count 2 each accused is fined E5 000.00 or in default of payment 5 years imprisonment E3 000.00 or 3 years imprisonment of that sentence will be suspended for a period of 3 years on the

condition that the accused are not convicted for any contravention of the Arms and Ammunitions Act committed during the period of suspension ".

The applicant, Enock Hadzebe, now seeks leave to appeal to this Court against this conviction and sentence. His co-appellant in the High Court Masilela does not seek such leave but merely asks that his sentence should be backdated to the date of his arrest the 29th July, 1995.

In considering an application of this sort the Court has to decide whether there are any prospects of success on appeal. In my view there are no prospects whatsoever of any success on appeal either on the conviction or on the sentence. The complainant Lindokuhle Dlamini testified how she was robbed at gun point at her father's shop. This was in the presence of other witnesses who were also in the shop. She was robbed E400.00 by the appellants. She said that Masilela stood at the door on the veranda of the shop preventing people from entering or leaving it while the applicant demanded from her the money which she had in the till from her. Both men were carrying firearms. The two men then ran off but were pursued by people in the shop who caught and arrested them after an exchange of gunshots between the two men and their pursuers. She said this in her evidence:-

"By then other people had chased the robbers and my father armed took part in the chase ". After two hours or so two men were brought back to the shop by community members and my father and I identified them as the robbers ".

She pointed out Masilela as the man who remained at the door and pointed out the applicant Hadzebe as the man who demanded the money from her. She said she clearly saw the guns in the hands of each one of the two of them. The evidence was also given by some of those who were in the shop at that time. One was Mandla

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Mbuyisa. He said that while he was in the shop one of the men approached the complainant. He said this in his evidence:-

"I heard the man asking for money from the lady ". He pointed out the applicant Enock to the Court. He said accused number 1 stood at the door.

"I saw accused no. 2 (that is the applicant Hadzebe) draw a gun. The lady attendant proceeded to the till and produced money. "

He then described how they had pursued the two men. He said:-

We followed up to the mountains and ran on foot Two people were arrested they are the accused. There was an exchange of firearm. The accused hid under rocks and Mr. Dlamini ordered them out. They then started shooting at us. Then Mr. Dlamini shot at them first in the air. The accused ran away. 1st accused crossed the river and accused no. 2 fired at us again. They ran into a bush and hid. We followed. 2nd accused (that is Hadzebe) was the first to be arrested. We asked for the firearm and he said he had thrown it away."

He said that he had fired twice at the applicant and hit him in the leg and buttock.

"At the arrest we recovered only one gun that is with accused no. 1. But later the Police searched the scene and in my presence found the other gun. " He identified the firearm. It is quite clear from this evidence together with the evidence of PW4 who was also a person who was present at the store on that day that it was the applicant and Masilela who were the two robbers on that

occasion. The Judge in the High Court said that the two appellants were, so to speak, caught red-handed.

He said, and I agree with him, that they were both fortunate to have survived and to be alive today. He said the whole community of the area where the robbery took place responded to an alarm and gave chase which resulted in the immediate arrest of the two appellants.

The applicant in addressing us today said that he had not been properly identified and no identification parade had been held. It is quite clear from the evidence that he was immediately identified by the people who had been present in the shop when the robbery was carried out. There could be no doubt that he was one of the two people who was involved in the robbery and therefore there was no need for any identification parade to be held. As for the possession of the firearm he drew attention to the fact that the firearm was only found some days after his actual arrest. Nevertheless the evidence is very clear that he had the firearm during the robbery but he threw away that firearm and it is that firearm which was eventually found by the Police. He submitted to this Court today that the Police had tried to frame him and that really this was a police firearm which they were now attributing to him. He

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said that if the serial numbers of the firearm were to be looked at this would show that this was a Police firearm and that no finger prints had been taken, which also is an indication that the Police were framing him. There is no substance whatsoever, in this. It was never suggested that the Police during the course of the trial and there is nothing to suggest that there was anything in that submission whatsoever.

On the question of sentence I would like to say that I agree with the High Court that this was an extremely lenient sentence. The two accused were very lucky to only be given two years of imprisonment. As the learned Judge of the High Court said there are far too many crimes of this nature being committed in this country. He says one does not have to look at the amount that robbers actually get away with or what they thought they would get away with. He pointed out that more severe sentences should be imposed for robberies of this sort and I agree with him entirely. Having regard to the lightness of the sentence on both these counts which was imposed by the Acting Senior Magistrate the Court on Appeal in the High Court did not consider the sentences should be backdated. I agree with that as well. This was an extremely serious case. The men entered a shop and confronted an innocent young girl shop attendant with firearms. When they were pursued they used the firearms to try and drive off their pursuers. The pursuers caught them and they can consider themselves lucky that the pursuers did not there and then do away with them. They were also very lucky that when they appeared before the Court they got sentences which, as far as I am concerned, are very lenient indeed.

The application for leave to appeal by Enock Hadzebe fails and his conviction and sentence and also the conviction and sentence of Pheneas Masilela are confirmed. The sentences will not be backdated to the date of arrest.

P.H. TEBBUTT, J A

I AGREE

G. P. C. KOTZÉ, J P

I ALSO AGREE

J. BROWDE, J A