SWAZILAND COURT OF APPEAL

BHEKI JOSEPH MASHABA & ANOTHER

v

THE KING

CORAM: LEON JA

STEYN JA

TEBBUTT JA

:

For The Respondent : MR. MASEKO

JUDGEMENT

24th Sept 1998

Steyn JA:

The appellant in this matter was charged with the crime of robbery. It is alleged that on the 16th August 1992 he and another person threatened the complainant with a firearm and hijacked the complainant's Nissan Bakkie. When the matter was called, it appeared that the co-accused was not present and a summary trial proceeded in which he was the sole accused. He pleaded not guilty. He was convicted and sentenced to ten (10) years' imprisonment of which four (4) years were suspended on certain conditions.

On the 17th of September 1998, the appellant filed with this Court heads of argument. In his first head of argument he makes, I think, a valid complaint i.e. that no proper identification parade was held and that the ***court a quo*** relied upon what is commonly called a dock identification. This was in respect of an event which had occurred five years previously. He then makes the point that the Crown case was weakened by the fact that he was never found in

possession of a firearm and that no firearm was exhibited in Court. He then says that, "I was never found or seen where the said car was discovered", and that the evidence of the police officer who described these events was tainted by the fact that this identification took place in the middle of the night and should not have been relied upon. He also complains about the absence of fingerprint evidence, which he contends the prosecution should have presented. He complained about the fact that the Court never conducted an inspection in loco and that the vehicle was to be seen outside the Court.

There are other submissions which do not seem to be of particular significance. He summarizes his case by saying that there was a miscarriage of justice in so far as this case was concerned, marked by shoddy work by both prosecution and the Court as well.

I proceed to consider these arguments in the light of the evidence. As I pointed out earlier the Crown relied on was the evidence of the complainant, one Magagula, who quite apart from the disputed identification of the appellant, gave evidence as to the events that took place.

In his evidence he describes in clear and graphic terms how while he was driving his vehicle two men confronted him. One of these men was armed with a firearm. He was standing in the middle of the road and ordered the complainant to stop. He was accompanied by a certain person who was carrying a big brown bag and that these two persons, (and I quote)

> "They forcefully took my motor vehicle away from me and I was left stranded in the bushes."

Facts that are relevant to the issues and that the ***court a quo*** found proven are the following:

> Firstly, at the time his bakkie was hijacked the complainant was conveying thatching grass in the back of his vehicle. Secondly, he identified the appellants as one of his two assailants. He says that the appellant was wearing a brown shirt and a brown pair of trousers and was carrying a big brown bag. Thirdly, his bakkie had a dented bumper and that when it was returned to him a week later its registration plate had been removed and was found in the back of the bakkie.

As I indicated in the introduction to this judgement, Magagula confirmed these facts when citing the submissions of the appellant, he had quite rightly pointed to the fact that no identification parade was held, and that the dock identification was an unsatisfactory way to seek to link him with the commission of the crime particularly in view of the lengthy lapse of time. In my opinion this conviction certainly could not stand if there was no other evidence which links the appellant with the commission of this crime.

The problem that faces the appellant is, however, that there is a considerable volume of other evidence. The appellant's neighbours Elizabeth Dlamini and her husband both gave evidence. Elizabeth Dlamini says that the following day, that is 17th August 1992, on Sunday, she saw the

appellant driving a motor vehicle near where she lives. It was a white Nissan motor vehicle, a bakkie. She went to greet him and she asked him, "You now own a motor vehicle?" The appellant replied in the affirmative. And a deal was then struck between the appellant and the witness in respect of some thatching grass that was on the vehicle. The appellant proceeded to drive the motor vehicle to the witness's home and the thatching grass was off-loaded at her home. The witness positively identified the vehicle that was parked outside the Magistrate Court and she referred to the damage that she saw at the back of the vehicle and that it had no number plate. This evidence was confirmed by her husband, Cornelius Maseko, he also confirmed that the thatching grass was delivered and that he knows the appellant because he lives next door to them.

On the 17th August 1992 the army officer one Robert Dlamini came across certain children who told him they were assisting a motor vehicle to cross the Komati River. The witness says as he was walking along, he saw a motor vehicle approaching him, it was a white Nissan bakkie, and it had no number plate. He went to summon help and took off his civilian clothes, dressed himself in his uniform and went together with two colleagues to search for the vehicle. He says that as he was proceeding to the river he met the vehicle going in the opposite direction. He noticed that the number plate had been removed and went back and summoned some help from his colleagues.

He proceeded with the search and late that evening he found the vehicle in the bush. He says, "I found some people next to the motor vehicle. They had spread some "muti" next to the vehicle." There were two persons next to the vehicle which he described as a white Nissan bakkie. He said he ordered them to stand but they ran away. He fired a warning shot in the air to stop them but they escaped.

In the morning, he searched the motor vehicle. He found a panga knife and also found that the vehicle had been carrying thatching grass, because the remains of the thatching grass were in the back of the vehicle. He said he made a perimeter check and found an AK47 near where the men had been standing the previous night. Inside the motor vehicle he found a note with the name of the complainant inside the vehicle. The witness knew the two persons that were standing next to the vehicle and he positively identified the appellant as one of the two people. This in broad outline was the evidence of the Crown.

The appellant went into the witness box and he merely said he was not involved in this crime, indeed he knew nothing about the commission of the crime. The appellant is quite right, as I have indicated earlier that he could not be convicted on single witness evidence of the complainant's identification. But the evidence of his neighbours, the husband and wife, concerning the discussions about the thatching grass and the identification of the vehicle driven by him at the time as well as the other evidence, links him quite clearly to the commission of the crime. The circumstantial evidence to which I referred to as well as the identification by his neighbours established a case of very considerable probative force.

I have given careful consideration to the various arguments advanced by the appellant in his heads of argument. However, in my opinion, the ***court a quo*** was, on the overwhelming evidence of the appellant's guilt, quite correct in convicting him.

The appeal against the conviction must accordingly fail.

On the question of sentence, however, it appears to us that there has been an incompetence sentence imposed by the learned Chief Justice. Mr. Maseko who appeared for the Crown quite rightly conceded that it was not competent to impose a partially suspended sentence in terms of the legislative provisions which are applicable in the Kingdom.

As I have indicated earlier in this judgement the learned Chief Justice sentenced the appellant to ten (10) years' imprisonment, four (4) years of which were suspended. I may say that an effective six (6) years' imprisonment, in my view, is on the lenient side. However, there is no way in which we can effectively increase the sentence imposed by the ***court a quo***. In the circumstances, Mr. Maseko conceded that it would be appropriate to set aside the sentence imposed to substitute it for a sentence of six (6) years' imprisonment.

I therefore summarize our conclusions as follows.

The appeal against the conviction is dismissed and the conviction is confirmed.

The sentence imposed by the ***court a quo*** is set aside and in its place is substituted with a sentence of six (6) years' imprisonment which is backdated to 27th January 1997.

J.H. STEYN JA

I AGREE : R.N. LEON JA

AND SO DO I : P.H. TEBBUTT JA

Delivered on this 24th day of September 1998.