IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.4/97

In the matter between:

JAMLUDI MKHWANAZI APPELLANT

VS

REX RESPONDENT

CORAM : P.H. TEBBUTT J A

: R.N. LEON J A

: J.H. STEYN J A

FOR THE APPELLANT :

FOR THE RESPONDENT :

JUDGEMENT

Tebbutt J A:

On 3rd April 1994 Donkana Shiba, the deceased, was shot in the back of the neck and killed while driving his Colt Galant motor car in the Lawuba Area in the District of Shiselweni, Swaziland. His assailant then robbed him of the car. The Crown alleged that it was the appellant who was the assailant. He was in consequence charged with, and convicted by Dunn J in the High Court, of murder, armed robbery and being, in contravention of Section 11(1) of the ARMS AND AMMUNITION ACT 24/1964, in possession of an unlicenced firearm viz. a .38 special revolver. On the murder count the trial Court found that there were no extenuating circumstances and sentenced the appellant to death. On the charge of armed robbery the appellant was sentenced to 8 years' imprisonment and on the unlicenced firearm charge to the statutory minimum period of 5 years' imprisonment. The latter two charges were ordered to run concurrently. The appellant now appeals to this Court against his convictions and sentence.

How the deceased came to be shot was described to the trial Court by a woman witness, Lindiwe Ngwenya. It appears that the deceased left home at about 7.30pm on Sunday 3rd April 1994, driving his Colt Galant motor car. He did not return home. His body and his car were later found, his car being found about one and half kilometres away from the body, both in the Lawuba area. The deceased had a bullet wound which entered the back of his neck and emerged below the point of his chin. A spent bullet was found on the front floor board of the car. The cause of death according to the post-mortem findings was a gunshot wound of the neck. Lindiwe Ngwenya stated that she was walking home from Lawuba that evening when she met two men. She thought one of the men was a certain Masuku who had once been a boyfriend of hers. This man stopped a car, which was obviously that of the deceased, and asked the driver to give her a lift. She got into the front of the vehicle and the two men also got into the car and sat on the back seat. Along the way, she heard a loud bang and saw a blue flame. The bang came from the man

seated behind the driver. She got out of the car. The Masuku man followed her and took her into a forest where he had sexual intercourse with her. She did not see the car or the other man again. She reported the matter to the police the following morning.

The further evidence for the Crown that is relevant to this appeal is that the appellant was arrested on 8th April 1994. At the time of his arrest he was cautioned in terms of Judges' Rules that he was not obliged to say anything and that whatever he did say would be recorded and could be used at his trial. On the following morning he was taken to the Dumako Police Post. From there the appellant, according to the evidence of three police constables, Detective Constable Petros Mamba, Detective Constable Ephraim Dlamini and Detective Constable Mavuso, took the police to the house of his sister, Thokoza Mkhwanazi. At a field near her house, the appellant produced a plastic bag containing a .38 special revolver. He then took the police to the house. Thokoza's son, Sonnyboy, was present. With his assistance, using a long hooked stick, the appellant fished from a pit latrine there a bunch of keys. Sonnyboy helped him by first bringing a torch which did not work and then a candle to use in finding the keys.

It is undisputed, on the ballistic evidence adduced, that the revolver was the one from which the fatal shot was fired and, on the evidence of the deceased's wife, that the keys, which included the key to his car, belonged to the deceased.

One further aspect of the Crown case needs to be mentioned. While he was in custody at Nhlangano Prison awaiting trial, the appellant asked to see the police. Detective Constable Dlamini went to see him. Appellant said there was something he wanted to tell the police. Constable Dlamini again cautioned him that he was not obliged to say anything and that whatever he said would be recorded and could be used in evidence at his trial. The appellant asked for writing materials, which he was given, and the following day he gave the police a written statement. The admissibility of that statement was put in issue by the defence at the trial but was admitted by the learned Judge - in my view, correctly - on the basis that it was an exculpatory statement and did not amount to a confession. Little turns on this save that in the statement the appellant implicated one Elijah Shiba as the deceased's assailant.

The appellant gave evidence in his defence. He denied all knowledge of the incident. More importantly, he denied having pointed out the revolver and his retrieving of the bunch of keys from the pit latrine on 9th April 1994. According to him the revolver and the bunch of keys were shown to him by the police at the Hlatikulu Police Station on the day of his arrest. He said the police asked him if he knew the items. He denied any knowledge of them and he said the police then assaulted him by pulling his ears, tramping on his feet, beating him with a stick and pointing a firearm at him. He mentioned the names of the policemen, who had assaulted him. These policemen all denied the allegations of assault. The appellant also said that he made his written statement hoping that it would lead to his release from custody. As to its contents, he said these were untrue. He had built them up from what the police had told him during their interrogation of him and from what he had thought up himself It was, he said, untrue that Elijah Shiba had shot the deceased.

Elijah Shiba, who was called to testify at the trial, denied all knowledge of what was alleged by the appellant in his statement in regard to him, Shiba, or that the allegations were true. As a result of the appellant's statement, however, Shiba was arrested and detained in custody

for some eight months before being released. During that time, because the local community suspected that he was involved in the death of the deceased, two of Shiba's homesteads and his

motor vehicle were set alight. Shiba testified that while in custody the appellant had placated him in two ways for having involved him. He said this:

"PW11: And he calmed me down in two ways, the first one being that he denied my involvement in what he described as an accident that had befallen him, in court. And he informed me that he did not shoot at the deceased, shoot at the person intentionally.

JUDGE: Yes?

PW11: He informed me that he was walking with other people who were walking ahead of him, whom he saw stopping the car and he rushed for a lift, and since when he rushed and got into the car, he had already cocked or released the safety catch of the gun, and when he entered, it went off and he did not see who was hit by the bullet. He says when he looked he then could not see the driver.

JUDGE: Yes

ADVOCATE MAZIYA: Why would he tell you all that? What had you said to him?

PW11: He had already told the court that I was not involved, and due to anger, when I looked at him, he then told me these things, and I then realised that he did not intend shooting at my brother's son, it was an accident according to him.

It is undisputed that the deceased was killed by being shot in the neck and thereafter robbed of his car by his assailant. Did the Crown succeed in proving beyond reasonable doubt that it was the appellant who did so? Lindiwe Ngwenya did not identify him as one of the two men that got into the vehicle with her. As stated by the learned trial Judge, the link which the Crown sought to establish between the killing of the deceased and the appellant lay in the evidence given by the police of the pointing out by the appellant of the revolver and the bunch of keys.

The trial court found that the evidence of the three police constables that the appellant did point out these items was true beyond any reasonable doubt. They impressed him as honest, reliable and truthful witnesses whose evidence was corroborated by that of Sonnyboy, whom the Judge found to be a most impressive witness. Their versions of what occurred when the revolver and keys were pointed out tallied in all respects. The appellant, on the other hand, did not impress the trial Judge as honest and reliable. He had not fared well under cross-examination. Moreover, his explanation of how he pieced together his statement to falsely

implicate Shiba in order to save his own skin, which he admitted to be untrue, demonstrated that he was not a person to be believed. These findings by the trial Court were not challenged on appeal - and in my view, rightly so. A reading of the record of the evidence clearly shows them to be correct. It was accepted by Mr. Mamba, who appeared for the appellant at the appeal, that there was a pointing out of the revolver and the keys by the appellant.

Mr. Mamba, however, advanced two contentions in regard to the evidence of such pointing out. Firstly, he said that the evidence of the police witnesses should be disregarded in its entirety in that, although they took the oath to tell the truth before giving their evidence, such oath was irregular and of no force and effect because it was not administered by the Court or, indeed, by anyone. They all swore themselves in. In regard to this the record reads: "Detective Constable Petros, Muzi Mamba swears himself in, in English."

The same applied to Detective Constables Petros and Mavuso, save that the former swore himself in siSwati.

Section 217 of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 OF 1938 states that "any person.... shall not be examined as a witness except under oath." Sub-section 2 of Section 217 provides that:-

"The oath to be administered to any witness shall be administered in the form which most clearly conveys to him the meaning of such oath and which he considers to be binding on his conscience."

Having sworn themselves in, so Mr. Mamba submitted, the three police witnesses had not had the oath "administered" to them and consequently there had been no compliance with Section 217. Mr. Mamba relied heavily for his submission on the decision in the Natal Provincial Division of the South African Supreme Court in S VS NDLELA 1984(1) SA223 (N), where dealing with a similarly worded Section the Court held that the administering of the oath to a witness was peremptory. The Court went on to say that:-

"The result, when no oath is taken by a witness of whom one is required is that which he then says has neither the character nor the status of evidence."

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The requirement that the taking of an oath by a witness is peremptory and that a failure to do so will render his evidence of no force and effect is undoubted. It is, however, the manner in which that oath is taken or administered that is important in deciding if the oath has been properly taken or not.

It is well recognised that in the High Court in this country, as in the Supreme Court in South Africa, the oath is more often than not administered not by the presiding Judge but by his Clerk, or the Court Registrar, or the Interpreter in the presence of the presiding Judge. In a detailed and exhaustive consideration of the history of the oath and the requirements in regard thereto, van Zijl J (as he then was) in the Cape Provincial Division of the South African Supreme Court in S VS BOTHMA 1971(1) SA332 ©, said that the form of the oath and the need to bind the conscience of the testifier were governed by our common law. Referring to Merula and other Roman Dutch writers, van Zijl J stated that the presiding Judge is responsible for seeing that the oath is properly taken. Where somebody other than him administers it, it is sufficient if it is done in the presence and under the supervision of the presiding Judge who will ensure that the oath is a proper one and one by which the witness's conscience has been so bound that he feels constrained to speak the truth. In Bothnia's case the Court was dealing with the provision in the South African Magistrate's Court Act as to how an oath had to be administered. The Court held that that provision was directory and not peremptory. In my view, the same applies to the administration of the oath in the High Court in this country. How the oath is administered is directory. As stated in Ndlela's case, it is where no oath "is taken" that what the witness says loses the character and status of evidence. In my view, if the oath is taken by a witness in the presence of the presiding Judge and under his supervision and the Judge is satisfied that the form in which the witness has taken such oath is sufficient to bind his conscience to tell the truth, it matters not if the oath is administered by the Judge, or an disinterested official of the Court or if the witness himself pronounces the words usually used in the taking of the oath, or other words to similar effect. It is probably the better practice - and Courts should be encouraged to follow it - for the oath to be administered by the Judge or an appropriate official instead of the witness swearing himself in. However, in the present case that swearing took place in the presence of the presiding Judge and under his supervision and was, in my view, a

sufficient compliance with the provisions of Section 217. Mr. Mamba's contentions on this score must fail.

The second attack by Mr. Mamba on the pointing out was that it was not done freely and voluntarily. Although he conceded that the appellant had been warned in terms of the Judges Rules that he need not say anything, this, so Mr. Mamba submitted, did not go far enough. He should also have been warned that he need not point out anything before he did so. In this regard Mr. Mamba relied on a decision of this Court in ALFRED SHEKWA AND ANOTHER VS REX CRIMINAL APPEAL 21/1994, unreported. In that case a warning had been given in terms of Judge's Rules to an accused by a police officer. The accused subsequently pointed out certain items linking him to the crime with which he was charged to another police officer, a Detective Sergeant Mamba, who did not give him a similar warning prior to such pointing out. The Court held the evidence as to such pointing out to be inadmissible. Browde J A who gave the judgement of the Court referred to the case of JULY PETROS MHLONGO AND OTHERS VS REX (CASE NO.155/92) where this Court approved the decision of the South African Appellate Division in S VS SHEEHAMA 1991(2) SA860 (AD) where the following was said:

"A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute in extra-judicial admission. As such, the common law, as confirmed by the provisions of Section 219A of the CRIMINAL PROCEDURE ACT 51 of 1997, requires that it be made freely and voluntarily."

For a pointing out to be made freely and voluntarily, a warning to the accused in terms of Judges' Rules would be necessary. As Browde J A said in regard to the pointing out by the accused in Shekwa's case:-

"In this regard it was, in my opinion, essential for Detective Sergeant Mamba to have said, if such was the case, that he warned the appellant according to Judges' Rules."

In the present case, it was while he was at Dumako Police Post that the appellant offered to take the police to the homestead of Thokoza Mkhwanazi. It is obvious that his purpose in

doing so was that he intended to point out something there to the police. He would have had no other reason for doing so. And, in fact, that is what he did there. The police evidence was that he was warned in terms of Judges' Rules at Dumako Police Post and again on arrival at the homestead. That, in my view, was sufficient to render his pointing out of the revolver and keys freely and voluntary and accordingly admissible.

A South African Court in S VS NOMBEWU 1966(2) SACK 396 (E) in discussing a persons right under the South African constitution to be told that he has a right to remain silent and to be warned of any consequences of making a statement, dealt with a similar argument to that advanced by Mr. Mamba in this Court. The learned Judge there said this:-

"I have already mentioned that the warning section of the Constitution applies to an implied admission by conduct, such as a pointing out (See S VS SHEEHAMA and S VS MELANI (supra)). In this respect, an admission by conduct is no different from a written or oral admission.

In either case the evidence is really created by the accused. Where the pointing out is obtained in the same manner as an oral or written admission, it should be preceded by the same warning."

The learned Judge went on to say:-

"In this case in hand the customary warning was given in terms of the Judges' Rules."

I return to remind oneself that the similar thing occurred here. The learned Judge went on to say:

'The police were not in addition called upon to give an explanation to the appellant that conduct can amount to a statement, and that evidence of such conduct can also be used against him in the same way as evidence of an oral or written statement. It is unrealistic and indeed absurd to suggest that the warning that they gave did not cover this situation, and that he has been unfairly treated as a result. Any accused person in the position of the appellant would readily understand that if he disclosed information to the police it could be used against him. This would obviously include, for example, showing the police stolen property or giving them the weapon used in an assault, whether or not the accused's action was accompanied by an oral or written explanation. The appellant could not have thought otherwise. There can be no unfairness resulting from a reliance upon admissible evidence of the discovery of a weapon or property as a result of information from or conduct by an accused in these circumstances. The Constitution Act does not expressly require an additional and more detailed warning. I am satisfied that it also does not do so by implication."

Those remarks, in that case, apply in my view, to the facts of this case. And I similarly agree that it would be unrealistic and absurd having warned the appellant in terms of the Judges' Rules and indeed twice before he did so, to also have had to explain to him that the warning applied to his pointing out or, even more unnecessary, prior to his pointing out each item viz. first the revolver and then the keys. There was no unfairness to the appellant. Moreover, it was never contended on the appellant's behalf at the trial that the pointing out was in any way irregular. He denied that he had ever taken part in any pointing out. The point of irregularity was a point raised by his Counsel at the appeal stage. In my view, in all the circumstances it has no substance.

I therefore agree with the finding of the trial Court that in the absence of any acceptable explanation by the appellant regarding his knowledge of the revolver and the keys, the irresistible inference to be drawn is that the appellant participated in the killing of the deceased. (of REX VS TEBETHA 1959(2) SA337 (AD) AT 341-342.) The finding of the car some one and a half kilometres from the deceased's body shows that it must have been driven to where it was found. The appellant's possession of the car's keys also leads to the irresistible inference that he is linked to the robbery. His production of the revolver, for which he admittedly had no permit to possess it, justified his conviction on that count as well. None of the latter convictions were challenged on appeal. His convictions on all three counts must accordingly stand.

On the question of extenuating circumstances, the learned trial Judge stated that "the onus of establishing, on a balance of probabilities, the existence of extenuating circumstances rests on the accused." The appellant was not called to testify in regard to extenuating circumstances. His Counsel relied upon the evidence which had been given at the trial on the merits, which of course he was perfectly entitled to do. He advanced two factors which he submitted amounted to extenuating circumstances (i) that the appellant had been drinking excessively that evening and (ii) that the attack on the deceased had not been premeditated. In the latter regard it was submitted that Shiba's evidence that the appellant told him that he had entered the vehicle with the gun cocked and that the gun had gone off accidentally

indicated an absence of premeditation. The appellant had also said it was the intention to rob the deceased and not to kill him.

The learned Judge found on the first point, that is the drinking submission, that there was no evidence to support it. He was correct in so doing.

Coming to the question of premeditation the learned Judge considered Shiba's evidence that the appellant had told him that the gun had gone off accidentally. In regard thereto he said:

'This is what Shiba said he was told by the accused. The accused denied that such a statement had been made by him. Shiba's evidence has been accepted by the Court. The truth of the accused's statement to that effect would of course be relevant to the present enquiry."

The trial Judge went on to say that the appellant had not elected to give evidence to explain the circumstances under which the events which he described to Shiba took place. He said:-

"How and why did the accused get into the vehicle? Why was it necessary to have the gun cocked? Why if the intention was to rob, was the vehicle not taken at whatever time the accused first met with the deceased. These are some of the questions which in the circumstance of this case can only be answered by the accused. Evidence of these matter would provide a basis for a decision on the existence or otherwise of extenuating circumstances."

The learned Judge stated that he was alive to the fact that in deciding the question of extenuating circumstances consideration must be given to the cumulative effect of whatever factors are placed before the Court. The factors advanced were not, however, supported by evidence. The fact that a gun goes off accidentally may or may not provide the basis for a finding of extenuating circumstances, depending on the circumstances of each case. The Court, had not been told, in respect of Shiba's evidence as to the gun having gone off accidentally, the circumstances under which that took place.

The learned Judge accordingly found that the appellant had not discharged the onus resting on him of proving the existence of extenuating circumstances.

In my view, the learned trial Judge misdirected himself in failing to give proper consideration to Shiba's evidence as to what the appellant had told him as to the gun having

gone off accidentally. That he did so probably arises, I feel, from his approach to the question of the onus in regard to extenuating circumstances.

In the courts of this country, as in South Africa before the death sentence was abolished, it has been, and was in South Africa, consistently held that there was an onus resting upon an accused person to prove on a balance of probabilities the existence of such circumstances. This approach has, as it was in this case, been consistently followed and it was not incorrect for the learned trial Judge to have done so. This Court has, however, during the present session of this Court had the opportunity to revisit this statement of the law. It has now been held by this Court in the case of DANIEL MBHUDLANE DLAMINI VS REX CRIMINAL APPEAL 11/98, in a judgement delivered on 29th September 1998, that no onus rests on an accused person who is convicted of murder in respect of extenuating circumstances and that the question of onus is inappropriate to the enquiry as to whether extenuating circumstances exist or not. The decision in DANIEL MBHUDLANE

DLAMINI VS REX is a judgement of the three Judges in this case but has also been considered by two other Judges of this Court, who agree therewith.

In the Dlamini judgement the Court restated the accepted general definition of an extenuating circumstance as being one which morally, although not legally, reduces an accused person's blameworthiness or his degree of guilt. The Court referred to the landmark decision of the Botswana Court of Appeal in DAVID KALELETSWE AND 2 OTHERS VS THE STATE (CRIMINAL APPEAL 26/94) where the history and evolution of the topic of extenuating circumstances and the question of the onus in regard thereto were fully considered. It adopted the findings of that Court and its reasons for coming to them and stated that:-

"In reaching a conclusion as to whether or not extenuating circumstances are present the Court makes a value or moral judgement after considering all the relevant facts and circumstances both mitigating and aggravating in order to make such a judgement. In these circumstances it seems to us to be quite inappropriate to determine the issue of raising the question of onus. The duty falls upon the Court."

In regard to the duty of the Court, this Court in the Dlamini case cited with approval the following statement by the Botswana Court of Appeal:-

"We note in particular the significance which Schreiner J A ascribes to the "subjective side" and that no factor not too remote or too faintly or indirectly related to the commission of the crime and which bears on the accused's moral guilt can be ignored. (R VS FUNDAKUBI (supra)).

It seems to us that there is therefore an over-riding responsibility on the Court and its officers - Counsel - to ensure that the second phase of the process -the enquiry as to the presence or absence of extenuating circumstances - is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is inter alia to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above... When all the evidence is in, the Court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating... This would include evidence tendered during the second phase enquiry. It will then make its "value or moral judgement."

In making that value or moral judgement in this case we are of the view that the trial Court should, as we do, have taken into account Shiba's evidence of what the appellant told him. It was a factor not too remote or too faintly or indirectly to the commission of the crime and which bears on the appellant's moral guilt.

Shiba's evidence was accepted by the Court. Mr. Ngarua for the Crown argued that the fact that the appellant told Shiba that the gun had gone off accidentally did not mean that it was true. Appellant, on his own admission, was a liar. He had denied making the statement to Shiba. It is however well-known that accused persons often lie in order to try and avoid any complicity in the crime with which they are charged. It does not necessarily follow though with what they have said to other people extra - curially is untrue.

In my view appellant's story to Shiba that the gun had gone off accidentally may reasonably possibly be true. It seems highly unlikely that if he had planned to shoot the deceased he would have done so in the presence of Lindiwe Ngwenya and within minutes of their entering the deceased's car, providing, as this would, a witness to the killing. It is not so unlikely therefore that the gun went off accidentally that it cannot reasonably be possibly true. It seems unlikely therefore that the appellant had a direct intention to kill the deceased

when he did so. The fact that the gun had gone off accidentally would not, however, exculpate the appellant. Getting into a car with a cocked gun would be grossly negligent but appellant obviously did so reckless as to what the consequences would be. He is still therefore guilty of murder but on the basis of dolus eventualis rather than dolus directus.

Furthermore, it would appear that the fact that the deceased happened to be travelling along the road where the appellant and Masuku were at the time was a fortuitous circumstance. The shooting thereafter of him would therefore appear in all the circumstances not to have been premeditated.

In my view a consideration of these factors in making the Court's value or moral judgment leads to a conclusion that extenuating circumstances do exist in this case. It follows that the death sentence should be set aside.

The crime, however, was a most serious one, the killing occurring during the intended robbing of the deceased by the appellant. In my view it merits a severe sentence. Accordingly on the murder count the appellant is sentenced to 18 years imprisonment. As pointed out at the start of this judgement, the appellant on the armed robbery count of which he was convicted was sentenced to eight years' imprisonment and on the unlicensed firearm count he was sentenced to five years' imprisonment. No appeal had been directed against these sentences and they will stand but the latter two sentences are ordered to run concurrently with the sentence of 18 years' imprisonment on the murder count, and all are dated to run from the time of appellant's arrest i.e. from 8th April 1994.

P.H. TEBBUTT J A

I agree:

R.N. LEON J A

I agree:

J.H. STEYN J A

Delivered in open Court this 1st day of October 1998