IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.3/99

IN THE MATTER BETWEEN

VUSI ROY DLAMINI APPELLANT

AND

THE KING RESPONDENT

CORAM

BROWDE, J.A.

VAN DEN HEEVER, J. A.

SHEARER, J.A.

FOR THE APPELLANT : MR NTIWANE

FOR THE RESPONDENT : MR. MASEKO

JUDGMENT

Van den Heever. J, A.

The appellant was tried in the High Court on two charges: of robbery, and of a contravention of the Arms and Ammunition Act. He pleaded not guilty to the first count, and guilty to the second. On the first count it was alleged that on the 31st of January 1998 he had assaulted Jose Ferreira Da Silva in order to deprive him of his Honda Ballade motor car. The second detailed that on the 8th of February 1998 he had been in unlawful possession of 40 rounds of live ammunition, without being the holder of a current licence or permit for a firearm for which that ammunition is intended.

He was convicted on both counts. The sentences imposed were eight years' imprisonment, backdated to the date of his arrest, on the first count, and a fine of El 000 or one year on the second, the latter being moreover ordered to run concurrently with that imposed for the robbery, making the option of a fine meaningless.

He appeals against both the conviction and sentence. The Notice of Appeal does not limit the appeal to one relating only to the first count, but it must clearly have been so intended, in view of both the plea of guilty relating to the ammunition, and the fact that the sentence imposed on that count was in effect that he did not receive even a slap on the wrist. He could derive no benefit from paying the fine where he in any event was to undergo imprisonment on the first count. Because the sentences were to run concurrently and be backdated, even were his appeal to succeed on the first count, the sentence on the second count would be water under the bridge and he entitled to immediate release.

Merely in passing, the evidence revealed that the indictment on the second count was kind to the appellant. He had in his possession on 8th February 1998 not only 40 bullets in a box which when full contains 50, but also a magazine loaded with eight live 9mm rounds.

It was not disputed that Da Silva had been robbed as he testified. The defence disputed the identity of his assailant, relying on an alibi.

Da Silva owns a filling station at Simunye. His son was the owner of a Honda Ballade with registration number SD 063 PM, which he wished to sell, for "about E20 000". The son was in Portugal on holiday at the relevant time. According to Da Silva he knew the appellant well. He had been a customer at the filling station since 1993.

The appellant had displayed an interest in buying the Honda. He had spoken to Da Silva junior before the day in question, Saturday the 31st January. That morning the appellant had arrived at the filling station and spoken to the complainant, intimating that he could raise the purchase price by means of a loan from relatives at Ngomane and the balance from his employer at Mhlume. The appellant asked whether the latter could first be shown the car. Da Silva agreed, but was too busy to comply forthwith: they could go that afternoon. They agreed to meet at the filling station at three, and did. They headed for Mhlume but did a detour at the appellant's request, to Mlawula where the appellant was to meet his brother who

would advance him some of the money. There the appellant got out of the car and entered a homestead. When he returned they headed again for the main road towards Mlawula. Then a gun was put to his head. He was ordered to stop. He did. The appellant pulled out a pair of handcuffs, ordered Da Silva to put his hands together, handcuffed him, and ordered him to get out of the car. He did. He however refused to obey the next instruction: to get into the boot of the Honda. He was consequently shot in the face, below the right eye, otherwise assaulted, and lost consciousness. When he came to, the assailant and his car were gone. He crawled towards the road. There game rangers found him handcuffed and bleeding and took him to the clinic at Simunye, where his immediate needs were attended to, whereafter he was taken to the hospital at Nelspruit.

Da Silva had been in the company of his assailant for almost an hour during their journey. He said they left the garage at three. A game ranger testified that he heard a shot at twenty to four that afternoon and, suspecting poachers, radio'ed colleagues. One of the rangers who found Da Silva estimated that they had received the call at "going on four" that afternoon. When Da Silva returned from Nelspruit, the appellant had already been arrested. The Honda was never recovered.

Despite the fact that Da Silva knew the appellant well, by the name Roy and as a customer at the filling station, and even knew that his wife used to work at Barclays Bank, the Crown called witnesses in corroboration of his identification of the appellant as having robbed him of the Honda. Two of his employees testified before he himself was called. They had been at the filling station that Saturday, had seen the appellant there during the morning, and had seen that afternoon that he and the complainant had driven off together in the son's Honda. One of them, Ms Mncina, identified him from a line-up of eight similarly-dressed men at an identification parade held on the 5th of February.

The appellant himself testified that he had been elsewhere that day: at home at his homestead in the Ngwane Park area, waiting for a friend, Alarm Dlamini, who was supposed to come and collect a Cressida he had left there. After Alarm arrived in a van, they were together for most of the morning. I return to the detail of the appellant's alibi below.

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The trial court accepted the evidence of the Crown witnesses, and rejected that of the defence. The only criticism this court could have of the proceedings in the court a quo, is that that court was far too kind to the appellant. Defence counsel was not checked in his method of "cross-examination" of the Crown witnesses. Some objections as to the admissibility of evidence, raised on behalf of the appellant, which were without merit, were allowed. Counsel was permitted, on occasion even encouraged, to question a witness about that witness's opinion as to the intentions and motivation - or credibility - of persons other than the particular witness him - or herself. And ultimately, if the sentence imposed for this robbery is subject to criticism, it must be that it errs on the side of leniency. On the evidence of the appellant himself as to his circumstances, the robbery must have been motivated by greed, not need, to effect which a measure of violence was used which in truth constituted attempted murder, not

merely an assault. One does not shoot a man in the face without intending to kill.
Many practitioners I have come across of late, seem to think that cross-questioning is a synonym for "questioning crossly". Since, in the adversarial system inherited from the United Kingdom, cross-examination and the basic rules of evidence are the tools of the trade of every trial lawyer, it bears repeating that proper knowledge of those two subjects are indispensible to the administration of justice. One could start by quoting from Hoffman & Zeflfertt on Evidence, 4th edition at page 460:
"Cross-examination should be conducted with restraint and dignity and it is to say the least unbecoming for a prosecutor or counsel to be gratuitously offensive to witnesses"
The many cases listed in foot-note 87 on that page bear this out; save that Gidi's case is to be found at 1984 (4), not (3), of the SALR. See the comments at pages 539B - 541B of that report. They are applicable to all counsel, - after all, officers of the court - not merely to prosecutors, and should be taken to heart. The record before us illustrates commission of most of the sins identified in that decision. They are too manifold to list. S v Nisani, 1987(2) SA 671 is unfortunately in Afrikaans, but it adopts the comments in Gidi's case, and correctly frowns on counsel's indulging in sarcasm and voicing during the course of cross-examination, his or her own commentary on credibility. His submissions in argument are the time and place for that. May I add to the sins, that of insisting that a witness give his view on the credibility of others, particularly where the choice between his own version and that of another may
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depend on someone having made a mistaken assessment, or incorrect observation, and not have its origin in moral turpitude: being a liar. The assessment of credibility is both the prerogative and the duty of the Bench. Mr Ntiwane, who appeared for the appellant both at the trial and before us, often advanced - in his cross-examination, in his notice of appeal, in his heads of argument and in the argument itself - a version of what had been said or done which did not correspond with the record. And in cross-examination he wasted a good deal of time in challenging matters not in issue, in the process on occasion unfairly intimidating a witness. As examples: In the light of the appellant's plea of guilty to unlawful possession of ammunition, his questioning the police witness whether he had opened up the relevant bullets to see whether they were live, or "merely assumed" that to be the case, was inane; and challenges such as the following to Da Silva, mere aggressive posturing where the fact and manner of the robbery were not in issue, merely the identity of the perpetrator. I quote:
"Q. Mr Da Silva you did not tell the police that the accused person
handcuffed you?
A. I am sure that I told the police that I was handcuffed even though I may not be so sure but I am certain that they even tried to take off the handcuffs when I was still in them.
Q. Well, speculation. You see, what I am suggesting to you is that I believe the question of you being handcuffed is very, very important in this case and if it had happened, it would have appeared in the summary of evidence from your statement. If you had told the police, then this would have been set out clearly in the summary of evidence as it is very, very important."
Mr Ntiwane challenged virtually all the Crown witnesses; and submitted to us that the trial court had erred in failing to find that the alibi evidence tendered by the defence could reasonably possibly be true.
The question in a criminal case is whether the evidence as a whole furnishes sufficient proof of guilt (Hoffman & Zeffert, Evidence, 4th ed. p.591 and cases referred to in footnote 16).
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It cannot be accepted that the Crown witnesses lied in unison to implicate the appellant falsely. There was no motive suggested for them to have deliberately concocted a tale to incriminate the appellant. Had they wished to, and rehearsed their story, they could have done far better. In the case of the complainant, he had more than enough opportunity to see a man he knew, who shot him and left him for dead. He would, one must accept, be eager to bring the correct person to book - Mr Ntiwane's suggestion that for the complainant anyone already arrested would do, is unreasonable, at best. Short of almost irrefutable proof that the appellant had been elsewhere - for example was already at the relevant time serving a sentence and so safely in goal, or something of that nature - his conviction was inevitable in this matter. It was argued that it is highly improbable that anyone would rob a victim to whom he was well known. That, too, depends on the circumstances and the conduct of the robber. This one had no reason to surmise that the victim would survive to testify against him.
The defence evidence fell far short of anything that can disturb the logical conclusion to be drawn from the Crown case.

The relevant evidence in chief of the appellant was brief. One the 31st of January 1998 he was at bis homestead at Ngwane Park area, waiting for a friend, Alarm Dlamini, who was supposed to collect his motor vehicle, a Cressida, which he had left at the appellant's home. Alarm finally arrived at about eight "in a bakkie to use in order to tow the other car. So I also assisted him in trying to connect the tow bar to the other vehicle only to discover that the other

vehicle had an accident.... so he then said he would have to hire a breakdown.....He asked me

to take him to town so that he could go and hire the breakdown. So when we got to town he discovered that he did not have enough money.....because it would have cost him E340 to hire the breakdown from Ngwane Park to the place he wanted to take the motor vehicle to."

Alarm suggested they wait for a businessman whom Alarm knew, and thought might lend him the money. "He finally got the money from the businessman and proceeded to go to hire the breakdown and that is where I left him and he proceeded to Ngwane Park. I also went back to my homestead and I got busy because I also service motor vehicles."

Under cross-examination he said he must have got back from town after ten o'clock, but refused to be pinned down to a closer estimation: before or after lunch or in the evening: "I cannot remember ....." He now inserts undefined " other chores" not mentioned before,

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between leaving Alarm and returning home "so that I can open the gate for (Alarm)." They grow to " a lot of things" that he did after they parted, so many that he knows only that he ultimately ended up at home but cannot tell when, not even whether it was during the day or already evening.

The story then changes: he denies having said that he and Alarm parted company after he had raised money from the businessman. Alarm decided to wait for the latter who might "turn up around ten or thereafter... so..., I went home and did my other chores" - reversing the previous order of the last two activities.

Alarm Dlamini had a different version of events. There was no pre-arrangement that he should fetch his Cressida from the appellant's homestead. "I recall that it was on a Saturday and I had just finished listening to the news on the radio and I decided to drive a red one ton bakkie....." to tow the Cressida. The appellant was still asleep, he had to shout to wake him.

The appellant opened the gate which is always kept locked. They discovered that the chassis of the Cressida had been damaged. It was the appellant who offered to take Alarm to town to hire a "break down". Ms evidence is fairly garbled about the order of events, whether he had arranged with a debtor who owed him money to meet him and pay, or whether he went to search his debtor out. He said that the appellant left him there at about half past ten. They were going to meet at his homestead later. Alarm actually got there first and was able to gain entry because the appellant had "left some instruction to some boys that they must allow me in." The appellant arrived shortly after 1.pm. This all happened during the weekend following the lobola ceremony of his wife, which had taken place on the 27th January. Mr Ntiwane was ultimately compelled to concede that on this record there were only two possible bases on which the alibi evidence could be held to be reasonably possibly true: the complainant had either been mistaken as to the identity of the man who robbed him, or he had deliberately lied.

The trial court cannot be faulted for having rejected the defence evidence. The appellant himself admitted that the complainant knew him, that he himself had been interested in acquiring the Honda and that his wife had worked at a bank at Simunye. The only challenge to the fact that he had opened negotiations about this, was in regard to the identity of the person whom the appellant had had dealings. It was put to the complainant,

"you don't know who your assailant was.... you knew that the person was

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interested in the motor vehicle.....you knew that my client was once a person

who was interested in this motor vehicle ....You are not certain its my client who came. Somebody did come but it's not my client.... My client when he talked about this motor vehicle he was talking to your son about this car and not to you. You don't know him very well" (emphasis added)

Da Suva's answer was decisive: it was the appellant who had come to him about the Honda that day, and "I know the accused person,.....I know your client better than you know him...."

There is no merit in the appeal. It is dismissed. The convictions and sentences are - the latter

despite their charity, there being no counter-appeal - confirmed.
VAN DEN HEEVER. J. A. I agree BROWDE. J. A
I agree SHEARER. J. A.
Delivered in open court on the ..3RD.....day of December 1999