IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Cri. Appeal Case No. 25/99

In the matter between

PATRICK WONDERBOY NGWENYA Appellant

And

THE KING

CORAM BROWDE, J A

STEYN, J A TEBBUTT, J A

JUDGMENT BROWDE, J A

The appellant was one of two accused in the High Court who were charged on three counts. On count 1 they were charged with murder, the indictment reading as follows;-

"In that upon or about 29 November 1996 at or near Hlane Game Reserve in the Lubombo Region the said accused, each or both of them acting with a common purpose did wrongfully, unlawfully and maliciously kill Prince Mahebedla Dlamini"

On counts 2 and 3 the accused were jointly charged with the possession of a 7,65 calibre Star Pistol and 8 rounds of ammunition in contravention of Sections 11(1) and 11(2) of the Arms and Ammunition Act No. 24/1964 as amended.

The appellant was the second accused, the first accused being Robert Musa Mdluli, The appellant was convicted together with Mdluli on count 1 but only Mdluli was convicted on count 2. They were both sentenced to 12 years imprisonment on count 1.

The facts are fully set out in the judgment of Dunn, J in the High Court and it is not necessary to repeat them in detail for the purposes of this appeal. The salient facts are set out in a letter dated 11 April 2000 addressed to the Registrar of the High Court by the appellant himself with the intention that it be placed before this court. In the letter the appellant admits accompanying Mdluli to Mhlume with the intention of stealing a car. Having taken a lift from the deceased in the latter's car it was decided by Mdluli and the appellant to rob the deceased of the car, the plan being the following. The appellant was to pretend to be ill and Mdluli would signal the deceased to stop. This was to enable the appellant to alight from the car where he was to pretend to be vomiting. When this happened Mdluli was to take the car at gun point. Although the appellant alighted, the plan was not carried out and it was only when they again proceeded on their way that Mdluli fired the shot that killed the deceased through the rear window of the cab. Mdluli and the appellant were seated in the rear of the vehicle. The appellant then goes on, in the letter, to say

"that the shooting occurred and a murder was committed as a result of accused one's unilateral decision in respect of which I neither partook nor

exerted even an aota of influence on him. In fact, I was also surprised to why he decided to

shoot at that stage, " (my underlining).

The appellant before us has repeated that the shooting came as a surprise to him and added that that was not the usual way in which he and Mdluli went about robbing people of their cars.

In the course of the evidence in the court a quo a witness deposed to the fact that the appellant knew that Mdluli was armed with a gun before they left to commit the robbery. Whether that is so or not does not appear to be crucial since the appellant admits to knowing of Mdluli's possession of the gun when he (appellant) alighted from the vehicle because it was then planned to take the car "at gun point". To say about the actual shooting, as the appellant does, that he did not expect shooting "at that stage", in my opinion proves beyond reasonable doubt that use of the gun was contemplated by the two accused if and when it became necessary to effect the robbery.

In the case of R v Nsele 1955(2) SA 145 (AD) the court considered the doctrine of common purpose. The facts were that two persons agreed to rob a shopkeeper. One of them was armed with a revolver. During the robbery the shopkeeper was shot and killed. Schreiner, J A said;

"The appellant, it is true, told a story which amounts to Philip's having drawn his revolver as a personal and unpredictable reaction to the truculent and offensive conduct of the deceased. If that story had been- true or if it had not been clear beyond reasonable doubt that it was not true, the appellant would no doubt have been entitled to be acquitted at least on the charge of murder. But the trial Court disbelieved the appellant and found that he and Philip were in the shop for the purpose of robbery; with that background the already highly improbable story of the deceased's provocative behaviour loses all plausibility."

In casu it is, as I have said, clear beyond reasonable doubt, indeed from the mouth of the appellant himself, that Mdluli's use of the revolver was not only predictable but that it was intended by both accused to rob the deceased at gun point. In the same case van den Heever J A cited R v Ndhlangisa 1946 AD 1101 in which Davis, A. J. A. remarked:

"If a number of persons go, for the purpose of a robbery, to a shop, armed with revolvers, then each must (my italics) anticipate that a revolver would naturally be used and the shopkeeper be shot. "

Van Den Heever J.A. then went on to say:

"In the circumstances the inference seems to me inescapable that appellant must have foreseen the possibility — even the probability - of Philip using the revolver if any person, whose premises they entered for the purpose of stealing or robbery, showed unexpected reluctance to part with his money or tried to impede their escape; that he was reckless whether or not this foreseen possibility materialised. Consequently appellant was rightly convicted of murder."

On the facts before us the inference is also inescapable that the appellant knew that the revolver might (perhaps even "would") be used to execute the plan to rob the deceased.

It merely remains to be recorded that in S v Safatsa and others 1988(1) 868(AD) the judgment referred with approval to the following passage from Burchell and Hunt's S.A. Criminal Law and Procedure at P364 which is "in conformity with the case law....."

"Association in a common illegal purpose constitutes the participation - the actus reus. It is

not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all."

The appeal against the conviction cannot therefore succeed.

The appellant has urged us to reduce the sentence on the basis that it was not he who fired the shot.

I have already alluded to the judgment which lays down that once a common purpose has been proved to have existed between accused persons "association in the common design makes the act of the principal offender the act of all." Once the appellant was party to a plan in which the deceased was to be robbed at gun point he cannot escape the consequences of the gun being fired at a moment when he did not expect it.

In the circumstances the appeal against the sentence must also be dismissed. The appeal is dismissed and the conviction and sentence are confirmed.

BROWDE, J A

I AGREE

STEYN, J A

I AGREE

TEBBUTT, J A

DATED AT MBABANE THIS.....30th.....DAY OF MAY, 2000