

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 9/2000

In the matter between

DUMISANE FAKUDZE Appellant

vs

REX Respondent

Coram R.N. LEON, JP

D.L. HEARER, J.A. P.H.

TEBBUTT, J.A.

For Appellant Mr. C.N. Ntiwane

For Respondent Mr. M. Nsibande

JUDGMENT

12-12-2000

TEBBUTT J A

Appellant was convicted by Maphalala J in the High Court of murder with extenuating circumstances and sentenced to 18 years imprisonment. He now comes on appeal to this Court against his conviction and sentence.

It is common cause that the deceased, Jobe Simelane, died on 2nd September, 1996 as a result of a shot-gun wound, seven pellets being

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recovered from his body. A plastic cover of a shot-gun cartridge was found lodged in the deceased's armpit. The pathologist who performed an autopsy on the deceased opined that the injuries were consistent with the deceased having raised his hands during the shooting. The Crown alleged that it was the appellant who had shot the deceased.

The background to the charge against the appellant, who was a taxi operator, was a dispute between him and other taxi operators, including the deceased, at Mpompotha. The latter had approached the police to assist them as the appellant was operating his taxi without having a permit to do so. On 2 September 1996 a meeting of the taxi operators in the area was held at Mpompotha. The appellant was present.

What occurred on that meeting was described by two witnesses at the trial, viz Det. Sgt. Edward Fakudze, who arranged the meeting, and one of the other taxi drivers, one Eric Hlandze. Told by the police that he had to obtain a permit, the appellant was adamant that he would not apply for

one but would continue to operate illegally. He raised his voice and although the police tried to calm him down he maintained his attitude and said that "he was going to finish them off."

Later that day a woman, Phumaphi Mamba, wanted to get from KaPhunga to Mpompotha. She asked the appellant for a lift, who agreed to give her one and put her luggage in his car. However, so she testified, a boy named Lukhele took her luggage out of the car. Appellant loaded it back again but Lukhele again took it away. Appellant did not say anything but drove away. She was told by the deceased, who was present and who apologised for what had happened, that she was caught in a dispute in which the appellant was refusing to obtain a permit for a taxi in

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that area. She later got a lift with someone else. She said that when the appellant drove away he appeared annoyed.

What occurred later that day was testified to by a number of Crown witnesses. Albert Mathobela (PW1) said he was in the deceased's car at about 3.30p.m. going from Manzini to the Mbhoke area. As they were going up the hills at Nsingweni, the appellant in his car came from the opposite direction. He stopped his vehicle across the road. The deceased branched off into the bush. The appellant chased after the deceased's vehicle on foot as far as a pit where the latter could go no further. The deceased jumped from his vehicle and started running away whereupon the appellant returned to his vehicle and drove off after the deceased. He and the others who were left in the deceased's vehicle heard two gun shots from the direction in which the appellant had driven. PW1 said that when the appellant stopped his car across the road he alighted from it. He was carrying a firearm - "the one for hunting wild game". PW2 was Fungile Fakudze. She was also in the deceased's taxi when the appellant stopped his vehicle across the road. The appellant alighted from it. He was carrying a gun. The deceased branched off into the bushes and jumped from his vehicle and ran away. She started crying as she thought the appellant was going to kill the deceased. The gun he was carrying was a "long gun". PW6, Nester Thabsile Khulu, gave evidence to the same effect.

An eye witness testified to the shooting of the deceased by the appellant. PW3, Tsembeni Mamba, an elderly woman, said she knew both the appellant and the deceased. On 2 September, 1996 she saw the two of them. She heard the deceased calling for help and saw him being chased by the appellant. She was with one Michael Muntu Mamba, who

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had died before the trial. Mamba said to the appellant "stop Fakudze, son of Mandolwane". The appellant fired a shot into the ground. The deceased said "stop, do not kill me, let's talk. I will give you my permit" The appellant stepped back, loaded his firearm and came towards the deceased who ran away. The appellant fired a shot at the deceased who was hit and fell down. The appellant again loaded his firearm and said to the deceased "I have always been telling you". The deceased then died. Before he died he said "help, here is Dumisane. He wants to shoot me". The firearm, said PW3, was similar to the one which was an exhibit at the trial, i.e. a shotgun. Another resident of the area, Dumisane Lukhele (PW 14) said that at about 3.30p.m. he saw a taxi standing next to some trees. There were people in and outside the taxi. He also saw the appellant, who was carrying a firearm. He saw the appellant going back to his motor vehicle and driving off. Some three to four minutes later he heard the sound of two gunshots. He then again saw the appellant's vehicle proceeding towards Mpompotha.

Two other significant Crown witnesses were the appellant's sister-in-law, one Sibongile Alice Nhlabatsi (PW4) and his girlfriend Nomthandazo Mamba (PW5). PW4 said she saw the appellant at her homestead at 4.30p.m. on 2nd September 1996 who told her that "Jobe had died

accidentally in my hands using a gun". He asked her to tell his father. She was afraid to do so and said he should do so himself. He later asked her to pack his clothes and gave her E50 for the bag in which they were packed. He then drove off. PW5 said on 13 September 1996 appellant telephoned her at work and said he was phoning her from Nseleni in KwaZulu Natal in South Africa and asked her to join him there which she did on 23 September 1996. He told her that he was in South Africa because the deceased had died accidentally in his hands. He gave

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her E2 000.00 to brief a lawyer for him and said he would hand himself over to the police.

All the crown witnesses were subjected to a lengthy, thorough and searching cross examination by defence counsel. PW3 was particularly cross-examined at great length as to why her version at the trial differed from what was reflected in the summary of her evidence prepared by the Crown. She said she was not responsible for this and did not know the reason for the discrepancy. Her version in court was the true one of the events that day. The only witness who was not cross-examined at all was appellant's girlfriend, PW5, whose evidence stood unchallenged.

The appellant's father Simon Mandolwane Fakudze, said he saw appellant at the KaPhunga Police Station after the latter's arrest. In the company of police officers, he said he had used a shotgun to kill the deceased which he had taken from one of his father's four wives. The appellant's face was swollen and it appeared that he had been severely beaten. A police inspector, one Mdluli, said he also saw the appellant's face was swollen and he was bleeding. The appellant said that when he said he had killed the deceased he had not done so freely and voluntarily but because of assaults by the police.

The police officer who arrested the appellant at Empangeni in South Africa said he found the firearm allegedly used by the appellant in a house belonging to his mother.

The appellant testified in his defence. He denied killing the deceased. He said that after the meeting at which the question of permits was discussed, he wanted to give Phumaphi Mamba a lift but the boy

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Lukhele prevented him from doing so by taking her luggage out of his car. The other taxi drivers were aggressive and he drove away. He later went to Mpompotha. He parked his vehicle next to a big tree and took out a tyre pump to inflate his tyres. After doing so and as he was taking the pump to the car he heard a loud sound behind him. He then heard a crying noise and saw a motor vehicle disappearing into the forest behind him. He went to investigate and saw people getting out of the vehicle and disappearing further into the forest. He recognized the vehicle as belonging to the deceased. He did not see the deceased. He drove to Mpompotha to pay a petrol attendant there, then went to see his girlfriend whom he did not find. Later that day he parked his vehicle at home and went to South Africa to check on his aunt who lived there as he wanted to acquire South African citizen documents in order to get a job. He had not used a passport to get into South Africa but had entered the country illegally. He said he had been assaulted and tortured by the police to tell his father that he had killed the deceased. This latter statement was not true.

Under cross-examination, the appellant said that all the Crown witnesses were lying. PW1 and PW3 were lying, as were all the rest. The evidence of his sister-in-law Sibongile Nhlabatsi was pure fabrication. His girlfriend was also lying. She had misunderstood what he told her. He had told her that the deceased was nearly injured in front of him. He denied that he had given her E2

000 to brief a lawyer for him.

The learned trial judge found the evidence of the passengers in the deceased's taxi truthful and stated that he could not see how they could come to court and tell lies against the appellant with whom they had no vendetta. He also found the evidence of Lukhele truthful. All these

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witnesses corroborated one another. The evidence of the only eye witness, Thembeni Mamba, although searchingly cross-examined, remained intact as to how the appellant had shot the deceased. The evidence of appellant's sister-in-law and girlfriend was also damning against the appellant. It was also significant that within hours of the event, appellant fled to South Africa, entering that country illegally.

This court will not lightly interfere with findings of credibility by a trial court and will only do so if they are manifestly wrong. In this case they are, manifestly correct. Appellant's evidence per Contra was evasive, improbable and obviously untruthful.

Before this court the only ground of substance that was argued on appellant's behalf is that the trial court erred in accepting as truthful the evidence of PW3, Thembeni Mamba. The major criticism of her evidence is that it was at variance with the summary of her evidence that was supplied to the defence by the Crown. The learned trial judge considered this carefully and applied the dictum of Cohen J in *Rex v Simelane and two others* 1979-81 S. L. R. 251 that although the summary of evidence must be taken from the statement of witnesses for the prosecution, the witnesses concerned are not personally responsible for the contents of the summary and save where there has been a clear departure from the summary on material issues, discrepancies between the summary and the actual testimony of a witness should not be overemphasised. This is especially so in the case of illiterate persons who would, in most cases, be too nervous even to correct a police officer's error when the statement is read over to them for confirmation. The learned trial judge said this was the position in respect of the evidence of this witness, whose testimony he found to be credible and acceptable. No

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fault can be found with either the reasoning or the finding of the trial court.

It was also argued that in the summary of evidence with which the defence was supplied prior to the trial a witness by the name of Jester Lukhele appears who, it seems, could have corroborated PW3 but was not called by the Crown. No inference adverse to PW3 can be drawn from this. The Crown may have been satisfied that her evidence was sufficiently convincing, as indeed the trial court found it to be. Other points of criticism of PW3's evidence were also raised: for example, as to variances in certain distances to which she testified. These were obviously only estimates and do not detract from her value as a credible witness. Her evidence, moreover, is corroborated in every material respect by the other witnesses who saw the appellant with a firearm, heard the sound of gunshots and testified as to what appellant told them had occurred.

The incontrovertible facts are that the appellant was seen with a shotgun; that he threatened the deceased; that the deceased died of a shotgun wound; and that he told both his sister-in-law and his girlfriend that the deceased had died at his hands.

The court a quo was correct, in my view, of convicting the appellant. As it stated, "In sum, the accused killed the deceased in cold blood because of the dispute he had with other taxi men, including the deceased".

The court a quo found extenuating circumstances in the fact that the appellant had been seething with anger following the meeting with the

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other taxi-men and the dispute over his giving a lift to the old lady, Phumaphi Mamba. This served, subjectively, to reduce his moral guilt. In my view the appellant was lucky in this finding. Indeed the trial judge recognised this when he said it was "based on narrow margins".

As to the sentence of 18 years, it is undoubtedly a severe one but, in my view, having regard to the circumstances, one that was merited. It involved no misdirection by the trial court. It was submitted before us that the appellant was in custody for almost three years before being sentenced and the anxiety of awaiting trial for so long should have earned the appellant a reduction in sentence. This is no reason for reducing a sentence. Most awaiting trial prisoners are anxious as to their fate. In any event appellant's sentence was backdated to the date of his arrest. The sentence, finally, is not such that there would be a discrepancy between it and what this court would have imposed, to warrant an interference with it. Indeed, there would, in my view, be no discrepancy.

In the result, therefore, the appeal is dismissed and the conviction and sentence are confirmed.

P.H. TEBBUTT, J A

I AGREE:

R.N. LEON, JP

I AGREE:

D.L. SHEARER, J A