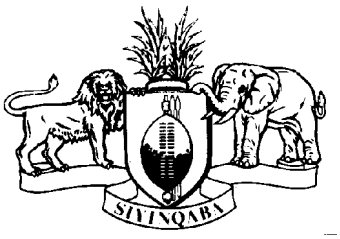

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.36/00

In the matter between:

PIKININI SIMON MOTSA		**APPELLANT**
VS		
REX		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BECK JA**
FOR THE APPELLANT	**:**	
FOR THE RESPONDENT	**:**	

JUDGMENT

Browde JA:

The appellant was charged in the High Court together with one Sidney Timothy Mabuza (they were alleged to have acted with a common purpose) on the following counts:-

1. with the murder of Nokwazi Margaret Mkhabeni on the 23rd December 1996;
2. with the murder of John Zondo on the same day and same place i.e. Sicunusa area in the Shiselweni District;
3. with the murder on the same day at or near the same place of Sibongile Asvinah Kunene;

4.

5. with armed robbery on the day and at or near the same place, the complainant being Isaac Mphiwa Fakudze from whom they were alleged to have taken by force the sum of E700.00;

6. with attempted murder on the same day and at or near the same place of one Beauty Mhlongo;

7. with armed robbery in that on the 2nd December 1996 at or near Sicunusa Border they took by force from Daniel Hadzebe a sum of E300.00.

In respect of count four, the appellant was charged alone with the murder of Almon Simelane on 11th February 1997 at Bethlehem in the Shiselweni District.

The appellant was also charged with five counts relating to contraventions of the Arms and Ammunition Act No.24/1964 (as amended).

Both the accused pleaded not guilty and the appellant was found guilty on counts 2 to 7 and also on the five counts relating to the possession of arms and ammunition.

The sentences imposed on the appellants by the learned Judge were the following:-
Counts 5 & 7 (armed robbery) – 9 years' imprisonment on each count;
Counts 6 (the attempted murder) – 7 years' imprisonment;
Counts 8 & 9 (under the Arms and Ammunition Act) – 5 years' imprisonment on each count;
Counts 10,11 (under the Arms and Ammunition Act) – a fine of E2,000.00 or two years' imprisonment;
Count 12 (under the Arms and Ammunition Act) – two years' imprisonment;
All the above sentences were backdated to 1st March 1997 and ordered to run concurrently.

On counts 3, 4 & 5 i.e. the murder charges, the Court found that there were no extenuating circumstances and the appellant was sentenced to death on each count. The appellant has now appealed to this Court against all the abovementioned convictions and the sentences.

The first witness for the Crown was Sikuta Hlatshwako (PW1). He stated in ***initio*** that he was persuaded by the appellant to join forces with him and his co-accused in a planned ambush of a bus, details of which I will refer to later in this judgment. He became an accomplice and testified to having been an eyewitness to all the offences alleged to have been committed on 23rd December 1996 i.e. counts one, two, three, five and six. The learned Judge a quo found that PW1 attempted to distance himself from the acts which were physically carried out in the perpetration of the crimes in

order to play down his role in their execution. Despite this however, the learned Judge, while adopting a cautious approach to the evidence of PW1, accepted his evidence. This has led to the presentation of argument before us on behalf of the appellant that, having regard to the learned Judge's criticism of PW1 and the fact that he was an accomplice, this rendered his evidence insufficient to justify the convictions.

In this Kingdom it is clear that a court may validly convict on the evidence of an accomplice provided that the crime charged is proved to the satisfaction of the court by evidence ***aliunde*** to have been actually committed – See Section 237 of the **CRIMINAL LAW AND PROCEDURE ACT NO.67 OF 1938** (AS AMENDED). It must be stressed that the evidence ***aliunde*** does not necessarily have to involve the accused – it only has to furnish proof of the commission of the offence, whether by the accused or anyone else, identifiable or not.

PW1's evidence was set out in accurate detail in the judgment a quo and it is not necessary to repeat it in this judgment. Suffice it to say that PW1 testified that he accepted an invitation from the appellant to come to the latter's home. It was there that the appellant, in the presence of the co-accused, produced three guns and suggested that the three of them ambush and rob a bus of the Lunwayo Bus Service. They agreed to do so.

On 23rd December 1996 they were on their way to carrying-out the ambush of the bus when they espied a van (described variously by PW1 as blue and also as green) occupied by a man and a woman, pulling off the road into a wooded area alongside. The appellant immediately saw in this an opportunity for a robbery before the arrival of the bus and so, shortly thereafter, the occupants, who were apparently having an illicit love affair were each shot three times by the appellant. PW1 alleged that while this was being done he and the co-accused stood a short distance away. The occupants of the van turned out to be John Zondo and Sibongile Kunene the deceased persons mentioned in counts two and three. The loot taken from this attack consisted of some groceries (which were divided among the three) a belt, a "bookcase"(which I assume to be an attaché case) containing personal documents of John Zondo including his bankbook, credit card and a photo album. Also taken from the van were its battery and a toolbox. These articles were subsequently recovered by the police and were all identified as Zondo's property by his wife who gave evidence before the Court a quo.

After the plundering of the van, they carried out their conspiracy to ambush the bus. When it arrived, shots were fired into the air, the bus stopped and the appellant fired two shots into the bus through the window on the driver's side. The driver was then robbed of the money he had in his control. Each of the accused and PW1 took a share of the loot – the largest share apparently going to the appellant.

Thereafter the three went their several ways after the appellant warned the other two

that if they dared to tell anyone of the incident he would shoot them. Two Crown witnesses whose evidence was admitted by the appellant and his co-accused corroborated PW1's account to the following extent. They deposed to the fact that three men ambushed the bus and some passengers, including Beauty Mhlongo, the complainant in count 6 were seriously injured by shots fired into the bus. (The deceased referred to in count one was apparently on the bus but because the evidence was not clear the appellant and his co-accused were acquitted on that count.)

I pause here to observe that the so-called cautionary rule regarding the evidence of an accomplice was carefully applied by the Court a quo. That Rule is no more than a reminder to the court that a facile acceptance of the credibility of certain witnesses may lead to false conclusions. At the same time it has often been stressed by the court that the exercise of caution must not be allowed to replace the exercise of common sense. **S V SNYMAN 1968(2) SA582 (A) at 585.**

Corroboration of an accomplice, which has been questioned in this case and with which I deal below, is not the only manner in which the required cautious approach can be satisfied. Any factor which can, in the ordinary course of human experience reduce the risk of a wrong finding will suffice e.g. the failure by an accused to cross-examine Crown witnesses on material aspects of the case, or to put his version to witnesses or were the accused himself to attempt to mislead the court by palpably false evidence.

Finally, I should add that even if the above facts are absent, it is competent for a court to convict on the evidence of an accomplice provided the court understands the peculiar and oft-stated dangers inherent in accomplice evidence and appreciates that rejection of the evidence of the accused and the acceptance of that of the accomplice are only permissible where the merits of the accomplice as a witness and the demerits of the accused are beyond question.

S v MASUKU 1969(2) SA 375(W) at 375-377.

In my judgment, not only did Matsebula J in the High Court exhibit a proper appreciation of the need for caution but there are also other factors which he properly took into account to which I will refer and which militate against the possibility of the court being misled by the dangers inherent in the evidence of PW1.

I turn now to the evidence on count 4. PW17 was Albertina Mota whose evidence was not placed in issue at the trial. According to her unchallenged evidence, she heard a gunshot at what is called the Mission Shop in Bethlehem in the Shiselweni District and saw a man running away. At the shop was found the dead body of Almon Simelane. A moneybox which was missing from the shop was recovered by the

police and was identified by an inscription on the inside of the words "Bethlehem Grocery."

The conviction of the appellant on this count was based on the fact that he pointed out the moneybox to the police in a maize field near his house. This pointing out and others have been criticised by Mr. Twala who appeared for the appellant. He has submitted that it was not shown that this pointing out was done freely and voluntarily, and relying on the case of **REX VS ALRED SHEKWA APPEAL CASE NO.21/95,** contended that no reliance whatsoever should be placed on the pointing out. I return to the question of this pointing out and others later in this judgment.

On count five, i.e. the armed robbery on the bus, the learned Judge a quo accepted the evidence of PW1 regarding the conspiracy to rob the bus. The learned Judge pointed out, correctly in my respectful opinion, that the acceptance of the evidence of the driver of the bus that three men robbed him after firing shots in the air and at the driver corroborated the evidence of PW1. Similarly on count 6, i.e. the attempted murder of Beauty Mhlongo, the learned Judge, once again correctly in my view, regarded the complainant's evidence that three armed men ambushed the bus and shot into it (she had a wound on her arm) was sufficient corroboration of PW1 to justify the acceptance of his evidence on this count.

Count 7 related to the robbery by two men of the driver of the bakery van and the theft of an amount of E300.00. Two assistants of the driver, Zulu and Sam Kunene, were robbed of their jackets at the same time as the robbery took place of the money. These two jackets were pointed out by the appellant and were identified by the persons who were robbed of them.

I return now to the question of the pointings out generally. One of the investigating officers in the case, Detective Sergeant Msibi, was the main Crown witness in regard to the discovery of various exhibits in the case. He stated that when he commenced the investigations, he went to the home of the appellant in order to search for firearms. This was as a result of a report that he had received. He stated that the appellant, who was present, was told that the purpose of the visit by the police was a search for firearms. The witness said he cautioned the appellant after introducing himself as a police officer and that, together with the other officers, he explained to the appellant that he was not obliged to say anything in relation to their search for firearms. Some of what the witness said in his evidence was unfortunately inaudible and consequently has not been transcribed, but in the first search, at any rate, nothing was found and the appellant said nothing to the police. Later, so Sergeant Mr. Msibi's evidence went, the appellant and his co-accused were both again questioned under caution concerning the matters before this Court. It was then that appellant pointed to three firearms hidden in tall grass next to his homestead. There was also ammunition pointed out there. Msibi went on to say that the appellant took the police to a forest in the Sicunusa area where he led them to a "bookcase" which contained documents of a personal nature belonging to the deceased Zondo. These included cheque books, driver's licence, an album and a travel document in the name of Zondo.

Thereafter Sergeant Msibi accompanied the appellant to his homestead where he found a car battery and a toolbox. Although the appellant stated that he was assaulted and tortured by the police, he did not say in his evidence that his maltreatment led to his pointing out anything. In fact he denied Mr. Msibi's evidence in respect of the pointing out. Thus, in regard to the finding of the firearms which, as I have already indicated, Msibi said were found very close to the appellant's homestead, it was put to Msibi on behalf of the appellant that the arms were found about 100 metres from his home. He specifically denied having pointed them out.

Under those circumstances, I am of the opinion that the Crown can make use of the finding of the firearms near to the home of the appellant and can legitimately ask the Court to drawn an inference from that fact alone. It can certainly be used by the Crown as evidence corroborating that of PW1 i.e. that it was the appellant who produced the firearms which were used in the attack on the van and the bus.

Further corroboration of PW1 can be found in the finding of the "bookcase" which, according to the appellant, was pointed out not by him but by PW1 himself. The most vital piece of evidence linking the appellant to the shooting of the two deceased in the van prior to the attack on the bus, was the finding of the battery in the home of the appellant. It was put to Msibi by counsel for the appellant that he was instructed "that this battery was never pointed out and you know, you only found the battery in the house and you said this must be the battery that belonged to the motor vehicle." This battery was identified beyond any doubt as belonging to the deceased Zondo by his wife and the obvious inference to be drawn from its presence in the home of the appellant that he, appellant, removed the battery from Zondo's car is not dependant upon any pointing out by the appellant.

Similarly the recovery of the cash box of the grocery shop does not depend on a pointing out by the appellant as a result of torture. On the contrary, counsel for the appellant, in regard to this exhibit, put to Msibi that when the appellant failed to produce it, the police went on a search and found the box in the maize field. There was only one reasonable inference to be drawn from the finding of the box and that was that the appellant was the person who stole the box after killing the deceased Simelane.

Much of the evidence of Detective Sergeant Msibi was confirmed by Sergeant

Sibandze who told the court that in the appellant's house the police found the battery, a box of spanners, a brown belt and a wrist watch. In his evidence, the appellant confirmed that the battery was found in his house as also the spanner box, he stated specifically that they were not pointed out by him but they were merely found there by the police. Similarly, the belt which was identified as belonging to the deceased Zondo, was claimed as being his own by the appellant. As I have said the battery was identified without doubt as belonging to the deceased and the same applies to the box of spanners. The appellant claimed to have bought the box of spanners himself but this cannot reasonably possibly be true since the belt, the battery, and Zondo's private papers were found with the appellant and the inference is therefore inescapable that the box of spanners was obtained by the appellant in the same way as he obtained the other items.

I think I have said enough to explain why, in my judgment, the court a quo was fully justified in convicting the appellant as it did on counts 2 to 12 inclusive.

I turn now to consider the question of sentence. It must once again be stated that the sentencing of an accused person is pre-eminently the task of the trial Judge. Unless he misdirects himself or imposes a sentence which is grossly inappropriate, the Appeal Court will not interfere.

In the present case the only arguable point regarding the sentence imposed by the learned Judge is the fact that he found that there were no extenuating circumstances. The learned Judge appeared to have approached the problem of extenuation on the basis that the onus of proving the existence of extenuating circumstances was on the accused. Thus, at the end of the evidence the learned Judge said:

> "We have reached the stage of another enquiry. That enquiry is as important as the trial that we have just completed. Because he might have to call witnesses just as he has been doing in defence or in establishing extenuating circumstances. And obviously the Crown will also address me whether in fact, because the onus is on him on the balance of probabilities to establish this and the Crown will also have to address me whether in fact the accused has succeeded in establishing - so that is a full enquiry into the circumstances." (sic)

After the evidence of Dr. Malepe, the psychologist who was called by the defence, the learned Judge said, in reference to a postponement that had taken place, that it was "to enable the defence to lead evidence in an enquiry into whether or not there are extenuating circumstances."

Finally, on the question of sentence, the learned Judge, after referring to the evidence of Dr. Malepe and saying among other things that the evidence in chief given by the

appellant did not support the doctor's findings said "in the result, I find no extenuating circumstances to have been established."

As I have said, it appears to me that the learned Judge misdirected himself in finding that there was an onus in regard to extenuating circumstances on the accused himself. This led the learned Judge to analyse the evidence of Dr. Malepe but to go no further in the enquiry regarding extenuating circumstances. The least the Crown should have done, in my judgment, was to have called another expert in order to ascertain whether Dr. Malepe's evidence should or should not be accepted. Once that was not done, all that remained was the evidence of Dr. Malepe who stated that the appellant had a mental age of 15 years. That statement remains uncontradicted and was an expert opinion based on tests carried out on the appellant by the psychologist. Without evidence to the contrary, it was a misdirection, in my opinion, for the learned Judge to find there were no extenuating circumstances because of his own observations of the appellant during the trial. The question to be answered is were there circumstances present which reduce the moral blameworthiness of the appellant. If one accepts that his mental age was that of the youth of a 15 despite being of a chronological age of approximately 28 years when the offences were committed, then in my opinion that is an extenuating circumstance within the meaning of that expression.

In the result I am of the opinion that the appeal of the appellant in this Court should be dismissed both in regard to the convictions and to the sentence imposed by the ***court a quo*** save that the court should have found, in the light of the evidence of Dr. Malepe, that there were extenuating circumstances present in regard to the counts of murder on which the appellant was rightly convicted.

I am of the view that the proper sentence therefore, was not the death penalty but a substantial period of imprisonment. It is my opinion that the appellant should be sentenced to twenty years' imprisonment on each of counts 3, 4 and 5 and that such terms of imprisonment should run concurrently. All the sentences on the other counts are confirmed save that they should run concurrently with each other but consecutively with those on counts 3, 4 and 5. The effect of this would be that the appellant will serve 20 years' imprisonment on the last-mentioned three counts and 9 years on all the other counts i.e. 29 years in all.

Save for all alteration of the sentences of death the appeal is dismissed and the convictions and sentences confirmed.

J. BROWDE JA

I AGREE : J.H. STEYN JA

I AGREE : C.E.L. BECK JA

Delivered on this day of December 2000.