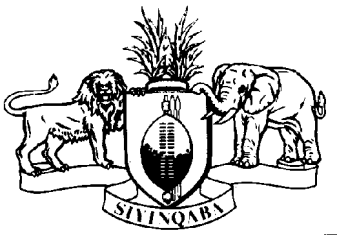

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.2/97

In the matter between:

PIUS SIMELANE		**APPELLANT**
VS		
REX		**RESPONDENT**
CORAM	**:**	**R.N. LEON JP**
	:	**P.H. TEBBUTT JA**
	:	**D.L. SHEARER JA**
FOR THE APPELLANT	**:**	
FOR THE RESPONDENT	**:**	

JUDGMENT

Tebbutt JA:

In this case the Court made the order which is to be found at the end of this judgment and said that it would give its reasons later. These are the reasons.

A saga, the dictionary tells us, is a long involved story.

The saga of this appeal is indeed a long involved story. It starts four years ago, almost to the day, when on 5th December 1996, Matsebula J in the High Court convicted the appellant on three counts of armed robbery and sentenced him to five years' imprisonment backdated to 18th January 1996 on each count.

The appellant was charged in the High Court with four other accused persons on five counts of armed robbery and, as against two of the accused, with three counts of being in possession of arms and ammunition. For ease of narration, I give the names of the

five accused as they appeared in the High Court. Appellant who was accused no.1 is PIUS SIMELANE, accused no.2 was MUZI NGWENYA; accused no.3 was FIRSTBORN SHONGWE; accused no.4 was PETER MASHABA; and accused no.5 was SAM MABUZA.

Sam Mabuza was acquitted of all charges at the end of the Crown case. All the accused were acquitted at the end of the trial of counts two and four. The appellant and Ngwenya and Shongwe were however, convicted on counts one, three and five i.e. of armed robbery and the latter two of the arms and ammunition charges. Their sentences on those charges were ordered to run concurrently with the sentences on counts one, three and five where, like the appellant, they were sentenced to five years on each count, backdated to 18th January 1996. Mashaba was convicted on count one of receiving stolen property knowing it to be stolen but acquitted on all the other counts. His sentence was a fine of E3,000.00, or 18 months imprisonment.

The next event in the saga was the noting of appeals by appellant, Ngwenya, Shognwe and Mashaba against their convictions and sentences. Their appeals were enrolled for hearing in this Court on 10th June 1999. On that day, for reasons which are not germane to this judgment, their appeals were postponed to the next session of this Court. The Court was, however, requested to rule as to whether the sentences in respect of counts one, three and five were to run concurrently or consecutively. In a written judgment handed down on 10th June 1999 the Court ruled that they were to run concurrently.

The saga continues. At the next session which was held in November 1999, the Court was asked, again for reasons which I need not set out, to postpone the appeals to the next session of this Court in 2000, save for the appeal of Mashaba, who asked that his appeal be dealt with then. The Court acceded to his request and, in a written judgment dated 26th November 1999, upheld the appeal and set aside Mashaba's conviction and sentence.

That left the appeals of the appellant, Ngwenya and Shognwe for the first session of the Court this year. By then all three appellants had served their sentences and Ngwenya and Shongwe indicated that they did not wish to proceed to argue their appeals. Not so, however, the appellant who, despite having served his sentence, wished to have his guilt or innocence determined by this Court and persisted with his appeal but, once again, asked that it be postponed to this session of the Court. It is that appeal which, as the next chapter in the saga, is the subject of this judgment. It is also to be recorded that at this session, Shongwe, despite his earlier intimation that he did not wish to pursue his appeal, stated that he now wished to do so and this Court in the interests of justice felt it had to accede to a request by him to have his appeal heard at the first session of this Court in 2001. That, one hopes, will be the final chapter in the saga. I return to the appeal of Pius Simelane.

The three counts, all of them armed robbery, on which the appellant i.e. Pius Simelane, was convicted, were the following. On count one he was convicted with Ngwenya and Shongwe, acting in common purpose, of robbing at gun point on 4th

January 1996 at or near Mantenga Lodge, in the district of Hhohho, Prince Thumbumuzi Dlamini and one Bruce David of a Mercedes Benz motor car TBR 166 T and a number of items that were contained in the vehicle. I shall refer to some of these later herein. On count 3 the appellant was convicted of acting in common purpose with Ngwenya and Shongwe in robbing Byron Alvon Bahlmann on 9th December 1995 at Mountain Inn Hotel by threatening to shoot him, of a Ford TS5 sedan car and a number of items in the car, including ***inter alia*** two sets of golf clubs, three wrist watches, two gold chains and a gold bracelet. On count five the appellant was convicted, once again while acting in common purpose with Ngwenya and Shongwe, of robbing Zakhele Simon Shabangu on 29th December1995 at Boyane in the Manzini district, also by threatening to shoot him, of a Jetta sedan car and E350 in cash.

Much of the record is concerned with counts two and four on which the appellant was acquitted including parts of the appellant's own evidence. Save where it may go to the question of credibility, that evidence is not relevant to this judgment and I do not intend to refer to it.

The evidence for the Crown on counts one, three and five is in the first instance that of the victims. Prince Dlamini said that on 4th January 1996 some time after 11pm he and certain friends were driving in his Mercedes Benz S500 motor car from Happy Valley Motel is Mantenga Lodge when he noticed a car with a police flashing lamp on it following them. Thinking it was the police, he stopped at the gate of the hotel, where the security guard came to open it. He then saw the latter running away. He was getting out of the car when he saw two men with firearms and wearing balaclavas approaching. They told him to leave his motor vehicle and not look back. He and his friends went into the hotel where they were told that his car had been taken away.

In his car he had his jacket, a casual khaki one, and two others one of which was a track suit top and the other a jacket with the insignia of the "Miss World Pageant" on it. He also had six CD cassettes and a number of papers containing the letterheads of the Hyatt Hotel in Johannesburg. His car was found later. He saw it at Lobamba police station and identified it as his. It had been damaged in a number of respects and he had to have it repaired by a garage. It had, according to the police evidence, been found with hidden number plates on it. At the trial he identified his jackets, particularly the "Miss World Pageant" one and certain charred remains of his car's number plate and of the papers from the Hyatt Hotel. The cross-examination of him was short, relating only to the certainty of his identifying the articles in court as belonging to him.

Byron Bahlmann said that on 9th December 1995 he and some friends had played golf. They later visited a casino and returned to the Mountain Inn, where they were staying, at between 1 and 2am. While parking in the parking lot, four men wearing balaclavas and using hand guns held them up at gunpoint and robbed him of his car, two sets of golf clubs, two pairs of golf shoes and of two gold chains, wrist watches and a gold bracelet from his friends. One set of golf clubs, the brand of which was Eeze, was his. He identified his clubs as being those that were exhibits at the trial, as

well as a golf glove. His car was never recovered.

Simon Shabangu said that on 29th December 1995 while driving with a friend at about 10pm towards Boyane he saw a car following him. It had a blue flashing light on it. He thought the police were following him. He stopped on the side of the road, switched off the engine and got out of the car, putting the keys on the car in his pocket. Three men alighted from the following car. They were wearing balaclavas. They told him to lie down. He did not do so and they hit him to the ground and kicked him. He then looked up and saw them pointing what he thought was a gun at him. They took his car keys and his money. One of the men drove off in the car in which the men had been travelling, leaving two who took his car from him. The car was later recovered.

The Crown also called an accomplice witness, Musa Hlophe. He testified that on 4th January 1996 he met Ngwenya and Shongwe in Manzini at about 6pm. They asked him to drive them to Mbabane. He had his wife with him and first dropped her off at home before returning to pick up the two men. They then had the appellant with them. He drove all three of them to a house in Mbabane. They paid him E60 for the trip. He went back to his home in Manzini and went to sleep. During the night the three man came to his house. They were in a white Toyota Corolla car and asked him to accompany them to Ezulwini in order to drive the Toyota back from there for them. They said they would pay him for doing so.

The appellant drove the car and he, Hlophe, sat in the back seat where he fell asleep. Ngwenya woke him up and told him to take the car quickly and to fetch them at Ngogola. At that stage i.e before he drove off in it, the car was parked with another car, a Mercedes, parked in front of it. He left for Ngogola. The others were heading for the Mercedes. He saw two men and women alighting from that car. He reversed and drove off to Ngogola to the house of Sam Mabuza (who had been the fifth accused at the trial) where the other three joined him. They told him not to tell Mabuza that there was a vehicle in his yard. He was later paid E1,5000 by Ngwenya and Shongwe. A few days after that the appellant came to his house and asked him to accompany the appellant to drop off a friend. The appellant was driving a blue Toyota Corolla. After doing so they picked up Ngwenya and Shongwe at the appellant's house and drove to Manzini and then to Moneni. On the way they met another vehicle, Jetta, which they followed. The three men had a blue flashing "breakdown" light which they used to get the Jetta to stop. They got out of the car and went up to the driver of the Jetta. He (Hlophe) then drove off in the car in which they had been travelling, having been instructed to do so and to meet them at Mfabantfu. On the way the Jetta, in which then were the appellants Ngwenya and Shognwe, overtook them and he followed them. They left the Toyota at Mfabantu and went to a casino in Manzini.

They were then using the Jetta. He dropped them at the casino and drove back to Mfabantu where the other three later joined him. They were then driving a Kadett. He was told to drive the Jetta to Mabuza's place where it was parked in the garage. They took him home in the Kadett. Hlophe said that the following day he went to Mabuza's place where the appellant, Ngwenya and Shognwe later joined him. All

three of them asked Mabuza to buy the Jetta from them but he said he had no money. Hlophe said he had not seen any firearms in the possession of the appellant and the other two men. Hlophe's evidence was not challenged by the defence on any material aspect.

Another link in the chain of the Crown's evidence was given by one Gcina Magagula, a driver employed by Mashaba. On a day in January 1996 Mashaba instructed him to drive three men to Manzini. Leaving these men in Manzini, he and Mashaba then drove to Ngogola to Sam Mabuza's house, where Peter and others tried unsuccessfully to start a vehicle. They went back to Manzini where they found a white man, whose name was Tony. With the latter they returned to Ngogola to Mabuza's house. Tony also could not start the vehicle. Again they went back to Manzini where they found the appellant. They all then returned to Ngogola to try to start the vehicle. Magagula said he did not know if they succeeded in doing so or what the type of vehicle it was.

The vehicle was, however, identified as a Mercedes by a subsequent witness, one Sifiso Mabuza, a nephew of Sam Mabuza who lives with his uncle at the latter's house at Ngogola. He testified as to a number of men trying during January 1996 to start a vehicle parked in Sam Mabuza's garage. This vehicle was a Mercedes car. The witness also told how he had earlier been instructed to watch some papers and a number plate that some men who had come to the house were burning. The number plate bore the letters TBR166T. Sifiso Mabuza also testified that during December 1995 some men had left a car at his uncle's house. It was a blue Jetta.

In convicting the three accused, the trial Court placed much reliance on the evidence of one of the investigating police officers in the case, Acting Superintendent Ndlangamandla. He arrested the appellant on 18th January 1996. At the police station he was properly warned that he was a suspect in an armed robbery of Prince Dlamini's Mercedes Benz car.

He later also arrested Ngwenya. The two of them on 20th January 1996 took him to Sam Mabuza's house where in the yard they pointed out a yellow burnt number plate and some charred pieces of paper on which some of the printing was still legible. He also went with Ngwenya to the home of his girlfriend, Khanyisile Ferreira, where he was handed a jacket in which he found two live rounds of ammunition for a 9mm pistol. Ndlangamandla was also handed a jacket bearing the words "Miss World Pageant 1993". In the house, he also found a 9mm pistol loaded with six live rounds of ammunition hidden in a pair of brown tools. He also later found in a rubbish pit a burnt flasher lamp. On 22nd January 1996 Shongwe handed himself over the police. He gave Ndlangamandla a 9mm pitol hidden in an old drum behind his parent's house. Ndlangamandla said that the appellant had also taken him to the house of one Phang'muzi Mdluli where in the garage the appellant pointed out two golf bags. In cross-examination it was put to Ndlangamandla that the appellant was assaulted and tortured by the police. This was emphatically denied by Ndlangamandla who said that after his arrest the appellant was co-operative with the police.

Ngwenya's girlfriend, the aforesaid Khanyisile Ferreira, said she had found a gold

wrist chain and glove in Ngwenya's jacket. She had once seen him wearing the chain. The glove was an exhibit at the trial and was the one identified by Bahlmann as his golf glove.

On the third count the Crown called one Elphas Mdluli who said that the appellant, Ngwenya and Shongwe, were his neighbours and he knew them well. He said they came to his house at about 4am one morning ain a white sedan car and talked to his brother Vusani. They left the car at his house and some golf bags. Mdluli said he did not know the make of the car and could not recognise the bags.

The aforegoing was in essence the Crown evidence on counts one, three and five.

The appellant gave evidence in his defence. He denied any involvement in the three robberies. He had, he said, been assaulted and tortured by Ndlangamandla by suffocating him using a plastic bag and tyre tube. He had not pointed out the things mentioned by Ndlangamandla. On the contrary it was Ndlangamandla who had produced them and had then, by assaulting and torturing him, tried to get him to admit that he had been in possession of them. Questioned about Hlophe's evidence the appellant said that he was lying on all material aspects. So, too, were all the other Crown witnesses i.e. Magagula, Elphas Mdluli and Ndlangamandla. A reading of the record of the appellant's evidence does not impress one of his reliability as a witness and he could venture no reason why every one of the witness should, as he averred, lie against him.

Although not specifically saying so, the learned trial Judge appears to have convicted the appellant on the inferences to be drawn from the following facts. As to count one, that (i) on Hlophe's evidence, the appellant was with Ngwenya and Shognwe in the car driven by Hlophe when it stopped behind the Mercedes and the three of them approached the latter, as Prince Dlamini testified when he was robbed of his car, (ii) that the Mercedes was taken to Sam Mabuza's house at Ngogola; (iii) that the number plate and papers bearing the Hyatt Hotel's name which were later identified by Prince Dlamini as having come from his car were burnt at Mabuza's hosue; (iv) that the charred remains of these items were pointed out to Ndlangamandla by the appellant, who (v) was present when the Mercedes was started at Mabuza's house. As to count three, the only fact linking the appellant with the charge is that the appellant left a car and some golf bags which were later identified by Bahlmann as belonging to him at the house of Phangmusa Mdluli where the appellant later pointed them out to Ndlangamandla. As to count five, (i) the relevant facts are that, according to Hlophe, appellant with Ngwenya and Shongwe followed after a blue Jetta that Shabangu said he was driving when he was robbed of it, and were later the same evening seen driving it; (ii) that it was taken to Sam Mabuza's house, and (iii) that appellant, with Ngwenya and Shongwe, tried to sell it to Mabuza.

The learned trial Judge made no finding as to the appellant's credibility. He did, however, make a strong finding of credibility in regard to Ndlangamandla, who, he said, had made a very impressive impression on the Court" was "exceptionally unbiased." He also found that Hlophe, whom he treated as an accomplice and applied to his evidence the necessary caution in dealing with accomplice evidence, was a credible witness. The learned Judge was quite justified in doing so as Hlophe's

evidence was not challenged by the defence on any material aspect.

On appeal before us, Mr. Maziya for the appellant criticized the trial Court for not dealing with the appellant's evidence and particularly with his evidence that he did not voluntarily point out any items to Ndlangamandla. Apart from the latter question i.e. pointing out of the charred remains of the items from Prince Dlamini's car and the two golf bags, which the appellant said he had not pointed out, there was nothing in the appellant's evidence to which the trial Court could advert. The appellant's evidence was a simple denial of involvement in any of the robberies and further a litany of repeated statements in respect of each witness that he or she was lying. There was therefore no version by him that the Court could consider to be reasonably true, other than his story that he had seen assaulted and that any items pointed out by him had been planted by Ndlangamandla.

In the light of the trial Judge's very positive finding of the latter's credibility, the appellant's version could not stand. In any event Ndlangamandla's evidence as to the appellant's pointing out of the burnt remain of the items at Mabuza's house, is corroborated by that of Sipho Mabuza and as to the golf clubs, by Phangmuzi Mdluli.

Mr. Maziya also criticized the trial Court for accepting the evidence of Hlophe. In the light of the failure to test the latter by any cross-examination on any of the substantial or material points, that criticism is unwarranted.

The aforegoing remarks notwithstanding, however, I have difficulty with the learned Judge's conviction of the appellant on counts three and five. On count three, the only evidence in any way connecting him with the offence is that he brought a car and the two sets of golf clubs to Mdluli's house. The offence charged was that the appellant, acting in common purpose with Ngwenya and Shongwe on 9th December 1995 robbed Bahlmann at gun point on the Mountain Inn Hotel of his Ford sedan car and its contents, including the golf clubs. There is no evidence that the appellant was ever at the Mountain Inn Hotel, either alone or in the company of Ngwenya and Shongwe, on 9th December 1995 or had anything to do with Bahlmann's car. When Mdluli saw them at his home, the three men were in a white car. No evidence was let as to the colour of Bahlmann's car. It cannot be assumed, therefore, that the white car was Bahlmann's. The appellant's possession of the clubs is, of course, highly suspicious but it does not give rise to the only reasonable inference that he participated in the robbing of Bahlmann of his car. The three men may have obtained the clubs from another source. As I have stated, the inference is strong that they were the robbers but it is not the only reasonable one. The appellant, in my view, must be given the benefit of the doubt. On count three, therefore, his appeal must succeed and Mr. Maseko, for the Crown conceded as much.

On count five, the charge was that the appellant, with Ngwenya and Shongwe, robbed Shabangu of his Jetta car and money on 29th December 1995. Shabangu fixed this date as being a Friday on which he had attended a function at Stanbic Bank. Hlophe's evidence as to the appellant's involvement with a Jetta was that the incident had occurred a few days after the incident with the Mercedes Benz car which he said

he was on 4th January 1996, a date which was confirmed by Prince Dlamini as the day on which he was robbed of his Mercedes. That the incident of which Hlophe testified involved a Jetta other than that of Shabangu is therefore not only reasonably possible but indeed probable. Moreover, Hlophe testified that the colour of the Jetta was either black or green. No evidence was led from Shabangu as to the colour of his car. Again, on this count the charge as framed against the appellant was, in my view, not proved against the appellant and on count five therefore his appeal must also succeed. Once again Mr. Maseko conceded this.

On count one, the picture is an entirely different one. I agree with Mr. Maziya that the ***court a quo*** should have dealt with the appellant's evidence as to the alleged pointing out of certain items by him. Even without the evidence of pointing out, however, the case against the appellant is overwhelming. On the uncontradicted evidence of Hlophe, the evidence of Ndlangamandla and the evidence of the other witnesses as to the appellant's involvement with the Mercedes at Sam Mabuza's house, I am of the view that the inference drawn by the learned trial Judge that the appellant was a participant in the robbing of Prince Dlamini of his car and its contents, was the only reasonable one in all the circumstances. On count one, the appeal must fail.

In the result, therefore, the following order is made;-

1. The appeal against the appellant's conviction of armed robbery on counts three and five succeeds and the convictions and sentences on those counts are set aside.
2. The appeal against the appellant's conviction on count one is dismissed and the conviction and sentence on that count are confirmed.

P.H. TEBBUTT JA

R.N. LEON JP

D.L. SHEARER JA

Delivered on this day of December 2000.