



IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.2/97

In the matter between:

MONTY FIRSTBORN SHONGWE

VS
THE KING

<u>CORAM</u>	<u>:</u>	<u>BROWDE JA</u>
	<u>:</u>	<u>VAN DEN HEEVER JA</u>
	<u>:</u>	<u>SHEARER JA</u>
<u>FOR APPELLANT</u>	<u>:</u>	
<u>FOR RESPONDENT</u>	<u>:</u>	

JUDGMENT

Browde JA:

The Crown indicted five accused in the High Court on various counts of robbery and contravention of the Arms and Ammunition Act. As a result of a series of individual hearings which are irrelevant to the present appeal four of the accused who were originally indicted had their cases disposed of and those who were sentenced to terms of imprisonment have served such terms. The present appellant, who was the third accused in the court below, was found guilty on three counts of robbery and two counts relating to contraventions of the

Arms and Ammunition Act. He was sentenced to five years' imprisonment on each of the robbery counts. But because of what might well have been an oversight on the part of the trial Judge those terms of imprisonment were all backdated to the date of his arrest as a result of which this Court held that this inevitably meant that those sentences were to run concurrently. Consequently the appellant has served his sentence. This appeal against the convictions and the sentences is, therefore, largely academic.

The first count was one of armed robbery. The appellant (together with three other accused) was charged with robbing one Thumbumuzi Dlamini and one Bruce David on 4th January 1996 of a Mercedes motor car and a number of articles which were in the car. These articles were subsequently identified as being or having being in the possession of accused no.1 in the trial court whose name is Pius Simelane (Simelane).

The complainant Dlamini, in his evidence, described how on 4th January 1996 he was driving a Mercedes Benz with three passengers including the said David. Some time after midnight near Mantenga Handicraft Centre, he noticed a motor vehicle

following them and using a flashing blue light, as the police do, to indicate to them that they should stop. This he did only at the gate of Mantenga Lodge Hotel in which they were to spend the night. What was thought to be the police turned out to be two robbers to whom, consequent upon threats of being shot, the car was surrendered. The four occupants of the Mercedes Benz, that is two men and two women were forced to alight from the car which was then driven away. The learned Judge in the trial court has comprehensively analysed the evidence of all the witnesses, and for the purposes of this judgment I intend to return to only some of them. The witness Musa Hlophe was called as an accomplice. He stated that on 4th January 1996 and at about 6pm at the Mfabantfu station he was asked by the appellant and Simelane to convey them (and one other) to a destination in Mbabane. This he agreed to do. Consequently, during the night, the three arrived at his house in a white Toyota Corolla car. He was asked to

accompany them for a fee to Ezulwini from where he would drive the Corolla back to Ngogola where they were living. En route to Ezulwini he sat at the back of the car and fell asleep. When he awoke he found that they were parked behind a Mercedes car from which he saw four people alighting, two men and two women. He then proceeded to drive the Toyota Corolla back leaving the accused persons including the present appellant at the Mercedes car. For his trouble, he was later paid E1,500 “for having been woken up”. This evidence was accepted by the learned Judge as evidence corroborative of the complainant himself - and it is hardly surprising that he did so.

Mr. Hlophe was hardly cross-examined and he was not questioned about the statement that on 4th January 1998 he was woken up in the dead of night and asked to accompany the appellant and the others so as to be available to drive the Corolla back after the others no longer needed him. His evidence, was, of

course, also corroboration that four persons alighted from the Mercedes Benz as described by the complainant. The evidence went on to show that the Mercedes was taken to the home of one Sam Mabuza where, the following day, according to Sam's nephew Sifiso, the appellant was involved in trying to get the Mercedes started. When, after a few attempts it finally started, it was driven off in the direction of Simunye. Very shortly thereafter, the car was pointed out by Simelane to the police hidden in the bushes off the road. It is correct, as it was strenuously argued by Mr. Twala on behalf of the appellants, that it is crucial whether or not the learned Judge was justified in accepting the evidence of the accomplice. In my judgement he was so justified. The learned Judge carefully analysed the evidence in order to subject the accomplice's version to the caution necessary in the circumstances. He found him to be a credible witness, and, what is more, points out that his evidence implicating the

appellant went largely unchallenged. That being so he was led to the inevitable conclusion that the appellant was present at the incident in the Ezulwini Valley. That he was present when the accomplice was asked to drive the Corolla back to Ngogola, that four persons were forced out of the Mercedes Benz and that subsequently he was present when various amounts were paid to the accomplice for his participation in the affair. Nor can there be any valid criticism of the learned Judge's finding that the appellant was involved in trying to get the Mercedes Benz on to the road, the day following the robbery.

There is also of course, the evidence of the police particularly that of Assistant Superintendent Ndlangamandla. This witness was found by the learned Judge to be "very impressive" and "exceptionally unbiased". The latter adjectives were justified on the basis of the witness's evidence regarding one of the other accused whom he could easily have dragged into the net together with the other accused had he been in any degree dishonest. This he did not do as a result of which that accused was found not guilty and discharged.

In any event it is hardly necessary to point out that the Judge who saw and heard the witnesses is in a much better position to judge their credibility than is an Appeal Court which is confined to the written words in the record. No good reason has been advanced to question the finding of the learned Judge in regard to the police evidence and consequently it must be accepted.

In regard to the appellant, count 2 was to the effect that he led the Assistant Superintendent to Ngonini where the accomplice Hlophe had his residence. The appellant pointed out a 9mm pistol with an empty magazine that was behind an old drum. There was no misdirection by the trial court and in my opinion there is no substance in the appeal regarding this count.

Count 3 related to a robbery at the Mountain Inn Hotel from Robert Bahlmann. His Ford sedan motor car plus the contents which included golf bags with clubs were stolen from him by hooded men who forced him into the boot of his motor vehicle. This was done at gunpoint and it involved other passengers as well as the complainant himself. The evidence linking the appellant to this count was that of one Mdluli who stated that he knew the appellant as one of his neighbours. Mr. Simelane and one of the other accused together with the appellant had come to his homestead one afternoon in a white sedan car. After talking to his father they left the car and its contents at the homestead. They later returned - including the appellant - to fetch the motor vehicle but left behind some golf bags which were in it. This took place at 4am at the homestead of Mdluli. The golf bags were adequately identified as being the property of Bahlmann.

I then turn to the evidence relating to the robbery in January 1996. The complainant Vermaak was in the home of a companion in the early hours of the morning when suddenly he heard the shattering of windows and saw three people pointing guns at him and ordering him and his companion to look downward. In this manner the robbers obtained car keys and took away with them, *inter alia*, Vermaak's car. It was later recovered in a state of complete demolition. A witness by the name of Sithole gave

evidence that he had been approached by accused no.1, 2, and 3 (the appellant) at his workplace and he was offered a radio for sale. This is merely evidence of the association between the appellant and the other accused in the various counts dealt with in the High Court. The evidence on this count does not implicate the appellant in the robbery of Vermaak beyond reasonable doubt. It is perhaps highly likely that the appellant, Simelane and the others involved before the High Court, were all involved in the series of robberies which took place at the times and places described in the indictment. However, on count four I think the learned Judge should have had a doubt as to the participation of the appellant in this. Consequently the appeal in relation to that count should succeed.

In the result, the appeal is dismissed regarding counts 1, 3 and 6 and the sentences are confirmed. The conviction and sentence on count 4 are set aside.

J. BROWDE JA

**I AGREE _____ : _____ L. VAN DEN
HEEVER JA**

**I AGREE _____ : _____ D.L.L. SHEARER
JA**

Delivered on this _____ day of June 2001.