HELD AT MBABANE Appeal Case No. 15/2002

In the matter between

LUCAS SHONGWE Appellant

and

THE KING Respondent

Coram LEON, JP

STEYN, JA

TEBBUTT, JA

For Appellant In Person

For Crown N. Maseko

JUDGMENT

LEON, JP

Despite the fact that the correct procedure in applications for leave to appeal was not precisely followed in this case counsel for the Crown agreed that this court should treat this case as an application for leave to appeal and we agreed to do so. I should add, that the applicant, instead of seeking leave to appeal from this court, appealed to it. It is in that respect that the procedure was not precisely correct.

The applicant was convicted in the Magistrate's court at Manzini of armed robbery and sentenced to seven years' imprisonment. He is a first offender.

Three judgments have already been given in this matter. The first by the Magistrate who convicted and sentenced the applicant. The second by the High Court dismissing the appeal against the conviction and sentence. The third judgment was that of the High Court in dismissing the application for leave to appeal to this court which it regarded as "hopeless".

In these circumstances it would be a work of supererogation on my part were I to repeat a detailed examination of the evidence. I have considered the applicant's argument and the grounds of his application but in my view the application has no merit.

Very briefly stated the facts are as follows. The applicant was the third accused in the Magistrate's court. He and his co-accused were charged with robbing the complainant Mrs. Rebecca Dlamini of E28 859.69.

At the close of the Crown case accused Nos 1 and 2 were acquitted while the applicant was put on his defence.

With regard to the robbery, none of the Crown witnesses was able to identify the applicant as having taken part in it. The robbery took place at Yesive Supermarket at about 6.00 p.m. on 4 August 1999. While those in the supermarket were busy counting their takings two men rushed in, one brandishing a firearm. One of the workers was assaulted and all were

made to lie down. The sum alleged in the charge sheet was stolen from the supermarket.

The evidence against the applicant depends upon that of a single witness, PW5. I pause to say that, although there was other evidence which confirmed his evidence in a material respect, that evidence did not implicate the applicant and was therefore not corroboration properly so called.

I am accordingly prepared to assume, in favour of the applicant, that this case should be treated as a case of a single witness. But even upon that assumption, I am satisfied that the applicant was correctly convicted.

The High Court has set out the proper modern approach which should be adopted towards single witnesses and I agree with that approach.

The evidence of PW5 was that the applicant sought his advice as to how Yesive Supermarket could be robbed. PW5 referred him to PW1 who worked there as a driver. PW5 arranged a meeting between the two. PW5 was present. The applicant asked accused No 1 how he could commit this robbery. The latter informed him that morning was the best time. They then left. On the day before the intended day of the robbery the applicant, in the presence of PW5, asked accused No 1 if he had a firearm but the answer was in the negative.

Some days later the applicant telephoned PW5 to inform him that they had gone to the supermarket but did not commit the robbery as they did not have transport. About two weeks later PW5 heard on the radio that a robbery had taken place at Yesive Supermarket. One night after that

announcement, the applicant came to the house of PW5. The applicant then informed PW5 that they had succeeded in carrying out the armed robbery and he asked the applicant to bring accused No 1 to his home at Lushikishini which he did on a Saturday evening leaving at 11.00 p.m. and arriving at 1.00 a.m. by taxi.

According to PW5, the applicant then took them to a rondavel saying that they had only managed to steal E2 300 in the robbery. He gave PW5 E300 and accused No 1 E350. Before the robbery, the applicant had promised money to PW5 and the first accused to be paid after the crime was committed.

The cross examination of PW5 by the attorney acting on behalf of the applicant was extremely brief occupying barely one page of the record. Not only did PW5 emerge from that unscathed but it was never put to him that the applicant did not know PW5 at all.

In his evidence the applicant, in his bare denial, stated that he was at home at the time when the offence was committed. He did not suggest any reason why PW5 should give false evidence against him nor was any suggested in cross examination. He denied knowing PW5. Why then, one might ask, should a person unknown to him, implicate him in this offence?

In his argument before us the applicant submitted that no one saw him commit the robbery. That is correct. He also contended that PW5's evidence does not connect him with the robbery. I disagree. A fair reading of PW5's evidence shows that the applicant was himself involved in the robbery.

5

Then it was contended by the applicant that the trial court had erred in disbelieving his evidence. I disagree. Quite apart from the fact that it was never put to PW5 that the applicant did not know him, the evidence of the applicant that an unknown person should falsely involve him in a robbery is inherently improbable. When PW5 gave evidence he stated that he knew the applicant as they used to be neighbours. That was never challenged in cross-examination. It was only when the applicant gave evidence that he claimed not to know PW5 at all. In addition to that inherent improbability to which I have referred, the failure to cross examine PW5 on this point suggests that the applicant's evidence concerning PW5 was false. In this regard the High Court, in its judgment dismissing the appeal, referred to the judgment of HANNAH, CJ in the unreported case of R V DOMINIC MNGOMEZULU AND OTHERS Criminal Case No 94/1990 where the following is said:-

"It is, I think, clear from the foregoing that failure by counsel to cross examine on important aspects of a prosecution witness testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross examination his instructions were that the unchallenged item was not disputed by the accused, and if the accused subsequently goes into the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was

6

put, the court may again infer that there has been a change in the accused's story."

I agree. Without going into detail, another example of the applicant's mendacity arises from the evidence of PW6 who was Mavis Shongwe the sister of the former accused No 2. She stayed with the latter in August and September 1999. She testified that the applicant came to see her brother at Ngwane Park where she was staying in August 1999. She was not cross-examined. But when the applicant gave evidence he denied that he had gone to Ngwane Park.

I am satisfied that the Magistrate was correct in accepting the evidence of PW5 and rejecting that of the applicant as false.

With regard to the sentence of 7 years' imprisonment, there has been no misdirection by the Magistrate and there is no other basis for interfering with the sentence.

There are no reasonable prospects of success either in relation to the conviction or the sentence. In my judgment the application for leave to appeal must be refused.

LEON, JP

I agree

STEYN, JA

I agree

TEBBUTT, JA

GIVEN AT MBABANE this 15th day of November, 2002