IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE — Appeal Case No. 1/2002

In the matter between

SHAKES NKULULEKO DLAMINI	1st Appellant
JETRO BOY SIMELANE	2nd Appellant
THOMAS SIDUMO DLADLA	3rd Appellant
VINCENT MDUDUZI DLAMINI	4th Appellant

And

REX — Respondent

Coram — LEON, JP
TEBBUTT, JA
BECK, JA

For Appellant
For Respondent

JUDGMENT

LEON, JP

I shall refer to the appellant as the accused. Four accused appeared in the High Court on three charges namely:

Count 1: Murder, it being alleged that on or about 25 September 1997 and at or near Big Bend Barclays Bank area in the Lubombo Region the four accused, acting with common purpose, unlawfully and intentionally killed the deceased Fritz Koch.

Count 2 alleged that on diverse dates in the months of August and September 1997 and at various places alleged in the indictment the four accused acting in common purpose conspired to procure the commission of and/or to commit robbery on Fritz Koch.

Count 3 alleged that the four accused were guilty of attempted robbery in that on or about 25 September 1997, and at or near Big Bend Barclays Bank in the Lubombo Region the said accused, acting in common purpose did unlawfully assault Fritz Koch and by intentionally using force and violence to induce submission by Fritz Koch attempted to take and steal from him the sum of E100 000, his property or in his lawful possession.

All the accused pleaded not guilty to all charges. They were convicted on Counts 1 and 3 and acquitted on Count 2. Extenuating circumstances having been found on Count 1, they were sentenced as follows:

Accused No. 1 was sentenced on Count 1 to 18 years' imprisonment and on Count 3 to 10 years' imprisonment. The sentences were ordered to run concurrently and were backdated to the date of his arrest. Accused Nos. 2, 3 and 4 were each sentenced on Count 1 to 15 years' imprisonment and on Count 3 to 10 years' imprisonment. These sentences were also ordered to run concurrently and were similarly back-dated.

The post-mortem report which was handed in by consent, indicated that the deceased died from haemorrhages from the neck due to a firearm injury. That firearm was established by the evidence to be a pistol which was an exhibit at the trial. In this regard the ballistics report, which was handed in by consent, showed that the spent cartridge found at the scene of the crime was discharged by the pistol which was an exhibit in the case. This is common cause . The death of the deceased was described by Dr. Timothy Phillip Nunn (PW1) who was then working at the hospital at Lubombo Sugar Estate as an employee of Illovo Sugar Estate. He saw the deceased, whom he knew, walk up the steps in front of the hospital holding a suitcase in his right hand and his neck with the other. It was obvious that he had been critically injured. Resuscitation was attempted but the deceased died within three minutes of his arrival. Dr. Nunn reported the death of the deceased to his employer Tambuti Estates.

Neither of the accomplices PW5 and PW6, to whose evidence I shall presently refer, saw the assault upon the deceased.

The Human Resources Manager of Tambuti Estates was R. Matsenjwa (PW2). . He testified that the deceased was the Administrative Manager of Tambuti Estates. His job, inter alia, was to attend to the paying of salaries. On 25 September 1997 the deceased was to collect the money from Barclays Bank at Big Bend in order to pay the workers. He thought that the amount involved was over E100 000. The deceased went to the bank at Big Bend in a company vehicle which was a white

Toyota Corolla. He received a report that the deceased had been shot and passed away at the hospital but that the money was intact.

He knew accused No. 2 who was employed by the company at its laboratory pest control administration.

On the day when the deceased met his death, a night watchman, Henry Cele (PW3), who resided at Big Bend, saw two men running. One was wearing a denim cap and a denim shirt and white and black sandshoes. The other was wearing a white T-shirt which had a brownish colour on the chest and brown trousers and light brown shoes. He became suspicious, and chased after them but the one in front then shot in the air with a "short gun" causing the witness to retreat to his room. He was not able to identify any of the accused.

Hezekiah Masuku (PW4) was working at the Lubombo Sugar Hospital on the day when the deceased met his death. At about 11.30 a.m. he was at Barclays Bank Big Bend. As he was walking towards the bus rank he heard a gunshot which caused him to look back and he saw a white Toyota Corolla driving off at high speed towards the hospital while two men were unsuccessfully attempting to board it. The men gave up the attempt and walked back. He noticed that one of the men put a revolver or "short gun" into his pocket. He noticed that one of the men, who was coffee coloured in complexion, was wearing a "jean shirt". He was not able to identify these men.

On the evidence which I have briefly outlined so far it can safely be inferred that it was the deceased who was driving the white Toyota Corolla towards the hospital after a shot had been fired and the two unidentified men had unsuccessfully attempted to board the vehicle.

The identity of those two men, their involvement in the case, and the involvement of the other accused appears from the evidence of the two accomplices, Lucky Sihlongonyane (PW5) and Sabelo Louis Dlamini (PW6) who substantially corroborate one another although there are undoubtedly discrepancies on matters of detail between them and also in each of their evidence. The discrepancies were made much of by and on behalf of the appellants. I do not intend to refer to the evidence in detail but I shall summarise it broadly.

Before doing so I shall say a word about accomplice evidence in general. Because an accomplice usually has an intimate knowledge as to how the crime has been committed a Court must not on that account assume that his implication of an accused person is reliable. To do so is to fall into what has been described as "a trap for the unwary". There are a number of reasons why the evidence of an accomplice should be approached with caution. They include a desire to exculpate himself and implicate another as well as the hope of obtaining immunity from prosecution. However the evidence of an accomplice may corroborate another but they remain accomplices and the need for caution is not displaced.

There is one unusual feature about the evidence of the accomplices in this case which, if anything, tends to strengthen not weaken their evidence. Neither claimed to have witnessed the crime itself. As I shall presently show, PW5 did not carry out his task

of being a party to the operation as he had to return home on other business, while PW6 had arranged to meet accused Nos. 1 and 3 after the robbery. They did not appear at the designated spot causing him to return home. Later accused No. 1, according to his evidence, reported what had occurred.

PW5 knew accused No. 4 as a policeman and accused No. 1 who was a friend of PW6. He came to know the other accused in August 1997. The idea of the robbery at Tambuti was first suggested to him by accused No. 4 in the presence of PW6 and it was further discussed with accused No. 1 on the same day when it was agreed that they needed a gun to commit this crime.

The robbery was planned for 25 September 1997 for that was the day when the workers would be paid. That information was obtained from Boy Simelane (accused No. 2) who also informed them that a white man would obtain the money from the bank at Big Bend and described the car which he would be driving. Accused No. 2 also informed them that the amount to be drawn that day would be about E80 000 as casual workers were also due to be paid.

The initial plan, according to PW5, was that he, accused No. 1 (Shakes) and PW6 would commit the robbery but, in order to strengthen the party, accused No. 3 became involved and agreed to take part.

Accused No. 4 supplied the gun which he obtained from a teacher at Bethany (Jabulane David Bhembe, PW7). He waited in the car while accused No. 4 obtained the gun which he described as a small brown gun the bullets being inserted underneath the gun. He identified the pistol exhibited as being like the gun which accused No. 4 had obtained from PW7. Accused No. 4 also gave them a hand grenade which was to be used if a crowd chased them. The gun was to be used to frighten the white man and both were tested before the robbery was attempted. They also visited an inyanga to obtain strength for their mission. A number of plans for the robbery were made and jettisoned. The final plan was to take the white man's car, abandon it and then leave the scene in the car of PW6 who would be waiting. The final plan was to go to the bank into which the white man had gone and when he came out they would attack him, take him with his car, dump him along the way, dump his car and then speed off in PW6's car. Before the robbery they went on two inspections in loco of Tambuti Estate.

On the fateful day, according to PW5, he, PW6 and accused Nos 1 and 3 set off on their mission of robbery. They proceeded to Big Bend area with a hand grenade in the possession of PW5 and a gun in the possession of accused No. 1. He thought that accused No. 3 wore a two-piece overall with a white T-shirt and a denim cap. Accused No. 1 wore moccasin shoes and blue jean trousers.

On the way PW5 realised that he would be late for fetching some pre-school children and so he gave the hand grenade to accused No. 3, showed him how to use it and left the party.

According to PW5 the final plan was to attack the white man as he came out of the bank but if that failed they were to get into his car and attack him there. They had

been instructed by accused No. 4 as to how to use the gun and the hand grenade.

The intention was that the proceeds of the robbery would be divided amongst accused No. 1,2, 3 and 4 and PW5 and PW6.

PW5 left the scene, attended to the pre-school children and went home. The next day he heard and read that a white man had been shot in the area where the robbery was to take place. A few days after the incident accused No. 1 told him that he had tried to stop the white man while he was in the car but the white man did not stop and he accidentally shot at him.

At about this time he met accused No. 4 who told him not to worry as the police were not talking about anyone suspected of being involved.

In the course of an extremely lengthy cross-examination PW5 contradicted himself. It was suggested by counsel for accused Nos. 2 and 4 that he was lying. PW5 said that:

> *"…..it is my first time to give evidence and I might be missing some parts. I do extend my apologies to the Court."*

Those remarks do not suggest to me that the witness was a lying witness.

PW6 testified that the plan was first proposed to him by accused No. 4 who told him that the "deal" was to obtain money from Tambuti Estates when it was collected from the bank. He said that accused No. 1's half brother accused No. 2 worked at Tambuti Estates and this was later confirmed by accused No. 1 who told him that his brother had informed him that money was collected for Tambuti Estates by a white man who collected it from Barclays Bank at Big Bend. He then introduced PW5 into the planned robbery who agreed to take part. He confirmed the evidence of PW5 regarding a meeting with accused No. 2 who gave them the information about how the money would be collected by a white man and when various plans were discussed.

As to what happened further before the attempted robbery the evidence of PW6 is substantially in accordance with that of PW5.

At about 9.00 a.m. on the morning of the attempted robbery the party comprising PW5, PW6 and accused Nos. 1 and 3 set out for Big Bend having been told by accused No. 2 that the white man collected the money at about 11.00 a.m. PW6 said that accused No. 3 was wearing a blue two-piece overall and a jean cap, while accused No. 1 was wearing a brownish corduroy pair of trousers with a blue top. PW6 wore jeans, a black pair of trousers and black shoes. He agreed that PW5 had to go back as he was late for the pre-school children leaving PW6 and accused Nos 1 and 3. They were travelling in a yellow Cressida having given money to PW5 to board a kombi. They arrived at Big Bend at about 10.30 a.m. accused Nos. 1 and 3 alighted from the car but the white man only appeared after 12 noon. It was agreed that if the white man's car was not in the place where it had been parked (i.e. in the

yard of the bank) PW6 was to drive to a spot where they would meet him. Having observed that the white man's car was no longer where it had parked PW6 moved off to the spot where they had agreed to meet. They did not appear and, having waited for 30 minutes, PW6 drove off to Manzini as they had not appeared. He assumed that they had taken another route. When he arrived at Manzini he was telephoned by accused No. 4 and he informed the latter what had occurred causing accused No. 4 to say that something must have gone wrong.

On listening to the 7.00 p.m. news on television that night PW6 heard that a white man from Tambuti Estates had been shot at Big Bend. The news shocked him and he informed PW5 of what he had heard on the following morning.

They saw accused No. 4 that morning who told them not to worry as no one had been caught.

After a few days he and PW5 met accused No. 1 at the Trade Fair who explained to them what had happened. His evidence on this point is somewhat more detailed than that of PW5. He said that as the white man came to his car accused No. 1 pointed a gun at him. This was ignored by the white man who got into the car causing accused No. 1 to fire a warning shot through the window but the white man drove off "in a rough manner". He confirmed the evidence of the security guard that he and accused No. 3 were chased by the security guard while they were running away causing him to fire a shot in the air. That evidence is entirely consistent with the evidence of the security guard PW3.

PW6 was asked why he had taken a gun and he replied that when one commits a robbery it is necessary to frighten people. The gun had been loaded with ammunition by accused No. 4 who was knowledgeable about guns.

As I have indicated earlier there are discrepancies on matters of detail between PW5 and PW6 the latter suggesting that the former had mixed up certain events. But the essentials of their stories are the same.

Jabulane David Bhembe (PW7) testified that he had given accused No. 4 a gun which had been left at his home by one Simo. He was asked whether he would be able to recognise the firearm. He replied in the negative "as I did not take notice of the firearm and I am not used to firearms." In fact he did not know "what is a revolver and a shotgun, the difference of those guns because I do not know of guns." He thought that the exhibit shown might be the gun but confirmed in cross-examination that he was not familiar with guns. He was then shown pictures of a revolver and a pistol and he thought that the gun which he had given to accused No. 4 was a revolver. But his answer does not seem to me to carry any weight in view of his professed ignorance on the topic.

The person from whom PW7 testified that he obtained the firearm gave evidence as PW8. He was Simo Danford Shongwe . Counsel for the Crown had difficulty in leading the evidence of this witness, who is the brother-in-law of accused No. 4, because he claimed that his evidence was in sharp contrast to what he had told the police. He applied to have him declared a hostile witness but it is not clear from the

record whether the application was granted or not. However, counsel for the Crown cross examined him on his previous inconsistent statement. He admitted that his signature appeared on the statement but that that was not the statement which he had made: it differed in material respects.

In the High Court he admitted that he had left a firearm with PW7 but that firearm was a revolver not a pistol. Moreover on the day of the offence he, the witness, was in possession of the firearm not PW7 nor accused No. 4. His evidence is not worthy or credence.

According to the evidence of Mabandla Ewert Dlamini (PW9) he gave five bullets to accused No. 1 and PW6 in September 1997. They wanted the bullets for a 7.65 mm gun and they required them for an undisclosed "prophecy'.

The witness Moses Muzi Lukhele (PW10) knew accused No. 1 as Shalambe. Around April 1997 he asked accused No. 1 if he could obtain a firearm for him. In September or October of that year accused No. 1 told him that he had a firearm for him which they tested and which he bought for E350 giving accused No. 1 E300 at the time. He identified the pistol exhibited as the very firearm which he had obtained from accused No. 1. He obtained seven bullets from a Mr. Dlamini to whom he had been referred by accused No. 1. He handed over the firearm to the police.

Superintendent Ndlangamandla (PW12) gave evidence that he had obtained the 7.65 mm Star pistol from PW10 together with seven live rounds of ammunition. The pistol was the one which was an exhibit and which had been identified by PW10 as the one which he had obtained from accused No. 1. It was from that pistol that the fatal injury was inflicted. He arrested accused Nos. 1, 2, 3 and 4. The latter two revealed the name of accused No. 1 and also David Bhembe. He also arrested the two accomplices PW5 and PW6. In the course of his evidence he explained that a pistol is loaded by a magazine from below whereas a revolver is loaded "in the holes that appear" which he also called a magazine.

All four accused gave evidence under oath. Accused No. 1 said that he knew the second accused in 1997 but denied that he had ever visited him in the company of PW5 either at his work or at his home. He knew nothing about the obtaining of the firearm or ammunition, nothing about the planning of a robbery, nothing about the killing of a white man. He denied further that he had told PW5 and PW6 how the white man was shot. He also denied the whole of Moses Lukhele's evidence implicating him.

Accused No. 1 admitted in cross-examination that he knew both the accomplices as well as Moses Lukhele. The latter was a frequent passenger in his taxi. He was on good terms with all of them with whom he had never quarrelled. He knew all the other accused, accused No. 2 being related to him. He denied every piece of evidence from every witness who implicated him in any way.

Accused No. 3 adopted a similar stance in which he denied all the evidence implicating him including his alleged visit to a traditional healer. He only met PW5 and PW6 for the first time in April 1998, i.e. seven months after the crime, which

raises the question as to why they should implicate him. Later he said in cross-examination that he had seen PW5 and PW6 before his arrest in April 1998 but had never been introduced to them. He also claimed to have met accused No. 4 for the first time on 1 April 1998 which is quite inconsistent with the Crown evidence.

He admitted being unemployed in September 1997 which lends some credence to the evidence of PW6 that he was unable to pay his rent and asked for financial assistance after the attempted robbery. He denied that he had told PW6 and accused No. 1 (PW6's evidence) that he had had bad dreams about a white man being killed at Big Bend and that he needed to go to prophets in his church for holy water but he admitted that there were prophets in his church.

Accused No. 2 gave evidence after accused No. 3. He too denied all the evidence against him. In particular he denied that he had shown anyone the office of the deceased or his car or given any information for the planned robbery. He said that he saw PW5 and PW6 for the very first time at the trial. This raises an inherent improbability in his evidence: why should they implicate him? He admitted that the workers were paid on Fridays but he claimed not to know whether they were paid in cash or by cheque. This, too, seems unlikely. He knew the deceased and knew that he was involved in paying the workers but denied that he knew the deceased's car.

Accused No. 4 also denied all the evidence against him. He denied that he had ever shown any of the Crown witnesses a pistol which he had obtained from the teacher PW7 but he claimed that the teacher had given him a revolver "on one of the days". He denied that he had ever taught anyone how to use a hand grenade or a firearm.

He admitted knowing PW6 before the crime and that they were on good terms. He denied that when he went to fetch the firearm he was with PW5. He denied the whole of the Crown evidence implicating him in the crime as well as all the evidence as to what he said and did after the crime was committed.

The Trial Court has given detailed reasons for accepting the evidence of the material Crown witnesses and rejecting that of the accused. I am unpersuaded that there are adequate grounds for disagreeing with that conclusion. I have not lost sight of the fact that PW5 and PW6 are accomplices and I have borne in mind the discrepancies in their evidence.

So far as the question of common purpose is concerned, it is clear from the Crown evidence that accused Nos. 1, 3 and 4 knew that a gun and a hand grenade could be used for the robbery to achieve their purpose. As far as accused No. 2 is concerned he was clearly a party to the robbery and there is adequate evidence that he knew that a gun and a hand grenade could and would be used and for that reason he was correctly convicted of murder as well as attempted robbery.

Although accused No. 4 was not present when the crime was committed he was, on the Crown case, the mastermind behind the crime. He had trained the others in the use of the firearm and the hand grenade and knew that they were intended to be used.

Shortly expressed the law of common purpose may be stated as follows. Where two

or more persons conspire for an unlawful purpose each one is liable for the acts of the other if what was done was known or ought to have been known would be the probable result of their endeavours. On the evidence it is accused No. 1 who fired the fatal shot. Accused Nos. 2, 3 and 4 knew that it was intended to use a firearm to commit the robbery. Although there is no evidence that any of them had the actual intention of killing the deceased they must have appreciated the danger of him being killed when a firearm would be used to frighten him. I consider, therefore, that the case of attempted robbery has been proved against all the accused and murder on Count 1 proved against accused nos. 1, 2, 3 and 4.

I should add this. In dealing with common purpose the trial court referred to the remarks of Browde, JA in ***PATRICK WONDERBOY V THE KING*** appeal case 25/1999:

> "In *casu* *it is as I have said, clear beyond reasonable doubt ……..that Mdluli's use of the revolver was not only predictable but that it was intended by both accused to rob the deceased at gun point."*

……
…

In the same case Van den Heever J.A. cited ***R vs NDHLANGISA & ANOTHER 1946 AD 1101*** in which DAVIS, A.J.A. remarked:

> *"If a number of persons go for the purpose of robbery to a shop, armed with revolvers, then each must……..anticipate that a revolver would naturally be used and the shopkeeper be shot".*

Van den Heever, J.A. went on to say:-

> *"In the circumstances the inference seems to me to be inescapable that appellant must have foreseen the possibility – even the probability – of Phillip using the revolver if any person, whose premises they entered for the purpose of stealing or robbery, showed unexpected reluctance to part with his money or tried to impede their escape, that he was reckless whether or not this foreseen possibility materialised. Consequently appellant was rightly convicted of murder."*

The sentences passed were appropriate in all the circumstances. No proper basis exists to interfere with these sentences.

In the result the appeals must fail and the convictions and sentences must be confirmed.

R.N. LEON, JP

I AGREE **P.H. TEBBUTT**

I AGREE **C.E.L. BECK, JA**

DELIVERED at Mbabane this……day of June, 2002