IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE — Criminal Appeal Case No. 1/2005

In the matter between

THE KING

and

KENNETH GAMEDZE	1st Appellant
SABELO MAZIYA MADALA	2nd Appellant
MATSENJWA	3rd Appellant

Coram	BROWDE, A.J.P TEBBUTT, J.A. ZIETSMAN, J.A.
For Appellant	Mr. S. Bhembe
For Respondent	Ms. N. Lukhele

JUDGMENT

TEBBUTT JA

[1] The three appellants were charged in the High Court before Annandale ACJ with murder, armed robbery and in the case

of 2nd appellant, with the unlawful possession of arms and ammunition. The first two charges arose from the hi-jacking of a motor vehicle during which the driver was shot and killed.

[2] The 1st and 2nd appellants were both convicted of murder and robbery and were each sentenced to 20 years imprisonment on the murder charge (the trial Court having found extenuating circumstances to exist) and 15 years on the robbery charge, the sentences to run concurrently. 3rd appellant was acquitted on the murder charge but convicted on the charge of robbery and sentenced to 15 years imprisonment. 2nd appellant was convicted on the charges of being in unlawful possession of (a) a firearm and (b) ammunition and sentenced on the first count to a fine of E5 000 or 5 years imprisonment, half conditionally suspended, and on the second count to a fine of El 000 or 1 year's imprisonment.

[3] All three appellants now come on appeal to this Court against both their convictions and their sentences.

[4] Although, as will appear later in this judgment, this Court differs from the learned Acting Chief Justice on two aspects of this matter, his judgment is a

comprehensive one. In it he has set out fully and in detail the evidence, both of the Crown witnesses and the defence and has carefully analysed that evidence before making the factual findings upon which he based his conclusions as to the guilt of the appellants.

[5] It would be purely repetition and a work of supererogation if I were to set out again the detailed evidence recorded at the trial. I adopt, with acknowledgement to the learned trial Judge, his comprehensive setting out of that evidence. He also summarised the evidence for the purpose of making his factual findings. Again, I am content to refer to that summary, expanded briefly where necessary, as the factual background to this matter, which is the following:

[6] The main witness for the Crown was an accomplice, who testified as PW1. He stated that on 9 February 2001 he was asked by the three appellants for information about a Toyota 4 x 4 Double Cab bakkie. This vehicle belonged to the Forestry Section of the Ministry of Agriculture and Cooperatives and was used by the deceased, Mthunzi Dlamini, who was an employee in the Ministry. On the following day PW1 and

the three appellants met again, this time at the house where the 3rd appellant lived. The 1st appellant said that he had a buyer for the Toyota in Maputo in Mocambique and it was then decided to hijack the vehicle later that day.

[7] The four of them then sought the services of an Inyanga, or traditional healer, to ensure the success of their mission. Evidence was given by PW1 and the Inyanga (PW2) as to what occurred at her house. I need not detail it here. The four then returned to 3rd appellant's residence. PW1 said that along the way he noticed a bulge in the waist-band of 1st appellant. He asked 1st appellant what it was. The latter said it was a firearm. PW1 said all then discussed the vehicle and that the owner of it would have to be robbed by force. PW1 added that "it was agreed that the motor vehicle must be taken by force only without using a firearm".

[8] PW1 and the 3rd appellant then went to the residence of the deceased to check if the vehicle was there. It was not and they reported this fact to the 1st and 2nd appellants, who told PW1 and the 3rd appellant that they (1st and 2nd appellants) would "take the vehicle" and instructed PW1 and the 3rd

appellant to stand back. The latter then took no further part in the attack.

[9] The vehicle driven by the deceased and in which the deceased's wife, who gave evidence at the trial as PW6, then arrived on the scene. The deceased got out of the vehicle to open the gate leading to his residence when 1st and 2nd appellants rushed to the open driver's door of the bakkie. The deceased ran back to the vehicle but 1st and 2nd appellants, said PW1, blocked his way. A scuffle ensued and two shots were fired, one fatally wounding the deceased. 3rd appellant then ran to the vehicle as did PW1 who said that 1st appellant ran towards the car brandishing a firearm which, PW1 said, he pointed at PW1. 1st appellant shouted "Voetsak" at him and ordered him to get into the bakkie. The deceased was lying on the ground with blood coming from his head.

[10] PW1 then said: "Accused 2 then suggested that we leave the motor vehicle and abandon it as is because it looks like we have killed the person". I have quoted this sentence verbatim because of the finding of the learned trial judge as to the 2nd appellant's participation in the actual hi-jacking of the vehicle, with which I shall have to deal in due course.

[11] The deceased's wife had by this time fallen out of the vehicle. 1st appellant, said PW1, then said that they cannot leave the motor vehicle after they "had obtained it" and had "successfully obtained a deal" and asked if 2nd appellant was insane. The latter then reversed the vehicle and they all drove away in it.

[12] The four men then took the vehicle to Lomahasha, a village near the Swaziland-Mocambique border, where the vehicle was hidden while arrangements were made by 1st and 2nd appellants to get the vehicle into Mocambique. They reported that these had not been successful due to difficulties at the border.

[13] On the following day i.e. Sunday, 11 February 2001, the vehicle was moved closer to the border where it was again hidden. The vehicle had, however, run out of fuel. 1st and 2nd appellants obtained some fuel from an unknown man. He, PW1 and the three appellants drove towards an illegal crossing point on the border between Mocambique and Swaziland, with 2nd appellant doing the actual driving. The unknown man dismounted along the way and two other men, also unknown to PW1, got in.

[14] As the six of them were travelling along the road they were about to pass a stationary white Opel Astra motor car which one of the two strangers identified as a police vehicle. As they passed this vehicle one of the police officers opened fire on the Toyota bakkie. The 2nd appellant drove on for a short distance but then stopped the vehicle and all six of its occupants ran away into the bush, abandoning the vehicle.

[15] PW1 said he then asked permission to go home, which the others reluctantly granted him.

[16] The deceased's wife, PW6, described how her husband was shot after he left their vehicle and had opened the gate to their residence and while she was still sitting in the bakkie, she opened her door and fell from the vehicle, which was then driven off by the attackers.

[17] The Crown also called a witness, who was regarded by the trial Court as an accomplice, and who testified as PW3. He is a resident of Lomahasha. He stated that he was asked by 1st appellant to help him smuggle a vehicle into Mocambique. He agreed to do so. He described how the first attempt to

smuggle the Toyota across the border was unsuccessful and that on the Sunday while taking the vehicle to an illegal crossing point, they were fired on by Police Officers in a white Opel Astra car when they were in the process of driving past it. The driver of the Toyota, the 2nd appellant, stopped the vehicle and they all ran from it on foot abandoning it where it had stopped. One of the Police Officers who had been in the Astra also gave evidence. He said he knew the 2nd appellant well, the latter coming from the same town as he did. He recognised 2nd appellant as the driver of the Toyota bakkie when it drove past them and they shot at it.

[18] The three appellants and PW1 were all subsequently arrested, PW1 thereafter agreeing to testify for the Crown, as did PW3.

[19] At their trial all three appellants gave evidence and all three denied any complicity in the robbery or the murder. The 2nd appellant also denied having been in possession of any firearm or ammunition. I shall deal with the evidence in regard to these charges when I come to deal with them later herein.

[20] The trial Court placed much reliance in convicting the appellants on the evidence of PW1. In his judgment Annandale A.C.J., correctly, in my view, carefully set out the criteria by which an accomplice's evidence has to be evaluated and the caution which has to be applied in the Court's evaluation of such evidence, citing applicable authority in support thereof. That he approached the evidence of PW1 with the requisite caution is manifest from the learned Judge's careful consideration of the evidence, including any discrepancies between PWl's evidence and that of other Crown witnesses. He then made the following finding in regard to the evidence of PW1.

> "*The cross examination of PW1 was exhaustive, prolonged and intensive. Throughout this all, he remained calm, collected and unruffled. His answers were to the point and he never made a negative impression by trying to be evasive or being contradictive. He readily conceded his role in the criminal activities he had been called to testify about - how he and the third accused were initially taken along to the* inyanga *and the subsequent events, how*

> *he had to establish the whereabouts of the vehicle that was the object of the exercise and how it came about that the driver was shot and the efforts to get the vehicle into Mocambique.*"

[21] The learned Judge added:

> "*The evidence of (PW1) is credible and believable. It is also corroborated in many material respects, which corroboration implicates the accused persons independently from (PW1).*"

[22] He then gave examples of such corroboration. I need not set these out. Suffice to say that from a reading of the evidence it is clear that the examples cited by the learned Judge are sound and bear out his finding that PWl's evidence was corroborated in material respects implicating the appellants.

[23] At the hearing of the appeal in this Court, Mr. Bhembe for the appellants, in a well prepared argument - and I would add that the Court also received helpful assistance from the able argument of Ms Lukhele for the Crown -challenged the trial Court's finding as to the credibility of PW1. He did so by pointing to certain inconsistencies between the evidence of PW1 and that of other

Crown witnesses. For example, PW1 said that when the 1st and 2nd appellants confronted the deceased there was a scuffle between them and the deceased during which he was shot whereas PW6, the deceased's wife, who was a witness to the shooting, did not mention any scuffle. Then, so Mr. Bhembe argued, there were inconsistencies between PW1 and PW2, the Inyanga, as to what had happened during the visit to her residence.

[24] These and other inconsistencies referred to by Mr. Bhembe are really minor in nature and do not detract in the least from the evidence as a whole. It is unquestionable that the deceased was shot near the gate to his residence. Apart from PW6's evidence as to this, it was there that the police found his body and it was there that the police found two cartridges. What does it matter then that PW1 says there was a scuffle while PW6 does not mention one? PWl's evidence, corroborated by the factors I have mentioned, cannot on this aspect be discarded as a whole because of this insignificant inconsistency between him and PW1. It is well known to our Courts that there are frequently some inconsistencies in the evidence of two or more witnesses. Witnesses hear or

see events from different perspectives. Then too, their evidence is usually given months or even years after the events when their memory of them has faded to some extent, particularly in regard to minor details of them. As Annandale A.C.J, correctly remarked -

"*It has to be borne in mind that different people do in fact observe the exact same event from different perspectives forming different opinions and recollections of what has actually happened.*"

[25] In MLIFI v KLINGENBERG 1999(2)SA 674 (LCC) at 697 para 80, MEER J referred to a lecture by NICHOLAS JA (Published in 1985 SALJ at 32) wherein he quoted Dr. William Paley, an 18th century Philosopher, who said:

> "*I know not a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity of the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of the courts of justice teaches. When accounts of a transaction come from the*

mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. The inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the Judges. On the contrary a close and minute agreement induces the suspicion of confederacy and fraud."

[26] Mr. Bhembe contended that this Court should reject PWl's evidence in *toto.* He was, however, constrained to concede that this would result in the Court's having to find that the crimes in question were not committed by the appellants at all but by other people altogether. This suggestion is fanciful, to say the least. It would mean the Court having to find that the police had coached PW1 in every detail of his evidence and had similarly "schooled" the other witnesses who gave evidence corroborating that of PW1. This is all too far-fetched to merit any serious consideration whatsoever.

[27] It also flies in the face of the evidence of PW3 and the Police Officer who recognised 2nd appellant as the driver of the car before it was abandoned. Mr.

Bhembe invited us to reject the evidence of both these witnesses on grounds which I find so flimsy as again not to merit serious consideration.

[28] I can therefore find no basis for disturbing the trial Judge's finding that PW1 was a credible witness. A careful reading of the record convinces me that he was correct in this regard. In addition the trial Judge had the benefit of seeing the witness and noting his demeanour. A finding of credibility by a trial Court is not lightly upset by a Court on appeal. It is clear from the totality of the evidence that the deceased was shot by 1st appellant and that the trial Court correctly convicted him of murder. Indeed Mr. Bhembe, except for his fanciful suggestion that these crimes were committed by people other than the appellants, did not seriously contest this finding.

[29] Nor did Mr. Bhembe contest the convictions of 1st and 2nd appellants on the count of robbery, should the Court uphold the trial Court's finding that PW1 was a credible witness whose evidence should be accepted, which I have done.

[30] Mr. Bhembe did, however, challenge the conviction of the third appellant on the robbery charge. He argued that

whatever part 3rd appellant may have played earlier, the initial plan changed at the scene when 1st and 2nd appellant told PW1 and 3rd appellant to move aside and not participate in the actual attack on the deceased. At that stage, so Mr. Bhembe's argument went, 3rd appellant ceased to be a participant in the robbery. 3rd appellant was, however, convicted on the basis of his having made common purpose with 1st and 2nd appellants in robbing the deceased. It must be remembered that he was present when it was planned to rob the deceased of his vehicle. It was he and PW1 who went to reconnoitre the scene and see whether the vehicle was there to be hijacked. He stayed, waiting in hiding until 1st and 2nd appellants had hi-jacked the vehicle, and then immediately ran to join the others in the car at a stage when, if he no longer wanted to be involved, he could have run off. He went with the others in the vehicle to Lomahasha and was with them, apparently of his own volition according to PW1, when the attempt was going to be made to smuggle the vehicle into Mocambique. In my view all this points unquestionably to his making common purpose with the others in the robbery, even though he did not take part in the attack on the deceased. It was the latter fact that

secured him his acquittal on the murder charge but he was in my view clearly correctly convicted on the robbery count. His appeal on this count must therefore fail.

[31] I turn next to consider whether 2nd appellant was correctly convicted on the charge of murder.

[32] It is clear, as I have found, that it was 1st appellant who shot the deceased. Now it is well-established that where two or more persons set out to commit a robbery and one of them is armed with a loaded firearm and the others know of this, they must be held to reasonably expect that in the event of resistance by the victim of the robbery - or perhaps even without it - the firearm will be used in order to accomplish their purpose. They become *socii criminis* with the actual user of the firearm. It is necessary, though to prove that they knew of the presence of the firearm at the time of the robbery.

[33] In the present case PW1 said that he was told by the 1st appellant, when he noticed the bulge in the waist band of the latter's pants, that it was a firearm he was carrying. This, according to PW1, was said in the presence of 2nd appellant. That, however, occurred on 9

February 2001 after the four of them had been to the Inyanga. PW1 did not say that he saw the firearm in 1st appellant's possession when they set out on their mission to rob the deceased i.e. on the following day, which was 10 February 2001. There is no evidence that at that time 2nd appellant was aware that 1st appellant was carrying a firearm. Indeed, it will be recalled that PWl's evidence was that it was agreed by them all that "the motor vehicle must be taken by force only without using a firearm". The learned trial Judge found that as 2nd appellant knew on 9 February 2001 that 1st appellant had a firearm in his possession at a time when they were planning the robbery, he was aware that 1st appellant had it with him when the actual robbery took place. This is an inference which I do not think can necessarily be drawn particularly in the light of there being no direct evidence in this regard and bearing in mind the agreement that no firearm was to be used in the attack.

[34] The learned trial Judge, in convicting the 2nd appellant for murder on the basis of a common purpose, also referred to the fact that according to PW1, 2nd appellant said after the shooting of the deceased that they should abandon the vehicle "because it

looks like we have killed the person." I have underlined the word "we" because the learned trial Judge emphasised it. That "we", he felt, related to himself (2nd appellant) and 1st appellant. This is not necessarily so. PWl's evidence in this regard was given in the form of a lengthy narration uninterrupted by any questions by counsel. In that narration he used the word "we" consistently throughout to refer to the four of them i.e. the three appellants and himself in his description of the events, stating in respect of them what "we" did. That 2nd appellant may also have used the word "we" in relation to all four of them who were involved in the robbery when he said "it looks like we have killed the person" cannot be discounted.

[35] In my view it has not been established beyond reasonable doubt that 2nd appellant was aware that 1st appellant was armed when the actual assault on the deceased occurred and that there was therefore a common purpose between him and 1st appellant in the fatal shooting of the deceased, (cf S v MAGWAZA 1985(3) SA 29(AD) where a similar conclusion was reached even where a co-robber knew that the robber had a firearm but did not know that it was loaded).

[36] It follows that the 2nd appellant's appeal against his conviction on the charge of murder must succeed.

[37] I come finally to the allegations that 2nd appellant was found in possession of a firearm and ammunition.

[38] The evidence was that a group of seven Police Officers on 9 March 2001 i.e. a month after the hi-jacking events, stopped and entered a bus in which 2nd appellant and others were travelling. One of these Police Officers, Detective Inspector Ndlela (PW10 at the trial) testified that he searched 2nd appellant and in the front of his trousers found a loaded 9mm pistol. He then arrested him. 2nd appellant denied this. He stated that he had already been taken out of the bus when Ndlela emerged with the pistol from the bus saying that he had found it in the bus and that he had seen 2nd appellant drop it there. 2nd appellant called a witness Macososo Kunene who, he said, would support his version. Kunene said that he and 2nd appellant were ordered out of the bus by the police who had boarded it and told to lie on the ground. While there a further three officers entered the bus and soon thereafter exited it holding the firearm.

[39] Although this evidence, as the learned trial Judge himself stated, seems to support the version of the 2nd appellant, he rejected it and 2nd appellant's evidence on the basis of a conflict between them: Kunene saying that it was one of the second group of three policemen who found the gun whereas 2nd appellant said that Ndlela remained inside the bus when he was taken outside and it was Ndlela who then came out with the firearm.

[40] The learned trial Judge rightly states that the Crown did not call any' witnesses to corroborate Ndlela's version although it was challenged by the defence and although there were a large number of policemen present as well as other passengers in the bus who could have done so. No reason was given by the Crown as to why none of the policemen were called. He also rightly states that in such circumstances an adverse inference against the prosecution could be drawn.

[41] The learned Judge, however, found that *in casu* such an adverse inference need not be drawn for although Ndlela was a single witness his evidence could be relied upon where the opposing evidence is patently false and is rejected. Moreover, no reason had been

advanced as to why Ndlela's evidence should be disbelieved.

[42] In S v LESOTO 1996(2) SACR 68(0) it was held that the Court should guard against requiring an accused to explain why a Crown witness should be disbelieved.

[43] This aside, however, there are here two conflicting versions as to what occurred. Although there is obviously a material discrepancy between 2nd appellant and his witness as to who found the firearm they both agree that it occurred when 2nd appellant was not in the bus but outside it, in conflict with Ndlela's version.

[44] Where there are two mutually conflicting versions, as is the present case, and where the onus is on the Crown, which it is here, before that onus is discharged it must be established that the evidence of the Crown witness is true and that of the defence is false. It is not enough to say the latter is unsatisfactory. It must be clear to the Court that the version of the Crown witness is the true version (see e.g. NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION v GANY 1931 AD 187 at 189; R v M 1946 AD 1023 at 1026). Moreover, a failure to call witnesses who may have been able

to elucidate the facts operates against the party on whom the onus lies, in *casu* the Crown. (See ELGIN FIRECLAYS LTD v WEBB 1947(4) SA 744(AD) at 750; BRAND v MINISTER OF JUSTICE & ANOTHER 1959(4) SA 712(AD) at 715). In the absence of the Crown having called any corroborative evidence from any of the policemen who were present at the time, I do not think it has been established beyond reasonable doubt that

Ndlela's version is the true one. 2nd appellant is entitled to the benefit of that doubt. His appeal on the counts of unlawfully possessing a firearm and ammunition must thus also succeed

[45] On the question of sentence, Mr. Bhembe submitted that the sentences of 20 years for murder and 15 years for robbery were excessive and should be reduced. Annandale ACJ considered what the appropriate sentences should be with care. In doing so he said this:

> "*What cannot be discounted is that an innocent man was shot and killed with no regard to the consequences. He was robbed of his vehicle and that was bad enough. There was no reason for the robbers to also shoot him. Vehicle hijackings has become a*

scourge of enormous proportions, an evil that will not be tolerated in any decent society. If not for stiff sentences, in the few instances where the perpetrators are brought to book, the Court will fail in its duty. The perpetrators of such heinous crimes as the present have to be removed from society."

[46] I completely agree with those remarks as well as his additional remark that the appellants should not be treated with kid gloves. In my view, the sentences passed were condign and I can find no ground for interfering with them, bearing always in mind that sentencing lies, in the first instance, within the discretion of the trial Court and will not be lightly interfered with by the Court of Appeal.

[47] In the result the following orders are made.

1. <u>As to First Appellant</u>

1.1 First Appellant's appeal against his convictions on the charges of murder and robbery are dismissed and the convictions confirmed. His appeal against the sentences fails.

1.2 The sentences of 20 years and 15 years imprisonment, to run concurrently and backdated to 9 May 2001, are confirmed.

2. As to Second Appellant

2.1 Second Appellant's appeal against his conviction on the charge of murder succeeds and his conviction and sentence on this charge are set aside.

2.2 Second appellant's appeal against his convictions on being in unlawful possession of

(a) a firearm and (b) ammunition succeeds and his convictions and sentences on those charges are set aside.

2.3.1 Second Appellant's appeal against his conviction on the charge of robbery is dismissed and his conviction on this charge is confirmed.

2.3.2 His sentence of 15 years imprisonment on the charge of robbery, backdated to 9 May 2001, is confirmed.

As to Third Appellant

3.1 Third Appellant's appeal against his conviction on the charge of robbery is dismissed and his conviction on this charge is confirmed.

3.2 His sentence of 15 years imprisonment on the charge of robbery, backdated to 16 March 2001, is confirmed.

P.H. TEBBUTT
JUDGE OF APPEAL

I agree

J. BROWDE
ACTING JUDGE PRESIDENT

I agree

N.W. ZIETSMAN

JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 15™ DAY OF MAY 2006