



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 16/2011

In the matter between

JABULANI MZILA DLAMINI

First Appellant

MFUNDO JELELE DLAMINI

Second Appellant

And

REX

Respondent

Neutral citation: *Jabulani Mzila Dlamini and Mfundo Jelele Dlamini v Rex (16/2011) [2012] SZSC 61 (30 November 2012)*

Coram: RAMODIBEDI CJ, M.C.B. MAPHALALA JA, and OTA JA

Heard: 20 NOVEMBER 2012

Delivered: 30 NOVEMBER 2012

Summary:

Criminal law – Accomplice evidence - Appellants convicted on one (1) count of murder and another count of robbery and sentenced to 22 years and 16 years imprisonment respectively – Appeal against both convictions and sentences dismissed – Both convictions and sentences confirmed.

RAMODIBEDI CJ

[1] The appellants and one Mduduzi Xolani Matsebula, who later turned Crown witness as an accomplice (PW1), were indicted in the High Court on two charges, namely, murder and robbery respectively. It was alleged in count 1 that upon or about 4 July 2008, and at or near New Village area in the Manzini Region, each or all of the accused persons acting in furtherance of a common purpose did unlawfully and intentionally kill Phindile Nhleko (“the deceased”), thereby committing murder. In the second count it was alleged that on the same date, and at the same time, each or all of the accused persons acting in furtherance of a common purpose did, by intentionally using force and violence to induce submission by the deceased, take and steal from her person certain property, namely, a cellphone valued at E500.00 and cash in the sum of E160.00 being her property or in her lawful possession, thereby committing the offence of robbery.

[2] As indicated in the preceding paragraph, when the trial commenced on 30 March 2010, the Crown withdrew the charges against PW1 who then proceeded to give evidence as an accomplice witness.

[3] On 23 December 2010, the High Court (Hlophe J) convicted the appellants as charged. On 5 October 2012, the court *a quo* finally sentenced the appellants as follows:-

The first appellant : 22 years imprisonment

The second appellant : 16 years imprisonment.

[4] The appellants have appealed to this Court against both convictions and sentences recorded by the High Court. On convictions, they complain principally on the ground that the trial court relied on the single evidence of the accomplice witness (PW1).

[5] In outline, PW1's evidence was as follows. He knew both appellants. He first got to know the first appellant since 2007. The first appellant used to come to PW1's homestead with the latter's friend by the name of Sifiso. The first appellant and PW1 became "friends." Similarly, PW1 knew the second appellant as someone who used to sell cigarettes. In fact PW1 used

to come to the second appellant in the company of the first appellant and Sifiso to buy cigarettes.

[6] According to the evidence of PW1, it was the first appellant who hatched the plan to go on a spree of robberies. He testified that on 4 July 2008, the first appellant approached him. The two young men sat down and discussed the means of getting “some money.” The first appellant suggested that they should wait “until the sun sets and we will see a plan on how to get money.” On the same evening, they went drinking from place to place until they got to Emoyeni Bar. It was there that they joined the second appellant whom they found drinking alcohol.

[7] It was the evidence of PW1 that after they had finished drinking, the first appellant then said, “gentlemen now we must go and get some money.” He explained that they must go and get the money from “the houses of the people.” The first appellant was carrying a knife, and so was the second appellant. PW1 himself was carrying “a sharp object” made of iron.

[8] According to PW1, the young men approached one homestead but they found that there were still some lights on. The first appellant then cautioned, “no, let us not get in here because the people are still not sleeping.” At that point they proceeded to another homestead which turned

out to be the deceased's homestead. They entered. But the first appellant said that only himself and PW1 should enter the inner room as there were several of them. He instructed the second appellant to remain on guard outside. Chillingly, he further instructed the second appellant, "if anyone comes out, you stab him."

[9] Significantly, PW1 owned up to the fact that he was the one who kicked the inner door open. They entered the room. When the occupant of the room screamed with fright, the first appellant slapped her across the face and ordered her to keep quiet. This turned out to be the deceased. She had "a child and a smaller child." The older child was sleeping on the floor. The deceased and the smaller child were sleeping on the bed.

[10] When slapping the deceased across the face the first appellant, according to PW1, ordered her to sleep, adding, "we want money here." Terrified, the deceased immediately pulled out a wallet underneath her pillow. She gave it to the intruders. PW1 says that at that point he saw a black Motorola cellphone V360. He grabbed it and put it in his pocket. While this was going on, the deceased got up and ran away naked. Unfortunately, she was fatally stabbed by the man standing on guard outside, namely, the second appellant. PW1 saw blood flowing from the woman's abdomen. At that point the first appellant instructed the intruders to run away. They ran to

the market area where they produced the loot for the purpose of sharing it amongst themselves. PW1 produced the black V360 cellphone. The first appellant in turn produced the wallet which he had picked up from the house. It contained cash amounting to E160.00. This, they shared. Each took E50.00 but the first appellant took the lion's share of E60.00. He also told the others that he already had someone who would buy the cellphone for E250.00. On the following day he disclosed to PW1 and the others that the buyer in question was one Jubilee Dlamini (PW3). The latter subsequently confirmed this but said that he had no ready cash. He promised to pay at the month end. He, however, gave the young men two boxes of dagga.

[11] The record shows that PW1 withstood long and tedious cross-examination from the appellants' legal representative at the trial court. He was unshaken in his evidence which, as can be seen from the preceding paragraphs, implicated the appellants in material respects. It confirmed that the appellants and PW1 acted in furtherance of a common purpose.

[12] The first appellant gave evidence in his own defence. He denied all the allegations made against him by PW1. He raised an *alibi* but could not explain why it was not put to PW1 if it was true.

He duly identified it in Court. Indeed, the evidence of Det/Constable Ernest Fakudze corroborated PW3. It was his evidence that the first appellant explained that he had handed the cellphone to PW3. He duly led the Police to PW3 where the cellphone was retrieved. Similarly, it was his evidence that the second appellant pointed out to the Police the knife used to stab the deceased.

[16] Nomathemba Thandi Dlamini (PW2) in turn identified the cellphone in question as that of the deceased.

[17] The record shows that the Judge *a quo* carefully analysed the evidence. He was alive to the fact that the Crown case was largely based on the evidence of a single accomplice witness (PW1). He duly cautioned himself of the dangers inherent in the evidence of an accomplice witness. He thus looked for corroboration, which he found in three respects, namely, (1) the deceased's cellphone which connected the first appellant to the offences charged and (2) the knife which was traced to the second appellant as having been given to him by the first appellant. I am unable to find fault with the Judge *a quo*'s approach. He is supported by a plethora of authority such as **R v Ncanana 1948 (4) SA 399 (A)** at 405 – 406; **S v Hlapezula 1965 (4) SA 439 (A)** at 440 E – G where Holmes JA restated the law in these terms:-

“It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec.257 of the Code (our s 237) has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him:”

See also **Themba Dlodlu v Rex, Appeal Case No. 22/2011.**

[18] As will be remembered, the record shows that the accomplice (PW1) was the first appellant’s friend. Similarly, he was close to the second appellant.

They were found sleeping together when they were arrested on 17 August 2008. In these circumstances, therefore, the risk of a wrong conviction was greatly reduced.

[19] It follows from the foregoing considerations that the court *a quo* was correct in returning a verdict of guilty as charged on both counts in respect of both appellants.

[20] Turning now to sentence, it is trite that the imposition of sentence lies primarily within the discretion of the trial court. It is, however, a judicial discretion which must be exercised upon due consideration of the relevant factors. Unless there is a material misdirection resulting in a miscarriage of justice, an appellate court is generally loath to interfere. No such misdirection has been shown to exist in the present case. The appellants were convicted of very serious offences where an innocent life was unnecessarily lost. The first appellant played the leading role in the commission of the offences. Accordingly, the disparate sentences meted out by the court *a quo* were fully justified.

[21] In the result the appellants' appeals against both convictions and sentences are dismissed. The convictions and sentences recorded by the court *a quo* are confirmed.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

E.A. OTA
JUSTICE OF APPEAL

For Appellants : **In person**

For Respondent : **Mr M. Mathunjwa**