

IN THE HIGH COURT OF SWAZILAND

Criminal case no. 72/98

held at mbabane

in the matter between:

REX

VS

1. PIKINEVI SIMON MOTSA
2. SIFISO TIMOTHY MABUZA

CORAM:	MATSEBULA J
FOR THE CROWN:	MR. L. NGARUA
FOR THE ACCUSED NO.1:	MR. N.J. HLOPHE
ACCUSED NO.2:	MR. M. MAMBA

JUDGEMENT DATE

08/10/98

The two accused Pikinini Simon Motsa and Sifiso Timothy Mabuza are indicted on a number of counts set out below:

Count one: Murder charge - it is alleged that on or about the 23rd December 1996 and at or near Gege along the Sicunusa/Nhlangano public road in the Shiselweni District acting in common purpose did unlawfully and intentionally kill Nokwazi Margaret Nkabinde. Count two: Murder charge - it is being alleged that on or about 23rd December 1996 and at or near Sicunusa area in the Shiselweni District acting in common purpose did unlawfully and intentionally kill John Zondo.

1

Count three: Murder charge - the allegation being that on or about the 23rd December 1996 at or near Sicunusa in the Shiselweni District acting in common purpose did unlawfully and intentionally kill Sibongile Asiyena Kunene.

Count four: Murder charge against accused no.1 only. The allegation being that on or about the 11th February 1997 at or near Bethlehem in the Shiselweni District he did unlawfully and intentionally kill Almon Simelane.

Count five: Armed robbery - it being alleged that on or about the 23rd December 1996 and at or near Sicunusa /Nhlangano public road in the Shiselweni District the accused acting in common purpose did unlawfully and intentionally used force and violence to induce submission by Isaac Mphiwa Fakudze to the taking of E700.00 in cash. The accused threatened the said Isaac Mphiwa Fakudze that unless he consented to the taking by the accused of the said property they will there and there shoot him and did thereupon take and steal from the said Isaac Mphiwa Fakudze the said property in his lawful possession and did rob him of the same.

Count six: Attempted murder - it being alleged that on or about the 23rd December 1996 and at or near

Gege along the Sicunusa/Nhlangano public road acting in common purpose did unlawfully and with intent to kill shoot at Beauty Mhlongo.

Count seven: Armed robbery - it being alleged that they on or about the 2nd December 1996 at or near Sicunusa Border Post in the Shiselweni District acting with common purpose did unlawfully and intentionally used force and violence to induce submission by Daniel Hadzebe to the taking by the said accused of E300.00 in cash. Accused threatened the said Daniel Hadzebe that unless he consented to the taking by the accused of the said property they would then and there shoot him and did thereupon take and steal from the said Daniel Hadzebe the said property in his lawful possession and robbed him of the same.

Count eight: Accused no. 1 only is charged under the provisions of the ARMS AND AMMUNITION ACT 24/1964 (AS AMENDED) in contravention of Section 11(1) as read with Section 11(8) that is possession a .38 special revolver. It being alleged that on or about 13th February 1997 at or near Siphundu in the Shiselweni

2

District found in possession a .38 special revolver serial no. R367930 without a licence for the firearm.

Count nine: Accused no. 1 only is charged under the ARMS AND AMMUNITION ACT 24/1964 (AS AMENDED) in contravention with Section 11(1) read with Section 11(8) possession of one 12 bore bait. It being alleged that on or at about 13th February 1997 at or near Siphundu you were found in possession of this firearm without a permit or licence.

Count ten: Accused no.1 only is charged in contravention with Section 11(1) read with Section 11(8) of the ARMS AND AMMUNITION ACT 24/1964 (AS AMENDED) in that he possessed 1.22 gerard rifle. It being alleged that on or about 13th February 1997 at or near Siphundu you were found in possession of this firearm without a permit or licence.

Count eleven: Accused no. 1 only is charged with the contravention of Section 11(1) read with Section 11(8) of the ARMS AND AMMUNITION ACT 24/1964 (AS AMENDED) in that he possessed 32 live rounds of ammunition. It being alleged that on or at about 13th February 1997 at or near Siphundu you were found in possession of this firearm without a permit or licence.

Count twelve: Accused no.1 only is charged with the contravention of Section 11(3) read with Section 11(8) of the ARMS AND AMMUNITION ACT 24/1964 (AS AMENDED) in that he possessed one magazine. It being alleged that on or at about 13th February 1997 at or near Siphundu you were found in possession of this magazine without a permit or licence.

When the charges were put to the accused, they both pleaded not guilty to all the respective counts and were duly represented accused no.1 by Mr. Hlophe and accused no.2 by Mr. Mamba.

The first witness for the Crown was introduced as an accomplice witness and the court took it upon itself to explain to the witness his legal rights in regard to giving evidence. The witness was Themba Sikuta Hatshwako. His evidence covered counts one, two three and counts five, eight, nine and eleven.

3

It is necessary from the onset to treat in some details the evidence of the accomplice witness PW1. This is necessary because his evidence touches most if not all the counts preferred against the two accused. The court has drawn on passages in the case of REX VS MANDLA HOMEBOY DLAMINI SLR. 1982/86 @387 and is treating the evidence of PW1 with extreme caution. The court is aware that it is dangerous to convict on the evidence of an accomplice alone and it must look for safeguards that will reduce the risk of convicting an innocent accused.

I have considered the evidence of PW1 and I have found him a credible witness and will deal with this aspect of his credibility in the course of my judgement. He was cross-examined extensively but stood his ground. The only weakness in his evidence is that of attempting to minimise his role in the commission of the alleged crimes otherwise most of his evidence was actually corroborated by other Crown witnesses. For example the evidence of the police officers who testified that after accused no. 1 and 2 had been warned in terms of the Judges Rules accused no. 1 led the police to places hitherto unknown to them and at these places accused no. 1 produced items which tied up with the description of the items which PW1 mentioned in his evidence in chief. Examples of these items are: (a) the three guns described by PW1 in his evidence in chief; (b) the items identified by the wife of the deceased Zondo on count two; (c) the jackets taken from the bakery truck identified by the witnesses who were on that truck, to mention but a few. I will deal with the other items as I deal with the evidence of the other witnesses.

PW1 told the court that he knew both accused no.1 and 2 and that they lived in the same vicinity as he did. It was his evidence that he made his living by selling firewood and accused no.2 would occasionally give him a hand for some consideration. On the 22nd December 1996 a date before the commission of the offences alleged to have taken place on the 23rd December 1996 he met accused no. 1. Accused no.1 invited PW1 to come to accused no.1's homestead on the 23rd December 1996. He agreed to go to the accused no.1's homestead on the date. He went there and found accused no.2 also present. It is PW 1's evidence that accused no.1 produced three guns and suggested that the three

4

should go and lay in an ambush and rob the Lunyawo Bus Service of money at gunpoint. They set out in accordance with the conspiracy. PW1 said as they proceeded along the road to Sicunusa on their mission they spotted a green van branching off the main road into the grass towards the forest. It is the evidence of PW1 that accused no.1 then suggested that they should accoust the van perhaps the occupants of the van will also have money. This suggestion was accepted however, PW1 advised against the shooting at the occupants and said they should only be frightened. This advice was however not acceptable to accused no.1 who fired at the woman first three shots and when the male got up he sat on his buttocks and accused no. 1 fired two or three times against the man as well.

I may just pause here and point out that the evidence of the police witness corroborates this piece of evidence of PW1. In the course of the investigation accused no.1 subsequently pointed out six spent cartridges hidden under a rock not far from the scene of the shooting.

To continue with the evidence of PW1, he told the court that certain items were then taken from the van of the two occupants. Some groceries were divided among the three, that is accused no. 1, 2 and PW1. Also taken was a bookcase which was later handed in at the trial as exhibit "1". The bookcase exhibit "1" contained certain documents which will be dealt with below. It was PW1's evidence that they had gone through the contents of this bookcase and found no money but found the documents to which I will refer below. For the purposes of corroboration I may at this stage refer to the evidence of PW5 Philisiwe Zondo the wife of the deceased on count two. She identified exhibit "1" and its contents as the property of her late husband. These contents included the following but were not confined to the following items that I will read.

1. A Barclay card exhibit "D" which was handed in as exhibit "D";
2. Barclays book which was handed in as exhibit "E".
3. Photo album exhibit "F."
4. A motor car battery which was handed in as exhibit "4".
5. A toolbox which was handed in as exhibit "5".

5

6. Men's belt handed in as exhibit "6".

These items were identified beyond any doubt by PW5 the wife of Zondo. Some of these exhibits bore the name of the deceased.

The evidence of PW1 is therefore corroborative in so far as he testified that these items had in fact been removed from the van after the shooting of the occupants by accused no. 1. This court cannot indulge in the somewhat fancy and flimsy suggestion by the defence that because the male and female deceased were in the act of committing adultery the surviving partners could possibly have murdered the two and set the motor vehicle alight. The person in whose possession the dead people's property was found must give some explanation. This was not forthcoming and this Court is entitled to infer that accused no. 1 is the person who shot and killed the two occupants. In so far as to how the motor vehicle with the bodies were set alight, the Court can only speculate and say that it suspects this was done by the people who took the dead men's property but until some kind of explanation, how accused no.1 came to possess the dead men's property the Court is justified in saying he is the person who killed these people.

PW1 also gave a graphic description of one of the three guns that he was carrying. He called it a 2.2 and said he was unlearned and called it 2.2 because he has been told it was a 2.2. In his description he described the gun as having a peculiar mark that is its nozzle had a piece of wire tied around it. He described this gun even before the Crown counsel showed the gun to him. He also said the other gun was similar to the one that he carried and said the third gun was a revolver. The gun that he referred to as a 2.2 was handed subsequently as exhibit "2" and PW1 said it was the gun he had testified about.

He also said that the two other guns produced at the trial were similar to the ones that he had mentioned in his evidence in chief. Again the court will pause here and refer to corroborated evidence which was given by the police officer who testified that after they had warned accused no.1 and 2 about the Judges Rules, accused no.1 had gone and pointed out these guns which were subsequently handed in. The police officer that gave evidence on this point said accused no. 1 took them to his homestead where in some tall

6

grass he produced the guns. I will expand on this piece of evidence when I deal with the evidence of PW8 Simon Msibi.

To continue with the evidence of PW1, PW1 testified that after the shooting of the occupants of the motor vehicle and the plundering of the dead people's property accused no.1 and 2 and PW1 continued with their mission in accordance with the conspiracy. He testified that as they were walking along accused no. 1 drew their attention to a revving of some engine and said it must be the targeted Lunyawo Bus Service. At this stage PW1 was without a gun but I am however hesitant to accept this part of evidence. Why would he at this strategic moment be without a gun when there are three guns? This Court would rather treat this part of evidence as part of his endeavour to minimise the part he played. It is PW1's evidence however, that accused no.1 and 2 entered the road and accused no.1 fired to the air and the bus stopped. The accused no.1 went to the driver's side, fired through the window twice and some voice was heard in the bus that someone was dying. Accused no. 1 went to stand at the entrance of the bus and demanded money pointing the firearm at the driver of the bus. PW1 testified that he warned accused no. 1 not to shoot the driver. The driver of the bus handed the money to accused no.1. Some of this money fell to the ground. Accused no.1 ordered PW1 to pick it up and he complied and accused no. 1 told the driver to drive off.

PW1 told the court that they had their heads covered. He said the money was given to accused no.1 and he divided it and gave accused no.2 and PW1 each E65. He stated that he was not happy with this division but he didn't want to complain, as he was afraid of accused no.1. They then continued on their way to their respective homes after accused no. 1 warned them not to tell anybody about this incident. Accused no. 1 threatened to shoot them if they dared tell anyone about the incident.

PW1 was shown a photo of the van exhibit "A" and he identified the van and said it was the van in which the two persons were shot. PW1 was extensively examined in cross-examination and in my judgement he stood his ground. He denied that the police had promised him anything if he cooperated. He said he was not promised to be released if

7

he agreed to give evidence. He denied that any quarrel had ever taken place between him and accused no. 1 concerning a gun. By consent between the defence and the Crown the counsel on the other, PW 13 Isaac Mphiwa Fakudze's evidence in the respect of count one, five and six was to be handed in as the summary of evidence has not been challenged.

This evidence was to the effect that three armed men ambushed the bus on 23rd December 1996 and took with them E700.00 in cash. PW13 also saw some of the passengers were seriously injured and one having been shot in the head. Even the evidence of PW14 Beauty Mhlongo was not challenged. PW14 stated in her summary of evidence that she was aboard the Lunyawo Bus Service on the day in question. Her evidence corroborates that of PW13 the driver of the bus. PW14 was shot on her arm. She stated that other passengers were also shot and injured. Even the evidence of PW17 Albertina S. Motsa on count four the murder of Almon Simelane at the Mission shop was not challenged. The summary of evidence, by consent was to be made part of the evidence of the proceedings.

On the 11th February 1997, PW17 heard a gun shot coming from the Mission shop. She saw a male person running towards the gate. She went to the shop and found deceased on count four. The medical certificates and post-mortem reports were also handed in by consent in these counts.

On count four the Crown also led the evidence of PW2 Amos Vilakazi whose evidence basically identified a certain moneybox which was in the shop which the deceased on count four was the Assistant. His evidence was to the effect that there was a moneybox in the shop that was run by the deceased on count four.

Sergeant Msibi said that the money-box identified by PW2 is that belonging to the shop which was run by deceased on count four was subsequently pointed out by accused no.1. The moneybox was handed in as exhibit "3". PW17 also went to the shop on the 11th February 1997 and PW2 went there too and both of them testified that they found the

8

deceased dead. PW2 stated in his evidence that he knew exhibit "3" very well. It was kept in the shop. He testified that when he found the deceased dead on the floor the moneybox was missing and that he had told the police about the missing moneybox. When he was subsequently summoned by the police to go to the police station he said there were a number of items on the floor and he was able to point out exhibit "3" as the money-box that went missing from the Mission shop.

On count four accused no. 1 faces the charge of murder. There is evidence that accused no. 1 pointed out the dead man's moneybox. He has not given an account except denying that the moneybox was found by his pointing out at his or near his homestead. Here again the court is justified in drawing the inference that he is the killer of Almon Simelane on count four. One of the investigating officer Sergeant Msibi called as PW8, I have already made reference to part of his evidence) testified and also the other witness testified about how the money-box was found. PW8 said they had proceeded to accused no.1's homestead after they receiving the report. He said it was early in the morning at 5am, they introduced themselves as police officers and informed accused no. 1 about their mission. PW8 said he warned accused no. 1 in terms of the Judges Rules. I am satisfied that accused no. 1 understood the warning he was given. PW8 said they started searching the homestead and found nothing to substantiate the report they had received. However, they took the accused no. 1 to the police station for further investigation into the matter. PW8 said whilst at the police station his other colleagues brought accused no.2. He stated that once accused no.2 had been brought there he once again warned accused no.1 in terms of the Judges

Rules. He stated that accused no.1 thereupon volunteered to take them back to his homestead, he then in the tall grass near his homestead pointed out at the three guns as I have already stated in my judgement. Accused no.1 also pointed out live ammunition. These were the guns as I said earlier, the accomplice witness testified and identified as the guns he was testifying about. From his homestead accused no. 1 left for a place called Sicunusa. This is the same place referred to by PW1 in his evidence as a place where the crimes were committed. In the forest, accused no.1 pointed out at a brown bookcase, this is a bookcase PW1 referred to as some of the items which were removed from the occupants of the motor vehicle in which counts 2 and 3 feature. The

9

bookcase was handed in as exhibit "1". The bookcase contained documents positively identified by PW5 Maria Ntombi Simelane the wife of the deceased in counts 2 and 3. These exhibits had been referred to in my earlier judgement. The discovery of these items and their positive identification by witness PW5 is corroborative of PW 1's evidence and the risk of convicting on a single evidence of an accomplice are thereby reduced.

PW8 told the court that accused no. 1 and 2 led them to some rock still at Sicunusa area in the vicinity of the place where crime on counts 2 and 3 were committed. There, accused no.1 pointed out under some rocks six spent cartridges. This again corroborates PW 1's evidence that accused no. 1, at this area, fired at least five to six shots at the motor vehicle occupied by the deceased on count 2 and 3.

Accused no.1 also pointed out a toolbox exhibit "5" and a battery exhibit "4" at his homestead. These were also identified by PW5 as items belonging to her late husband. It was PW8's evidence that accused no.1 had dug out from the midfield a metal moneybox exhibit "3". This was identified by PW2 Amos Tikhulu Vilakazi as the property of Almon Simelane who features on count 4 who was murdered. PW12 Detective Khumbula Sibandze whose evidence I do not propose to deal with in details corroborated PW8's evidence.

On count PW3 Daniel Bheki Hadzebe told the court that he was a driver of the bakery van on the 2nd December 1996 and had his two assistants Sam Kunene and one Zulu. They had money in the truck, part of the money, he said was in the safe and also in a moneybag. He said in the moneybag there was plus minus E300.00. Along the Sicunusa Border Post road they were confronted by two armed men who fired at them, ordered them out of the truck and demanded to be shown where the safe was. These robbers chased him away and remained with his assistants. They attempted to break open the safe but failed. At that stage a certain Phakama Bus approached and the robbers fled with the money, they had also taken with them two jackets that belonged to his assistants. The

10

jackets were pointed out by accused no.1 in the forest and were identified by PW9 Sam Kunene as jackets taken from them on the 2nd December 1996.

PW12 Detective Khumbula Simelane told the court that accused no.1 took them and led them to the forest at Sicunusa where he pointed out the jackets exhibit "13" and "14" and these jackets were subsequently identified by the assistants of the bakery van.

I turn to accused no 1's evidence. I have referred to PW1's evidence and said I was impressed with his evidence and I did say that I found corroboration of his evidence and I am satisfied that he risk of convicting an innocent man has been reduced. However accused no.1's evidence is on a total different footing. He was a very unsatisfactory witness. At one stage I suspected that he had not given his counsel proper instructions because most of what he said in his evidence in chief was never put to the Crown witnesses. Some of the glaring and most important effects that ought to have been put to the Crown witnesses are the following:

1. He raised a defence of an alibi when he gave evidence for the first time. He stated that during the

month of December he was in the Republic of South Africa in a place called Campsite. This was never put to any of the Crown witnesses. He stated that the battery and the toolbox belonged to him. He had marked the battery for identification purposes.

If his counsel was properly instructed he could have put this to the Crown witnesses and even put to them the mark, accused no. 1 claimed he had made on the battery. He also for the first time, when he gave evidence told the court of the version how the guns and the moneybox was found. He also, had initially denied the battery and the toolbox were found in his house. He had, according to him bought the belt exhibit "6" at Campsite in the Republic of South Africa and this was never put to any of the witnesses who positively identified the belt as belonging to the deceased. These are about the few surprises I believe to even his counsel that accused no. 1 brought about in his evidence in chief and the reason that they were not put there I suspect that accused no. 1 did not confide and told his counsel the truth.

11

In cross-examination accused no.1 for the first time came up with a story that PW1's goats had strayed into his mealie fields and sometimes purposely driven by the witness into his mealie fields, this was also never put to PW1 when he gave evidence. The only question that was put to the Crown witness by accused no.1's counsel was about a gun which was a cause of some misunderstanding between accused no.1 and PW1. He was also cross-examined extensively by Mr. Ngarua about the toolbox. I have said initially he said nothing about the toolbox but when he went to the witness stand he said the toolbox was his. He was asked about a certain saw that was a tenori and joint-saw and he referred to it as a hacksaw and said he used it to cut iron. There were also motor car parts in the toolbox that the wife of the deceased on count two had identified as her husband's. Accused no.1 failed to account what these parts were for. I am satisfied that this toolbox did not belong to accused no. 1 it belonged to the deceased on count 2.

There was also the battery, he was also taken at length in cross-examination by Mr. Ngarua and asked to indicate on a piece of paper how he had marked the battery for identification purposes. He indicated on a piece of paper exhibit "L" and "M" and when these marks which he had made on exhibit "L" and "M" were searched for in the battery they could not be traced. I am therefore satisfied that this battery too does not belong to accused no. 1 but belongs to the deceased. The evidence of accused no. 1 is not worthy of any credence at all. I am aware that no onus rests on the accused to convince the court of any truth of any explanation that he gives nor does the court have to believe the defence story in all its details. It is sufficient if the court thinks there is a reasonable possibility that such story may substantially true. The onus rests on the Crown to prove its case beyond reasonable doubt. This reasonable doubt is what was stated in MILLER VS MINISTER OF PENSIONS 1947(2) ELR 372 & 373 where Lord Danning said the following and I quote:

"It need not reach certainty but it must carry a degree of probability. Proof beyond reasonable doubt does not mean beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibility to deflect the court of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of

12

course it is possible but not in the least probable the case is proved beyond a reasonable doubt but nothing short of that will suffice."

I find corroboration of the accomplice evidence and I also find PW1 to be a credible witness. Accused no. 1 lied in his evidence in chief and cross-examination and the failure to contradict the evidence against him has also served to reduce the risk of convicting an innocent man. See in this regard the COURT OF APPEAL (SWAZILAND) CRIMINAL APPEAL CASE NO.12/1993 P.6 (UNREPORTED) where Kotze J A (as he then was) said the following in dealing with reducing the risk of convicting a wrong accused and I quote:

"But it will also be reduced if the accused showed himself to be a reliable witness or if he does not give evidence to contradict or explain that of the accomplice and it would also be reduced even in the absence of these features if the trial of facts understands the peculiar danger inherent in the accomplice evidence and rejection of the accused in such circumstances is only permissible where the merits of the letter are beyond question." During the trial and at one stage when there was an application for acquittal of the two accused in terms of Section 174(4) I referred to the case of REX VS NCANANA. The courts in Swaziland must read that case very carefully because we have a statute dealing with conviction on accomplice evidence. In Swaziland there is a provision in the CRIMINAL LAW AND PROCEDURE ACT 67 (1938) (AS AMENDED) Section 237 deals with a conviction on single evidence of an accomplice. It provides as follows and I quote:

"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment for summons on single evidence of an accomplice provided that such offence has by competent evidence other than the single and unconfirmed evidence of an accomplice been proved to the satisfaction of such court to have been actually committed."

13

It would seem therefore that if the court is satisfied that the offence had actually been committed and the only evidence that is there is that of an accomplice, it can convict. However, the practice involved in Swaziland and the courts have gone much further and looked for other features in a trial where the evidence is that of an accomplice. Single and unconfirmed. These are features that will reduce the risk of convicting on evidence of an accomplice alone. The courts have done this in practice because of the very nature of an accomplice witness' evidence. An accomplice witness is, to quote from the judgement handed down by Kotze JP (as he then was) in JEREMIAH PETROS DLUDLU VS THE KING CRIMINAL APPEAL CASE NO.12/93 P.5: -

"For an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

So that even if the provisions of Section 237 has been satisfied there may still be the risk that an innocent accused may be convicted wrongly and the risk would be reduced if the trial court is wary and looks for some safeguards against the wrong conviction. These other safeguards would be, this is without laying down any rule of law, that the conviction cannot follow in the absence of corroboration implicating the accused. Accused shows himself to be a lying witness or does not give evidence to contradict or explain that of an accomplice. Certain exhibits are found in his possession implicating him in the commission of the crime and he fails to explain how he came by them. He fails to put pertinent question that an innocent man in his position would put to the witnesses. In the course of this judgement I will therefore be alive of the provision of Section 237 of the CRIMINAL LAW AND PROCEDURE and be alive to the rule of practice that there is a special danger in convicting an accused person on the unconfirmed single evidence of an accomplice witness.

Another feature of the evidence which came to the fore prominently during the trial is the evidence of the pointing out of certain exhibits by the accused. This part of the evidence is also like the evidence of a singular accomplice witness regulated and provided for in

14

the STATUTES OF SWAZILAND - CRIMINAL LAW AND PROCEDURE ACT 67/1938 AS AMENDED Section 227 sub-section 1. This provides:

"Evidence may be admitted of any facts otherwise inadmissible in evidence notwithstanding that such facts have been discovered or come to the knowledge of the witness giving evidence respecting it only in consequence of an information given by the accused person in a confession or in evidence which by law is not admissible against it and notwithstanding that such facts have been discovered and come to the

knowledge of the witness against the wish and the will of such an accused."

I have dealt with these sections because in my view they differ from the sections as provided for in the Republic of South Africa.

Coming back to counts 1, 5 and 6 I propose to deal with these counts together for the purpose of this judgement. I have accepted the evidence of PW1 in-so-far-as the hatching of the conspiracy to go and rob the Lunyawo Bus Service at gunpoint. On the bus there were a number of passengers and by consent the two defence counsel on the one hand and the Crown counsel on the other agreed that the evidence of Isaac Phiwa Fakudze appearing on the summary of evidence as PW 13 could be dispensed with and what appeared in the summary of evidence was not disputed by the defence. That summary of evidence corroborates the evidence of PW1 about the holdout of the bus and the robbery. Three armed men perpetrated this. Shots were fired at the bus and some passengers were seriously injured. This Court is satisfied with that the evidence of PW1 is in this respect corroborated.

One of the passengers was Beauty Mhlongo whose evidence was also dispensed with by consent. Her evidence in the summary of evidence is that she was shot at on her arm. She stated that other passengers were also shot and injured. She does not identify them by name and certainly she does name the deceased on count 1 as one of the passengers in that bus. Notwithstanding the unchallenged evidence of PW 13 of Mphiwa Fakudze in

15

the summary of evidence and that of PW14 Beauty Mhlongo who stated that beside her own injury on the left arm other passengers were also injured. Her evidence does not assist the Crown because she does not say Nokwazi Margaret Nkabini was also one of the people injured nor does exhibit "I" the post-mortem report on the body of the deceased assist the Crown. Exhibit "I" describes the injury as having been caused by a rifle, firearm but it does not connect the injury with any of the three arms alleged to have been used by any of the accused. It is unfortunate that where spent cartridges and some other identifiable items found are never sent to Pretoria to experts for examination so that an accused person who has been found with a gun cannot escape a conviction.

On count 1 therefore, because of this lacuna in the Crown case the Court is not satisfied that the Crown has proved its case beyond reasonable doubt and on count one I find accused no. 1 and 2 not guilty.

On count four, the murder of Almon Simelane. His body was properly identified and cause of death is by firearm and injury. Exhibit "8" by consent summary of the evidence by PW17 Albertina S. Motsa was handed in, she heard a gunshot at the Mission shop and saw a male person running towards the gate. She went there and saw the deceased who was dead.

The evidence of PW8 Detective Sergeant Msibi is to the effect that accused no. 1 had pointed out in the maize field of his homestead the moneybox exhibit "4" which was stolen from the shop at the Mission grocery. Exhibit "4" was identified by PW2 as the property in the lawful possession of the deceased. He had gone there and found that the deceased was dead. He described exhibit "4" that it had an inscription on the inside "Bethlehem Grocery" and this was the exhibit which was produced before court.

On count five, armed robbery of Lunyawo Bus Service. I have accepted the evidence of PW1 as regards to conspiracy to rob Lunyawo Bus Service. The summary of evidence deposed to by PW13 by consent was mutually accepted between the two defence counsel, Crown.

16

PW14 was robbed of his money at gunpoint. I am satisfied that the three men who robbed the Lunyawo Bus Service are the accused together with PW1. According to PW1 the third man was accused no.2. However, throughout the trial, nothing of any of the exhibits in accordance with the conspiracy was found in possession of accused no.2. Even though I accept the evidence of PW1 as being credible exercising

the caution I have referred to one has got to look for some connecting link in-so-far-as accused no.2 and this I have not been able to find. All 1 can say is that I strongly suspect that he was one of the three and the suspicion is not sufficient for a conviction in criminal trials. On that account therefore accused no.2 is not guilty of that count.

Count 6, the attempted murder on Beauty Mhlongo. Her deposition in the summary of evidence PW14 is that she was aboard the bus of Lunyawo Bus Service on the 23rd December 1996. She corroborates the evidence of PW13 Isaac Mphiwa Fakudze that three men armed ambushed the bus and shot at it and she was injured on her arm. Having accepted the evidence of PW1 and having found that accused no. 1 and PW1 were the two men on the scene the position of accused no.2 will still be the same as in the count I have just acquitted him on.

Then I deal with count 7, PW3 gave evidence that on the 2nd December 1996 he was held up and robbed of an amount of E300.00 by two men. He was with two assistants Sam Kunene and Zulu who were also robbed of their two jackets but the accused are not charged with the robbery of these jackets. Sam Kunene who gave evidence told this court that at a subsequent stage he had seen the accused and accused no.2 would have said to him that he was sorry about what happened. This evidence does not appear in the summary of evidence and is not supported by the police officers and other witnesses who should have also heard this and on that count as well I find that accused no.2 should get the benefit of the doubt and he is acquitted. However, the position of accused no.1 is different because he went and pointed out these jackets which were identified by the people who were robbed on this truck and I find sufficient evidence on this charge against accused no. 1.

17

Before dealing with counts 8 to 12 I would briefly refer to Section 27(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT (AS AMENDED) whose heading is onus of who in prosecution under laws imposing licences etc. This section reads as follows and I quote:

"If a person carries on an occupation or business or performs an act or has in his possession or custody or owns any article is present in any place and he would commit or has committed an offence by carrying-on such occupation business or forming such act or having such article in his possession or custody or owning or being present at such place, entering it if you are not a holder of a licence or permission or other authorisation or qualification referred to in this section as the necessary authorisation to carry-on such occupation or business or to perform such act or to have such article in his possession or custody or to own or to be present at such place or to enter it he shall if he is charged with having committed such offence be deemed not to have been the holder of the necessary authorisation unless the contrary is proved."

That is Section 27(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT (AS AMENDED).

I have dealt with the question of pointing-out the exhibits featuring on count 8 to 12 against accused no.1. The police witnesses gave evidence about this pointing-out by accused no.1. I accept the evidence of the police witnesses and reject that of the accused that the police planted these exhibits there where they found them. It follows that in the absence of any explanation, how these exhibits came to be possessed by accused no. 1 the explanation that he stumbled on these exhibits and was about to take them to the police authorities. I find that his failure in terms of this Section has placed him in a position where he must be convicted.

The evidence of PW11 Inspector Nxumalo about the serviceability of these firearms and that the rounds of ammunitions were live rounds. I accordingly on these counts find that the Crown has proved the case against accused no.1 and return a verdict of guilty.

18

The evidence against accused no.2 is that he was present at the times these offences were committed

but as I have said earlier on, there is nothing that connects him except the evidence of PW1 who I have found to be credible but unfortunately there is nothing in the commission of the crime except the only evidence of PW1. He may consider himself very lucky but the court has a very strong suspicion that he was there but that is not sufficient for a verdict of guilty.

I find accused no.1 and 2 not guilty on count one and I find accused no.2 not guilty on count 2, 3,4, but accused no. 1 guilty as charged on 2,3 and 4. On count 5, armed robbery I find accused no.1 guilty as charged and accused no.2 not guilty. On count 6 attempted murder, I find accused no. 1 guilty and accused no.2 not guilty. On count 7 I find accused no.1 guilty as charged and accused no.2 not guilty and he is discharged. Counts 8 to 12 under the ARMS AND AMMUNITION ACT it is only accused no. 1 who is charged with those counts and I have stated that he is guilty on all those counts.

JUDGEMENT ON EXTENUATING CIRCUMSTANCES

Both counsel have addressed the court in relation to whether or not there are extenuating circumstances after you have been convicted of murder and some other crimes. I have consulted further decided cases referred to by both counsel. One such case is STATE VS MANYATHI 1967(1) SA435 A.D. where Williamson J A at page 439(e) said the following:

"To decide properly whether an accused's mental state at the time he committed a crime was such that his conduct was less blameworthy than it might normally be obviously requires a consideration of the cumulative effect of all the relevant circumstances. A failure by Court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances in a case such as the present would amount to the Court misdirecting itself on the question in issue."

19

The above quotation accords with cases decided in the courts of Swaziland dealing with the enquiry to the presence or otherwise of extenuating circumstances. And these are REX VS MTHEMBU 1982/86 SLR page 24 paragraph (f) to (g) where the then Chief Justice made and said the following remarks:

"The court can only decide the question of extenuating circumstances upon evidence either led specially on that issue, which may differ from the evidence led in the main trial, as in R V ZABEVE MKHOMBENI DLAMEVI 1970-76 SLR 440, which may fairly be gathered from the case as a whole. But the court cannot speculate upon what might possibly be extenuating circumstances."

I have considered the submission in this enquiry in the light of the above principles and I am unable to find that on a balance of probabilities the accused's mental capacity is that of the child of 15 years as deposed to by Dr. Molepe. Dr. Molepe's evidence must be considered in relation to the time when the accused committed these offences of which now he is convicted. Dr. Molepe's evidence was to the effect that the accused's mental state is very low close to that of an idiot. However, the accused's actions during the commission of the crimes he is convicted of do not support the doctor's evidence.

I have not been able to gather any other evidence led in the main trial that stands to reduce his moral blameworthiness. Extenuating circumstances have been held by both Swaziland courts and courts in the Republic of South Africa and I quote:

"Circumstances not too remotely or indirectly related to the commission of the offence that tend to reduce the accused's moral blameworthiness."

See also MBUYISA VS REX @283 reported in the COURT OF APPEAL 1978/81 SLR. I have cautiously applied my mind to the entire record of proceedings but have failed to find such circumstances. I have already indicated earlier in my judgement the evidence of Dr. Molepe did not assist me at all. The evidence did not relate the time when the accused committed the offences. Dr. Molepe said that the accused name Pikinini suggest that he is an old man with a mental state of a young man of 15 of age. However, the accused's behaviour and his modus operandi flies in the face of such

