

IN THE HIGH COURT OF SWAZILAND

DERRICK MATHEW BENNETT

1st Appellant

NTOKOZO MAMBA

2nd Appellant

VELAPHI LOGWAJA NDWANDWE

3rd Appellant

Vs

THE KING

CRL APPEAL NO. 35/99

For Appellants

In Person

For Respondents

Mr. P. L. K. Ngarua (DPP)

JUDGMENT

23/09/1999

The Appellants (to whom I shall continue to refer to as "the Accused"), were found guilty of committing the crime of robbery by the Senior Magistrate sitting in Manzini and were sentenced to seven (7) years imprisonment without the option of a fine. The charge sheet alleged that in or about the 11th November, 1997, and at or near Joy Mission in the District of Manzini, the said accused persons, acting in common purpose did unlawfully assault Themba Magwaza Mavuso and by intentionally using force and violence to induce submission by the said Themba Magwaza Mavuso, did take and steal from Mm certain property, to wit, a Mazda 323, red in colour, registered SD 122 BN, his property or in his lawful possession and did' rob him of the same.

The accused persons, who conducted their own defence all pleaded not guilty to the charge. The facts of the matter are as follows:-

PW1, the complainant stated that on the 11th November, 1997, he was at Manzini bus rank where he is self-employed as a taxi driver. At around 11a.m. accused no. 1 (A1) came and hired his taxi and stated that he was going to Joy Mission. PW1 agreed to convey A1 to his destination. When they reached Hhelehhele station, they saw two boys and A1 requested PW1 to offer them a lift and PW1 agreed. A1 called them and they boarded the vehicle.

At the junction next to Young's Farm, A1 told PW1 to stop in order for his cousins to alight and PW1 complied. A1 then grabbed PW1 by his shirt, assaulted him with a fist on the face and the other two (A2 and A3) alighted from the vehicle,

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pulled PW1 out of the vehicle and threw him into the boot of the vehicle. One of them carried a knife. The vehicle then drove on until they reached an isolated area, where PW1 was let out of the boot and was accompanied to the forest where he was ordered to sit under a tree.

PW1 was told that they would not kill him but wanted the vehicle as they intended to travel to Johannesburg to look for money. They cut off one of the vehicle's seat belts and used it to tie his legs and wrists together. They promised to return to fetch PW1 and they drove off. PW1 untied himself and walked towards the main road where he got a lift which conveyed him to Sidvokodvo Police Station where he reported the matter. He carried the seat belt with him. The Police apparently recovered the vehicle in question after it was involved in a collision.

PW1 stated that he knew A1 by sight as he (A1) used to work for Morning Star bus Service. At the Police Station the accused described his assailants. He said A3 was the one who carried the knife, PW1 was able to identify a radio which was in the vehicle when it was forcibly taken from PW1. There

was also an audio cassette which was in the vehicle. Nothing turns on the cross examination.

PW2 3561 Constable Mamba stated that on the 12th November, 1997, he attended a motor vehicle accident involving PW1's motor vehicle at Mbadlana. PW1's vehicle then bore registration number NUF5499. PW1's vehicle had been burnt but its occupants were not in the vicinity. This witness was not cross-examined. PW3 1807 D/Sgt Nhlabatsi stated that he went to Mbadlana and found PW1's vehicle and it was burnt. He opened the engine and inspected it and recorded its engine number. From its particulars, PW3 discovered that the vehicle had been reported stolen at Sidvokodvo Police Station. It was then towed to Sidvokodvo Police Station.

PW4, 3609 Constable Dlamini is the arresting Officer. He arrested the accused at Mzilikazi and found two knives on A2. Nothing turns on the cross examination of this witness. PW5, 3684 Constable Vilakati is the investigating Officer and he received the robbery report. He handed in the seat belt referred to by PW1. He was not cross examined.

PW6 was Alfred Ntshalintshali whose evidence is that on the 12th November, 1997 at about 22.30 hours his vehicle collided with PW1's vehicle which was driven by Accused No.1. PW1's vehicle bore a registration number beginning with NUF. The three occupants started fighting PW6 after the accident and he ran away. PW6 said that he was able to see the accused persons because of the light provided by the motor vehicles involved in the collision. In cross examination, it was suggested to PW6 that he never saw the accused persons due to insufficiency of the light. This was denied. He confirmed seeing all the accused persons.

The Crown called PW7 Thando Caleb Mkhathswa, who stated that A2 and A3 are his relatives. On the 11th November, 1997, A2 came with two men during the night in a red sedan vehicle driven by AI. In the morning, he saw AI, who was introduced as A2's employer. Another person was in the vehicle, which bore a registration number beginning with NUF. The vehicle left on the 12th November, 1997.

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Nothing turns on the cross examination of PW7, since he maintained the story stated in his evidence in chief. When cross examined by A2, PW7 said he did not know the make of the vehicle but that it was a red sedan. He confirmed that he saw AI and A2 and another person who was sleeping in the vehicle.

The last witness was PW8, Kenneth Henwood, who stated that AI came to his shop at Maloma on the 12th November, 1997. AI needed petrol for the vehicle but had no money. PW8 refused to give him any money as he did not know him and could not trust him with money. PW8 then asked AI to give him something as a form of security and he gave PW8 a car radio cassette. In return, PW8 gave AI E50.00 and AI signed for it. AI had something to eat and then drove off in a maroon sedan with a foreign registration number. This is the radio cassette which was in PW1 's motor vehicle.

PW9 2030 D/SGT Vilakati is the Police Officer to which the armed robbery was reported by PW1 and nothing much turns on his evidence save that the seat belt was handed to him. He was not cross examined.

AI gave an unsworn statement in which he only gave an account of his arrest on the 15th November, 1997. He said nothing of any consequence relating to the evidence led against him. A2 gave a sworn statement and like AI gave an account of his arrest and he was cross examined at length by the crown. He denied most of what was put to him. A3 also gave an account of his arrest without giving any defence to the charge. The accused persons did not call any witness and after submissions, the learned Magistrate found them guilty and sentenced them to seven (7) years imprisonment.

The appellant's grounds of appeal are as follows:-AGAINST CONVICTION

1. The complainant failed to furnish the trial Court with the blue-book of the car he alleged was robbed from him by us so as to prove ownership of it. The failure by the complainant to produce the blue-book really concerns us, especially because we fail to understand as to why and how, in the first place, must we be held criminally liable for an alleged robbery of a car the ownership of which was not proven before Court.
2. The police failed to conduct an identification parade a thing which, we believe was an

irregularity on the part of the police given the fact that the complainant's allegations regarding his identification of his assailants remained untested.

3. PW2 Alfred Ntshalintshali testified that he was involved in a collision with a car occupied by us, and that after the collision we proceeded to rob Mm of some articles which he mentioned to the Court. We were, however, not found with any of those articles, and an inference to be drawn here is that it cannot be said that we are the people this witness is talking about as we were not found with any of the articles he was robbed of. The learned Magistrate,

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however, failed to give consideration to this fact. Another thing concerning this witness i.e. PW 2 is that he contradicted himself under cross-examination, and we shall with the help of the Court record point this out in our heads of argument.

4. The evidence of the police officers in this case is full of inconsistencies and contradictions as shown in the following examples:-

- (a) PW3 Constable Mamba testified that he went to the scene of the collision of the cars involving the one of which it was alleged was occupied by us, and found that the car in question was smashed on the left hand side. PW 4 Constable Nhlabatsi, on the other hand said he found the same car smashed on the right hand side.

PW6 Constable Dlamini testified that he complainant came to him at the police station carrying a seat belt. Detective George Vilakazi, on the other, testified that he was led by the complainant to the forest where the seat belt was recovered.

5. We were not investigated about this case prior to our being brought to Court. We were only told that we are suspects in a case of Armed Robbery. As a result, there is not account from any of the police officers who testified before Court to the effect that following an investigation, such and such information and or exhibits were retrieved from us. No police officer testified to that effect.

AGAINST SENTENCE

1. In the event that the High Court decides to uphold the conviction in this case, we would like to ask for the reduction of sentence on the grounds that we are first offenders.
2. We would also like to ask for the backdating of our sentence since we were arrested on the 15th day of November, 1997 and have been kept in lawful custody up to date.

I shall now proceed to examine the merit of the accused persons' grounds of appeal.

1. The first complaint is that PW1 failed to furnish the Court a quo with the blue book of the motor vehicle in question. Appellants submit that they should not have been found guilty of robbery in respect of a motor vehicle whose ownership was not proved.

There is no merit at all in this ground. The charge sheet alleged both ownership and/or lawful possession. It must also be borne in mind that robbery is the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another. Ownership or lawful possession of the property need not be proved. In any event a blue book does not prove ownership but it is to prove in whose name the vehicle is registered. A person registered in the blue book may not be the owner of the vehicle.

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2. FAILURE BY THE POLICE TO CONDUCT AN IDENTIFICATION PARADE

Identification parades should be conducted, especially in cases where there is a doubt about the identity of the criminal in question. In this case, the identity of the accused is not in doubt as there is overwhelming evidence against them. PW1 saw all three during the day and had ample opportunity to observe them. When he reported the robbery to the Police, he gave apt descriptions which eventually

led to the accused persons' arrest.

There is also the evidence of Thando Caleb Mkhathswa, who stated that the accused persons came to his home during the night of the robbery and saw A2. In the morning, he was able to see A1 clearly and another gentleman at the back of the vehicle. His evidence, which remained unchallenged, is that he is a relative to A2 and A3 and it can be inferred that he knows them very well.

The evidence of PW8 Kenneth Henwood also puts A1 on the spot. There is also the issue of the radio cassette and the cassette which were recovered and link the accused persons to the offence. Lastly, one must make reference to the evidence of Alfred Ntshalintshali, with whose vehicle the accused's stolen vehicle collided. He testified that from the lights of the vehicles, he was able to identify the accused persons and also heard their voices by which he identified them.

I find therefore that the failure to conduct an identification parade is not fatal to the Crown's case in view of the overwhelming evidence of witnesses who testified to seeing the accused persons. This Court entertains no doubt as to the identity of the complainant's assailants from the evidence tendered. This ground of appeal must fail.

3. FAILURE TO FIND ARTICLES STOLEN FROM ALFRED NTSHALEVTSHALI'S MOTOR VEHICLE

The accused persons' argument is that PW6, Ntshalintshali testified that after the collision between his car and that driven by the accused, the accused tried to fight him and A3 took a stone and shattered the window of his vehicle. He ran away and reported the matter to the Police. On his return, he found certain items, including a car radio, wrist watch, baby clothing and a car pump missing. The accused argue that these items were not recovered from them and therefore they are not the ones who committed the offence relating to PW8.

The answer is simple. The accused were not charged with robbery of PW6 and the items missing from PW6's vehicle were not reported from the evidence led. The accused were charged with committing robbery against PW1 and items belonging to him were traced to the accused persons. That items stolen from PW6's vehicle were not linked to them is completely irrelevant to the charge the accused faced. This ground must also necessarily fail.

4. INCONSISTENCY IN EVIDENCE OF POLICE OFFICERS

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The accused alleged, rightly so that there was inconsistency regarding the side of PW1's vehicle which was damaged as a result of the accident. One officer said it was on the right whilst another said it was on the left. This inconsistency is minor and does not go to the root of the charge faced by the accused.

In this regard, the accused continue to allege that PW6 Constable Dlamini (PW6 was actually Alfred Ntshalintshali) testified that PW1 came to him at the Police Station carrying a seat belt while Detective George Vilakazi said that he was led by PW1 to the forest where the seat belt was recovered.

There seems to be a confusion regarding the Crown witnesses. According to the record, Constable Dlamini never adduced the evidence attributed to him. He was the arresting Officer, The officer who testified that PW 1 brought the seat belt was 3684 Constable Vilakati. There is however no Police Officer, who testified that he was led by the complainant to the forest where the seat belt was recovered. Indeed 2030 Detective Sergeant Vilakazi testified that PW 1 reported the robbery to him. He further testified that the complainant brought the seat belt with him.

This ground of appeal shall also fail. It is not supported by the evidence recorded in the record. The accused must have made a wrong recollection of the evidence when they drafted the Notice of Appeal.

5. NOT BEING INVESTIGATED BY THE POLICE PRIOR TO BEING BROUGHT TO COURT

There is no merit in this ground. Policemen are at large to deal with the investigation of criminal cases as they deem fit. In some cases, it is important or necessary to make extensive investigations and question the accused persons. In others it is not necessary. In casu, the Police investigated the matter very well and were able to find witnesses and evidence which linked the Appellants to the crime. Although the accused claim that they were never "investigated", the Crown led credible evidence on which the accused were properly found guilty. This ground must also fail.

AD SENTENCE 1. Reduction of sentence

It is trite law that an Appellate Court will not interfere with the sentence passed by a lower Court unless it can be shown that the latter is guilty of gross misdirection. I have carefully read the record and I am of the view that the Court a quo never misdirected itself in any respect and the accused failed to show any misdirection.

The learned Senior Magistrate, in considering sentence had this to say:

"The Court has considered the personal circumstances of the accused persons. The prevalence of the offences of this nature and the impact they have on society. It has found that the personal circumstances are by far outweighed by the manner this offence was committed Therefore a

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deterrent punishment is justifiable under the circumstance in order to deter other persons who are still thinking of committing such offences.

Each accused person is sentenced to seven (7) years imprisonment without fine".

The crime was committed under reprehensible circumstances and was well premeditated. This sentence fitted the crime, your personal circumstances and also considered the interests of the society. There is no need to disturb the sentence.

2. BACKDATING OF SENTENCE

The Director of Public Prosecutions rightly conceded in my view, that the sentence be backdated to the date of the accused persons' arrest. This is especially so because the accused persons are first offenders.

On the whole, I would dismiss the appeal against conviction and sentence but order that the sentence be reckoned to run from the 15th November, 1997, the date on which the accused persons were arrested and it is so ordered.

T. S. MASUKU

JUDGE

I AGREE

J. M. MATSEBULA

JUDGE