IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

In the appeal of

Sandile Charles Mdluli

Appellant

Versus

The King

Respondent

Criminal Appeal No. 43/05

Coram: J. P. Annandale, AC

: J J.M. Matsebula, J

For the appellant: Mr. Snyman of

Mngomezulu, Mnisi & Associates, Manzini

For respondent: Mr. N. Maseko, DPP's Chambers

JUDGMENT

1 December, 2005

[1] The appellant comes on appeal to the High Court following his conviction of robbery in the Magistrate's Court of Siteki, sitting at Siphofaneni. There is no appeal against the sentence of four years imprisonment. The appeal is focussed on a factual finding by the learned magistrate, who found that the appellant was involved in the

robbery he was charged with, together with a co-accused who was also convicted of robbery and received the same sentence.

[2] At the trial, both accused were also charged with the unlawful possession of a firearm and ammunition, in respect of which both were acquitted.

[3] In his Notice of Appeal, the appellant states that:

"*I) The learned magistrate erred in holding that the crown has proves (sic) beyond reasonable doubt or at all that the appellant was at the scene of the commission (sic) of the offence.*
2) The trial court erred in fact and in law rejecting the appellant's version in as much (it) might reasonably be true."
[4] The two accused were confronted with a charge of armed robbery. In the charge sheet, it is alleged that on the 26th July 2004, at Hlutse, the two accused, acting in concert, threatened one Siphosiso Musa Gamedze with a firearm, causing him to hand over E300-00 to them to avoid being shot. Both conducted their own defence and both pleaded not guilty.

[4] The complainant, Gamedze, related the events of the fateful day at the grocery store where he was robbed. An unknown person of light complexion wearing a white T-shirt entered the shop and bought a loose cigarette. He asked for a match from Gamedze, lit up and went outside to smoke, only to enter again but this time with a pistol in his

hand which he pointed at the shopkeeper. With the robber demanding money and being fearful, he took E300 he had in his pocket and gave it to robber who took it and left. Outside, a Toyota Hilux LDV came by, the robber entered it and the vehicle drove off.

[5] He said that he was close to the vehicle and saw the driver too, identifying him in court as the second accused while the first accused, now the appellant, was the main perpetrator, the man who robbed him. He noted the registration number of the getaway car and phoned it through on the police 999 emergency number.

[6] Less than an hour later the police came by his shop to tell him that the vehicle was found and that the two occupants were under arrest. I deviate here to compliment the swift action of the police, resulting in the very speedy and efficient resolution of a serious crime. The 999 system seems to pay dividends and effectively empowers both citizens and police officers to join hands in the fight against crime. This incident is not isolated but is yet another of many similar examples noted by the judiciary, with appreciation.

[7] The complainant "identified" in court E300 currency as that which was taken from him and also a handgun, which he said to be the same one used by the first accused/appellant at the time of the crime. The "identification" of banknotes, without referral to serial numbers, or denominations was left unchallenged. The trial court noted it to be the

same handgun which the police recovered from the vehicle in question, in the presence of the accused persons after their arrest.

[8] This witness was hardly cross examined by the appellant. He merely confirmed his evidence in chief about his identification of the first accused as being the robber, despite having been frightened. Gamedze is a single witness regarding the actual robbery and identification of his assailant. For unknown reasons the crown did not call an eyewitness to the event, a person stated to have been at the scene.

[9] The trial court was suitably impressed with his evidence, notably the favourable conditions to properly observe his assailant and the driver from close by. Also, his presence of mind to note the registration number of the vehicle used to leave the shop, reporting it to the police, with the same vehicle and the same two identified persons being found within the hour.

[10] Further, at the commencement of the defence case, both accused instructed an attorney who thereafter assisted them. No application was made to recall any of the prosecution witnesses to further cross examine them, especially so with the evidence of the complainant or in regard to an anomaly in the evidence, an inconsistency to which I revert below.

[11] The further evidence of the crown was that of a police officer and two people who were present at a filling station where the arrests were made.

[12] The police officer testified about the report of the robbery at the grocery store and the description of the vehicle relayed to the police, a white Toyota Hilux with the same SD 095 ES registration number as noted by the complainant. *En route* to Hluti, the police car stopped at Siphofaneni for petrol and whilst filling up, the eagle eyed and wide awake police officer saw the vehicle they were told about as it was driving by. He shouted at the driver to stop and miraculously the driver obeyed the command instead of speeding off.

[13] He found the appellant in the vehicle and having cautioned the man, wanted to then search both vehicle and suspect. Before he could do so, the appellant produced E300 which he took from his underpants. Leaving the suspect with a police colleague of his, he went to the back of the filling station where he found the second accused person. He cautioned and arrested him, whereafter he took him back to the other man and the police officer who was still at the Toyota LDV. Before proceeding to search through the vehicle, the police commandeered a bystander, PW1, Meshack Shongwe, to observe what they were doing.

[14] In the vehicle observed and described by the complainant to the police and which the police intercepted, he found a bag in which he discovered a loaded pistol and a knife. Neither of the accused could

produce any authority to possess the firearm. Some days later he took the two accused and the handgun to Matsapha Police College to test it for serviceability.

[15] Somehow the trial court seems to have disregarded or overlooked the evidence that the pistol was tested for serviceability as in his judgment, the learned magistrate perfunctory noted that:

"*On count 2 and 3* (which relates to the unlawful possession of a firearm and ammunition), *I will find them not guilty, acquit and discharge them because there is no evidence adduced by the crown that the gun and ammunitions in question are serviceable. There is thus a doubt if same can be said to be a 'firearm*" *and* "*live rounds of ammunition*" *without serviceability being proved.*"

[16] This acquittal is not subject to the appeal before us and need not be decided upon but the outcome could well have been different. There is no cross appeal either.

[17] Further evidence of the police officer is that the getaway vehicle "*...was discovered stolen from Manzini so it is presently at Manzini*". This was not canvassed at the trial at all.

[18] When cross examined, it transpired that the appellant was previously known to the police officer, before his arrest on the day of the robbery. This prior knowledge seems innocuous and incidental. He disputed having been the driver at the time he was seen by the police officer, the latter not conceding to it at all. He also declined to accede

to a challenge that no identification parade was held because "*the complainant would fail to identify us.*"

[19] The evidence about removing E300 from his underpants at the time of his arrest and the firearm found in their bakkie was left unchallenged.

[20] Both the bystander called by the police to witness the search of the Toyota bakkie, Shongwe (PW1) and the filling station attendant, Gamedze (PW3) corroborated the events at the Siphofaneni Filling Station, to the greater extent.

[21] Gamedze related how she sold fuel to the police when the Toyota LDV, SD 095 ES came by. The police confronted the driver and she saw him as he produced money from under the front of his trousers. That man was the appellant. The appellant then told the police of the whereabouts of his companion upon which the police found him behind the filling station. Back at the car, the second accused explained that the Toyota belongs to his brother. She also saw how the police then searched the vehicle, to find the firearm and a knife.

[22] Her evidence was hardly challenged but for what it is worth, she did not deviate from it in any way.

[23] The other person at the garage, Meshack Shongwe (PW1), gave a somewhat different version of the events, more dramatically adding that the police chased both accused at the garage, instead of having

the first accused in the vehicle, confronted by the police, after which the second accused was found behind the filling station.

[24] The remainder of his evidence is on par with the versions of the police officer and Gamedze, as to the description of the vehicle and the discovery of the firearm inside it.

[25] The aspect of a chase by the two police officers of the two accused is at odds with the other witnesses. Mr. Snyman argued before us, after the court invited him to do so, that this is indicative of the serious error of judgment made by the court *a quo* resulting in an erroneous conviction. Mr. Maseko, for the crown, rather has it that Shongwe did not witness the initial phases of the events and therefore slightly embellished his testimony.

[26] The question to determine is whether this incongruity has a detrimental effect on the whole of the matter, to the extent that the conviction has to be set aside on appeal.

[27] Viewed in total isolation, it might lend support to Mr. Snyman's argument, but a piecemeal evaluation of evidence is fraught with assumptions that could well end in a miscarriage of justice.

[28] Shongwe was not comprehensively examined in chief and much less so in cross examination, with no reexamination.

[29] The appellant disputed any suggestion that he tried to run away and correctly so, in view of the evidence by the other witnesses. Shongwe seems to have made a further mistake in his evidence by stating that it is the first accused who said that his brother owns the bakkie, saying the same thing to the second accused. He is unreliable on this latter aspect, and seemingly, also on the first aspect about the chase on foot. Correctly so, the first accused disputed this part of his evidence.

Whatever caused him to err in these two aspects, the remainder of his material evidence is in consonance with that of the police officer and petrol pump attendant. Witnesses do make mistakes about their narration of events and Shongwe is certainly not immune to it.

However, when the totality of the crown's evidence is considered, the mistakes made by Shongwe certainly does not, in my judgment, lead to a conclusion that the trial court erred in any manner in its factual findings about the events at the filling station. Even if Shongwe's evidence is totally disregarded, the corroborated evidence of either the police officer or the attendant proves the same material point.

What Shongwe did was to give a false picture of a more dramatic scene at Siphofaneni, for an unknown reason. The remainder of his evidence, apart from the chase on foot, is in line with the evidence of the other two eye witnesses at the garage. In my view, the incorrectly embellished part of his evidence can safely be disregarded without any

prejudice to the appellant or his former co-accused and the cogent reliable evidence that is material to the arrest remains in tact.
Fact of the matter is that the evidence accepted by the court *a quo* is that the vehicle described by the complainant was very soon afterwards found by the police. Inside it was the first accused, with the second accused nearby, behind the filling station. The police recovered a firearm in the vehicle and E300 in cash from the first accused.
Incorrect evidence on an ancillary aspect by Shongwe does not alter this factual finding at all and cannot result in the factual finding to be anything less than beyond reasonable doubt.

In this regard, the safe words of Lord Denming in **Miller vs Minister of Pensions** (1947) 2 All E.R. 372, (1948) L.J.R. 203, comes to mind:-

"*It need not reach certainty, hut it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course 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 course it is possible, but not in the least probable', the case* is *proved beyond reasonable doubt, but nothing short of that will suffice*".

[36] In the present matter, I consider the likelihood of a wrong conviction due to the error in Shongwe's evidence to be so remote as to be of no consequence.

[37] The thrust of the appeal against the conviction, as argued before us, is the alleged absence of a *nexus* between the offence and the appellant. That this is not so is evidently clear.

[38] The crown's case is that the complainant had a clear and lucid recollection of the robbery when he called the police soon thereafter. He described the vehicle used by his assailant to get away from his grocery store, whereat he took E300 in cash and used a firearm to threaten the complainant.

[39] Very soon thereafter, the police fortuitously were refuelling their car, on their way to the complainant, when they saw the vehicle as described by the grocery store man. They found the first accused inside it, who gives them E300 which he removes from inside his trousers, the same amount robbed just before then.
They also find an illegal firearm inside the vehicle. They also find the second person nearby.

[40] The coincidence of such a chain of events to be simply explained away is near to impossible, but this is what the accused person tried to do.

[41] The appellant gave such an unlikely excuse that the learned magistrate correctly rejected it. His version is that he didn't know any

of the witnesses from a bar of soap, except for the police officer, with whom he had no previous quarrel. On the day in issue, he was merely waiting to board a bus at Siphofaneni when the police arrested him for no reason, and then took him to a vehicle he did not know, then bringing along a person he did not know either, making all sorts of false allegations against them. He also knows nothing about the exhibits either, except for the E300 which he "got as a result of selling dagga."

[42] He could not explain why he didn't put any of this to the witnesses in cross examination. He dismally failed to explain away any of the overwhelming evidence against him. The possibility of his evidence even having a remote ring of plausibility in it is nil. The court *a quo,* as said above, quite correctly rejected his evidence as a fabrication.

It is my considered view that the learned magistrate was entirely correct, on the evidence heard at the trial, to convict the appellant of the robbery at the Hluti grocery store. The chain of events leading to the arrest of the appellant and his accomplice leaves no doubt that the appellant is the person who shortly before his apprehension robbed the complainant, at gun point, of the money he had stashed away in his trousers.

Therefore, the appeal against the conviction stands to be dismissed.

At the hearing of the appeal, the appellant's attorney started to also argue about the supposedly demerits of the sentence, but when it was

pointed out by the court that no appeal was noted against sentence, he abandoned that aspect.

In any event, the appellant should rather consider himself lucky to have been visited with only four years imprisonment for a robbery of this nature. Also, commencement of sentence was ordered to be backdated to the date of his arrest.

[47] I thus propose the appeal to be dismissed and it is so ordered.

JACOBUS P. ANNANDALE-. ACJ

I AGREE

J. M. MATSEBULA

JUDGE