IN THE HIGH COURT OF SWAZILAND

In the matter of:	App. No. 34/87
ANDREW DLADLA	1st Appellant
DON RELLI	2nd Appellant
VS	
THE KING	Respondent
CORAM:	HANNAH, C.J.
FOR APPELLANT:	MR. FLYNN
FOR CROWN:	MR. HASELDEN

JUDGMENT

(Delivered on 28th July 1987)

Hannah C.J.

The two appellants appeared before the Mbabane Magistrate's Court charged with unlawful possession of arms of war, unlawful possession of firearms, unlawful possession of ammunition and unlawful possession of component parts of arms of war. Both were convicted on each count and the first appellant was sentenced to four years imprisonment and the second appellant to a fine of E1000. Both appellant lodged appeals against conviction and, in the case of the first appellant, sentence; but at the hearing of the appeals Mr. Flynn, who appears for both men, stated that the second appellant no longer wished to pursue the matter and, accordingly, he was granted leave to withdraw his appeal. In the Court below the first appellant was one of five accused. The case against the first-named in the

charge sheet was withdrawn at the outset of the trial and the third and fifth-named were acquitted. For the sake of convenience I will, when necessary, refer to the various accused by the number in which they stood charged in the court below.

At 4.30a.m. on 8th February, 1987 the police conducted a raid on a house situated in the Sandhla district of Mbabane. The house is described as a big house containing many rooms and when the police arrived some of the rooms were lit. The police announced who they were and ordered all occupants to come out of the house. Someone inside said they were still preparing" and after an interval of about five minutes the door was opened by one of the accused. He was ordered out and was followed by three other men the last being the appellant. The appellant and the fourth accused said that there were only the four of them in the house. The police then searched the house in the company of the appellant and the fourth accused. As they entered one of the bedrooms one of the police officers (PW1) saw some rifle belts protruding form beneath a mattress and upon closer examination he found four AK 47 assault rifles each loaded with a full magazine of ammunition and with a spare magazine attached. Also under the mattress were three hand grenades and seven MD2 detonators.

The police then went into another bedroom where they found another hand grenade under the mattress of the only bed and four limpet mines and fuses under the bed itself. On the floor was a suitcase which when opened was found to contain two more magazines for an AK 47 rifle each containing twenty nine founds of ammunition.

The appellant and the three other occupants of the house were arrested and taken to the police station where they were questioned. They said that they were South Africans and members of the ANC and they failed to produce a licence or permit to possess the arms which had been discovered.

The appellant did not challenge the foregoing facts and he admitted in cross-examination that he and the fourth accused had been sleeping in the bedroom where the hand grenade was found under the mattress, the limpet mines under the bed and the suitcase on the floor. The other two occupants, he said, had been sleeping in the room where the other weaponry had been found. There were, however, certain conflicts between the evidence of the appellant and that of the two police officers who testified on a number of other matters. The first concerned who opened the door to the police. The appellant maintained that this was done by the fifth accused. PW1 said it was the third accused and PW2 said it was the appellant. There was clearly confusion on this point and on the evidence before the Court it could not be reliably ascertained who opened the door though having said that I would add that it does not appear to me that anything of much consequence turned on the point.

The second conflict concerned what, if anything, was said by the appellant to the police. According to the evidence of PW1, before the search begin he asked for the owner of the house and the appellant and the fourth accused replied that they were in charge of it. PW2 gave evidence on similar lines saying that the appellant and the fourth accused "introduced themselves as people in control of the house." The appellant.

however, testified that he was never asked if he was responsible for the house and it is, I think, implicit in this piece of evidence that he denied giving the answers attributed to him. Next, PW1 said that while going through the house the appellant had told them that it was safe to touch all the arms found and both PW1 and PW2 said that while at the police station the appellant had stated that they had had no intention of using the arms in Swaziland. The appellant denied having said anything about the arms and this denial also embraced the evidence of PW1, elicited in cross-examination and thus rendered admissible, that in answer to a question whether the arms belonged to them the accused had replied that they did but that they had had no intention of using them in Swaziland. The third conflict concerned the locking of the house prior to the accused and the police leaving for the police station. PW1 said that it was the appellant who produced a key and locked the door whereas the appellant alleged that this had been done by the third accused.

I now turn to those parts of the appellant's evidence not yet touched upon. He said that he and the third and fourth accused had arrived at the house en route to South Africa from Maputo a night before the police raid having been taken there by the first accused. Upon arrival they had found the fifth accused already in the house. The first accused was, he said, the person in control of the house and it was the first accused who had given them "food and everything." He said that he was not aware of what was in the suitcase and "was not aware of anything in the house because

Sipho (the first accused) only opened the room I slept in." He did not explain how it came about that two bedrooms were in use nor did he explain how he failed to notice limpet mines under the bed in his bedroom or the presence of the grenade under the mattress of the bed on which he presumably slept. The appellant's case appears to have been, therefore, that he and two of his companions were simply spending a couple of nights in the house as guests of the first accused and were not aware of any arms being stored in the two bedrooms which were allocated to them.

In his judgment the learned magistrate accepted the evidence of the two police officers and gave a number of reasons. He could find no reason for the police to have singled out the appellant and the fourth accused and to have falsely attributed to them an acceptance of responsibility for the house. He said he

could find nothing to indicate any bias on the part of the police officers. He found it impossible to accept that the appellant and the fourth accused could have used their bedroom and slept on the bed without becoming aware of the grenade under the mattress and the mines beneath the bed. He was of the view that had the fifth accused really been at the house when the appellant and the other accused arrived the appellant would have made this known to the police. And he considered that if the fifth accused was the more permanent occupant among those found at the house the likelihood was that he would have been the one to assume responsibility for locking the house. The learned magistrate simply did not believe the appellant's story.

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Before considering the legal position it is first necessary to decide the facts to which the law has to be applied. In this regard Mr. Flynn has submitted that the acceptance by the learned magistrate of the evidence of the two police officers in its entirety is open to question and he invites this Court to take a different view of the facts to that taken by the court below. He argues that there was no evidence to gainsay the appellant's account of having arrived at the house a night before and that they were merely putting up there for a night or two and that seen in this light it is unlikely that the appellant would have made certain of the statements attributed to him by the police. Also, Mr. Flynn points to the inconsistency in the evidence of the police officers as to who opened the door to the house. He submits that this calls in question the reliability of their recollection.

This appeal against conviction is to my mind essentially an appeal on the facts and it is as well to remind oneself of the proper approach to be adopted by an appellate court in such a case. The proper approach was described by the Privy Council in Khov Sit Hoh v Lim Thean Tong 1912 AC 323 in the following terms, terms which have been adopted by the Court of Appeal in the recent case of Mamba and Others v The King (App. 33/86) (as yet unreported):

"In coming to a conclusion on such an issue, their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under

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review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character, in a way not open to the courts, who deal with the later stages of the cases ..... Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesistate long before it disturbs the findings of a trial judge based on verbal testimony."

In the present case, accepting that the appellant and his compatriots had only arrived at the house a day or so previously and were only staying there temporarily, there was, nonetheless, the undisputed evidence that there was a delay of some five minutes or so before the door was opened to the police and also the fact that the arms subsequently discovered were found rather carelessly concealed in rooms being occupied. These circumstances, in themselves, indicate

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a high probability that the appellant and his companions, taken by surprise and aware of the presence of the weapons, made a hasty attempt to conceal them. This lends credence to the evidence of the Crown witnesses that the appellant not only made statements which showed such awareness but also admitted that the arms belonged to them. Looking at the circumstances of the case as a whole and bearing in mind the words of the Privy Council just cited I am totally unpersuaded that this Court would be justified in finding that the learned magistrate's assessment of the evidence was wrong. In my view, he was perfectly entitled to arrive at the conclusion he did, namely that the evidence of the two police officers was reliable

in all essential respects and that the appellant did indeed accept responsibility for the house and the weapons which were found there.

Possession is defined by section 2 of the Arms and Ammunition Act, 1964 as meaning "custody or control." Whether or not an accused can be said to have been in custody or control of arms is usually a matter for inference from the circumstances of each case. In the instant case the facts established by the evidence were that the appellant and three of his co-accused were occupying the very bedrooms of a house in which a quantity of arms were found barely concealed, that when that house was raided by the police in the early hours the appellant and his three co-accused failed to emerge for some minutes, that while accompanying the police on their search of the house the appellant commented that the arms discovered were safe to touch and later admitted that the arms belonged to them and that they had had no intention of

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using the arms in Swaziland. Further, that when asked who was the owner of the house the appellant was one of those who said that he was in charge of it and appeared to confirm this statement by being the one to lock up the house before they left for the police station. It seems to me that the only reasonable inference to be drawn from these facts is that the arms found during the night of 8th February were in the control or custody of the appellant albeit such control or custody was probably shared jointly with the other accused. I therefore conclude that the appellant was properly convicted and that the appeal against conviction must be dismissed.

I now turn to the sentence of four years imprisonment and the question whether it was too severe. The learned magistrate dealt with all the offences as one and in doing so followed what was done by this Court in R v Sithole (Crim. Case 18/87) (unreported). However, on reflection I think I was wrong to have dealt with the sentence in that case in that way. As in the present case the accused had been convicted of both unlawful possession of arms of war and unlawful possession of a firearm and ammunition. In the case of the latter two offences the prescribed penalty is a financial one and to treat all counts as one for the purpose of sentence entailed passing a sentence of imprisonment in respect of a count which did not attract such a punishment. Although the learned magistrate cannot be blamed for the course he decided to take I am of the view that the proper course would have been to treat counts one and four only as one for the purposes of sentence and to impose no separate penalty in respect of counts two and three.

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In passing a sentence of four years imprisonment the learned magistrate was heavily influenced by what was said in R v Sithole (supra) in which a similar sentence was imposed.

Mr. Flynn submits, however, that the learned magistrate failed to place any, or any sufficient, weight on the appellant's background and further failed to analyse sufficiently carefully the appellant's r61e in the offence.

According to his evidence in mitigation the appellant is twenty four years of age, was born in South Africa but left that country for political reasons. He is a member of the African National Congress and at the time when the offence was committed was on his way from Maputo to South Africa, I accept, as I think the magistrate must also have done, that the appellant sincerely and fervently believes in the justice of the cause for which he was working and that the justice of that cause is widely recognised internationally. No question arises at all of him being punished for being a member of the African National Congress, However, this country has its laws and these laws have to be enforced by the Courts regardless of the political motivations of the offender.

As I had occasion to say in Sithole's case (supra) there can be no doubt that unlawful possession of arms or war is, generally speaking, a very serious offence. That the Legislature intended it to be so regarded is made abundantly clear by the distinction made in the Act on sentences. The penalty for unlawful possession of ordinary firearms and mmunition is a financial one whereas the maximum sentence for

unlawful possession of arms of war is ten years imprisonment.

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It matters not that the arms are intended for use elsewhere.

Three very presence in this country represents a very real danger to the lives of ordinary citizens and law enforcement agencies. The Courts cannot stand idly by passing lenient sentences when it is obvious that the offence continues to be committed. When leniency is abused and the law continues to be flouted the Courts really have no choice but to review their sentencing policy. Certainly it would be a sad day if by reason of undue leniency on the part of the Courts the Legislature were to intervene and impose mandatory minimum sentences i as was done in Botswana where an accused convicted of unlawful possession of arms of war now faces a minimum sentence of five years imprisonment whatever the circumstances.

As for the point concerning the r61e of the appellant it seems to me to be a proper inference to be drawn from the evidence that his was an active role and there is little mitigation to be derived in this connection.

Mr. Flynn's final submission concerns the disparity between the sentence imposed on the appellant and that imposed on the fourth accused who was fined E1000. The general approach towards disparity in sentences was extensively reviewed by Holmes J A in State v Giannoulis 1975 (4) SA 867 and at page 873 the learned Justice of Appeal summarised the position as follows:

"1. In general, sentence is a matter for discretion of the trial court. Disparity in the sentences imposed on participants in an offence

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(whether tried together or in a separate court) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are no personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.

3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

In the instant case the personal factor which led the learned magistrate to impose a financial penalty on the fourth accused was that he is only eighteen years of age and his concern was that to send him to prison would expose him to the influence of hardened criminals. There is, of course, considerable merit in this view although it tends to ignore

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the need to make sentences for unlawful possession of arms of war a deterrent. What is of importance, in my view, is that it cannot be said that the disparity between the two sentences was a result of arbitrariness or caprice nor can it be said that a sentence of four years imprisonment was disturbingly inappropriate. A proper reason was given for the different sentences and in my opinion the disparity does not justify interference by this Court.

To summarise, I do not consider that any valid reason has been advanced for this Court to disturb the overall length of the sentence imposed. It was a substantial sentence but the very nature of the offence committed is such that a substantial sentence was called for. The only variation I propose to make is to

order that the sentence of four years imprisonment be imposed in respect of counts one and four, those two counts to be treated as one for the purposes of sentence, and to order that no separate penalty be imposed on counts two and three. To that very limited extent the appeal is allowed.

N. R. HANNAH

CHIEF JUSTICE