

In the matter of

THE KING

VS

MAHLONWANE JOBE MABUZA

CORAM :

HANNAH, C.J.

FOR THE CROWN :

MR. S.N. DLAMINI

FOR THE DEFENCE :

MR. T. MASINA

SENTENCE

Hannah, CJ.

Before considering what sentence to impose in this matter I have to consider in relation to counts 2 and 3 what sentencing powers are conferred upon the Court by the Arms and Ammunition Act, 1964 as amended. Until the Arms and Ammunition (Amendment) Act, 1988 came into force the position was perfectly clear. Section 11 of the principal Act provided:-

"11. (1) No person shall be in possession of a firearm or arms of war unless he is the holder of a current licence to possess it or is otherwise permitted to possess it under this Act.

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- (2) No person shall be in possession of ammunition unless he is the holder of a current permit or licence to possess the firearm for which such ammunition is intended or is otherwise permitted to possess such ammunition under this Act.
- (3) No person shall be in possession of a barrel, bolt, chamber or other essential component part of a firearm or an arm of war unless he is permitted to do so under this section.
- (4) Any person under the age of sixteen years is disqualified from owning a firearm, or possessing it except in accordance with this section.
- (8) Any person shall be guilty of an offence if he -
  - (a) is found in possession of a firearm or component part thereof in contravention of subsection (1) or subsection (3) and shall be liable on conviction to a fine of one thousand Rand or, in default of payment thereof imprisonment for two years;
  - (b) is found in possession of an arm of war or component part thereof in contravention of subsection (1) or (3) thereof and shall be liable on conviction to imprisonment for a period of ten (10) years or payment of a fine of 5,000 Rand or both;

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- (c) contravenes subsection (2) or (4) or fails to comply with any condition of a licence or permit granted under this section and shall be liable on conviction to a fine of one thousand Rand or in default thereof imprisonment for two years."

However, major changes were effected by the amending Act. Subsection (8) was replaced with the following -

"(8) A person who -

- (a) contravenes subsection (l) in relation to a firearm; or
- (b) contrary to subsection (3), is in possession of any part of a firearm or of an arm of war or of any essential component part thereof; or
- (c) fails to comply with any condition of a licence or permit granted under this Act shall be guilty of an offence and, on conviction, liable to -
  - (i) in respect of an offence under paragraph (a) or (b), to the penalties provided for in section 14(2); or
  - (ii) in respect of an offence under paragraph (c), to a fine not exceeding E2,000 or to a term of imprisonment not exceeding two years or both."

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It follows from this that for unlawful possession of a firearm contrary to section 11(1) of the principal Act an offender is liable to the penalties provided for in section 14(2) of the Act. I shall come to this section shortly but before I do so I pause to consider the position of a person who contravenes section 11(2) of the Act which relates to the unlawful possession of ammunition. Subsection (2) receives no mention in the new subsection (8) which only refers to contravention of subsection (1) (firearms), of contravention of subsection (3) (parts or essential components of a firearm or an arm of war) and failure to comply with a condition of a licence or permit. Ammunition is distinct from a firearm or part of a firearm and it must follow that one effect of the amending Act is that no penalty is provided for unlawful possession of ammunition. I apprehend that this was an oversight by Parliament because it is hardly likely that Parliament would have left an offence on the statute book without making provision for a penalty but it is not for the courts to remedy such mistake. Indeed as a matter of practicality it would be impossible for the court to do so because there is no way in which the Court can ascertain what was in the mind of Parliament so far as punishment for unlawful possession of ammunition is concerned.

I now come to section 14 of the principal Act which was replaced by the amending Act as follows -  
"Arms of war.

- (1) Subject to section 17(1) no person shall unlawfully import, purchase or otherwise acquire or be in possession of an arm of war.
- (2) Any person who contravenes this section shall be guilty of an offence and liable on conviction:

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- (a) to a term of imprisonment not less than five years or to a fine not less than E5,000 in respect of a first offender; or
- (b) to a term of imprisonment not less than ten years or to a fine not less than E10,000 in respect of a second or subsequent offence, but in either case no such period of imprisonment shall exceed twenty years or such fine shall exceed E20,000."

Initially there was some doubt in my mind as to when the new section 14 came into force. Section 1 of the amending Act provides -

"This Act may be cited as the Arms and Ammunition (Amendment) Act, 1988, shall be read as one with the Arms and Ammunition Act, 1964 (hereinafter referred to as "the principal Act") and shall, except sections 2(a).and 3, be deemed to have come into operation on the 18th March, 1988."

The new section 14 was enacted by section 3 of the amending Act and was therefore one of the two provisions which did not come into force on 18th March, 1988. When did it come into force? The answer is to be found in section 60 of the Establishment of Parliament of Swaziland Order, 1978 the effect of which is that subject to any express provision making an Act of Parliament retrospective or postponing its operation an Act comes into force when it is gazetted. the amending Act was gazetted

on 18th November, 1988.

Apart from the foregoing, there are two observations which need to be made with regard to the new section 14. Firstly,

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when read with section 11(8) it means that a person convicted of unlawful possession of a firearm faces the same penalty as a person convicted of possession of an arm of war. This seems to me strange as separate provision is made in the legislation for arms of war and possession of the latter is generally regarded as a more serious matter but nonetheless that is the effect of the words used.

Secondly, section 14(2) provides for a minimum sentence but then leaves it entirely open to the courts to mitigate the severity of the minimum sentence. While obliged to impose a sentence of five years imprisonment or a fine of E5,000 the courts can, for example, suspend the whole of the sentence of imprisonment or the fine or can suspend any part thereof. Also the courts are left free to impose a sentence of imprisonment of any duration in default of payment of the E5,000 fine (vide section 303 of the Criminal Procedure and Evidence Act).

When section 14 is viewed in the light of the foregoing comments the court is faced with considerable difficulty in ascertaining the policy which lies behind the amendments. If the policy is that firearm offences should be dealt with severely by way of swingeing minimum sentences why leave the way open for the impact of such sentences to be softened by suspension or a lenient default sentence: if the policy is that the courts should retain a general discretion why stipulate a minimum sentence at all?

However difficult it may be to ascertain the intention of Parliament the courts nonetheless have a duty to reach a conclusion and doing the best I can in difficult circumstances the conclusion I reach is that Parliament intended that firearm offences should be dealt with more severely than hitherto while at the same time giving to the courts substantial latitude to have regard to mitigating

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factors in individual cases. Whereas the unlawful possession of a cache of grenades, or automatic assault rifles and the like may well attract a sentence of at least five years immediate imprisonment the unlawful possession of a shotgun for hunting purposes would probably attract the minimum fine of E5,000 with a substantial part suspended and with a fairly modest sentence of imprisonment in default.

With these observations in mind I now turn to the sentences to be imposed on the accused. The accused is a first offender, is in his early forties, has a large family to support and, according to his attorney, is sorry for what occurred. I take all these factors into account. I also take into account the fact that he was no doubt incensed by the adultery which he believed had taken place and by the refusal of PW1 to make compensation. However, attempted murder is a serious offence even when there is no positive intention to kill. When such an offence is committed it means at very least that the offender has shown a reckless disregard for the sanctity of human life and in the present case the victim sustained a serious injury which must have caused him untold suffering.

So far as the firearm offence is concerned the accused says that he acquired the revolver as a guard against customers or others demanding money with menaces. I am prepared to accept this explanation but that is not to say that I approve in the least of the accused's conduct. Unfortunately in this day and age it is all too easy to acquire firearms illegally and what happened in this case underlines the need to deter people from succumbing to the temptation to arm themselves however

understandable their initial reasons may be. Once armed they become a danger to others and there is a very real risk that once they become involved in a quarrel they may use the weapon with which they have armed themselves. There is all the difference in the world

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between the case of a frightened shopkeeper in a remote rural district keeping a gun beneath the counter and the shopkeeper who travels the countryside with a loaded revolver on his person. Unlawful possession of firearms must be sharply discouraged.

Lastly, I have to consider whether such sentence as is imposed on count 2 for the unlawful possession of a firearm should be ordered to run consecutively to the sentence to be imposed on count 1. It could be said that the two offences formed part of the same transaction and the second offence merely facilitated the commission of the first. However, despite this I consider that generally speaking where an offence is committed with a firearm the proper approach should be to order sentences to run consecutively. To do so reflects the extreme concern shown by both Parliament and the courts towards the unlawful possession of firearms and the courts' sentencing practice should be aimed at persuading people that it is simply not worthwhile to carry a firearm illegally.

Taking all factors into account I pass the following sentences:

On count 1 the accused is sentenced to four years imprisonment to commence from 18th September, 1989.

On count 2 the accused is sentenced to five years imprisonment of which three years are suspended for three years on condition that he is not convicted of

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any offence contrary to the Arms and Ammunition Act, 1964 committed during the period of suspension. This sentence is to be served consecutively to the sentence imposed on count 1.

On count 3 no penalty is imposed.

N.R. HANNAH

CHIEF JUSTICE