IN THE HIGH COURT OF SWAZILAND

REX

Vs

Elvis Vusie Mazibuko Nhlanhla Masinda Dlamini

Cri. Trial No. 93/1996

Coram	S.W. Sapire
For Crown	Mr. N. Nduma
For Defence A/c 1	In person
A/c 2	Mrs. L. Matse

Judgment

(15/07/97)

There are two accused persons before the Court. Number one is Elvis Mazibuko and number two is Masinda Dlamini. They were indicted and stood arraigned on two counts. The particulars of the accounts I will deal with later.

At one time there was a third accused, one Pepe Dlamini. He however, was called as a crown witness and he testified to certain events on condition that he would be indemnified if he gave evidence satisfactorily. I will consider his position at the end of this judgment.

At the end of the crown case accused no. 2, Masinda Dlamini, was discharged and acquitted on count no. 1 because there is no evidence linking him with the offence. The 1st accused remains charged with this offence and it is with this count that I will deal first.

Count one alleges that the accused no. 1 is guilty of the crime of attempted murder. It

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is alleged that upon or about 16th September, 1995 and at or near Ngwane Park in the Manzini District accused with intent to kill did shoot Joel Ndlangamandla with a firearm. The evidence on this count as to the occurrance was that of the complainant. He described how on returning home during the night of the 16th September 1995 he was in the company of one Rosemary Greenthompson when he was suddenly attacked by three men. This took place within the precints of his home as he was parking his car. Someone fired at him and the bullet hit him on the left thigh. He too drew his own firearm to defend himself but his assailants overpowered him and took away his pistol. This pistol was the only item which was taken from him. These facts were not seriously charged.

On this evidence not only the person who actually fired the shot which wounded the complainant but also his associates who participated in the armed robbery are guilty of attempted murder. They were clearly acting with a common purpose to rob and they continued in participating in the overpowering of the complainant even after the shot had been fired. The inference of common purpose is inescapable.

It is fortuitous that the complainant was not fatally injured but if death had ensued the charge would have been murder for which they would all be responsible. Accused no. 1 is connected with and implicated in the offence in that he is said to have been found in possession of a 9mm pistol which Ndlangamandla the complainant has identified as the weapon taken from him in the course of the robbery on the 16th September. Accused no. 1 denies that the weapon was found on him. The circumstances of the finding of the pistol and the arrest of no. 1 accused must be examined to resolve this basic but decisive difference. The prosecution evidence was that of the Police Officers who early in the morning of the 30th November, 1995 had gone to the Bosco Skill Centre in Manzini to find and possibly arrest a wanted man who was referred to throughout this case as Noname Dlamini. On their arrival there they saw accused no. 2 who apparently undertook to assist them by pointing out where Noname could be expected to be found. He led them to a room in the centre but soon slipped away.

The Police decided to wait for their quarry. Later no. 2 reappeared and according to them he led them to a car which had just drawn up outside the building. There were two occupants in the vehicle and when the Police approached the vehicle and wished to ask questions of them one the driver who turned out to be Pepe got out of the car while the other one who turned out to be the 1st accused refused to get out and became involved in a struggle with the police. In the course of this struggle a Police Officer who I am informed himself has since been killed while on duty shot the 1st accused wounding him it seems superficially.

What is more important is that during the course of the struggle the pistol was found secreted in the clothing of number one accuse, and taken from him. . He was taken eventually to the Police station where he was arrested and detained. Four days later the pistol was identified by the complainant and evidence has been placed before the court which irrefutably proves that the pistol which was said to be found on the accused was indeed that of the complainant. The pistol which was an exhibit corresponds with the description in the certificate issued in favour of the complainant.

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The accused has said that this pistol was not found in him. He says that when the police approached the car they mistook him for Noname. He claims that the police had instructions to shoot Noname on sight and that that is the reason why he was shot. He denies that in the course of the struggle the pistol was found in his possession and says that the pistol was only produced later at the Police Station.

In order to believe the allegations of the accused one has to travel into the realms of fantasy. In order for his versions to be true the police must have had the pistol before they arrested him and for some reason or other not entered it in the register of exhibits and not taken any steps to have its owner identify it before the 4th December. It is also difficult to think how planting a pistol on the accused would justify what he claims to have been a wrongful assault. Although six weeks have passed since Ndlangamandla had been robbed, in the time frame with which we are concerned the accused no. 1 was found in possession of stolen property proved to have been recently stolen. The inference of the absence of any explanation acceptable, is that he was one of the people who were involved in the robbery. There is of course no evidence that it was he who fired the shot which injured the complainant but it was fired by him or one of his associates with whom he was involved in the common purpose. He is therefore liable as the actual perpetrator of the commission of the offence. He is therefore found guilty on count 1 as charged.

I now turn to count 2. Count 2 concerns the crime of robbery. It was alleged that on the 29th of November 1995 and at or near KaHelemisi in the Manzini District the accused or either of them did

unlawfully and with intention of inducing submission by Dedrie van Zuydam and Betty van Zuydam to the taking by the accused of the property belonging to the van Zuydam family, threatening that unless they consented to the taking by them all the said property or refrain from offering any resistance to them in taking the said property they will there and then shoot them and did there and then take and steal from the said Dedrie and Betty van Zuydam certain property including a telefunken video player machine, a KIC radio, E200.00 in cash, US$30 in cash, a black jacket, an Orio Wrist watch and a Concrete Braker Machine. All these were the property of the van Zuydam family or in their possession valued at E6 480.00.

Evidence to establish the commission of the offence was led from members of the van Zuydam family who described how during the evening of the 29th November 1995 while the family was in the dining room three men entered . All were armed with firearms which were levelled at the occupants of the house. They were wearing balaclavas or cooper hats. Under threat of the firearms the assailants took the items which are described in the charge sheet. The victims were not able to identify their assailants.

The evidence linking no. 1 accused with the offence is that after he had been arrested early in the morning of the 30th November as I have described previously, he was found to be in possession of an amount of 19 Dollars in US currency. This money was discovered on his person when he was searched at the Police Station and there is entry in the Police record of this money

having been found.

US Dollars are in a different category from the currency of this country. It is unusual for citizens especially those like accused no. 1 are not foreign travellers to be in possession of foreign currency.

Foreign currency is not legal tender within the borders of Swaziland and there are only certain circumstances in which people are permitted to be in possession. When one bears in mind that it was United States Dollars which were stolen from the van Zuydam household only hours before and in the absence of any explanation from the accused as to his possession of these notes the inference again is strong that he was one of the persons who was involved in that robbery. His bare but false denial that the notes of the United States Dollars found in his possession is quite unacceptable.

In argument he did raise the point that the amount in US Dollars found in his possession was less than that which had been stolen and accordingly did not correspond with the amount stolen. Such an argument is fatuous. There was ample time for the spoils of the robbery to be divided amongst the robbers. The fact remains that the dollars were found in his possession and dollars had been stolen in the robbery only hours before. There was no explanation for accused number one's possession of them.

As far as accused no. 2 is concerned, the evidence connecting him with the robbery which is the subject matter of count 2 is that he was seen to be wearing a gold watch and a gold chain on his wrist at the time of his arrest. Accused no. 2, like accused no. 1, was arrested at the Bosco Skills Centre and taken in the car belonging to Pepe to the Police Station. The evidence is that the two accused were manacled. When the accused were taken into custody at the Police Station it was noticed that the gold watch which had been observed on the wrist of no. 2 was no longer there and was not amongst his possessions. The same applied to the gold chain. When this discovery was made the investigating officer ordered his subordinates to search the car in which the accused had been brought to the Police Station. The search revealed that the gold chain was found on the back seat and

a gold watch was found in an ashtray. There is no evidence which ashtray was spoken of and where about in the motor car it was. These items were brought into the police station and the watch was confidently identified as the item which had been stolen from the van Zuydam house in the course of the robbery.

Accused no. 2 denies that he ever had a gold watch on his wrist and says that the Police must have been mistaken. He claims that he had another watch. The coincidence that the police say that they saw a watch on accused's wrist but later they missed it and then searched the car and found it in the car is too great.

To accept no. 2's explanation and for his version to be capable of being reasonably true the facts would have to be disregarded.. One cannot accept that not only did the police believe that they saw a gold watch on his wrist because this item struck them and realising that something was missing when they reached the Police Station conducted a search for it. That the item was found in the motor vehicle is conclusive of the account given by the police witnesses. . It is

doubtful whether the Police would possibly have known of the robbery at that time of the morning.
I have to deal at this stage with the evidence of Pepe. He was called by the prosecution as an accomplice witness. He was duly warned that he would receive indemnity if he gave evidence in a satisfactory manner. Suffice it to say that his evidence did not disclose him to be an accomplice in any way. He did not accept that he had been involved in any offence whatsoever and he went further to try and assist both accused in supporting their versions.

In the first place he denies that the pistol was found, he denies having seen the pistol when the arrest of number 1 was arrested and he tried to assist no. 2 by speaking of a third watch which accused number 2 was supposed to have been wearing. He obviously did not give the evidence that the prosecution had expected. I find it strange that no statement was taken from him before he was offered the opportunity to be crown witness so that he could have been confronted with a statement which categorised him as an accomplice witness.

On the other hand the fact remains that a watch which was proved to have been stolen early that very morning was found in his car and he did not in any way give any explanation about the presence of that watch which assists accused no. 2. One is left with the inescapable impression that Pepe knew a lot more about the events of that night and early morning than he was prepared to testify. On his version as I say he is guilty of no offence and is therefore not an accomplice. I do not find that he has given evidence in a satisfactory manner and I am withholding the indemnity from him. The gold watch was found in his car and he has not attempted to explain on it. I leave it to the Director of Public Prosecutions to deal with him as may be considered best.

I must also consider other evidence of an alibi by accused no.1's brother who gave evidence suggesting that he was somewhere else at the time of the robbery of the van Zuydam. That evidence really took the matter no further. Although he says that the accused was at home that evening such evidence is facile. Furthermore this alibi evidence came at a very late stage and I know of no opportunity given to the crown to investigate. And the evidence connecting him with the offence is strong enough to make me reject the alibi.

I therefore find both accused guilty on Count 2.

SENTENCE

You the accused have been found guilty of serious offences. In the case of no. 1 not only have you been found guilty of the offence of attempted murder but you have also been found in

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conjunction with accused no. 2 to have perpetrated an armed robbery upon a family in their home. I would deal now with the question of the previous conviction which is now being proved. Shortly after you had been found guilty the crown submitted forms RSP 107 in respect of both of you. But as far as accused no. 2 is concerned he disputed the correctness of the previous convictions and the case was postponed to enable amended forms to be placed before the Court. These amended forms especially in the case of No. 1 indicated a serious omission on the original forms and that was that namely in respect of both accused each had been previously convicted and sentenced in 1984 on one count of robbery and one count of theft. Both accused were subsequently convicted and sentenced to 8 years imprisonment in the High Court in December last year. This was in the same case in respect of the same offence in which they were associated. It seems very unlikely that had the court known of the previous convictions in 1984 for a similar offence that the sentence would have been less than the sentence first imposed. Also in the case of accused no. 21 am not clear whether the High Court in December knew of your conviction in 1991 on the two counts of contravening the Arms and Ammunition Act. I disregard for the purposes of this judgment those convictions in respect of both accused which took place in the National Court and I disregard as well the convictions in the Magistrate's court which accused no. 2 has declined to admit. I also disregard the conviction recorded which is not admitted in respect of which the accused no. 2 is said to have been declared a habitual criminal. But I do take into account your history as reflected in your previous convictions from 1984 onwards. In 1984 the two accused in the same case were convicted of robbery and theft. In the case of no. 1 he was sentenced to 9 years imprisonment with effect from 1st of January 1984 on account of robbery and to 12 months imprisonment running concurrently in respect of count 2. In respect of the 2nd accused the period was 10 years and 6 months respectively. What is significant is that at that time that crime was committed in 1984 you had already associated with each other in a life of crime.

In the case of accused no. 2 in 1991 he was found guilty and sentenced on two counts of contravening the Arms and Ammunition Act. This offence like the others which he had previously been convicted are 2nd schedule offences. Both accused were in December last year convicted on a count of robbery and sentenced to 8 years imprisonment. These convictions are of such a nature and of such a degree of seriousness that it makes it clear that on the present convictions primary consideration is to prevent you from once again committing similar crimes to the detriment of the community.

It has been said that the duty of a judicial officer in imposing punishment is to have regard to the triad consisting of the crime, the offender and interests of society. In the case of no. 2 accused Counsel has submitted to me a document headed Psychological Profile. Apparently this is a summary of evidence given by expert which was placed before the Court in December last year when the accused were convicted on case 71/1996. The recommendations which were made at that time it was said should apply in this case . There is a difficulty with this Psychological Profile in that it does not appear that the Psychologists knew of the convictions in 1984. The whole basis of the whole premise that there is a possibility of reformation in accused no. 2 is based on incomplete set of facts.

Placed before me were also certificates to show that accused no. 2 had qualified himself

to take on some white collar work. Nothing was shown to me to show that he had attempted to get such work for why having so qualified himself he nonetheless engaged upon the serious offences which have culminated into his appearing before Court. The conviction in 1991 for illegal possession of a firearm and ammunition is more sinister when one bears in mind that he has now been found guilty of an armed robbery. Here again one wonders if the Magistrate of Manzini would have suspended even the two years of the five years had he known that the accused had previously been convicted and sent to jail for ten years for robbery.

On consideration of your records you are in fact and you have in fact shown yourselves to be habitual criminals. All considerations of possible reform pale into insignificance when consideration has to be given to protection of the public from people like yourselves. It has been argued by both counsel for accused no. 1 and accused no. 2 that you should not be declared habitual criminals in terms of Section 302. The point is made and correctly so that you have never been given a specific warning that the conduct which you had engaged was likely to have a consequence of being declared habitual criminals. There are authorities of which I am aware which indicate that generally speaking a person should be warned on an appropriate conviction that any further conviction will result in his being declared habitual criminals. This however is not a requirement of the Act. That you have not previously been warned of such a declaration could perhaps be explained by the inaccurate keeping of the records of your convictions. Yours are cases where I feel that a departure from a general rule is justified and it seems to me that I would be failing in my duty in the interest of the society and the protection of the public if you were not declared habitual criminals.

The question arises whether specific sentences should however be passed on you in respect of each of the offences of which you have been found guilty. Having regard to Section 302 read with section 333 of the Criminal Law and Procedure Act it seems that it is envisaged that such other specific punishments in respect of each crime should be imposed and that imposition of such punishment is envisaged. In fact of Section 3 sub-section is to the effect that if His Majesty orders the release of a habitual criminal for a period and subject to the conditions which His Majesty may see fit to determine and if the offender so released complies with the conditions then he is no longer to be considered a habitual criminal nor is he liable to suffer any other punishment in respect of the conviction upon which he was declared to be a habitual criminal.

The effect of this is that whatever sentences I now impose will be affected by the decision of His Majesty whether to release you in terms of Section 333. That means that if His Majesty at His Majesty's pleasure to release you before your sentences have run out he may do so and if you comply with the conditions you will be absolved from any punishment remaining in respect of such sentences.

Turning now to the individual accounts as far as accused no. 1 is concerned he has been found guilty of attempted murder on count 1 and the facts are that he has been found to be one of a group who attached the complainant in order to rob him and that one of that group fired a

shot which injured the complainant. That the complainant recovered to a large extent from the injury if due to no thank to his assailants. That the shot was in fact fired shows that the would-be robbers of which you were one were quite willing to shoot anybody who stood in their way. In respect of this offence you are sentenced to 12 years imprisonment.

Turning now to count two of which both accused have been found guilty. This again was an attack by a group of armed men on innocent home owners in their house. This sort of offence is taking place far too often I must take into account that both of you were previously sent to prison for 10 years for a similar offence, and that again you have both been found guilty in December of armed robbery.

Sentence cannot be anything less than 15 years.

You are each sentenced to 15 years imprisonment on count 2.

I am not declaring that these sentences shall run concurrently either with each other or with the sentences you are presently serving. As I say the consideration of public safety requires that you go to jail for a long time.

Both of you in view of your previous convictions qualify to be declared habitual criminals. And such a declaration is made in respect of each of you.

The sentences which I have imposed today are to be considered the sentences on which this declaration is made so that if His Majesty sees fit and at his pleasure to release you as contemplated in Section 333 before you have served your sentences and if you comply with any conditions which His Majesty may impose you will have the opportunity of having not only this declaration but also the balance of your sentences remitted.

Both accused are therefore declared habitual criminals under Section 302. In terms of that Section I will be reporting to the committee and indirectly to His Majesty on the sentence which I have passed and the declaration of the accused to be habitual criminals.

S.W. SAPIRE

ACTING CHIEF JUSTICE