IN THE HIGH COURT OF SWAZlLAND

KHULU.WPDa:Khulu

Rex

VS

ZAKHELE SAMSON KHULU

CRI. TRIAL NO. 48/1997

Coram S.W. SAPIRE, A C J

For Crown Mr. Wachira

For Defence Mr. L.M. Maziya

Judgment

(09/06/98)

The accused faced an indictment of five counts. In each of the first three counts it was alleged the accused was guilty of murder, he having unlawfully and intentionally killed three people, Jabulani Matse, Mfana Ngcamphalala, and Sipho Kutsemba each on 19th June, 1996 at or near Mambane area in the District of Lubombo. Each of the three counts related to one of the deceased persons.

Counts 4 and 5 related to contraventions of the Arms and Ammunition Act.

At the commencement of the trial, Mr. Maziya, who appeared for the accused, indicated that the accused was challenging the locus standi of the prosecutor. This was done and the accused's plea in terms of Section 155(2)(g) of the Criminal Procedure and Evidence Act was entertained. After hearing argument I rejected the special plea and indicated that I would give my reasons for so doing at this stage. Before, therefore, I turn to dealing with the verdict on the charges themselves, it is appropriate to state such reasons.

The argument advanced in support of the plea was that the 1973 Royal Proclamation and Decrees which had abrogated the Independence Constitution, also reinstated portions thereof including the provisions for the establishment of the office of the Attorney General and its

functions. One of such functions of the Attorney General was to have and exercise the sole and exclusive XXX to institute and undertake criminal proceedings against any person before any court on behalf of the crown.

In terms of the Director of Public Prosecutions Order 1973, this function and power was separated from the other work of the Attorney General and vested in an officer styled the Director of Public Prosecutions. It was not argued that this Order at the time it was assented to by His Late Majesty and promulgated was invalid as being in conflict with the constitutional provisions of the 1973 Decree.

What was argued was that when in 1982 the King's Proclamation (amendment) Decree No. 1 of 1982

was promulgated the position was drastically altered. The 1982 Proclamation amended the 1973 Decree by adding a paragraph reading as follows:-

"14(1) This Proclamation is the supreme law of Swaziland and if any other law is inconsistent with this Proclamation that other law shall, to the extent of the inconsistency, be null and void....."

It must be born in mind that in terms of the 1973 Decree the King appropriated all legislative powers to himself and it follows that if exercising those powers he passed the Director of Public Prosecutions Order 1973 his latter act cannot be in conflict with the former. The provisions of the Decree no. 1 of 1982 were made retrospective from the 12th of April, 1973. But it is difficult to see how this in any way altered the status of the 1973 Royal Proclamation. The 1973 Proclamation and any amendments in terms thereof were at all times the supreme laws of Swaziland. This is illustrated by the King's Proclamation amendment Decree no. 1 of 1987. Therein it was provided

".....It is furthermore hereby affirmed that the King's Proclamation to the Nation dated 12th April, 1973 (amended from time to time) is the supreme law of Swaziland and if any other law is consistent with the said proclamation, that other law shall to the extent of the inconsistency be null and void".

This decree proclaimed itself to be read and construed as one with the King's Proclamation to the nation of 12th April, 1973. It follows that all proclamations as amended from time to time remain the supreme law of Swaziland. But it must be remembered that if the sole legislative powers remains vested in the King then the King is entitled to change the proclamation and to amend it in terms of subsequent legislation.

The nub of the argument is that because the Director of Public Prosecutions Order is in conflict with the provisions of the original 1973 Decree, which reserves for the Attorney General

the sole and exclusive prosecuting rights at the public instance in the country, the latter decree taking these power away from him was to be read as being in conflict with the original decree. This argument has in itself the indications of its invalidity. For the King retained whatever powers he had the constitution by his own further decree. The Court will not readily read the legislation to understand and imply revocation of a legislation passed by His Majesty under his hand and accordingly rule that the Director of Public Prosecution is presently the only person entitled, authorised and required to prosecute at the public instance in the name of the King. It follows that the plea challenging the authority of the prosecutor failed

The accused then pleaded "not guilty" to each of the several counts on which he stood arraigned. The prosecution called its witnesses and comprehensive admissions were made by the accused through his counsel. At the close of the prosecution case the accused was found not guilty and discharged on counts four and five for lack of substantiating evidence.

On the remaining three counts the issues were narrowed down as it was common cause that the persons named in the indictment were each killed by bullets fired by the accused at them from close range.

The evidence of the crown mainly from the testimony of Musa Zwane and Mbuso Nkhabindze was that the accused came off duty early in the morning of the 19th of June, on which the killing of the victims in this case took place. The accused as is common cause remained in camp until approximately midday. The accused claims that he had a lot to drink from a 25L container of a liquor manufactured from grapefruit juice. The overwhelming evidence however is that that container of liquor was brought to the camp the previous day and other soldiers in the camp drank most of the liquor. By the 19th June there was only approximately 2 litres of the liquor left for consumption and this was shared amongst a number of the soldiers including the accused. The amount of the accused's consumption must have been relatively modest. The evidence goes further and describes how the accused person left the camp in the company of some of his comrades and went to a shebeen where liquor was being served. There accused

may well have taken further liquor. And it is also clear that the accused got himself embroiled in an argument with some of the local people who were also at the house. One of his comrades came out from the hut in which he was drinking and persuaded the accused that they had not come there to get involved in fights but only to drink. They returned to, and continued to remain in the home quietly drinking until the accused decided that it was time for him to return to the camp. Apparently he was aware that he had to go on duty that evening. One thing is clear that the amount of liquor that had been imbibed was not sufficient to make the accused obviously drunk or to incapacitate him from knowing what he was doing. Indeed the witness testified that the accused did not appear drunk.

The accused returned to the army camp and persuaded another of his companions to

accompany him with arms back to the house where the drinking was taking place because he said he suspected XXX some people had met there were in possession of an arm. It is clear that the accused had left these people together with a further one of his comrades. When the accused returned the three people who were soon to die had been ordered to lie on the ground and when they got up the accused first shot one of them and then almost immediately thereafter emptied his ammunition on the three people who all died on the spot.

There was evidence that at least one of the deceased pleaded for his life but the accused was deaf to his entreaties. There is also evidence how the accused's companion who had accompanied him from the camp armed with a machine gun somehow stumbled and fell and had lost his ammunition. A shot may have gone off but all that is quite irrelevant. The undisputed fact is that the accused deliberately killed three people.

The defence raised to this charge is that the accused was so drunk as a result of the liquor consumed that he did not remember what he had done. He somewhat inconsistently with this was at pains to describe how he had stumbled and that his weapon had been fired by accident. As a statement of facts the accused evidence is completely unacceptable. This because in the first place he soon after the event the time made a detailed exculpatory statement to the police.. He also explained the events to his sergeant convincingly enough, so that he and his companion were actually left to guard the bodies for the night.

The statement reveals that firstly the accused did not claim to have been intoxicated that. Secondly it is so detailed account of the events that it could not have been invented and given by one whose senses were so impaired as the accused would have the court believe. His evidence is characterised by selectiveness of what he wishes to remember and what he feels would not suit his case to remember. He furthermore is completely contradicted by his companions who were on the scene.

There is a further difficulty with the defence raised by the accused and that is that the provisions of the criminal liability of the intoxicated persons Act no. 68 of 1938 which commenced on the 3rd of January, 1939 provide that intoxication is not to be a defence to any criminal charge. This is subject to two exceptions provided for in sub-section 2(a) and l(b) of the Act. Mr. Maziya who raised this argument concede that Sub-Section 2 did not apply in this case and the circumstances of the killing do not fall within the exceptions provided for in that subsection. He did however argue that in terms of Sub-Section 4 the accused was to be found not guilty of the crimes for which he was charged because the intoxication is to be taken into account for the purpose of determining whether an accused person had formerly any intention specific or otherwise in the absence of which he would not be guilty of the offence charged. For this means is that if in this case it were to be found that the accused had taken sufficient liquor so as to impair his intellectual capacity to such an extent that he could not have formed the intention

necessary on the charge of murder he could not be found guilty of the murder. In the instance, however, the fats are quite clear that the accrued whatever liquor he may have taken had not reached such a state of intoxication. His actions as observed by eye witnesses on that afternoon are consistent only with his having retained a full sense of what he was doing and awareness of the nature of his acts.. After he had consumed all the liquor he went back to camp and reinforced by his comrade and both heavily armed they returned purposefully to the place where the liquor was consumed and where the victims were already under arrest.

Having regard to all the circumstances the crown has proved beyond any doubt whatsoever that the accused deliberately killed the three people named in the indictment. He is accordingly found guilty of murder on counts 1, 2 and 3.

EXTENUATING CIRCUMSTANCES

We have reached this stage in the trial where I have to consider whether there are extenuating circumstances affecting the commission by the accused of these three shocking offences. It has been held in previous cases that intoxication can operate as an extenuating circumstance. There is considerable difficulty in applying that to the present case. Although the accused claims to have taken a considerable amount of liquor the evidence as a whole contradicts this.. On the other hand there is the evidence that the accused did consume some liquor at the camp and more at the shebeen that afternoon. One then asks oneself why the accused who claimed to be a. teatotaller up to that day should suddenly have taken liquor. The fact remains that he had on the uncontradicted evidence which is before me, taken some liquor. The liquor he took could well have affected his judgment. In coming to this conclusion one has to bear in mind that the eye witnesses who were the accused comrades saw nothing in his behaviour to show that he was under the influence of liquor. It may well be however that those witnesses themselves did not recognise the extent to which the accused had been drinking because they themselves were imbibing at the same time.

There is another factor which I have put to counsel and that is that the whole misconception under which people labour namely, that the soldier has some right greater than that of the ordinary citizen to interfere in the lives of other citizens operated to dull his sensitiveness to his cruel behaviour. He may have been drunk with a false sense of power and status. Which entitled him to act as he did. For this state of affairs the accused is not entirely to blame. One must look to those in authority over him and a lack of proper instruction as to his duties. I am prepared in this case to accept that that is a contributory fact and I therefore find that extenuating circumstances do exist.

SENTENCE

You the accused have been found guilty of murder of three people. The law provides that if you are found guilty of murder and these are no antedating circumstances found the death penalty is obligatory. In this case I have found that there is extenuation. The grounds on which extenuation is found are very thin indeed. I have to consider whether the death penalty is not appropriate in your case despite the finding of these extenuating circumstances. I heard your counsel Mr. Maziya pleading some leniency for you. He referred to the fact that you are a married man; but as I have pointed out again and again most people who are found guilty of serious crime and are faced with heavy penalty plead with the court that they are married with children to support. As I have to say again and again that these personal circumstances are insignificant when the seriousness of your crime has to be considered.

Mr. Maziya has also pointed out to me that you claim to have been drunk at the time of the commission of this offence. For the purposes of extenuation I have found that there is a reasonable possibility that you

may have taken enough liquor to interfere with your judgment. The overwhelming evidence is that you did not drink as much as you say you did. The overwhelming evidence is that you appeared sober when you left the shebeen as you said you were going to sleep at home before you went on duty. Instead you went back to the camp and taking your friend to assist you, you went heavily armed to arrest these innocent people. The picture then comes to mind of three people lying on the ground. The dignity of those people lying on the ground in the brutish custody of you companion was first assaulted. Then you came there and deliberately loading your firearm as you were seen to do, and brushing aside the warnings of the other soldiers who were there, turning a completely deaf ear to the plea of the unfortunate deceased, you shot them in cold blood.

This terrible picture has made me consider even if there are extenuating circumstances as I have found, whether your act does not deserve a death sentence. After all why are you entitled to more mercy than you were able to show these people. Your aggressiveness and your contempt of the lives of these people is indescribable.

Mr. Maziya has spoken of your remorse. There is little evidence of remorse in your actions either shortly after the commission of the crime or since.

On reflection, however, I am prepared to show you the mercy which you did not show your victims. Your sentence will be one of life not death.

KHULU.WPDa:Khulu

You will be sentenced to life imprisonment on each of the three counts on which you have been found guilty.

S.W. SAPIERE

ACTING CHIEF JUSTICE