814

# SWAZILAND HIGH COURT

**REX**

VS

**JUSTICE SIPHO MAGAGULA & OTHERS**

*Cri. Case No. 75/98*

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|---|---|
| Coram | SAPIRE, CJ |
| For Crown | Mr. L. Ngarua/ |
| | Mrs. Dlamini |
| For Defence | Mr. Twala |

**JUDGMENT**

**13/11/00**

This is a criminal trial which was commenced before His Lordship the late Mr. Justice Ben Dunn. The accused were charged under a number of counts some of which were common to some of them and other counts related only to specific accused. The first 4 accused, as they then were, and of them. there are only presently three in the dock, as the one I am informed has died before this case is completed.

These 3 accused were charged with 2 counts of murder and 2 counts of robbery. The other accused charged with various other offences to which I will refer later. The stage at which the trial had reached when the late Mr. Justice Dunn died was that all the accused had been found guilty of all the offences with which each of them had been charged.

As the accused on the first two counts were found guilty of murder the court commenced dealing with the question of extenuation but nothing conclusive took place in that regard.

When the late judge died the matter of this trial was immediately brought to the attention of the authorities. It was also brought to the attention of the authorities that the local Criminal Procedure and Evidence amendment act of 1986 did not provide for a situation where a trial was interrupted by the death of the presiding officer.

After the matter had received the attention of the authorities and of the Law Society an amendment to the act was tabled in parliament and the matter proceeded very slowly until at last on the 12th July, 2000 the act no. 3 of 2000 was assented to by His Majesty.

This act provides that notwithstanding any law to the contrary, if sentence is not passed upon an accused forthwith upon conviction in any court or if by reason of any decision of an order of a superior court on appeal review otherwise it is necessary to add to or vary any sentence passed on a lower court or to pass sentence of which in such court any Judicial Officer of that court may in the absence of the judicial officer who convicted the accused or passed sentence as the case may be and after consideration of the evidence recorded in the presence of the accused within a reasonable time pass sentence on the accused or take such steps as the judicial officer who convicted or passed the sentence, that is to say the absent judicial officer could lawfully have taken in the proceedings in question had he not been absent. Absence in this section means absence by reason of disability, removal from Swaziland, death, desertion or any similar happening.

It is really section 2911(bis) (a) which is applicable in this case and although the legislation provides that the proceedings must be completed within a reasonable time, it is difficult to place the circumstances of this case within the meaning of a reasonable time. This matter has been dealt with as soon as the circumstances have allowed.

This act is to apply in all criminal proceedings before any court irrespective of whether or not the proceedings commenced before or after the publication referred to in section 1. The effect is retrospective and accordingly empowers me to deal with the case from the point at which circumstances removed the late judge.

This I proceeded to do. I have had argument from Mr. Twala who appears for the first 3 accused on the question of whether extenuating circumstances can be said to exist in relation to the murder which forms the subject matter of charges 1 and 2.

Mr. Twala based his argument really on two submissions. In the first place he dealt with the common purpose to kill and the fact that it is unclear on the evidence which of the persons involved in the robbery were armed and fired the shot. This argument cannot commend itself in view of the authorities on this point. If a number of accused persons are charged on the basis of common purpose in connection with the commission of an offence, they are all equally liable both legally and morally for the harm they do in furtherance of that common purpose. Thus in this case all those involved in the murder of the late Messrs Wessels father and son knew that some of the robbers were armed with pistols or firearms .They must have known, that inference is inescapable, that if necessary those firearms were going to be used and that the death of the victims or anyone of them could ensue. None of the accused concerned have come to the witness box to say that they did not know that firearms were going to be used. None of them have come to the witness box and said that as soon as they found out that firearms were going to be used that they withdrew from their common purpose. They have remained steadfast in their unity in the matter and have not put anything before the court on which the findings of the late judge could in any way be discounted. There was a common purpose which he found they were all parties. They are equally liable no matter who pulled the trigger when the shots were discharged. He detected little difference from moral culpability point of view that it was one or two of the comrades and not all of them who fired the shots.

The second argument advanced by Mr. Twala was that the accused are members of an economically disadvantaged group of persons in society. I am not sure what that means nor is there any evidence to suggest what the economic status of these people is. Even if they are unemployed and even if they are from those people

who are at the bottom of the economic scale, that can in no way justify the callous murder which took place. I need refer only to the fact that Joshua Senior was shot, when he had already been subdued and bound. Not only did they shoot, but they shot a man who was bound. In no way can their poverty or lack of employment be an answer morally for that callous act.

The second victim, the son of the first, was summarily shot when he came upon the scene which had been created by the accused persons.

Nothing in what I have said is in anyway intended to suggest that there is any onus on a person convicted of murder to establish any extenuating circumstances. These are to emerge from the facts of a case as a whole. A judge would search the facts of a case and if possible will find extenuating circumstances even if these do not come from the evidence or argument of the accused person.

In this case I have done just that. I have gone through the record and I have considered the judgment of the late Mr. Justice Dunn. I can find nothing which can be considered as extenuation in the present case.

I accordingly find that there is no extenuation.

I have also had submissions in mitigation by the other accused in this matter and I now will proceed to pass sentence on the various accused for the different crimes for which they have been found guilty.

COUNTS 14 & 15

MAINSTAY VUSI MAVIMBELA
KHAZI MKHWANAZI

On these two counts I intend treating the two counts as one for the purpose of sentence. The accused will be sentenced to 5 years imprisonment on both counts treated as one for the purpose of sentencing.

I now proceed to count 13 which concerns accused number 2 ,4 &5 who are charged with the robbery of Kenneth Mandlakayise Mbuli on the 22nd June, 1997. On this count, again this is a count involving theft with violence and in view of the association of the accused one with another in this sort of behaviour the proper sentence in a case like this cannot be minimized, nothing has been said to me which indicate any remorse or any facts which reduce the moral capability of these offences. On count 13 three of the accused involved, i.e. 2, 4 and 5 as they were during the trial are sentenced to 15 years imprisonment.

Count 12 involving 2, 6 and 7, The charge is robbery of Dr. Robert Caithness of Checkers on the 16th July, 1997. Again the charge of robbery involving violence and again there is nothing to justify it. Again the sentence will be 15 years imprisonment.

There are further two counts, count 10 & 11 involving accused 2, 5 & 6, again robberies of two women in their home on the 4th July, 1997, They burst into their home and robbed. They will be sentenced on each of the counts to 15 years imprisonment.

On counts 7 & 8 accused no. 2 is charged with the possession of a firearm and ammunition in contravention of Section 11(1) & 11(2) in respect of the Arms and Ammunition Act and in his case he will be sentenced to the minimum sentence which is 5 years imprisonment for counts 7 & 8 treating the two counts as one for purposes of sentence.

I turn now to count 6 and count 5. This concerns accused no. 1. He is also charged under the Arms and Ammunition act being in possession of a pistol without a licence and also under 6 contravening 11(2) of the act found in possession of 17 rounds of ammunition without a permit. He will be sentenced to 5 years on each count running concurrently.

I now turn to count 4 dealing with the survivors of 1, 2, 3 & 4. This deals with the events of the 28th August 1997 at Mount View where the 4 accused committed a

robbery at the home of the Wessels in the course of which they robbed Cornelia Griffin.

Before I continue I must deal with this question which has arisen. One of the accused has been previously warned of the possibility of being declared a habitual criminal. In the case which I mentioned previously of Elvis Vusi Mazibuko and Nhlanhla Masinda Dlamini which was a judgment of the appeal court of the 31st May, 2000, the judge who gave the judgment, Beck JA said it should be said in conclusion that it is not in my view clear that it is correct to impose the sentence of imprisonment for a specified period in addition to making a declaration that the accused is a habitual criminal.

Section 333(3) of the Criminal Law and Procedure Act of 1938 provides that a habitual criminal who has been conditionally released and who has complied with all the conditions of his release for the whole of the time during which such compliance was recorded shall no longer be deemed a habitual criminal or liable to suffer any other punishment in respect of the conviction upon which he was declared to be a habitual criminal. The judge said that the learned Chief Justice took the words to mean that other punishment in addition to the declaration of habitual criminality must be imposed. It seems to me that it is pointless so to do so if a specific sentence of imprisonment is imposed in addition to declaring the convicted accused to be habitual criminal and he is not released by His Majesty in terms of Section 333 before such sentence expires. That sentence would have served no purpose. If on the other hand he were to be conditionally released in terms of Section 333 before such a sentence has expired and he faithfully complies with the conditions required of him, he is not liable to undergo any further punishment. Once again the imposition of a specific sentence of imprisonment would have served no purpose. This is what the judge says but I make it clear he had said it should be said in conclusion that it is not my view clearly that it is incorrect to impose a sentence of imprisonment. In fact he is making it clear that this is not a judgment of the court and that it is obiter and he said that the question of the proper interpretation of Section 333 of this act was not argued in the court a quo and is not being argued at all before us.

It is not therefore necessary nor is it proper to come to the conclusion upon this point. It is clear that the judgment is obiter and besides what the judgment say

subject to what Mr. Twala may say, I do not see any reason to depart from the original view which I took.

The robbery of Cornelia Griffin which was part of the events of 28th August 1997 the accused involved will be sentenced to 15 years imprisonment on this count.

On count 3 the same accused committed a robbery on Suzanne Vessels who was a daughter of the other two victims and that will also carry a sentence of 15 years each. These two sentences on count 3 & 4 are to run concurrently.

I now turn to count 1 & 2 and the accused involved are 1,2 & 4, I also want to make it clear that the sentences on counts 10 & 11 that is the robbery of Harriet Wasswa and the robbery of Christine Wasswa are to run concurrently.

As far as the accused Anthony Mkhonta is concerned, he has now been found guilty of the offence which makes the declaration of him a habitual criminal is desirable. He has been previously warned by the High Court and the Appeal Court . In 1995 he was sentenced to 7 years imprisonment on each count of housebreaking which was altered on appeal to 4 years imprisonment on each count and on appeal the sentences were to run concurrently with effect from the 7th October, 1994. He was further warned to be declared a habitual criminal if convicted for theft or where theft is an element of the occurrence. Robbery is such an offence and he is accordingly declared a habitual criminal. I will report to the relevant authorities as required of me of this declaration and your case will be considered by the relevant committee which considers cases from time to time.

The initial custodial sentences to be served concurrently by the accused persons in terms of my judgment this morning are deemed to have commenced on the date of their arrest. This means that service of sentences to be served consecutively commences only after the first sentence has been served.

I now turn to counts 1 and 2. These are counts of murder and the Criminal Procedure and Evidence Act in the case of murder where there are no extenuating circumstances allows only for one sentence. I have no discretion in the matter and the

convicted persons Sipho Magagula, Mainstay Vusi Mavimbela, and Khazi Mkhwanazi, who have been found guilty of murder on two counts are sentenced as follows.

On Count 1, each of the accused mentioned are sentenced to death according to law.

On count 2 they the same convicted persons are sentenced to death according to law.

***SAPIRE, CJ***