



SWAZILAND HIGH COURT

Held at Mbabane

Criminal Case No. 127/2002

In the matter between

REX

**KENNETH GAMEDZE
SABELO MAZIYA
MANDLA MATSENJWA**

Coram

J.P. Annandale, ACJ

For Crown

Ms Lukhele

For Defence

S. Bhembe

SENTENCE

In a judgment of this court, handed down a year ago on the 23^d October, 2003, accused 1 and 2 were convicted of Murder (count 1) and all 3 were convicted of Robbery (count 2); Accused 2 was also convicted of unlawful

possession of arms and ammunition (counts 3 and 4). Delays in sentence were caused by a number of factors, not enumerated, save adverse comment - Registrar to keep track of postponed and non-finalised cases, give priority on roll. Date of offences committed 10/02/2001. Today its 2nd November 2004.

In order to determine the appropriate sentences for each of the three accused persons in respect of each offence the court has the most difficult part of the trial to deal with. It settles the future of each accused for many years to come. Unlike the factual enquiry in determining the guilt of the accused, where the court had a good body of evidence, I now have relatively meagre information to deal with. There are statements from the Bar and some findings made at the trial, but precious little else

In *S v Maxaku* 1973(4) SA 284 (C) Steyn J, (as he then was) stated:

"It must be remembered that it is sanctions which ultimately sustain the system of criminal justice.

It little avails the court to determine guilt or innocence in accordance with long established principles of fairness and then to leave the assessment of penalty to a hazardous guess based on no or inadequate information."

A further question arises, namely what purpose is to be served by the imposition of a sentence. In *S v Rabie* 1975 (4) SA 855(A) at 862 A - B, Holmes JA said:-

"The main purposes of punishment are deterrent, preventative, reformative, retributive".

See *R v Swanepoel* 1954 AD 444 at 445. As pointed out by Gordon: *Criminal Law of Scotland* (1967) at 50:-

"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ... The other theories, reformative, preventative and deterrent, all find their justification in the future, in ¹ the good that will be produced as a result of the punishment. "

In the present matter, difficult as it may be, the court is enjoined to balance these theories of punishment. Retribution is what the victims of the crimes may have as a priority, whereas a more reformative approach may be the best option from the perspective of the families of the prisoners. To

prioritise deterrence may lead to a misacknowledgement of the interests of the accused persons.

When I look at the prisoners, the first accused is a man of 32 years of age. He is married and has 5 children, taken care of by their mother, his brothers and his sister. None of them deserve to be punished for the crimes of their father, but should he not be released forthwith, they will suffer in the process of his incarceration.

Prior to his arrest, he used to run a small poultry business at Siteki. He was arrested on the 9th March 2001 and has been in custody since then, apart from a short respite of about three months, due to his release under section 136 of the Act as a result of the delay in the commencement of the trial.

The second accused is a man of 26 years, single and without vocational training. He used his "pirate taxi" to earn an income, from which he took care of his two children. He shared the same reprieve from custody as did the first accused.

The third accused is also 26 years old, also single, also with two children. He used to work as a welder, from which income he helped in supporting his children. He did not also get the reprieve as did his two co-accused, to be released for a while between his arrest and commencement of the trial. He was arrested on the 16th March 2001.

The degrees of participation in the crimes differ. The second accused, with whom the firearm was found, more than likely was not the one who pulled the trigger when the victim was killed, but unlike the third accused who was in the vicinity of the scene but did not actively participate in the killing, the first two accused must be dealt with in the same manner regarding the murder. As already stated earlier in this matter, the primary objective was robbery and not murder. This does not imply that the killing of an innocent person during the robbery of his vehicle has a different effect on the victim or his family. What does make a difference is that the crimes are so interlinked that it becomes proper to order that the sentences in respect of the murder and the robbery can and should be ordered to be served concurrently instead of consecutively.

Regarding the robbery, the roles played by each of the three accused were such that the sentences should not be of such variance that the first accused, who was the instigator, should be punished much more severely than the third accused. The latter may not have masterminded and orchestrated the crime but he played an equally reprehensible role in executing the robbery, using his personal knowledge of the movements of the deceased and his vehicle.

The crown's counsel brought to the fore the principle that a *socius criminus* should receive a similar sentence as the principal perpetrator, as was held in *R v Josephine L. Msibi*, 1979-81 SLR, 357 at page 359, also as per *George Lukhele and five others v R* in unreported appeal judgment 12 of 1995.

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When sentence is considered, it is more than just useful to consider a triad of factors which consist of the crime, the offender and the interests of society. However, it is also proper to import a measure of mercy where appropriate, as a fourth factor. The sentence should be suitable and balanced, without over or under emphasising any of these factors. A sentence which is too light is equally as wrong as one which is too much. Society may also revolt against sentences which are perceived as too light and ineffective.

One aspect that favours all three accused persons equally is that no previous convictions were proven against any of them. With no history of past criminal convictions, and having regard to the fact that they have spent considerable time awaiting trial, mostly incarcerated, it opens the door to ameliorate their sentences by backdating the commencement thereof to tie in with their effective dates of arrest, taking in account the time that the first two were released for some three months.

What cannot be discounted is that an innocent man was shot and killed with no regard to the consequences. He was robbed of his vehicle and that was bad enough. There was no reason for the robbers to also shoot him. Vehicle hijackings has become a scourge of enormous proportions, an evil that will not be tolerated in any decent society. If not for stiff sentences, in the few instances where the perpetrators are brought to book, the court will fail in its duty. The perpetrators of such heinous crimes as the present have to be removed from society. There is no possibility of even considering a fine to be paid, or a suspended sentence.

By the thickness of the skin on their teeth, the first two accused have avoided a compulsory sentence of death. The further effect is not also that they must be sentenced with a kid grove approach.

When I consider all of the relevant factors and information available, and also consider the purpose of sentencing and also bear in mind that to show mercy is not a sign of weakness, the sentences that are ordered by this court are as follows:

The first accused, in respect of murder (count 1): Sentenced to 20 (twenty) years imprisonment and in respect of the Robbery (count 2): 15 (fifteen) years imprisonment.

the Second accused in respect of murder (count 1): 20 (twenty) years imprisonment and in respect of the Robbery (count 2): 15 (fifteen years imprisonment) and in respect of the firearm and ammunition convictions: (count 3) (a contravention Section 11(1) read with Sections 10(2), 8(a) and 8(i) of the Arms and Ammunition Act, 1964 (Act 24 of 1964) - Unlawful possession of a firearm): Fined E5 000.00 or 5 years imprisonment of which E2 500 or 30 months is suspended for a period of 3 years, on condition that

the accused not be convicted of a contravention of Section 11(1) of the Arms and Ammunition Act, 1964 (Act 24 of 1964) (Unlawful possession of a firearm) which is committed during the period of suspension and in respect of Count 4 (a contravention of Section 11(2) read with Sections 8(c) and 8(ii) of the Arms and Ammunition Act, 1964 (Act 24 of 1964) - unlawful possession of ammunition: Fined E1 000 or 1 year imprisonment.

The third accused, in respect of Robbery (count 2): 15(fifteen) years imprisonment.

Under the provisions of Section 318 of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938), it is ordered that the custodial sentences of first and second accused be backdated, to be deemed as having commenced on the 9th May 2001, and that the sentence of (he 3rd accused be backdated to the 16th march 2001.

In respect of accused one and two regarding their sentences in respect of counts one and two, and in respect of the second accused regarding his sentences in respect of counts 3 and 4, it is ordered that their sentences be

served concurrently, not consecutively, under the provisions of Section 300(2) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938).

Order ad Exhibits:

In terms of Section 324(3) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) read with Section 31 of the Arms and Ammunition Act, 1964 (Act 24 of 1964) (the latter which incorrectly refers to Section 317(2) and not 324(3)), it is ordered that exhibits 2(2.1 - 2.4) be forfeited to the Government.

In terms of Section 324(1) of the Criminal Procedure & Evidence Act, 1938 (Act 67 of 1938), in so far as it may be necessary as the vehicle that was shown to the court and not actually "handed in" as an exhibit, it is ordered

that exhibit "X" be returned to the lawful possession of the Principal Secretary of the Ministry of Agriculture.



JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE