THE HIGH COURT OF SWAZILAND

REX

Vs

AMOS NHLEMA MELUSI

ACCURATE MATSABA

Criminal Case No. 254/2002

Coram: S.B. MAPHALALA - J

For the Crown: MR. N. MASEKO

For the Defence: MR. S.C. SIMELANE

JUDGMENT ON SENTENCE

(18th October 2005)

[1] The accused before court was charged with another for various offences including the crime of murder in counts 1 and 2, rape in count 3, 4, and 5 and housebreaking with intent to steal and theft in count 6. There has been a separation of trials in terms of Section 170 of the Criminal Procedure and Evidence Act No. 67 of 1938. The Crown proceeded to strike out counts 3, 4 and 5 of the indictment to be pursued at a later stage. The accused person has tendered a plea of not guilty to murder but guilty of being an accessory after the fact in respect of count 1 and 2. On count 6 he tendered a plea of guilty.

The Crown accepted the pleas and read into the record a statement of agreed facts. A number of exhibits were entered by the consent of the parties. The accused was accordingly found guilty in respect of count 1, 2 and 6 of the indictment.

[2] The issue which concerns the court presently is the question of sentence. The general principles in determining a proper sentence were clearly enunciated by Holmes JA in S vs Rabie 1975 (4) S.A. 855 (A) at 861 A - 862 F which contain a comprehensive and useful guideline of the principles. The learned Judge of Appeal, and with admirable brevity, summed up the principles at 862 G as follows:

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".

[3] See also the comments by Corbett CJ and Kotze' AJA who concurred in the same case of S v Rabie (Supra) - see further S vs Zinn 1969 (2) S.A. 537 (A) at 540G; S vs Scheepens 1977 (2) S.A. 154 (A); S vs Somo 1980 (3) S.A. 143 (T) at 145 E and the case decided in the former Bophuthatswana by Friedman J in S v Banda and others 1989 - 1990 B.L.R at page 290 and the cases cited thereat.

[4] In mitigation of sentence Mr. Simelane for the accused person advanced a number of factors to be taken into consideration in passing sentence in this case. Firstly, that the accused has pleaded guilty to all the counts and thus saved the court's time. Secondly, that the accused person has only been convicted of being an accessory after the fact, not murder as such. Thirdly, that at the time of the commission of the offence the accused person was only 18 years old was thus impressionable to the suggestions of an older man being accused no. 1 who has since disappeared. Fourthly, that the accused

person grew up as an orphan and therefore did not get the required stability and was thus easily influenced by other people. Fifthly, that the accused person has been in custody for 4 years and that whatever sentence the court imposes should be backdated to the date of arrest and also that the counts should be made to run concurrently.

[5] Mr. Maseko for the Crown filed very comprehensive Heads and authorities on accessories after the fact, and I am most grateful to the Deputy Director of Public Prosecutions for his painstaking effort in this regard.

[6] Section 181 (3) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended provides as follows:

"Any person charged with any offence, may be found guilty as an accessory after the fact in respect of such offence if such be the facts proved, and shall on conviction, in the absence of any penalty expressly provided by law, be liable to punishment at the discretion of the court convicting him".

[7] The general principles governing this sphere of the law are aptly stated in the textbook Gardner and Lansdown, South African Criminal Law & Procedure (Vol. I) at page 120 as follows:

"A person who, with a view to defeating the ends of justice, receives, comforts or assists anyone who, to his knowledge, has committed an offence, is indictable and punishable as an accessory after the fact to that offence"

"Those who knowingly do any act with the object of promoting the attainment of the ends of an offence already committed, may, in some cases be indictable and punishable as principles in that offence".

[8] According to Swift's Law of Criminal Procedure, 2nd Edition, 1969 at page 342 the term "accessory after the fact" is not a term known in our law. It is a term taken over from the English law for the sake of convenience, and used in our courts as indicating that class of person who did not have anything to do with the actual commission of the crime itself but who comes upon the scene afterwards and with knowledge that the crime has been committed, assists the criminal in some way or other, either by hiding or harbouring him or shares in the spoils {per De Wet J, in R vs Reynolds 1933 W.L.D. 1, 4).

[9] The subject is also addressed by the authors Burchel and Hunt, South African Criminal Law and Procedure (Vol I), (General Principles) at page 438 where it is stated, inter alia, that although the crime of being accessory after the fact is distinct from the principal crime and not part of it, a person cannot be an accessory after the fact to his own crime.

[10] The following local cases dealt with the subject of accessories after the fact being Philemon Mdluli and others vs R 1970 - 76 S.L.R (CA) page 69; Joseph Kunene and others vs Rex 1970 - 76 S.L.R 37; Mciniseli Samson Simelane and others vs R 1970 - 76 S.L.R. 278; R vs Mbhamali and another 1979 - 1981 S.L.R. 11; R vs Simelane and others 1979 - 81 S.L.R. 221 and R vs Joseph Lomasonto Msibi 1979 -81 S.L.R. 351.

[11] See also Rex vs Mlooi and others 1925 A.D. 131 (per Innes CI).

[12] From the above- cited legal authorities what can be deduced therein is that the sentence provided for in Section 181 (3) rests within the discretion of the court taking into account all the circumstances of the case. Further, it is clear from these authorities that an accessory after the fact is not a socius criminis, and cannot therefore be convicted and punished for the main offence. In casu, the accused pleaded guilty to being an accessory after the fact to two murders. The accused committed the acts with the design of defeating the ends of

justice by assisting accused no. 1 not before court, and should not result in the accused evading criminal responsibility by being an accessory after the fact.

[13] I have considered all the factors in mitigation of sentence as advanced by Counsel for the defence and also considered the legal authorities filed by the Crown and I agree with the Crown's submission that accused should not evade criminal responsibility by being an accessory after the fact. He acted this way twice and he further went on to participate in the housebreaking and theft offence. This is very serious and it is my considered view that the following sentence will be appropriate to the facts of the present case;

Count 1 - Murder - 9 years imprisonment Count 2 - Murder - 9 years imprisonment Count 6- Housebreaking with intent to steal and theft - 4 years

Imprisonment

The sentences to run concurrently and be backdated to the date of incarceration thereof.

[14] I further wish to state en passant that I applaud the conduct of both Mr. Simelane for the accused and Mr. Maseko for the Crown who have conducted these proceedings with a very high degree of professionalism and maturity.

S.B. MAPHALALA

JUDGE