

THE HIGH COURT OF SWAZILAND

REX

Vs

S1PHO NKAMBULE

ISHMAEL MOHATSI

BAFANA MADUMA

PATRICK NDLOVU

BHEKI MAVUSO

BHEKI SIMELANE

Criminal Case No. 31/2002

Coram

S.B. MAPHALALA-J

For the Crown : MR. FAKUDZE

For the Defence: IN PERSON

## SENTENCE (11/02/2005)

[1] The accused persons being nos. 2 and 3 pleaded guilty to both the crime of armed robbery and attempted murder. After the Crown has led evidence to prove the commission of the offence were duly convicted of the two crimes. What remains for the court is to mete out an appropriate sentence in the circumstances of the case.

[2] The circumstances of the crimes are that the accused persons accompanied by accused no. 1 Sipho Nkambule, accused no. 4 Patrick Ndlovu, accused no. 5 Bhcki Mavuso and accused no. 6 Bheki Simelane on the 22<sup>nd</sup> April, 2003, at Mathendele location in the Shiselweni District proceeded to a shop there and robbed one Lulama Thwala of a sum of E800-00 and acting in common purpose attempted to kill the said Lulama Thwala and inflicted a gun shot wound upon him from which he sustained an injury.

[3] There was a separation of trial in respect of accused no. 1 Sipho Nkambule and accused no. 5 and the others. Trial proceeded in respect of Accuscd no. 2 and 3.

[4] The two accused persons have made submissions in mitigation of sentence. They both stated that they are remorseful for what they have done. They accept all the responsibility despite the fact that accused no. 1 misled (hem. They are both from South Africa from a town called Carltonville. They are both in (heir early twenties. They both told the court that they are sickly. Accused no. 2 suffers from

T.B. and is still undergoing treatment. Accused no. 3 suffers from an eyesight problem and also has a bone disease. They were both arrested on the 24<sup>th</sup> April 2000. They applied that whatever sentence the court imposes should be backdated to (he date of arrest.

[5] At this stage of the proceedings, the court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the court. These are referred to in legal parlance as the triad. The nature of the crime, the interest of society and the interest of the accused. According lo Holmes JA in the case of S vs Rabie 1975 (4) S.A. 855 (A) at 862 G:

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

"Despite their antiquity these wise remarks contain much that is relevant lo contemporary circumstances (they were referred to, with approval, in S vs Zinn 1969 (2) S.A. 537 (A) at 541) "a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."

[6] The above in the legal approach I ought to adopt *in casu*.

[7] The position of the law as regards to the liability of each accused person in ihc commission of a

robbery like the present one has been a subject to a number of decided cases here and in South Africa.

[8] In the Court of Appeal Case No. 25/99 that of Patrick Wonderboy Ngwenya vs The King - Browde JA had this to say:

"In casu it is, I have said, clear beyond reasonable doubt, indeed from the mouth of the Appellant himself, that Mdluli's use of revolver was not only predictable but that it was intended by both accused to rob the deceased at gun point, in the same case Van Per Heever JA cited R v Ndhlangisa 1946 AD 1101 in which Davis, A.J.A. remarked:

"If a number of persons go for the purpose of robbery, to a shop, armed with revolvers, then each must (my italics) anticipate that a revolver would naturally be used and the shopkeeper be shot".

Van Per Heever JA then went on to say:

"In the circumstances the inference seems to me inescapable (that Appellant must have foreseen the possibility - even the probability - of Phillip using the revolver if any person, whose premises (they entered for (the purpose of stealing or robbery, showed unexpected reluctance (to part with his money or tried to impede their escape; that he was reckless whether or not this foreseen possibility materialised. Consequently Appellant was rightly convicted of murder".

[9] Having considered the personal circumstances of the accused vis a vis that of the society the latter

outweighs the former. These are very serious offences where a forearm was used and might have led to the death of the complainant. These offences are very serious by any standards. The complainant was injured in the process.

Shopkeepers and their assistants, particularly in isolated areas have become easy targets to triggerhappy gunslingers like the accused persons before court. They are entitled to the protection of the law. The only protection the court has in its disposal is to impose severe sentences to offenders to discourage those who are still planning such sinister ventures.

[10] Having considered the above factors, it is my considered opinion that the following sentence will meet the justice of the situation;

1. Each accused is sentenced to 10 years imprisonment without the option of a fine in respect of the first count that of armed robbery; and
2. Each accused is sentenced to 10 years imprisonment without the option of a fine in respect of the second count that of attempted murder;
3. The sentences to run concurrently and be backdated to the 24 April 2000.

S.B. MAPHALALA

JUDGE