

IN THE COURT OF APPEAL OF SWAZILAND

In the matter between: Appeal No. 8/84

VINCENT S. DLAMINI

AND 2 OTHERS Appellants

VS

THE KING Respondents

CORAM: MAISELS J.P.

WELSH J.A.

HANNAH A. J. A

J U D G M E N T

(11 / 5 / 87)

Welsh, J.A.

The appellants in this case were charged in the High Court on three counts.

The First count was a charge of robbery. It is alleged that this was a bank robbery. The bank was robbed of E39 500.00. Appellant no.1 pleaded guilty in the court below to this charge and was found guilty by the court. There yea an alternative charge of theft included in count one namely that the accused stole the sum of E39 500.00 from the Manzini branch Barclays Bank. Appellant no.2 pleaded guilty to this alternative charge of theft. He was found guilty on that charge.

Count two was a charge against appellant no.3 only. It was a charge of contravening Section 11 subsection 2 of the

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Arms and Ammunition Act 24/64 in that the accused on the 29th March 1983 was found in possession of a revolver without having a licence or a permit to be in possession of that weapon. Appellant no.3 pleaded guilty to that charge and was found guilty.

Appellants nos.1 and 2 were bath represented by Counsel in this court. Appellant no.3 was not. The appeals of appellants nos.1 and 3 were appeals against sentence only but appellant no.2 originally appealed against his conviction as well as against sentence. At the hearing before us this morning however, appellant no.2 informed us that he is now appealing against sentence only and not against conviction.

The only question that this court has to consider is whether the sentences of the three appellants should be reduced. I should now explain the sentences passed by the court below.

Appellant no.1 was sentenced to eight years' imprisonment. He had been arrested on the 18th

April 1983 and judgment was pronounced against him on the 30th November 1983. Thus a period of approximately seven and half months elapsed between the date of arrest and date of judgment. There is nothing in the judgment of the court below to indicate that the learned judge took this into account.

Appellant no.2 was sentenced to eight years' imprisonment, back-dated to the 2nd May 1983. We were informed that appellant no.2 had been first arrested at an earlier date but escaped from custody and was re-arrested on the 2nd May 1983, The judgment against him was delivered on the 17th February 1984, so that a period of slightly more than nine months elapsed

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between the date of his re. arrest and the date of judgment.

Appellant no.3 was sentenced to six years' imprisonment on the charge of theft, that is the alternative charge under count 1. Of this, the learned judge ordered that two years "will be suspended on condition that during the period of suspension you should not be involved in any offence of theft." On count 2 appellant no.3 was sentenced to three months imprisonment, to run concurrently with the sentence on count 1. In the case of no.3 his arrest took place on the 24th March 1983, which was the day of the commission of the offence. The Judgment against him was given on the 30th November 1983. Thus a period of slightly more than eight months elapsed between the date of his arrest and the date of judgment and no J was in custody through out that period.

In my opinion, the trial judge did not misdirect himself in regard to the proper sentences to be imposed on these three.

appellants. It goes without saying that participation in armed bank robbery is a very serious offence indeed.

In the case of appellant no.2 the learned judge took into account various mitigating factors including the youth of no.2 and in addition he back-dated the sentence to the 2nd May 1983 which, as I have said, was the date when no.2 was re-arrested after escaping from custody. He did not take into account against no.2 the fact that no.2 had escaped from suitably: no doubt because no.2 was apparently tried for this offence in a Magistrate's court and acquitted.

It seems to me that the only question of substance in this appeal is whether the trial judge ought not to have back-dated the sentences of imprisonment of appellant no.1 and 3.

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We have been referred to a judgment on Review which was given by the present Chief Justice on 15th October 1986. His Lordship was dealing with Review Cases Nos. 209 and 210 of 1986, involving certain persons called B. A. Dlamini, M. M. Simelane and M. G. Ginindza. His Lordship pointed out that Section 318 of Criminal Procedure and Evidence Act expressly confers upon the court the power, when passing a sentence of imprisonment, to order that it should take effect from some day prior to that on which it is pronounced. His Lordship went on to say this: "It is, in my view, highly desirable that some degree of uniformity of practice be established if only to dispel the sense of grievance that some prisoners must feel upon learning that a fellow inmate has had his sentence back-dated while they have not."

His Lordship went on to say that it seemed to him that the trend of recent decisions of this court and of the High Court, if it might be properly be called a trend, had been to back-date sentences

to the date when an accused was first taken into custody. And then His Lordship said this: "Although the question of when a sentence should commence is a matter for the discretion of each court, in my judgment the courts of this country should, as a general rule, exercise that discretion in favour of back-dating sentences of imprisonment in those cases where an, accused had been in custody awaiting trial."

I respectfully agree with that the learned Chief Justice said in that case and I consider that those principles should be applied in regard to the sentences imposed on appellants noSo 1 and 3 in the present appeal. One of the strange features of this case is that the court below did back-date the sentence

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imposed on no.2 and did not back, date the sentences imposed on NOS. 1 and 3.

I think justice would be amply done to Nos. 1 and 3 if their sentences were ordered to be back, dated to the date of their respective arrests.

I would therefore, dismiss the appeal of no.1, save for ordering that the sentence of eight years' imprisonment imposed upon him should take effect from the 18th April 1983o this question does not arise in case of appellant no.2. I would simply dismiss his appeal.

As far as no .3 is concerned, I would amend his sentence in two respects. I would confirm his sentence of six years' save to order that that sentence should take effect from 24th March 1983. I also think it necessary to clarify the conditions of suspension. I have already quoted the terms in which the learned judge suspended part of the sentence. I would re-word those terms as follows:

2 years of the sentence will be suspended for 3 years on condition that during the period of suspension accused no.3 is not convicted of any offence of which theft is an element.

Save as aforesaid, I would dismiss no.3's appeal.

R.S. WELSEH

J. A.

I agree I agree

I. A. MAISELS N. R. HANNAH

J. P. A. J. A.