IN THE COURT OF APPEAL OF SWAZILAND

CASE APP. CASE NO.27/86

HELD AT MBABANE

In the matter of

MAKHOKHO DLAMINI Appellant

vs

THE KING

CORAM: MELAMET J. P.

WELSH J.A.

HANNAH C.J.

COUNSEL FOR APPELLANT: MR. FLYNN

COUNSEL FOR THE CROWN: MR. TWALA

JUDGMENT

(08/10/87)

Melamet J.P.

The appellant comes on appeal to this Court against both conviction and sentence in the High Court Swaziland in terms whereof he was found guilty of murder with extenuating circumstances and sentenced to twelve years imprisonment.

It is alleged in the indictment that on or about 15th March 1986 and at or near Matimatima the appellant intentionally and unlawfully killed and murdered July Dlamini by shooting him with a gun.

Although the appeal appears to be noted against the conviction and sentence it appears from the body of the notice of appeal that the appellant admits having committed the murder but claims that he did so because the lightning which the deceased had threatened him with did strike his homestead although it missed him.

On appeal the appeal against the conviction was but faintly argued. The evidence of the Crown witnesses was that the appellant together with one Goodman Dlamini, who was a Crown witness, went to the house of the deceased to obtain the muti bag of the deceased with a view to burning it. According to the Crown witnesses the appellant and the said Goodman Dlaraini kicked a hole in the door of the house of the deceased through which Goodman Dlamini shone a torch and the appellant fired the shot killing the deceased. In his evidence the appellant claimed that he had held the torch and that Goodman had fired the shot which accidentally killed the deceased.

The appellant was positively identified as being the person who fired the gun by the wife of the deceased, who the Court a quo found to be a credible witness, and this was confirmed by the accomplice, Goodman Dlamini. The Judge a quo accepted the version of the Crown witness and rejected that of the appellant. It matters not in my view who carried the torch and who fired the revolver as it is clear that the appellant and the Crown witness acted in concert with a common purpose.

I am of the opinion, therefore, that the appellant was correctly found guilty of murder and the extenuating circumstances were correctly found to be the belief of the appellant in witchcraft and that the deceased was the cause of his house being struck by lightning. The Court a quo also found that the appellant did not have a positive intention to kill but that he fired into the house with a reckless disregard of the consequences.

On sentence I have some difficulty in understanding how the imposition of a heavy sentence on the killer of a wizard will lead to the stamping out of witchcraft, The evidence was that the appellant and the accomplice were to obtain the muti bag with a

"view to destroying it - this would not appear to be consistent with practising withcraft. Belief in witchcraft can in certain cases be an aggravating circumstance and in certain cases a mitigating circumstance. In the present case I would view it in the latter light.

I am of the opinion that the learned Judge has misdirected himself in his approach. It leaves this Court at large to impose a fresh sentence. The appellant has a record of seven convictions of which five contain an element of violence against the person of another. Two of these are coupled with the intention to do grievous bodily harm for which sentences of eleven months and twelve months respectively were imposed. In his notice of appeal the appellant states that he is serving a sentence of five years and six months for robbery, housebreaking and assault.

It would appear, therefore, that the appellant is a man of violence and one who does not respect the law. These factors negate the mitigating factors in his case. I would therefore not interfere with the sentence of twelve years imprisonment imposed on him in the Court a quo which I consider to be an appropriate sentence, In the notice of appeal filed on his behalf the appellant stated that in the Court a quo he was told that the sentence of five years six months would run concurrently with the sentence of twelve years being imposed. There is no note of such statement in the record of the proceedings and it would appear that this position is being challenged by the Prison Authorities.

It would appear from the appellant's prison record which was made available to the Court of Appeal that sentences running consecutively and totalling five and a half years were imposed on the appellant on 18th July 1986. The sentence of twelve years, the subject of this appeal, was imposed on 26th September 1986. It

appears, further, from the same record that on 27th October 1986 a further sentence of four years imprisonment was imposed on the appellant for robbery and it was ordered that the sentence was to run consecutively with any other sentence that the appellant may be serving.

Section 318 of the Criminal Procedure and Evidence Act provides that subject to sections 300(2) and 313 a sentence of imprisonment shall take effect from and include the whole of the day on

which it is pronounced unless the Court orders, expressly, that it shall take effect from some date prior thereto. Section 300 of the Act reads as follows:

"(1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(2) If such punishment consists of imprisonment the Court shall direct whether each sentence shall be served consecutively with the remaining sentence."

On a proper construction of these sections it would appear that sentences, even if not imposed at the same time, run concurrently unless it is specifically ordered that they will run consecutively. It would appear therefore that the sentences of five and a half years and twelve years will run concurrently and the sentence of four years imposed to run consecutively will commence thereafter.
I would therefore dismiss the appeal against the conviction and sentence.

D.A. MELAMET,

JUDGE PRESIDENT

I agree.

R.S. WELSH, J.A.

I agree.

N.R. HANNAH, C.J.