

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL NO. 3/1987

In the matter between:

MDUDUZI SITHOLE APPELLANT

versus

REX RESPONDENT

CORAM:

MELAMET J.P.

WELSH J.A.

SCHREINER J.A.

APPELLANT: IN PERSON

COUNSEL FOR RESPONDENT: MR. M. NSIBANDZE

J U D G M E N T

WELSH J.A.

(06/10/87)

On the morning of the 3rd January 1987 the Royal Swazi Police raided a house at Queensgate in Mbabane. Six persons, including the Appellant, were present in the house. The police enquired who the responsible person was and the Appellant told the Police that he was the occupant of the house. The Police then proceeded to search the premises and they found a pistol loaded with 8 rounds of ammunition, 2 hand grenades and component parts for time bombs, all on a shelf. They also found a locked suitcase and a brief case with three compartments, one of which was locked. They did not open the locked suitcase or the locked compartment but in the open compartment they found 8 grenades and 3 limpet mines.

The Police Officer who was in charge gave evidence to the following effect. He said Accused No. 1, namely the Appellant, said that the arms were there temporarily in Swaziland and were being taken somewhere else. This answer was given in response to an enquiry whether any of the six persons had permits or licences. The Police Officer said further that the Appellant asked him that the Police should leave the arms since they had a purpose to serve and they were being taken out of Swaziland and they had a purpose to serve wherever they were to be taken not in Swaziland. The Police Officer told the Appellant that the Police would take the arms since the Appellant and the other persons did not have a permit to have these arms in Swaziland.

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Another Police witness gave evidence of the opening of the suitcase and the closed compartment in the brief case. This Officer is a member of the Bomb Disposal Unit of the Royal Swazi Police.

He has been trained in these matters both here and abroad. He said in his evidence that when he opened the bag he found a lot of things inside associated with explosives. He gave a list of the articles which comprised 1 pistol with 2 magazines loaded with 16 rounds of ammunition, various rounds of ammunition for a different pistol, 6 small brown limpet mines, one fuse for a certain type of land mine, 3 limpet mine fuses, 113 small limpet mine fuses, 10 hand grenades, 13 hand grenade fuses, 94 MD2 detonators, 30 other detonators for personnel mines, 3 electrical detonators, 5 non-electrical detonators, 3 watch time devices and 2 silencers for AK 47 assault rifles. All these weapons according to the uncontradicted evidence of this witness were of Russian origin and were serviceable. It also appears from this witness's evidence that when he opened the bag or bags the Appellant and two of the other persons who were found in the house were present. The Appellant and five other persons were arrested and charged on four counts of contravening the Arms and Ammunition Act No, 24 of 1964. They were charged under subsections 1, 2 and 3 of Section 11 of that Act. Subsection 1 provides that no person shall be in possession of a fire-arm or arms of war unless he is the holder of a current licence to possess it or is otherwise permitted to possess it under this Act. The expression "fire-arm" is defined in Section 2 to include amongst other things a pistol from which a shot, bullet or other missile can be discharged. The expression "arm of war" is also defined in Section 2 and the definition includes amongst other things apparatus for the discharge of all kinds of projectiles and bombs, grenades and land mines of any kind whatsoever. The expression "possession" is also defined in Section 2 to mean custody or control. Subsection 2 provides that no person shall be in possession of ammunition unless he is the holder of a current permit or licence to possess the firearm for which such ammunition is intended or is otherwise permitted to possess such ammunition under this Act. The expression "ammunition" is defined in Section 2 to mean, inter alia, ammunition for a fire-arm and grenades, bombs and other

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like missiles whether or not capable of use with a fire-arm.

Subsection 3 of Section 11 provides that no person shall be in possession of a barrel, bolt, chamber or other essential component part of a fire-arm or an arm of war unless he is permitted to do so under this Section.

Under subsection 8 of Section 11 the penalties for contravention of subsections 1, 2 and 3 are prescribed. The maximum penalty for being in possession of a fire-arm or a component part thereof unlawfully is a fine of E1,000 or in default of payment 2 years imprisonment. The maximum penalty for being in unlawful possession of ammunition is the same, namely a fine of E1,000 or in default of payment 2 years imprisonment. The maximum penalty for being found in unlawful possession of an arm of war or a component part thereof is imprisonment for a period of ten years or payment of a fine of E5,000 or both.

To complete my account of the relevant provisions of this legislation I should refer to subsection 9 of Section 11 which provides that an occupier of premises on or in which there is an arm of war or ammunition shall unless the contrary is proved be presumed to be the possessor of such arm or ammunition as the case may be.

There are, of course, special provisions in the Act for the licensing of fire-arms and ammunition and there are also special provisions in Section 36 which permit persons in the Regular Forces or Police Officers and other authorised persons in Government employ to be in temporary possession of arms and ammunition.

I must now describe the charges which were laid against the Appellant and the other five persons. Count 1 is a charge of being in unlawful possession of arms of war, namely 6 small brown limpet mines and 10 hand grenades. Count 2 was a charge of being in unlawful

possession of a fire-arm, namely one pistol. Count 3 was a charge of being in unlawful possession of ammunition, namely 25 rounds of ammunition, and Count 4 was a charge laid under the Section dealing with the unlawful possession of component parts of arms of war. The Appellant and the other five persons were charged with being in unlawful

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possession of a fuse for a land mine, 23 hand grenade fuses, 3 limpet mine fuses, 113 small limpet mine fuses, 94 MD2 detonators, 30 detonators for anti-personnel mines, 3 electrical detonators and five non-electrical detonators.

The Appellant and the other five persons were charged on these 4 Counts in the Magistrate's Court and the Appellant was legally represented at his trial. A formal admission was made at the beginning of the trial after the Appellant and the other accused persons had pleaded "not guilty". This admission was an admission of the identity of all the arms referred to in the 4 Counts and an admission that all the arms were serviceable. The uncontradicted evidence of the Police Officer who led the raid is that the Appellant is not a Swazi. It appears furthermore that the suitcase in which some of the arms were found had a false bottom under which the arms in question were concealed. At the end of the evidence which was led for the Crown the Magistrate discharged the 2nd, 4th, 5th and 6th of the accused persons.

The Appellant gave sworn evidence in his own defence. He said this:

"I was arrested on 3rd January 1987 for possession of fire arms and ammunition. I did not know about the presence of these items found in my house. I became aware of them first at the Police Station. I know about the suitcase and the brown bag referred to in Court."

The Appellant then mentioned the name of a certain person who he said "brought them to my house in the company of another person whom I did not know. They asked me to keep the items for them. They came on Thursday and told me that some other people would come on Thursday the following week to collect the suitcase and brown bag. He (the Appellant was here referring to the named person who had brought these receptacles), did not tell me of the contents of the suitcase and the bag. The items were kept in my bedroom in the wardrobe. I showed them where to put them in my bedroom. When I told them to keep these items in the wardrobe I was not hiding them, I was merely keeping them there. I did not know that the suitcase had a false bottom.

I discovered this at the Police Station when the suitcase was

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opened. I heard PW1 (I should mention PW1 was the Police Officer who led the raid) say that some of the items were not found in the suitcase or the bag. This is not true. The contents of the containers were not known to me. I heard the Police Officer say that I said the arms were in transit to South Africa. All I said was that the bag and suitcase would be collected by some people who would come the following week. There was no mention of the fire-arms."

The only other evidence which might conceivably be relevant is this. Under cross examination the Appellant was asked what his occupation was and he replied "I am a member of the African National Congress". He was then asked whether the Organization use similar weapons, to which he answered "yes". He did not, however, suggest in his evidence that he was consciously acting on behalf of the African National Congress in keeping these arms for later conveyance to the Republic of South Africa. On the contrary, his story was that he was entirely ignorant of the contents and that the Police evidence that a pistol and certain hand grenades were found lying loose on a shelf in the house was untrue.

I have expounded at what would seem to be undue length on the nature of the evidence in this case because of the nature of the grounds of appeal which the Appellant has sought to raise in this Court. Before I come to that, however, I should describe the further course of the proceedings in the criminal trial. The Magistrate found the Appellant "guilty" but the other remaining accused persons were discharged. The record contains a summary of the Magistrate's judgment and it appears from that summary that the Magistrate did not believe the accused's evidence that he was unaware of the nature and the contents of the suitcase. Moreover the Magistrate pointed out that certain items, namely the pistol and certain of the hand grenades, were found on the shelves and not in the suitcase, and the Magistrate accepted the Police evidence to that effect.

The Magistrate himself did not pass sentence on the Appellant. He is recorded as having said this: "Due to the large quantity of arms involved in this case and the circumstances thereof and the necessity for guidance on

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sentencing in a case of this nature this Court finds it necessary to commit the same to the High Court for sentencing in terms of Section 292 of the Criminal Procedure and Evidence Act."

On the 11th February 1987 the matter came before the Chief Justice for sentence. The learned Chief Justice said this about sentence: "The maximum sentence for unlawful possession of arms of war is ten years imprisonment. This is to be contrasted with the maximum sentence for unlawful possession of fire-arms and ammunition which is a fine of E1,000. It is evident from this that the legislature makes a clear distinction between the two offences and intends the Court to take a much more serious view of possession of arms of war. According to the accused the arms of war in this case were not intended for use in Swaziland but were merely in transit to another country. As the accused is a member of the ANC this seems more than likely. However in my view this fact is of little assistance to the accused. The offence of unlawful possession of arms of war attracts a heavy sentence because the very existence of such arms in this country threatens the security and safety of its ordinary citizens. While I take into account the fact that the accused has no previous convictions and the other personal factors urged by his Attorney I am of the opinion that the very nature of the offence is such that a substantial sentence must be imposed. I treat all offences as one for the purpose of sentence and sentence the accused to four years imprisonment to commence from 3rd January 1987. The arms in question are forfeited to the Crown."

It is against that judgment that the Appellant now appeals to this Court. He has appeared before this Court in person and has not been legally represented. His Notice of Appeal which was signed by himself on the 16th February 1987, reads as follows: "I, appellant, Mduduzi Sithole, hereby appeal that the Appeal Court of Swaziland should grant me the option of a fine in my four (4) years jail term which was imposed on me on the 11th February, 1987, by the High Court of Swaziland. I am neither appealing for conviction nor reduction in sentence" - he means he is not appealing against the conviction nor is he appealing for a reduction in the sentence, but, and I continue reading from his letter - "I am requesting the Honourable Court of Appeal

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to grant me an option of a fine in my whole prison sentence of 4 years.

Sir, following are the reasons why I request the Honourable Court of Appeal to offer me a fine:-

1. I was charged with possession of arms of war, and these were not meant to harm the Kingdom

of Swaziland, but were to be used in accordance with the wishes of the African National Congress as I am a member of the ANC which is fighting apartheid in South Africa, and liberation of all the people oppressed.

2. My Lords, one does understand the fact that such weapons are dangerous to the innocent society as they might explode any time, but in the position they were found or kept was such that they should not explode and that they were to pass soon not to be kept for a longer period. Unfortunately they were discovered before they passed.

3. My Lords, I request this Honourable Court to remember that the African National Congress does not only want to liberate South Africa and its people, but it also wants to liberate all people affected by apartheid. The African National Congress does not gloss over the across the border raids which South Africa practises on its neighbours. This is a form of aggression which is tantamount to oppression just because these neighbouring countries do not have the power to counteract these bully attacks. I am therefore not supporting the use of violence. But the African National Congress found no other alternative than to resort to the arms of war since their sincere pleas fell on the deaf ears of the South African Government. I am one of the freedom fighters and that is what led to my being found with the arms of war. I was in the process of the struggle.

4. I request this Honourable Court to view the fact that I am a first offender. The courts do have reserved privileges for first offenders which I may also be given."

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"5. My Lords, lastly, I ask this Honourable Court to have mercy and grant me the fine, not only because of the above reasons but also because the arms which were found in my possession were intended to liberate all people troubled by apartheid and Swaziland is one of the affected countries."

I now proceed to consider what the functions of this Court are. This Court is the highest Court in Swaziland and its duty is to administer the Laws of Swaziland without fear or favour. This Court hears many criminal appeals and especially appeals against sentence, and its function when it hears such appeals was defined many years ago in the well known case of THWALA AGAINST THE KING which was decided on the 2nd February 1976, reported in 1970/76 Swaziland Law Reports 363.

The then President of this Court said this: "Sitting as a Court of Appeal the ambit of the Court's jurisdiction in relation to sentence is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed is primarily the responsibility of the trial court. On appeal it is clearly established that in the absence of a misdirection or irregularity a Court of Appeal will only interfere if, as it is sometimes expressed, there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed. Sometimes the phrase "striking disparity" has been disclosed by the phrases "startlingly inappropriate" or "disturbingly inappropriate". These expressions all really mean the same thing, they are one might say expressions of what used to be classified under the phrase "a sense of shock"." A little later the learned President said this: "It is important that an Appeal Court should not erode the discretion of the trial judge despite the fact that an appeal is a re-hearing."

Coming now to the present case, I do not find any misdirection or irregularity in the judgment of the learned Chief Justice. Despite the fact that the Appellant apparently gave false evidence under oath pretending that

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the presence of the arms in the suitcase was not known to him and that he was merely an innocent conveyer I have no doubt that the learned Chief Justice took account of the fact that these arms were not intended for use in Swaziland or against the Swazi State or Nation.

The maximum sentence which is capable of being imposed for the unlawful possession of arms of war is ten years imprisonment and if the Appellant had intended these arms for use in Swaziland I have little doubt that the sentence Would have been very much heavier than it was. Indeed the charge might not have been a mere charge of contravening a Statute. The learned Chief Justice has imposed a sentence which is far below the maximum sentence which he might have imposed. As I have said, I think it is impassible to find that he misdirected himself or committed any irregularity in imposing the sentence which he did impose, nor da I think that the sentence can be described as "disturbingly inappropriate" or "shocking". The Appellant in his Notice of Appeal seems to think that the only danger which the legislature was guarding against was the possibility that arms of this kind might explode of their own accord but that is the least of the evils against which this kind of legislation is directed. A perusal of the legislation makes it clear that it is not in the public interest that unauthorised persons should be in possession of arms of war. For these reasons I am of the opinion that there are no grounds upon which this Court can or should disturb the judgment of the learned Chief Justice and the suggestion by the Appellant that he should be given the option of a fine is out of the question. I would dismiss the appeal.

R.S. WELSH J.A.

I agree

D.A. MELAMET,

JUDGE PRESIDENT

I agree

W. SCHREINER J.A.

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