IN THE APPEAL COURT OF SWAZILAND

HELD AT MBABANE

CR. APPEAL NO. 1/91

In the matter between:

THORNTON HENWOOD Appellant

And

THE KING Respondent

CORAM : KOTZE JA

BROWDE JA

HULL AJA

FOR THE APPELLANT :MR FLYNN

FOR THE RESPONDENT : MR KILIKUMI

JUDGMENT 8TH APRIL 1994

KOTZE JA

This appeal is in my view an appeal without merit. Despite that Mr Flynn, has made a valiant attempt on behalf of the appellant to persuade us that there is indeed some merit in the appeal. He has said everything that could reasonably be said in support of the appeal. We are indebted to him for his assistance.

The appellant was tried in the High Court by Rooney J. on two accounts of attempted murder, in that on the 9th of June 1990 he shot Moses Hlatshwayo and Milton Khoza with a revolver. Count 1 relates to Moses and Count 2 to Milton.

The, facts are not substantially in dispute. The trial Judge summarised these as follows:-

"It would appear that the accused has a son Theo, (not a witness) who had the use of a Ford Escort belonging to him. The two complainants, who are from Mozambique, and one Merigo da Silva, a Portuguese, all young men, were friends of Theo Henwood. They earned a living by repairing cars at various farms. They had no fixed place of employment. All, except Theo, had unstable backgrounds although it now appears that for several weeks before this incident Theo had absented himself from his father's house.

Hlatshwayo said that Theo had left the car with him and Milton Khoza. The car was parked at night at Fairview near where Milton lived. During the day the car was used as transport in connection with whatever work the young men were engaged in.

On a Saturday evening the witness and his friends encountered the accused near Mthunyelelwa's Bar. No words were exchanged and the young men drove to Tinker's Petrol Station. While they were obtaining petrol the accused came and parked his vehicle infront of

the Ford. He was armed with a gun and he ordered this witness, Milton, the driver and Amerigo to alight from the Ford. He ordered them . not to move. Amerigo advanced towards the accused and asked if he could have a word with him".

The evidence further establishes clearly that the appellant then shot both Moses and Milton in their respective stomachs.

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Mr Flynn based his arguments, that the appellant had no intention to kill, on his own say so in the course of evidence.. Mr Flynn's submission was that on this evidence, the appellant should not have been found to have acted recklessly in as much as he had the limited intention of merely injuring the two complainants to stop them from running away. He referred to the following passage in the evidence.

The question was asked:-

"Q. What was your intention when you shot at each of them?

The appellant answered

" to stop them from running away. I did not shoot to kill. I shot to injure them so that they could not run away.

A case of this nature cannot in my view, be decided on the egresses, say so or ipse dixit. One must look at all the evidence. That he acted with reckless abandon is clear from another passage of his evidence and again I quote.

" I said anybody moves I shoot and that I repeated your, Worship, several times. There was, Amerigo, moving towards me, wanting to talk to me privately. The other two also decided to moved away and that is the time I shot.

I shot very fast. It was hardly any seconds in between, it was just bang-bang. I shot the two because there was no time to waste"

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A case in the Appellant Division of South Africa R v HUEBSCH 1953 (2) S.A. 661 establishes the correct principle "as being:-

"That it suffices for the Prosecution to prove in a charge of attempted murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death".

The appellant's own evidence that he shot very fast; that there was hardly any second in between; that it was just bang bang bang is really the end of the matter in so far as his plea of not guilty is concerned. That the shots found their way into the stomachs of the two complainants admits of no conclusion other than reckless disregard as to whether death would follow or not.

The result is that the appeal against conviction fails. The appellant's conduct amounts to an arrogant taking of the law into his own hand, and the sentence in that regard, is in my view, completely appropriate and not excessive.

I have been authorised by my brother Browde to indicate that he concurs in this judgment. The learned Chief Justice favours a different approach and he will now intimate what his views of this appeal are.

(SGD)

KOTZE JA

I agree

(SGD)

BROWDE JA