IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Cri.Appeal Case No. 60/1998

In the matter between

PETROS POSI KHUMALO 1st Appellant
SIBUSISO LONGABAVU GINA 2nd Appellant

Vs

REX

Coram LEON, J.P.
VAN DEN HEEVER, J.A.

BECK, J.A.

For Appellant In Person
For Crown Mr. J. Maseko

JUDGMENT

LEON, JP

The two appellants appeared in the High Court charged on four counts. On count 1 they were charged of murdering Charles Liversage at Lavumisa on or about

8th November, 1997. On count 2 they were charged with robbing him and his wife Gezina of certain keys. Counts 3 and four allege contraventions of Sections 11(1) and 11(2) respectively the arms and Ammunition Act 24 of 1964 as amended. Both appellants were found guilty of murder with extenuating circumstances on count 1 and sentenced to 15 years imprisonment.

On count 2 they were both acquitted of robbery while the 2nd appellant was convicted of theft. But no specific sentence appears to have been passed in respect to that count. I can only assume that whatever sentence was passed it was intended to run concurrently with the sentence which was passed for the conviction of murder. On counts 3 and 4 the 1st appellant was convicted as charged while the 2nd appellant was acquitted. On these two counts the 1st appellant was sentenced to 5 years imprisonment which was ordered to run concurrently with the sentence on count 1. One of the points made by the 1st appellant when he appeared before us today was that the sentences ought to be ordered to run concurrently. But he had obviously forgotten that they were indeed so ordered.

At the trial counsel for the 1st appellant correctly conceded that his client was in unlawful possession of a firearm and that he was accordingly guilty of counts 3 and 4. But in any event when this appeal was called today the 1st appellant restricted his argument solely and exclusively to the question of sentence. It was only the 2nd appellant who attacked the conviction as well as the sentence. It is however necessary, despite the attitude adopted by the 1st appellant before us today, to give a brief account of the background to this case.

The deceased was a scrap metal dealer conducting his business at Lavumisa. He did not own the business himself for it was owned by one Mutton who lived across the border. The deceased sometimes bought scrap in the town while on other occasions people came to his house. The case against the 1st appellant rests upon the direct evidence of the deceased's wife Mrs. Liversage who gave a clear account of the conduct of the appellants. It is not in dispute that the deceased died as a result of an injury caused by a firearm nor is it in dispute, and that was not argued today, that that firearm was fired by the 1st appellant. What was in dispute was the circumstances under which this occurred. Shortly stated it was the defence case that the deceased attacked the 1st appellant and that the gun went off by accident. As he has not argued this matter I do not intend dealing with the facts at any length with regard to this aspect of the case.

Mrs. Liversage's evidence was to the following effect.

The appellants walked in saying they wanted "money, money". First appellant had a gun. They asked for money. They demanded money. There was no money. And then the 1st appellant asked for a black box. The deceased grabbed hold of a broom with which he struck the 1st appellant. But having done that the 1st appellant fired a shot at the deceased hitting him on the left side of his chest causing his death. 2nd appellant then shouted "you have shot him we must run away." They ran away through the window the 2nd appellant taking the house keys with him. That is why he was convicted of the theft of the keys..

Now the case against the 2nd appellant is that he was convicted by virtue of the doctrine of common purpose and also because he had taken the keys and hidden them away in the part of an engine making it very difficult for anyone to retrieve them. As for the keys Mrs. Liversage identified these as being the keys which were stolen on the night on which her husband was killed.

The court a quo found that the crown witnesses were totally unshaken on cross-examination. The appellants had given every indication of rehearsing their story. Not only did the learned judge form the view that Mrs. Liversage was the most impressive witness but he also relied on the conduct of both the appellants after the events. In this regard he drew attention to the fact that the pistol and the keys were deliberately hidden, the pistol hidden by 1st appellant and the keys by 2nd appellant.as well as the completely unsatisfactory inability of the appellants to give any satisfactory explanation for their conduct following the killing of the deceased.

With regard to the particular position of the 2nd appellant I shall now briefly address it. The learned judge held that he was a party to the attack on the deceased. He undoubtedly was. He saw the first appellant in possession of a firearm and must have appreciated that it might be used to overcome any resistance which may have been encountered in the plan to obtain money from the deceased. That finding in my judgment was plainly correct. The 2nd appellant was in those circumstances convicted of murder by virtue of the doctrine of common purpose. It follows that the

case of the 2nd appellant on the merits must fail.

I return now to the question of sentence of both appellants. In passing sentence the learned judge took into account the personal circumstances of the appellants. The 1st appellant has correctly pointed out that he has no previous conviction. But the court a quo also refers to the serious nature of the offence and the prevalence of cases where defenceless elderly people are routinely eliminated by thugs in their own houses. This is actually a terrible case. Here we have a defenceless old man, all he had was a broomstick. The evidence shows that he was in poor health and he was shot down in cold blood because these people, the appellants, were in pursuit of his money. I find myself unpersuaded that the sentence on count 1 was strikingly inappropriate or that there was any misdirection by the trial judge which would justify us in interfering with the sentence. With regard to the question of sentence in so far as the 2nd appellant is concerned, one of the matters which might have given us some cause for consideration is whether he should have obtained a lesser sentence on the murder charge by reason of the fact that it was not he who killed the deceased but that his guilt arises by virtue of the doctrine of common purpose. Had he been a first offender there may well have been some merit in coming to the conclusion that we should possibly give him a lesser sentence than that inflicted upon the 1st appellant. However as he himself candidly admitted he has a large number of previous convictions. They were given to us by the Registrar this morning. I shall read them out.

1. *In February, 1991 he was convicted of housebreaking and theft and was fined E90.00 or 9 months.*
2. *2 years later he was convicted of theft and was fined E60.00 or 6 months imprisonment.*
3. *At the end of 1994 he was convicted of robbery.*
4. *That same year and on the same date he was convicted under the arms and ammunition Act..*
5. *In January, 1995 he received 12 months imprisonment for the crime of housebreaking with intent to steal and theft.*

Since he is a young man of 24, he has the most appalling record. What is more all these previous convictions are highly relevant to the conviction for which he has been convicted and highly relevant to the circumstances of this particular case. In my judgment there is no merit whatsoever in drawing any distinction between the position of the 2nd appellant with regard to the question of sentence and the 1st appellant.

It follows in my view that the appeals of the 1st and 2nd appellants must fail and the convictions and sentences must be confirmed.

LEON, J.P.

I AGREE **VAN DEN HEEVER, J.A.**

I AGREE **BECK, J.A.**

DATED AT MBABANE THIS 23RD DAY OF MAY, 2000