IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.

In the matter between:

JUSTICE SIPHO MAGAGULA & OTHERS
VS
REX

CORAM	**:**	**BROWDE JA**
	:	**VAN DEN HEEVER JA**
	:	**SHEARER JA**
FOR THE APPELLANT	**:**	
FOR THE CROWN	**:**	

JUDGMENT

van den Heever JA:

There were originally eight accused charged in the High Court on a number of counts arising from events which occurred in the period from the 22nd of June to the 9th of September, 1997. The Crown decided to use the person who had been indicted as the fourth accused, as an accomplice witness. Those still due to appear were renumbered appropriately. At the end of the trial on the merits, all were on 4th November 1998 convicted on every count with which each had been charged. As far as the first four accused are concerned, these included two counts of murder. The matter was postponed for the issues of extenuating circumstances and sentence to be determined. The trial Judge, Dunn J, died before these had been dealt with. The CRIMINAL PROCEDURE AND EVIDENCE ACT made no provision for such a situation. The legislature stepped in and amended the statute by Act 3 of 2000, which provided that it was to operate with retrospective effect.

Sapire CJ then dealt with the issue of extenuating circumstances in respect of the murder charges and found that there were none. On 4th November 2000 he proceeded to sentence the accused on the various counts on which they had been convicted. He dealt with only six of the accused. Apparently No.3 had died before the proceedings came before the court once more. All six of those dealt with have appealed against their convictions on the merits; against the procedure that was adopted as a result of the death of the trial Judge and the alleged unfairness of the legislation adopted to close the procedural lacuna revealed by that demise, and the sentences imposed by Sapire CJ – including, in the case of the two murder counts, his finding that no extenuating circumstances existed, and consequent imposition of the death penalty.

At the commencement of the hearing before us Mr. Twala who appeared for some of the appellants, complained vigorously that the record was incomplete. It failed to reveal that after conviction and before sentence, two applications had been brought before the High Court attempting to put an end to the situation in which the unsentenced accused remained nevertheless detained – for two whole years. That detention, he submitted, was unlawful. On the first occasion the High Court ordered their continued detention as awaiting trial prisoners – *ergo*, until the Crown instituted a prosecution against them *de novo* in terms of the common law. The second was aimed at putting the Crown to terms as regards doing just that, but no order was made, leaving the appellants in limbo and unable to appeal.

Reflection persuaded Mr. Twala that, however justified the complaint against that detention might be, amplification of the record of the criminal trial with the papers relating to events after the conviction of the accused and before they were sentenced, could serve no practical purpose. This court cannot wind the clock back and undo the fact of their detention.

Clearly this Court has no jurisdiction to determine, more particularly in these proceedings, the validity or equity of the exercise by Parliament of its legislative powers in passing Act 3 of 2000. Issues properly placed before us by the appellants, are whether the Act as amended authorised the procedure adopted; whether each of the convictions was justified; and whether the sentences are excessive.

In both the Republic of South Africa and Swaziland the common law was altered by statute enabling an accused convicted by a Magistrate to be sentenced, in defined circumstances, by a judicial officer other than he who had convicted. In the Republic of South Africa this possibility was extended to proceedings in the High Court. (See 275 of Act 51 of 1977 as substituted by Section 7 of Act 34 of 1998). Sensible provision was also made in regard to a part-heard matter which cannot be completed by the bench before which it was initiated: where that has to be commenced *de novo*, the record of evidence already adduced may be admitted in the new trial where a witness has since died or is too ill or cannot be traced now, provided that both the defence and the prosecution had a proper opportunity in the earlier proceedings, to cross-examine that witness.

In Swaziland the legislature has now also made provision to extend what has long been possible in regard to trials before Magistrates, to the High Court.

Act 3 of 2000 provides that as from 20th July 2000 it shall apply to all criminal proceedings before any court, irrespective of whether or not commenced before or after the commencement of the Act. The third (and last) section reads:

> "Section 291 of the principal Act is amended by the addition of a new section 291 *bis*, as follows:
>
> "*Sentence, or re-trial, in all courts, where the presiding officer is unable to pass sentence.*
>
> 291 (1) *bis.* Notwithstanding any law to the contrary –
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> (a) if sentence is not passed upon an accused forthwith upon conviction in any court; or
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> (b) if, by reason of any decision or order of a superior court on

appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court,

any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, within a reasonable time –

(i) pass sentence on the accused; or

(ii) take such other steps as the judicial officer who convicted or passed sentence, that is to say the absent judicial officer, could lawfully have taken in the proceedings in question if he had not been absent.

(2) Absence" in this section means absence by reason of disability, removal from Swaziland, death, desertion or any similar happening."

Counsel were in my view quite correctly agreed that as far as the murder counts are concerned, the first stage of the proceedings had not been completed when the relevant appellants were convicted of murder, so that Section 291 (1) (*bis)* has no application to them and it was incompetent for the court *a quo* to supplement the conviction before proceeding to sentence all the appellants. Section 296(1) of the **CRIMINAL LAW AND PROCEDURE ACT** compels imposition of the death penalty by the High Court convicting an accused of murder, subject to three provisos of which only the third is relevant in the present matter. It provides that "where a court <u>in convicting any person</u> of murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the death penalty." (emphasis added)

The italicised words make clear what Section 295(1) also affirms:
"if a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances."

The rest of the Section 295 says what norms should be applied in categorising the conviction as "with" or "without" extenuation and that the judge may, but does not have to, specify what factors place the offence in the "with" category rather than that which attracts the compulsory penalty of death by hanging.

> In short, classification of the offence as being murder without extenuating circumstances is part of the process of conviction, not part of the process of sentencing. This was the legal position in the Republic of South Africa also when the death penalty was mandatory for murder without extenuating circumstances.

It follows that the finding of the (new) court *a quo* that no extenuating circumstances existed as regards the murder charges and imposition of the death penalty for those, cannot stand and must be set aside; leaving it to the Crown to decide whether to try the respective appellants *de novo* on those.

That is however not the end of the matter as far as this court is concerned. The appeal was launched also against the convictions and sentences of those appellants on other counts, and appellants not involved in any murders. The retrospective legislation results in the necessity for a hearing *de novo* on the merits as regards those, falling away. And, sympathise as one may with the attempts made to compel the Crown to regularize the legal position, Mr. Twala conceded, rightly, that the two applications brought to push the Crown into action were neither appealable nor before us even assuming that anything we might order could have any beneficial practical effect for his clients.

> To get then to the facts. In what follows I refer to the appellants as they were named and numbered at the trial.

The first four counts arise from an armed robbery committed on 28th August 1997, during which a father and son, Messrs Wessels senior and junior, were

killed and the wife of the former and the fiancé of the latter deprived of listed possessions by means of threats. Accused 1, 2, 3 and 4 faced these charges. A fifth person, formerly accused no.4 also allegedly a participant in these events, became as already stated, a Crown witness.

Count 5 and 6 relate to the illegal possession of a 6.35 Astra pistol No.931954, and 17 live rounds of 6.35 ammunition, by accused no.1, on 9th September.

Counts 7 and 8 relate to the illegal possession of a 9mm Star pistol No.1542186 and 13 rounds of 9 mm ammunition, by accused no.2, on 8th September.

> Only No.3, Sipho Mgiyo Magagula, was charged (count 9) with illegal possession of 9 live rounds of ammunition for a .38 special revolver. This merits little if any further attention, in view of his demise.

Counts 10 and 11 charge accused no.2, 5 and 6 with having held up at gunpoint and robbed Harriet and Christene Wasswa on 4th July 1997. The booty included a Toyota with registration number SD314.

According to count 12, accused no,2, 6 and 7 on the 16th of July assaulted Dr. Robert Caithness and deprived him of his property including a Mercedes SD545BG.

Count 13 alleges that on the 22nd of June accused 2, 4 and 5 robbed K.M. Mbuli of assets at gunpoint. These included a white Jetta with registration number SD493GS.

Counts 14 and 15 charge accused 2 and 4 of having on 24th June stolen

Osman Mansoor's Opel Astra SD760GH, and broken into his house and removed listed articles.

All the accused, despite their pleas of not guilty, having been convicted as charged by Dunn J, Sapire CJ sentenced them as follows; ordering, after determining the terms of imprisonment for each for the counts on which he had been convicted,

"The initial custodial sentences to be served concurrently by the accused persons in terms of my judgment this morning are deemed to have commenced on the date of their arrest. This means that service of sentences to be served consecutively commences only after the first sentence has been served."

ACCUSED NO.1: JUSTICE SIPHO MAGAGULA

Count 1: murder of Wessels Sr.: 28th August 1997; death penalty.

Count 2: murder of Wessels Jr. 28th August 1997: death penalty.

Counts 3 and 4: armed robbery of Mrs. Wessels and Ms. Griffin, same date: 15 years each, sentences to run concurrently.

Counts 5 and 6: possession of Astra and of bullets on 9th September 1997, 5 years each, also to be concurrent.

Therefore, a total of 20 years incarceration to be served.

ACCUSED NO.2: MAINSTAY VUSI MAVIMBELA

Counts 1-4: same sentences as imposed on accused 1 – double death penalty, and two terms of 15 years to run concurrently.

Counts 7 and 8: possession of Star pistol and live rounds, taken as one: 5 years.

Counts 10 and 11: robbery of the Wasswa women on 4th July 1997 – 15 years on each count, but to run concurrently.

Count 12: robbery 16th July 1997: Dr. Robert Caithness: 15 years

Count 13: robbery 22nd June 1996: Mr. M.K. Mbuli: 15 years

Counts 14 & 15: (taken together) - Osman Mansoor – housebreaking and theft; theft of an Opel : 5 years.

Therefore a total of 70 years incarceration.

ACCUSED NO.4: KHAZI MKHWANAZI

Counts 1-4: same as accused 1 and 2 i.e. double death penalty and 2 x 15 years, to run concurrently.

Count 13: robbery 22nd July 1996 : M.K. Mbuli : 15 years

Counts 14 & 15: (taken together) : Osman Mansoor housebreaking and car theft : 5 years.

Therefore, a total of 35 years incarceration.

ACCUSED NO.5: ANTHONY MKHONTA

Counts 10 & 11: robbery 4th July 1997 of Harriet and Christene Wasswa :

15 years each count but to run concurrently.

Count 13: robbery 22nd June 1997 : K.M. Mbuli : 15 years

Thus 30 years, but this accused was also declared an habitual criminal – presumably on all three counts since the declaration is not linked to a particular offence – by reason of his previous convictions.

ACCUSED NO.6: DUMISANI DLAMINI

Counts 10 & 11: robbery 4th July 1997 of Harriet and Christene Wasswa: 15 years each count, to run concurrently

Count 12: robbery 16th July : Dr. Robert Caithness : 15 years
Therefore, a total of 30 years.

ACCUSED NO.7: PATRICK GODWANA MAVIMBELA

Count 12: robbery : 16th July : Dr. Robert Caithness : 15 years

The record in the appeal is not satisfactory. The entire record is riddled with the comment “inaudible”. And there is often no record of what the items were which were pointed out by a particular witness, though the trial judge must have noted that information himself, since his judgment often

supplements these deficiencies. Such flaws may influence the outcome of an appeal in other matters. In the present one, since all the appellants denied having participated in any way in any of the conduct alleged by the Crown – save in regard to a visit by some of them to an "inyanga", which was admitted but the purpose and detail of that visit challenged – it can have no bearing on the outcome of the appeal.

> On the merits, we have to determine whether the trial judge was correct in finding that the Crown had proved beyond a reasonable doubt, all the elements of each offence of which each accused was convicted. It is trite law that the court sentences a man for having committed a crime, not for having lied under oath.

I propose to deal with each count in chronological order, rather than in the sequence in which the Crown formulated the charges against the appellants. I do not detail the evidence given by each witness, since the judgment of the lower court does so sufficiently.

Count 13 (Accused 2, 4 & 5)

During the night of Sunday 22nd June 1997, Musa Fakudze was at home with her partner Kenneth Mbuli. She woke, saw light on in the passage, went to investigate, and saw a man armed with a long knife. A shot was fired, a number of men demanded guns (there were none in the house), money and the keys of Mbuli's Jetta. They said they needed the Jetta to convey their loot but would leave it unharmed but minus its radio "near Mangwaneni School" next day. She saw them packing articles from the house, but she and the other occupants were ordered to cover themselves with a blanket, and obeyed. She was accordingly unable to say how many intruders participated in the robbery, or to identify anyone as such. Before they left with the Jetta, they tied the occupants up with telephone wire. She did subsequently at the police station identify exhibits 29 to 38 as articles removed from the house that night: respectively a Sanyo radio; navy suitcase; pot; lace curtain; pair of loin skins; multi-coloured carpet; duvet

cover; pair of sheets; pair of towels; and a pair of shorts. The Jetta was discovered the next day near Pigg's Peak. It was a write-off.

Sibusiso Nkentjane testified that he knew all three accused. In June 1997 he and accused 4 came to Swaziland from the Republic of South Africa, and accused 2 invited him to accompany Nkentjane and numbers 4 and 5 on a mission to "fetch (no.2's) things". They went to a double-storeyed house where no.2 made an opening in the fence. It was already dark, no.2 and no.4 went in, while no.5 and Nkentjane himself remained outside, and "kept on walking when a security guard's car came along." Accused 2 and 4 caught up with them but they parted company. Later accused 2 and 4 fetched him and the three of them went together to a garage where they got into a Jetta which accused 2 drove towards Pigg's Peak, at the suggestion of no.4 since his mother lived there. En route the car overturned, and was abandoned. Days later no,2 driving an Astra dropped Nkentjane and no.4 off at the border. No.4 was carrying a bag containing a video recording machine and other electronic appliances.

> Sipho Kunene testified that he bought a radio from no.5 in September, which the police a few days later instructed him to bring to them. He did, and testified that it was in court. All three, 2, 4 and 5 were sufficiently linked to this charge by corroboration of Nkentjane's sometimes rambling and self-exculpatory evidence by the facts that accused 2 led police witness Eric Mkhonta to his own home and produced the two loin skins exhibit 33; at the house of no.4, exhibits 31 and 34 were found, and John Mwanga testified that he had bought exhibit 30 from him; and at the house of no.5 exhibits 32, 36, and 37 were found. Accused 5 also led the police to Kunene who handed over a double deck Sony radio cassette as having been sold to him by accused 5; but I do not find a record of this being linked to the Sony exhibit 29 and therefore to this particular count – not a matter of any moment in the light of other Crown evidence and the fact that none of accused attempted to explain their possession of these articles.

> Counts 14 and 15 (accused 2 & 4)

When Osman Mansoor woke on the morning of 25th June 1997 he found that

his house had been broken into and burgled, and his Opel Astra SD760GH stolen from his garage.

Sibusiso Nkentjane told the court that after the previous episode, accused 2 and 4 took him in an Astra to the border, where no.2 dropped the pair of them off to enable them to return to South Africa. Accused 4 told him they had stolen the car, and taken the video recording machine, other electronic appliances and some three remote control sets in the bag he was carrying, from the same place they had taken the car. Inspector Gamedze received a report that there was an abandoned car at Mahlabatsini in the Matsapha area. He went there and found the Opel Astra SD760GH locked, but its radio had been removed. He had it towed to Manzini, where Osman identified it as his. According to Nkentjane accused 4 had sold the articles he took over the border in the bag he was carrying, to Sabelo Mkhatshwa. Sabelo Mkhatshwa testified about the articles accused 4 had sold to him; and that Sergeant Singwane soon after came to find out from him what these had been. He showed him, and the police took these – according to the judgment, exhibits 25, 26, & 27, articles which Mansoor identified as his missing property at the police station. He had also positively identified exhibit 24, two pairs of shoes. According to police witness Eric Mkhonta, accused 2 was wearing one of these when he was arrested, accused 4 the other.

Counts 10 & 11 (accused 2, 5, & 6)

During the night of the 4th July 1997 Harriet Wasswa was at home with her children. She went to investigate a noise, was confronted by two people, one armed. They threatened her, entered her home, assaulted her daughter Christene, and took money and many articles from her and her daughter and also the keys of her car, a Toyota SD314HS, in which they carried off their loot. She identified the shell of her car later, as also at the police station exhibits 40, 41, 42, 44, 45, 46, 47, 48, 49 & 50. Exhibit 47 is a JVC music

system. Eugene Mavuso testified that on the 5th, accused 2 came to his house with a bag in which there was a radio plus music system which Mavuso took to the police at their request. Accused 2 had led them to his house when he was not present. After hearing they had been there, he reported to the police and in response to the request then made, took an article to them which sounds as though it might have been exhibit 47. The record however reflects Mavuso as having pointed out in court exhibit 27 as the article accused 2 brought. This exhibit number was however allocated to a satellite recorder stolen from Osman Mansoor's house, not to the Wasswa counts. The probable confusion in the record becomes irrelevant in the light of the evidence of Mangaliso Dlamini that accused 2 had during July brought a TV set exhibit 50 to him and asked him to find a buyer – which he did, one Terror Matsebula, who paid for it in three instalments, one of which accused 2 said Dlamini could keep as commission. Accused no.2 led the police to Dlamini. He gave them the name and work address of Terror, from whom they received the set which he pointed out as the Panasonic before court. Accused 2 also in July 1997 offered a Toyota Corolla for sale to Goodman Dlamini. It had no registration number or tax certificate. Its engine was put into a car belonging to Goodman, who also took all the wheels. Accused 5 and 6 are linked to this charge by the facts that the police found exhibits 40-44, 48 and 49 in the house of the former, and exhibit 45 in the possession of the latter. All three offered no explanation, merely denied the Crown evidence.

Count 12 (accused 2, 6 & 7)

On 16th July Dr. Roberts Caithness was woken by four men in his bedroom, armed with ceremonial swords, a spear and a dagger which had been decorations on his own walls. He and his wife were tied up. The intruders demanded his car keys. He was blindfolded, his wife and child covered with a blanket. The intruders selected and took many articles from the house,

and went off in his Mercedes motor car. This the police found, but it had been overturned and was a write-off. Dr. Caithness was later called to the police station to identify some of the articles which had been taken that night. Accused 2 was present, admitted to the complainant that he had taken the complainant's watch, which had been found in his possession, from next to the complainant's bed, and when the latter asked him where the swords were, said they were "at his place."

Bongani Lukhele had participated in this robbery and was called as an accomplice witness. They wanted a motor car, and the four agreed they would meet that evening. According to him accused 2 and 6 broke into the house, after which he himself and accused 7 also went in. The cross-examination of this witness by his counsel put accused 2 on the scene. Counsel put it to Bongani:-

> "My instructions are that it was your idea, you are the one who selected the house?... When you arrived on the premises where this offence was committed, you [were] the one that was carrying the bolt cutter, correct?
> ANSWER: Yes.
> And also you are the one that cut the padlock with the bolt cutter...and also when you went into the bedroom you are the one that spoke to the occupants of that bedroom?
> ANSWER: Yes."

According to Bongani when the Mercedes overturned, each of the four took a bag of booty. Those taken by numbers 6 and 7 contained clothes and some CDs. There is no evidence that anything taken from Dr. Caithness was found in possession of either of these; but the trial court found Bongani to be a credible witness and the argument advanced by Mr. Kunene for the Crown before us was persuasive. The fact that he testified favourably to accused 7 that "accused 7 was reluctant or did not want to get into the premises, we then forced him to get in" supports the finding of the trial judge that he was telling the truth. Mr. Kunene conceded that in the light of that evidence, the sentence imposed on accused 7 was too severe: he should not have been treated on a par with the other two.

Counts 1-4 (accused 1, 2, 3 and 4)

During the night of 28th August 1997 Mrs. Wessels and her husband heard noises, got up and dressed, and opened their bedroom door to investigate. Three men entered the room. Two carried handguns, one a knife and a small axe – the latter being property of the Wessels household. One (who had a "shining pistol") cut a towel into strips and tied Wessels' hands behind his back. The couple were ordered to lie on their stomachs on the floor, but at Mrs. Wessels' request were given permission to sit on the bed instead. The intruders started packing up Wessels' belongings into Wessels' bags. They demanded money and firearms. She told them that there was no money and their firearms had been handed in at Oshoek Border Post. Finding a safe in a cupboard, one of the three who kept demanding firearms and was aggressive, accused the victims of lying and demanded the key. He was told where it was. In the safe were "eight or nine 9mm bullets" which were taken. The packed bags were put at the door, and removed by intruders. When only the aggressive man holding a dark, smaller firearm was left in the room, and had his back to their victims, Mr. Wessels charged at him and hit him with his shoulder. The robber fired two shots which felled Mr. Wessels, and ran out. While Mrs. Wessels was trying to assist her husband, she saw her son coming out of the room he shared with his fiancé, Ms. Griffin. Before she could shout to him, she heard another shot, ran out to the passage, where she saw her son lying on his back with blood pouring out of a hole in his head. He was dead. Wessels Sr. was taken to hospital but died in the theatre.

Mrs. Wessels compiled a list of articles missing from their bedroom and the rest of the house and later identified items at the police station: her husband's watch, exhibit 4, and her son's blue denim trousers exhibit 5.

> According to Ms. Griffin three people had entered the bedroom she shared with Wessels Jr., one of whom was carrying a silver pistol. All that was removed which she could later identify, was a purple bag, exhibit 1; two cassettes exhibit 6; and the denim trousers exhibit 5.

> The accomplice and former co-accused, Collen Muzi Ngwenya, implicated all four in the events of this night. He himself had been left outside the house to keep watch, and to warn if necessary. He saw them at a window, and after a while accused 2 climbed in, the door was opened, and the other three also entered. After a while accused 4 came out, sought and was given reassurance from Collen that all was quiet outside, went back in and came out with a hi-fi system and a litre of Krest cooldrink which he put down next to Collen. Some minutes later he heard shots, and started running away. Then he saw the four coming out of the house, carrying bags, and accused 1 and 2 carrying handguns. He had not seen the firearms before the four went in the house, saw them only when they came out. Accused 1 had a smaller one, like a revolver, while accused 2 had a pistol that was shining and longer than that accused 1 carried. They shouted to him to stop. Accused 4 gave Collen a purple bag. They parted company. When he got to his room he found that the purple bag contained woman's clothes. When he told accused 4 of this the next day, the latter instructed him to burn them, and not to say a word about the events of the previous night. He burned the clothes but kept the bag.
>
> Collen's evidence was convincingly corroborated.

The police on 9th September found exhibit 4, the watch of Wessels Sr., in the room where accused 1 was asleep. Under his pillow was a 6.35mm Astra pistol with serial number 931594 with seven rounds in it. On the wall was a coat or jacket, in the pocket of which was a wallet or black bag containing a further 10 rounds. His girlfriend, also in the room, said the room, the watch, the coat, were his, and he did not deny her statement. He had no licence for the firearm. (These facts form the basis of counts 5 and 6 against him.)

> Returning to counts 1-4, the police found four empty 6.35 cartridge cases in the Wessels house and 6.35 bullets were removed from the corpses of father and son. Ballistic evidence established that the cases had been fired from this Astra pistol.

The presence of accused 2 in the house that night was established by his fingerprints on a litre bottle of Krest in the house. An "inyanga", P.M. Lukhele, testified that on 8th September accused 2, 3 and another of the accused (it is not clear whether he referred to accused 6 or 7, but this person

was not charged with being involved in the relevant crimes) came to him for treatment of a problem. Accused 3, whom he knew well, explained to him that eleven days earlier they had killed some white people, and wished to be "cleansed" so that they would not be called to account for those actions. Accused 2 had already earlier handed him a firearm, which he had received, wrapped in a ceremonial cloth, and kept in his consulting room. Having been given preparatory instructions, on 8th September they came for the actual treatment. A group of policemen also arrived, surrounded the "inyanga's" home, and ordered the occupants to come out one by one, with their hands up. They were searched. The police found a bag tied around the waist of accused 2, containing five live rounds. They asked him where his gun was. He said he had given it to Lukhele. The latter produced it. It was exhibit 2, a 9mm Star pistol, serial number 1542186. Accused 2 had no licence for this. The pistol accords with the description of the longer of the two firearms Mrs. Wessels had seen in the hands of the robbers. This had been held by the one who cut towels into strips to be able to tie up her husband. This pistol and ammunition formed the basis for counts 7 and 8 against accused 2; and is of course relevant also on counts 1-4. accused 2 admitted having visited the "inyanga", but denies having handed over a firearm or confessed to having killed anyone. The visit was aimed at getting a proper job, on the part of accused 3, and in connection with "some sickness" as far as he himself was concerned. "I suffer from fits." He denied that any waist bag or ammunition had been found on him.

The evidence corroborating Collen as regards the participation of accused 3 in the events detained in counts 1-4, is important only for that reason: that it corroborates the testimony of the accomplice, and underscores the correctness of the assessment of the trial judge, of his reliability. On the 9th September after being arrested at the "inyanga"s" abode, accused 3 gave the police a number of cassettes. These were identified at the police station

later by the Wessels complainants as being their property. They also identified the denim trousers accused 3 had on, which he was wearing already when he was arrested, as having been the property of Wessels Jr., by its label. Accused 3 disputed their identification, but failed to answer as to where he had bought the article. He admitted that he had gone to the "inyanga" with accused 2, but said it was because "I wanted luck because I wanted to look for a job."

The conviction of accused 4 as regards to counts 1-4 rests on only the evidence of the accomplice Collen. I find nothing in the record beyond that which links him to the events at Mountain View on 28th August but Dunn J found the accomplice to be a trustworthy and reliable witness. His evidence is supported by the independent evidence which links accused no.1, 2, and 3 at the scene of the crime. There can in my view be no reason for the accomplice to falsely incriminate accused no.4. The evidence of the accomplice regarding what transpired leading up to the entry of Wessels house was not seriously challenged nor shaken under cross-examination.

> I find nothing in the record indicative of any misdirection by the trial Judge in his assessment of Collen's credibility.
>
> One of the four robbers remained with Mrs. Wessels, armed; there were three others, one of whom was armed, in her son's bedroom at the time Mr. Wessels was shot; and the son came running out of his room immediately after that and was himself shot. Although accused number four at some stage came out of the house with articles not normally found in a bedroom, in the absence of any evidence by the accused to counter the reasoning of the trial Judge in finding all four the accused guilty on the basis of common purpose, it cannot be faulted:
> "the fact that two of the accused were armed with pistols must have been known to all the accused at the very least at the time the accused entered the house."
>
> Finally, Mr. Twala argued that Sapire CJ had erred in sentencing no.5 twice: to a defined term, but also by declaring him to be an habitual

> criminal. In terms of the latter, as I understand the position, in theory he could either spend the rest of his life in prison or be released after a few years – or tomorrow – at the discretion of the King. It seems to me to do nothing but create uncertainty as to what the position of no.5 is, to adopt this sentencing course. Either the future of the appellant lies in the judgment of the King, or the legal system has ruled that he merits a sentence totalling thirty years. The court now either purports to fetter the discretion of another ["You may release him but not until thirty years have elapsed"] or abandoning its own ["I have sentenced the man to thirty years' imprisonment but by reason of declaring him an habitual criminal I leave the door open for him to be released earlier."] Whether such a course is competent was not argued in detail before us. Since it creates uncertainty it is in my view undesirable and this court may and should resolve that uncertainty.

The reasons given by the court *a quo* when sentencing the accused make it clear that it did not inquire into the ages of the accused although Dunn J had mentioned when he heard argument on sentencing, that he thought it advisable to do so. The previous convictions of the accused are before us, and vary considerably. Sapire CJ does not appear to have given past history any weight, save in regard to no.5. The summary of sentences imposed on each accused, earlier in this judgement, seems to reflect an unwavering standard: 15 years for armed robbery, 5 years for possession of an unlicensed firearm and live rounds, 5 years for housebreaking and theft of a car. And he held that accused persons "convicted on the basis of common purpose in connection with the commission of an offence…are all equally liable both legally and morally for the harm they do in furtherance of that common purpose" (emphasis added). As a generalization, that conflicts with the judgment of this court in **JAMLUDI MKHWANAZI VS REX, APPEAL CASE NO.4/97,** delivered on 1st October 1998.

> None of the accused save perhaps no.5 could be described as a hardened criminal, on the strength of his previous record.

Accused no.1 tended towards both dishonesty and violence, but his previous brushes with the law were not serious judging by the sentences imposed:

Nevertheless, even accepting that one must not take into account the tragic result consequent upon the robberies he perpetrated (since then he may well be punished twice for that result, on the counts of murder also, should there be a trial *de novo* relating to those) there is no ground for interfering with the sentences imposed in respect of counts 3 an 4. An aggravating feature is that they were perpetrated in what should have been the sanctity of the victims' home.

Accused no.2 had only one previous conviction, for assault in July 1990 in respect of which he was sentenced to E10 or one month's imprisonment. After a six-year gap, he during the short period from 22nd June to 28th August 1997 broke into four houses, on three occasions robbing the occupants. There is no suggestion that he himself physically injured any of his victims, but he does seem to have been a leading figure, having been involved in every offence charged save no.1's possession of a firearm. Nevertheless no account could have been taken or allowance made for the cumulative effect of the sentences imposed on him by the trial court: a period which stretches far beyond his probable lifespan. Since possession of the illegal Star was indispensable to the armed robbery of the Wessels, it would be appropriate to order that sentence to run concurrently with those on counts 3 and 4; and to order the sentences on counts 12 and 13 to run concurrently, resulting in a total of 50 years' imprisonment instead of 70.

> Accused no.4 had already been subjected to fines (in 1989 and 1993), and been sentenced to a total of six years on two separate charges of housebreaking and theft; which punishment did not succeed in discouraging him from repeating that conduct.
>
> Accused no.5 has been at loggerheads with the law since 1983, has been fined, attempted to be discouraged from repetition by partially suspended sentences, and has a conviction for armed robbery (1985) as well as convictions for 12 separate incidents of housebreaking.
>
> Accused no.6 was apparently a first offender. Under the circumstances

it was inappropriate to treat him on the same basis as his colleagues. In my view a total sentence of thirty years in his case is grossly excessive and 12 years on each of counts 10, 11, and 12, all to run concurrently, would be more appropriate.

The history of accused no.7 is somewhat more damning than that of no.6 : since January 1990 three convictions of housebreaking and theft have been chalked up against his name, as well as one each of theft and "theft from a car." On each occasion he was offered the option of a fine ranging from E5 or 5 days, to E80 or eight months. In the light of Mr. Kunene's fair concession, referred to earlier, and the Crown evidence that he had been a reluctant participant in robbing Dr. Caithness, a sentence of 10 years of which 4 are suspended for 3 years on condition that he is not convicted within that period of any offence involving dishonesty or violence for which he is sentenced to imprisonment for a period in excess of 6 months without the option of a fine would hopefully encourage him to mend his ways.

In the result, the following order is made. The appeals of the appellants are partially successful and:-

1. The convictions and sentences as regards to accused numbers 1, 2 and 4 on counts 1 and 2 are declared a nullity and set aside.
2. The conviction of accused no.1 on counts 3, 4, 5 and 6 are confirmed as also the sentences imposed in respect of those.
3. The convictions of accused no.2 on counts 3, 4, 7, 8, 10, 11, 12, 13, 14 and 15 are confirmed as well the as sentences imposed, save that it is ordered that the sentences on counts 7 and 8 shall run concurrently with those on counts 3 and 4, and the sentence on count 13 run concurrently with that on count 2.
4. The convictions and sentences of accused no.4 on counts 2, 3, 13, 14 and 15 are confirmed.
5. The convictions and sentences of imprisonment of accused no.5 on counts 10, 11 and 13 are confirmed but the order declaring him an habitual criminal deleted.
6. The convictions of no.6 on counts 10, 11 and 12 are confirmed but the sentence replaced with one of twelve years on each count, all to run concurrently.

7. The conviction of accused no.7 on count 12 is confirmed but the sentence replaced by one of 10 years' imprisonment of which 4 are suspended for three years on condition that the accused is not convicted of an offence, committed during the period of suspension, involving dishonesty or violence against the person of another, in respect of which he is sentenced to imprisonment for more than six months without the option of a fine.

In so far as it may be necessary the injunction of the Chief Justice is repeated that the custodial sentences to be served concurrently in terms of this order are deemed to have commenced on the date of their arrest. Service of sentences to be served consecutively shall commence only after the first sentence has been served.

L. VAN DEN HEEVER JA

I AGREE : J. BROWDE JA

I AGREE : D.L.L. SHEARER JA

Delivered on this day of June 2001.