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10pt"><span lang="en-US">IN
THE COURT OF APPEAL OF SWAZILAND</span></font></font></p>
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10pt"><span lang="en-US">APPEAL
CASE NO.65/01 </span></font></font>
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10pt"><span lang="en-US">In
the matter between:</span></font></font></p>
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<font face="Arial, serif"><font size="2" style="font-size:  
10pt"><span lang="en-US">CHRISTIAN  
OBI MACREA 1st APPELLANT</span></font></font></p>  
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MASEKO 2nd APPELLANT</span></font></font></p>  
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10pt"><span lang="en-US">VS</span></font></font></p>  
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10pt"><span lang="en-US">THE  
KING RESPONDENT</span></font></font></p>  
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BROWDE JA</span></font></font></p>  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">STEYN  
JA </span></font></font>

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1st APPELLANT IN

PERSON</span></font></font></p>

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2nd APPELLANT IN

PERSON</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">FOR

CROWN

MR. N. MASEKO</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Tebbutt JA</span></font></font></p>  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">In the High Court, before Nkambule J, six persons were arraigned. They were variously charged with seven counts of robbery, one of kidnapping, five counts of contraventions of the ARMS AND AMMUNITION ACT NO.24 of 1964 (as amended) (the Act) and a count of murder. At the</span></font></font></p>  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">2</span></font></font></p>  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">commencement

of the trial, the Crown abandoned two of the robbery counts and requested a separation of the murder count from the others, which was

granted.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">At

the conclusion of the Crown case at the trial, two of the accused persons were acquitted and discharged on all the counts with which

they were charged and at the end of trial as a whole a sixth accused

was similarly found not guilty and discharged.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Of

the remaining three accused, Accused No.1, James Ijeoma was found guilty on one of the robbery counts and on the kidnapping count, as

well as of being in possession of a 9mm parabellum firearm and of 11

and 16 rounds of ammunition for it i.e. of three counts under the Act. The robbery and kidnapping counts were treated as one for the

purposes of sentence, which was one of seven years imprisonment and

on the three counts under the Act, also treated as one for sentencing

purposes, he was fined E5 000 or five years imprisonment, the sentences to run concurrently.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Accused

No.2, Christian Obi Macrea, was found guilty on one count of robbery

and sentenced to seven years

imprisonment.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Accused

No.3 was convicted on five of the robbery counts, on the kidnapping

count and on two counts under the Act i.e. of being in possession of

two AK47 rifles and 126 rounds of ammunition for them. On the one robbery and the kidnapping count, he was sentenced to seven years imprisonment. This was also his sentence on each of the other four

robbery counts and on the two counts under the Act, taken together

for sentencing purposes, he was sentenced to five years imprisonment.

All his sentences were ordered to run concurrently. The sentences on

all three accused were backdated to 11th September 2000.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">3</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Of

the three accused, two of them, Accused No.2 and No.3 have appealed

to this Court against their convictions and sentences, as appellants

Nos 1 and 2 respectively. To avoid confusion, I shall refer to them

herein either by their names or as they were cited in the court a quo

i.e. as Macrea or Accused No.2 (A2) and as Maseko or Accused No.3 (A3). Accused No.1, Ijeoma (A1), has not appealed.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">The

facts show that the three accused were part of a group that were involved in a series of robberies, some of them involving the use of

firearms, in the Ezulwini, Mdzimba and Ngwenya areas between 14th June and 23rd August 2000. Also involved with them was one Albert Sabelo Shongwe, who, as an accomplice, was the main Crown witness at

the trial. I shall refer to him, as he was at the trial, as Sabelo.

He knew all three accused. He testified that on 14th June 2000, he

was introduced by A3 to a Nigerian national by the name of Steve who

asked them to kidnap a Chinese woman whose brother owed him some money. Steve said he would get another Nigerian to assist them.

He

was A1. At about 5.45pm that day a Chinese woman, Jenny Kwokchoon,

was held up at gunpoint by A1 as she drove up in her car to her home.

Sabelo and A3 forced her back into the car. She was blindfolded, tied

up and held by them at Pine Valley where they used her cell phone

to telephone her brother to demand a ransom of E1 million. At about 2am she was released, the man Steve saying that they had kidnapped the wrong person. She was allowed to drive her car home. She was unharmed but they took her cell phone, her purse with E400 in it, a gold chain and some CDs which were later found during a search of A1's home. These facts formed the basis of the robbery and kidnapping charges on which A1 and A3 were convicted. A1 was arrested on 11th September 2000. A 9mm pistol was found in his possession. It was loaded with 11

rounds of

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">4</span></font></font></p>  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">ammunition  
and a further 16 rounds were found during the search of his premises  
after his subsequent arrest.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Sabelo  
further testified that in August 2000 he, A3 and another accomplice,  
who also testified, one Collen Magagula, hatched a plan to rob the



Mantenga Bottle Store at Ezulwini. At about 6pm on 1st August, the three of them went to the bottle store. He and A3 were each armed with a rifle, which A3 had provided. He fired a warning shot which frightened off a security guard there.'. He also shot a dog which was guarding the premises. They entered the bottle store, whose employees had run away in fright, and took E1900 which was in a bag near the till and which the three of them shared. A3 was arrested on 10th September 2000. After his arrest, according to Detective Superintendent Jomo Mavuso, who was in charge of the investigation of these robberies, A3 took them to the Mkhondolwane River at Ezulwini, just below the Mantenga Bottle Store. Sabelo, who was also under arrest, was with them. A3 and the police dug in the sand there and retrieved a white sack in which there were two AK47 rifles and two magazines loaded with nine and sixteen live rounds of ammunition respectively. Sabelo identified the rifles as those used in the robbery of the bottle store. An independent witness, Varaza Mkhwanazi, who was present at the time, corroborated the police evidence. These facts formed the basis of the Crown case on one of the robbery counts and on the counts against A3 under the Act.

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">On

the other two robbery counts on which A3 was convicted, Sabelo described how on 8th August 2000 he and A3 had hijacked a car on the

Tea Road, using a rifle to get the car to stop. The owner of the car

had fought with them as they were driving off in the car until he was

able to free himself and run off into the darkness. They then proceeded to Mbabane in the car. The owner corroborated Sabelo's

evidence. That car

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">5</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">a

Toyota Corolla, was used as a get away car in the second of the two

robberies. This was the hijacking of a car in which a fruit and vegetable merchant, who had E16,500 with him to use in buying supplies in South Africa for his store, was travelling. The latter

said that near Beral in Ngwenya a Toyota Corolla blocked their way.

Sabelo said he, A3 and another one of the accused, who was later acquitted; were in the latter car, A3 and the other accused, using firearms, demanded money from the merchant. They took the E16,500 and

another E10 from the merchant's driver. They then went to Mbangweni

..where they abandoned the Toyota Corolla and shared the money. Sabelo said he got E3,000 as his share. A3 went off with the firearms.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">On

23 August 2000, so Sabelo said, he met A1, A2 and A3 at Ezulwini and

they decided to get a car for a robbery at Manzini. A2 would go to

the Casino at the Sun International Hotel and get a car. He came

back

in a Toyota Corolla, in which he was a passenger, Sabelo said he pointed a gun at the driver who was forced into the boot of the car.

They then drove towards Mbabane, As they were travelling Sabelo noticed that the driver had removed the right tail light of the car

and was waving from the boot to the traffic to stop the car. They stopped and put the driver out of the car before proceeding further

towards Mbabane. They then noticed that a car was following them. They gave this car the slip in the Sidwashini Industrial area where

they abandoned the Corolla and decided to separate. Sabelo took the

battery of the Corolla. The driver of the Corolla, Lucky Maseko, a

taxi driver at the Sun International Hotel, testified that A2 came to

him in the presence of a security guard looking for another taxi driver, one John, who was not available, Maseko offered to take A2 to

where he wanted to go. He described how they picked up two other men

on route and how the three men forced him into the boot of his car at

gunpoint. He described how he removed the right tail light and waved

to traffic for assistance; how he was forced out of the car; how

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">6</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">he

called the police; how he and the police spotted his car and

followed  
it until they lost it in the Industrial area; and how it was  
later  
found abandoned, with the battery missing. Maseko said he had  
every  
opportunity of seeing A2 at the Casino where the area was well  
lit  
and also when he was forced into the boot. He later identified  
him at  
a police identification parade. The security guard, Charles  
Dlamini,  
said he saw A2 at a garage near the Casino. A2, who was acting  
suspiciously, said he was looking for a taxi driver called John.  
Dlamini said he accompanied him to the Sun International taxi  
area.

John was not there. He introduced A2 to Maseko who offered to  
ferry  
A2 to wherever he wanted to go. Dlamini also said that the taxi  
area

was brightly lit and he saw A2 very clearly. He too identified  
him at

the police identification parade.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">It

will be appreciated that the convictions of both the appellants were

based mainly on the evidence of the accomplice, Sabelo. The trial Court found him to be a &quot;reliable and trustworthy

witness&quot;.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">It

is a well-known principle that a court on appeal will not upset a credibility finding made by a trial court unless it is manifestly incorrect. That cannot be said in this case in regard to Sabelo.

His

evidence on the record reads well and convincingly. He was subjected to a searching cross-examination by the appellants but came through it unscathed, answering the questions put to him promptly and confidently. He was also corroborated on the salient features of each of the counts by the Crown witnesses who testified on those counts.

Although an accomplice, his evidence was correctly accepted by the trial court.

In

In his appeal in this Court, A2 submitted that he had been denied the right to recall for cross-examination the taxi driver Maseko. He was,

however, when Maseko testified, represented by counsel who certainly

In

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cross-examined

cross-examined

cross-examined him and no fault can be found with the trial Judge's refusal to have him recalled. A2 also complained that he had been denied the right to

get his own counsel to represent him. He was initially represented by

counsel who later withdraw from the case. The trial Judge took considerable pains to allow A2 to obtain another legal representative. He could not do so. However, A2 subjected the

witnesses, especially Charles Dlamini and the police who conducted the identification parade to a thorough, penetrating and, if I may add, for a layman, competent cross-examination. He had a perfectly fair trial. He further submitted that nothing placed him at the scene of the crime and that no case had been proved against him. The witnesses Maseko and Charles Dlamini positively identified him, at a properly conducted identification parade, as a participant in the robbery of Maseko, which was also the evidence of Sabelo. He was correctly convicted of the charge against him and his appeal against

his conviction must fail.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">A3

on appeal pointed to what he said were contradictions in the evidence. Most of these are completely insignificant and irrelevant

and often ridiculous e.g. one witness saying on one count that the

assailants carried guns while another said there was only one gun;

another saying that the hijacked car was a red one while yet another

said it was maroon one (maroon is, of course, a shade of red!). I need not detail the others. They in no way detract from the

overall

credibility of the Crown witnesses and particularly that of Sabelo.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">A3

said the evidence as to his pointing out the whereabouts of the

AK47

rifles was fabricated by the police. There is no suggestion by him as

to why they should have done so. Their evidence was explicit and clearly unbiased and, in any event, it is supported by the independent witness, Varaza Mkhwanazi. A3 was also correctly convicted on all the counts

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">8</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">with

which he was charged and his appeal against his convictions must fail

as well.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">As

to the sentences, these were lenient in the extreme. I find it hard

to comprehend how an accused person who was convicted of five counts

of robbery and of being in possession of two AK47 rifles which were

used in some of those robberies, as A3 was, could have been sentenced

to only an effective seven years in prison. He was one of a group of

robbers who terrorized the community with their unlawful activities.

His misdeeds clearly justified a substantially higher period of

incarceration. Mr. Maseko for the Crown agreed that the sentence on A3 was extremely lenient. Sentencing is, of course, in the discretion of the trial court. However, crimes of violence which are, from this Court's experience, on the increase in the Kingdom, require judicial officers to use the one tool available to them to try to curb them viz the passing of sentences of suitable severity. Individual circumstances may naturally dictate the imposition of sentences which may be less severe. No such circumstances are present in this case.

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">A3's sentences must therefore stand as they are. As to A2's sentence, he complained that in the light of the sentences on A3, his sentence of seven years was, by comparison, out of proportion and too heavy. While the Court looks to consistency in sentencing the fact that one sentence is too lenient does not, however, justify the Court's reducing a sentence which is, in the circumstances, an appropriate and condign one, as A2's sentence is.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">The appeals of both appellants against their sentences are accordingly also dismissed.</span></font></font></p>

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<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">The
Court therefore makes the following
order:</span></font></font></p>
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height: 100%; widows: 0; orphans: 0">
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<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">9</span></font></font></p>
<p lang="en-US" align="right" style="margin-bottom: 0cm; line-
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  <li><p align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
    <font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">The
    appeals of both appellants, Christian Obi Macrea, and Nelson
DAY OF NOVEMBER 2004</span></font></font></p>
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