APPEAL CASE NO. 16/98

In the matter between:

ELVIS VUSI MAZIBUKO	**1st Appellant**
NHLANHLA MASINDA DLAMINI	**2nd Appellant**
VS	
REX	Respondent

Coram:	**LEON J.P.** **VAN DEN HEEVER J.A.** **BECK J.A.**
For 1st Appellant:	**M. MABILA**
For 2nd Appellant:	**T. MASINA**
For Respondent:	**J.W. MASEKO**

JUDGMENT

Beck J.A.

The first appellant was charged with, and was convicted of, attempted murder and robbery. On the count of attempted murder he was sentenced to 12 years imprisonment, and on the count of robbery he was sentenced to 15 years imprisonment. The sentences were ordered to run consecutively, resulting therefore in an effective sentence of 27 years. He was also declared an habitual criminal. He has applied for condonation of the late filing of notice of appeal against both conviction and sentence.

The second appellant was charged with the same two counts. At the conclusion of the Crown case he was acquitted and discharged on count 1, the attempted murder charge, but was put on his defence on the charge of robbery, of which offence he was convicted at the end of the case. He was sentenced to the same sentence that was imposed on the first appellant on that count, namely 15 years imprisonment. He was also declared an habitual criminal. He too, has applied for condonation of the late filing of his notice of appeal

against both conviction and sentence.

Both appellants have satisfactorily explained why their respective notices of appeal were not filed timeously. There remains however, the question as to whether either or them have any prospects of success in their proposed appeals against their convictions and sentences.

With regard to the attempted murder count, the undisputed facts are that the complainant, Mr Ndlangamandla, was parking his car upon arriving home on the night of 16th September 1995 when he was suddenly attacked by three men, one of whom fired a shot which struck him in his left thigh. He had his own pistol in his possession which he drew to defend himself but he was overpowered and robbed of his licensed firearm, the serial number of which is 1660638.

The learned Chief Justice who presided at the trial correctly said of this evidence that "not only the person who actually fired the shot which wounded the complainant but also his associates who participated in the armed robbery are guilty of attempted murder. They were clearly acting with a common purpose to rob and they continued in the overpowering of the complainant even after the shot had been fired. The inference of common purpose is inescapable."

A little more than two months later, early in the morning of 30th November 1995, the first appellant was one of two occupants of a stationary car when Police officers approached the vehicle and required the occupants to alight. The Police officers testified that the first appellant refused to get out of the car and physically resisted the attempts of one of their number to make him do so. In the course of this physical struggle the policeman in question shot the first appellant in the leg. Fortunately for the first appellant the injury did not prove to be serious.

The Police witnesses went on to testify that the first appellant, when being forcibly removed from the car, had attempted to draw a pistol that was concealed in his trousers. The pistol was taken from him, and he was taken under arrest to receive medical attention for the gunshot wound to his leg. The pistol bore the serial number 1660638, the Police informed Mr Ndlangamandla of the recovery of the pistol, and he duly identified the pistol as the one that he had been robbed of on the night of 16th September 1995.

The first appellant denied that he was in possession of a firearm when he was made to get out of the motorcar. It was his evidence that he was shot by the policeman who ordered him out the car, not because he was offering physical resistance or reaching for a concealed weapon, but because the policeman mistakenly thought that he was a dangerous criminal for whom the Police were then searching. He does not dispute that Mr Ndlangamandla was shown a pistol by the Police a few days later, nor does he dispute that the pistol that the Police showed Mr Ndlangamandla is indeed the pistol of which Mr Ndlangamandla was robbed on the night some ten or eleven weeks earlier when he was attacked and shot. His contention is that the Police have deliberately framed him by falsely claiming that he was reaching for a pistol when their deceased colleague shot him, and that they have lied further in alleging that the pistol that they say they found on him is the one that had forcibly been

taken from Mr Ndlangamandla on the night of 16th September, 1995. The first appellant suggests that the reason for this conspiracy on the part of the Police is a desire on their part to protect themselves from the consequences of their deceased colleague's error in shooting the first appellant because he was mistakenly taken for a much wanted and dangerous suspect.

The inherent improbability of these assertions by the first appellant is obvious. It borders on the absurd to contemplate that the Police, having at some previous time recovered the firearm that was taken from Mr Ndlangamandla, deceitfully hushed up the circumstances under which they did so and refrained from telling Mr Ndlangamandla that they had recovered his pistol, so that they could secretly keep it for some future nefarious use, and then put it to such use when the first appellant was shot in the leg.

The trial court accepted the evidence of the Police witnesses as truthful and accurate and rejected as a "flight into the realms of fantasy" the first appellant's evidence. There is no conceivable ground upon which that finding can be faulted and I am in entire agreement with the learned Chief Justice that the first appellant's false denial that the complainant's pistol was taken from his possession leads irresistibly to the inference that the first appellant was one of the three persons who made common purpose in attempting to murder the complainant on the night of 16th September, 1995. In my view, therefore, the first appellant has no reasonable prospect of success in an appeal against his conviction on the charge of attempted murder.

He is in no better a situation with regard to his conviction on the robbery count. The evidence relating to this count is that on the evening of 29 November 1995 three armed men, two of whom wore balaclavas to conceal their faces, entered the house of the Van-Zuydam family in Manzini and robbed the Van-Zuydams at gunpoint of various things, among which were a gold Orio wrist watch and 30 American dollars.

Early the next morning the first appellant was arrested and found to be in possession of a pistol – the one stolen from Mr Ndlangamandla – as I have just recounted. Also found on the person of the first appellant that morning was an amount of 19 American dollars, for the possession of which he gave the Police no explanation. United States of America currency is not legal tender within the borders of Swaziland and, as the learned Chief Justice said, "It is unusual for citizens, especially those like accused no.1 who are not foreign travellers, to be in possession of foreign currency…….When one bears in mind that it was United States dollars which were stolen from the Van-Zuydam household only hours before, and in the absence of any explanation from the accused as to his possession of these notes, the inference is strong that he was one of the persons who was involved in that robbery."

Not only did the first appellant refrain from giving any explanation of how and why these dollars came to be on his person, but he went so far as to deny that the Police found any such American currency in his possession, and that denial was found by the trial court to be false. That finding cannot be faulted. The suggestion that the Police must have conspired to frame the first appellant on this count as well, and to have procured United States dollars in order to prove their alleged conspiracy, is far fetched in the extreme.

It is of further significance in relation to this count that the second appellant, who was

arrested that same morning at the same time and place as the first appellant, was seen by one of the Police officers to be wearing a gold watch and chain when he was put into the back of a car together with the first appellant in order to be transported to the Police station. Later, after arrival at the Police station, the Police officer in question noticed that the gold watch and chain that the second appellant had earlier worn on his wrist were no longer on his person. A search was therefore made in the car in which the two appellants had been put after they were arrested and in an ashtray of that vehicle a gold watch was found, together with a gold chain which was on top of the watch. The gold watch was identified as the watch that was stolen only hours earlier from the Van-Zuydams.

The false denial by the first appellant that he was found in possession of 19 U.S. dollars amply justifies the inference that those dollars were part of the American money of which the Van-Zuydams had been robbed only hours earlier by three armed men, and that the first appellant, who was also found in possession of a firearm as well as the American dollars, was one of those three armed men. I consider therefore that the first appellant has failed to show any reasonable prospect of success in an appeal against his conviction on the charge of robbery.

Turning to the second appellant's application for leave to appeal against his conviction on the charge of robbery, I have already mentioned that he was seen, at the time of his arrest, to be wearing a gold watch and chain; that by the time he reached the Police station it was noticed that he had divested himself of that watch and chain; and that a search of the motorcar into which he had been put before being conveyed to the Police Station, revealed a gold watch and a gold chain concealed in one of the ashtrays of the vehicle. The gold watch thus recovered proved to be the gold watch of which the Van-Zuydams had been robbed.

Once again we have the situation where there is not only the absence of any explanation by the second appellant of how he came to be wearing a watch so recently stolen, but there is a false denial by him that he had any such watch in his possession. The trial court was satisfied with the truth and reliability of the evidence that the second appellant had indeed worn a gold watch and chain at the time he was put into the car in which such a watch and chain were later found stuffed into an ashtray, and there is no reason whatsoever for upsetting that finding. The attempt to rid himself of the watch, and the false denial that such a watch had been seen on his wrist, make the conclusion unassailable that the second appellant was one of the three men who robbed the Van-Zuydams. He too therefore, has failed to show any reasonable prospect of success in a appeal against his conviction on the charge of robbery.

With regard to the sentences that were imposed, leaving aside for the moment the declaration that both appellants are habitual criminals, there is no misdirection to be found in the trial court's judgment on sentence; and bearing in mind the seriousness and the prevalence of offences of this nature, and especially the previous criminal records of the appellants, I do not consider that the consecutive sentences of 12 and 15 years imposed on the first appellant, and the sentence of 15 years imposed on the second appellant, are in any way shocking or disturbingly inappropriate.

As for the declaration that both appellants are habitual criminals, one of the most important previous convictions that the learned Chief Justice took into account was the most recent

conviction of both appellants on 6th December, 1996 of robbery, for which they each received a sentence of 8 years imprisonment. However, two years after the two appellants were tried, convicted and sentenced in the present matter, the Court of Appeal set aside the above-mentioned conviction and sentence of the first appellant. Accordingly that forms no part of his previous criminal record and this court is at large to consider whether or not he should be declared a habitual criminal.

I do not think that such a declaration is called for in the first appellant's case. His previous record consists of two old and relatively minor offences (in 1977 malicious injury to property – 6 strokes with a cane; and in 1983 theft – E60 or 6 months imprisonment). Apart from these two convictions he was convicted in 1984 of robbery and car theft and received an effective sentence of 9 years. These are indeed serious offences, and he could not have been long out of prison when he committed, in 1995, the present two offences of attempted murder and of robbery. The time has come, I think, to warn him of the likelihood that he will be declared an habitual criminal should he again be convicted of a schedule 2 offence.

With regard to the second appellant the list of his previous convictions that is before us as part of the appeal record does not reflect a conviction in 1984 of robbery and theft, nor is there any indication that he ever admitted any such previous conviction. The trial court however took such a supposed conviction into account in considering whether to declare him an habitual criminal.

In the light of the record before us we cannot be satisfied that such a previous conviction was correctly taken into account, and we are therefore at large to consider whether or not, having regard to his admitted previous convictions from 1991 onwards, he should now be declared an habitual criminal.

No prior warning of the risk of such a declaration has ever been given to the second appellant. In my view he should not be declared an habitual criminal, but should now be warned of the danger that such a declaration will be made if he is again convicted of a Schedule 2 offence.

It should be said in conclusion that it is not in my view clear that it is correct to impose a sentence of imprisonment for a specified period in addition to making a declaration that the accused is an habitual criminal. Section 333(3) of the Criminal Law and Procedure Act 67 of 1938 provides that an habitual criminal who has been conditionally released, and who has complied with all the conditions of his release for the whole of the time during which such compliance was required of him, "shall……be no longer deemed an habitual criminal or liable to suffer any other punishment in respect of the conviction upon which he was declared to be an habitual criminal."

The learned Chief Justice took the words that I have underlined to mean that other punishment in addition to a declaration of habitual criminality must be imposed. It seems to me however that it is pointless to do so. If a specific sentence of imprisonment is imposed in addition to declaring the convicted accused to be an habitual criminal, and he is not released by His Majesty in terms of section 333 before such a specific sentence has expired, that sentence would have served no purpose. If, on the other hand, he were to be conditionally released in terms of Section 333 before such a sentence has expired, and he

faithfully complies with the conditions required of him, then he is not liable to undergo any further punishment, and once again the imposition of a specific sentence of imprisonment would have served no purpose.

The question of the proper interpretation of sub-section (3) of section 333 of the Act was not fully argued in the court *a quo*, and it has not been argued at all before us. It is not therefore necessary, nor would it be proper, to come to any conclusion upon the point.

In the final result therefore the applications by both appellants for leave to appeal against their convictions are refused. The applications for leave to appeal against their sentences however are granted, and in respect of both appellants the declarations that they are habitual criminals are set aside and are substituted by warnings of the risk that such a declaration may be made in the event of a future conviction of any offence enumerated in Schedule 2 of the Criminal Law and Procedure Act, 67 of 1938. The sentences of 12 years imprisonment on count 1, and of 15 years imprisonment on count 2, to run consecutively, that were imposed on the first appellant are confirmed; and the sentence of 15 years imprisonment on count 2 that was imposed on the second appellant is also confirmed.

C.E.L. BECK
JUDGE OF APPEAL

I agree

R.N. LEON
JUDGE PRESIDENT

I agree

L.VAN DEN HEEVER
JUDGE OF APPEAL