IN THE COURT OF APPEAL OF SWAZILAND

Appeal Case No. 13/1998

In the matter between:

ZAKHELE SAMSON KHULU APPELLANT

VS

REX RESPONDENT

Coram : LEON, J P

STEYN, J A

TEBBUTT, J A

JUDGMENT LEON, J P

The appellant appeared before the High Court on three counts of murder (counts 1, 2 and 3) and two counts (counts 4 and 5) under the Arms and Ammunition Act. At the close of the Crown case he was acquitted on counts 4 and 5 while at the end of the whole case he was convicted on counts 1, 2, and 3. After hearing evidence and arguments on the topic the court a quo found that extenuating circumstances were present and sentenced the appellant to life imprisonment on each of counts 1,2 and 3.

With regard to the conviction the appeal is brought on two grounds, namely: -

1. The learned judge erred in law in rejecting the appellant's special plea inasmuch as the prosecutor had no title to prosecute in view of the fact that the Institution of the Director of Public Prosecutions is unconstitutional.

2. The learned judge erred in law and in fact by convicting the appellant of murder notwithstanding the fact that the evidence did not establish any intention to kill.

With regard to the sentence it is claimed that the sentence is too harsh and induces a sense of shock having regard to the facts and circumstances of the case.

Before the trial commenced a notice was served on the Director of Public Prosecutions in terras of Section 153(1) of the Criminal Procedure and Evidence Act No. 67 of 1938 that, at the hearing of the trial, the appellant would raise the plea that the prosecutor had no title to prosecute in terms of Section 155(2) (g) of the Act.

Such a special plea was indeed raised at the hearing, but was dismissed by Sapire, A C J (as he then was) indicating that he would give reasons for the conclusion when he gave judgment which is what he did.

It was suggested on behalf of the Crown that Section 155(2) (g) applies to a person and that therefore it does not relate to the office. I am unable to agree. If the office does not exist because it is unconstitutional then neither the Director of Public Prosecutions himself nor any other person appointed by him would have any title to prosecute.

The gravamen of the argument in support of the special plea amounts to this. When the Independence Constitution of Swaziland of 1968 was repealed by the King's Proclamation of the 12th April 1973 it also reinstated certain provisions thereof including the provisions for the establishment of the office of the Attorney General and its functions. However, by King's Order-in-Council No. 17 of 1973, which was assented to by the King on the 4th May, 1973, and came into operation on the 15th June, 1973, the office of the Director of Public Prosecutions was established. In terms of Section 3(2) of that Order the powers and functions of the Attorney General under the Proclamation, in so far as criminal proceedings only are concerned, were removed from him and vested in the Director of Public Prosecutions.

It is contended that the King's Order-in-Council No. 17 of 1973 is an "inferior law" which cannot amend the King's Proclamation of 12th April, 1973 and that it is therefore unconstitutional . It is argued that an amendment must be by decree. Particular reliance is placed on the King's Proclamation (amendment) Decree No. 1 of 1982. This Proclamation amended the 1973 decree by adding a new paragraph reading as follows:-

"This Proclamation is the supreme law of Swaziland and if any other law is inconsistent with this Proclamation that other law shall, to the extent of the inconsistency, be null and void "
That paragraph was deemed to have come into operation on the 12th April, 1973, i.e. before the coming into operation of the Order-in-Council setting up the office of the Director of Public Prosecutions.

Reliance is also placed on the King's Proclamation (amendment) Decree, No. 1 of 1987. Paragraphs 1,2 and 3 of that Proclamation read:-

"1. I hereby reaffirm that in terms of Swazi Law and Custom, the King holds the Supreme Power in the Kingdom of Swaziland and, as such, all Executive, Legislative and Judicial powers vest in the King who may from time to time by Decree delegate such powers and functions as he may deem fit.

It is furthermore hereby reaffirmed that the King being Commander-in-Chief of the Umbutfo Swaziland Defence Force is the Supreme Commander of the Umbutfo Swaziland Defence Force and all armed forces in the Kingdom of Swaziland

It is furthermore hereby reaffirmed that the King's Proclamation to the Nation dated 12th April, 1973 (as amended from time to time) is the Supreme of Law of Swaziland and if any other law is inconsistent with the said Proclamation, that other law shall, to the extent of the inconsistency, be null and void "

It will be convenient at this stage to set out how the respective offices of the Attorney General and the Director of Public Prosecutions are set up.

Under the King's Proclamation of the 12th April, 1973 Chapter VII is headed ATTORNEY-GENERAL and reads:-

"Attorney General.

91(1) There shall be an Attorney General whose office shall be a public office.
(2).....
(3) The Attorney General may, whenever requested to do so, advise the King on any matter of law relating to any function vested in the King by this Constitution or any other law.
(4) The Attorney General shall have power in any case in which he considers it desirable to do sof

1. to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed

by that person,

2. (b) to take over and control any such criminal proceedings that have been instituted or undertaken by any person or authority, and
3. (c) to discontinue at any stage before judgment is delivered any such criminal proceedings.....

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(5) The powers conferred on the Attorney General by sub-section 4(b) and (c) of this section shall be vested in him to the exclusion of any other person or authority:
Provided that, where any other person or authority has instituted criminal proceedings, nothing in this sub-section shall prevent the withdrawal of these proceedings by or at the instance of that person or authority or with the leave of the court.

(6).....
(7).....
(8) In the exercise of the functions vested in him by sub-section (4), the Attorney General shall not be subject to the direction or control of any other person or authority"

It is to be observed that the Proclamation setting up the office of the Attorney General gives him two separate and distinct functions namely: -

1. as the legal adviser to the King when requested to give legal advice;
2. as the sole and exclusive prosecuting authority in criminal proceedings in the Kingdom of Swaziland.

It is to be noted that in the publication - THE CURRENT CONSTITUTIONAL FRAMEWORK OF SWAZILAND which is compiled and consolidated by the Constitutional Review Commission of Swaziland and which was published after 1992 the following appears, after setting out Section 91 of the said Proclamation;-

"NOTE sub-sections (4) - (8) amended by Director of Public Prosecutions Order, 1973."

The NOTE is entirely in accordance with the conclusion of the learned Judge a quo there being no suggestion in the NOTE that the said ORDER is unconstitutional in any way.

The Director of Public Prosecutions Order, 1973 was assented to by His Majesty the King on 4th May, 1973 and came into operation on the 15th June, 1973, i.e. about two months after the Proclamation setting up the office of the Attorney General. The Order is the King's Order-in-Council.

Section 2, under the heading "Interpretation" reads:-

2. In this Order-in-Council, unless the context otherwise requires - "Minister " means the Minister of Justice.
"Proclamation" means the Proclamation and decrees contained therein made by the King to the citizens of Swaziland on the 12th April, 1973" (i.e. the aforesaid Proclamation).

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"repealed constitution " means the Constitution Act No. 56 of 1968 repealed by the Proclamation "

Section 3 establishes the office of Director of Public Prosecutions and provides: -

3(1) There shall be a Director of Public Prosecutions whose office shall be a public office.

3. Notwithstanding section 9 of the Civil Service Order No. 16 of 1973 the powers,

duties and functions of the Attorney General under the Proclamation (Decree No. 5) in so far as criminal proceedings only are concerned shall from the date of coming into force of this order, be vested in the Director of Public Prosecutions.

Section 4 provides:

"Sections 100,119 and 120 of the repealed constitution shall also apply to the Director of Public Prosecutions: provided that such sections shall be construed as if there is no reference in them to the Judicial Service Commission or the Public Service Commission."
Sections 5 and 6 make sections 6 and 12 respectively of the Civil Service Order No. 16 of 1973 applicable to the office of the Director of Public Prosecutions. It is not necessary to refer to them.
It is, however, necessary to refer to section 9 of the Civil Service Order No. 16 of 1973 which is referred to in the Director of Public Prosecutions Order, 1973 and which provides: -

"In addition to the powers and duties vested in him under the Proclamation, the Attorney General shall have such other functions as may be conferred on him by any other law "

Subject to the possible question of unconstitutionality raised by the argument, it would seem that what has been created in Swaziland is, on the one hand, the office of the Attorney General who is the Principal Legal Adviser to the King and the Government, and on the other hand, the office of Director of Public Prosecutions whose sole and exclusive function is that of the prosecuting authority in criminal cases.

I do not agree with the submission that an order assented to by the King himself in setting up the office of the Director of Public Prosecutions is an "inferior law". It is true that it is contemplated by the constitution that the normal method of amending the Proclamation may be by decree but that does not mean that, if the King chooses to do so, he may not use his prerogative by assenting to a King's Order-in-Council. What must be borne in mind is that it is the King himself who retains the power under the relevant Proclamations to make or amend laws. That is precisely what the King did when he introduced the Director of Public Prosecutions Order No.

17 of 1973 and this, too, is the view of the Constitutional Review Commission to which I have referred. The Constitution does not oblige the King to amend by decree.

Furthermore I agree with the approach of the learned Judge a quo who dealt with the argument in this way:-

"It must be borne in mind that in terms of the 1973 Decree the King appropriated all legislative powers to himself and it follows that if, in exercising those powers he passed the Director of Public Prosecutions Order 1973 his hitter act cannot be in conflict into the former. The provisions of the Decree No. 1 of 1982 were made retrospective from the 12th April, 1973. But it is difficult to see how this in any way altered the status of the 1973 Royal Proclamation. The 1973 Proclamation and any amendments in terms thereof were at all times the supreme laws of Swaziland. This is illustrated by the King's Proclamation Amendment Decree No. 1 of 1987.....

This decree proclaimed itself to be read and construed as one with the King's Proclamation to the Nation of 12th April, 1973. It follows that all proclamations as amended from time to time remain the supreme law of Swaziland But it must be remembered that if the sole legislative powers remain vested in the King, then the King is entitled to change the proclamation and amend it in terms of subsequent legislation.

The nub of the argument is that because the Director of Public Prosecutions Order is in conflict with the provisions of the original 1973 Decree, which reserves for the Attorney

General the sole and exclusive prosecuting rights at the public instance in this country, the latter decree taking those powers away from him was to be read as being in conflict with the original decree. The argument has in itself the indications of its own invalidity. For the King retained whatever powers he had under the constitution by his own further decree. The court will not readily read the legislation to understand and imply revocation of legislation passed by His Majesty under his hand and accordingly rule that the Director of Public Prosecutions is presently the only person entitled, authorised and required to prosecute at the public instance in the name of the King. "

The special plea was correctly dismissed by the Court a quo.

I turn now to the facts of this case. It is common cause that the three deceased were shot to death by bullets which were admittedly fired by the appellant himself at close range and that they were fired by a gun which was exhibit 4.

The defence raised by the appellant was that he was intoxicated at the time although in an exculpatory statement to the police he stated that he had acted in self defence.

In order to decide whether the crown proved that the appellant had the necessary intention to kill, and also to consider the merits of the defence raised, it is necessary to give a brief review of the evidence.

At the material time the appellant was a serving soldier with the Umbutfo Swaziland Defence Force.

One of the key crown witnesses was MBUSO NKAMBENDZE (PW2) . Although he was introduced as an accomplice witness it transpired from his evidence that he may not have been. He was a fellow private in the army. On the 19th June 1996 (the day of the killing) he was at the camp where he saw the appellant. The latter came into his tent saying that he had seen people carrying guns. The appellant picked up a firearm giving another to the witness. They went out looking for these people. They found five, three men and two women. Some were carrying a bag which contained nothing. But he instructed the people to lie down. According to PW2 the appellant and Zwane later searched them but found nothing. Zwane then returned to the camp to look for his ammunition belt which he had lost. Having found it he returned to the scene where the appellant was with the deceased. The appellant took ammunition from Zwane's ammunition belt and loaded his gun. He prodded one of the people there and the gun went off. The appellant then shot the deceased, one of whom was then standing, one kneeling and one lying down. PW2 asked the appellant why he had shot them. The latter replied that they were carrying guns and also that one of them had been accidentally shot. One of the deceased pleaded for his life.

With regard to the question of intoxication, PW2 described the appellant as being normal. He denied any suggestion that the appellant had drunk some brewed juice the previous day. On this topic the evidence for the crown was consistent and clear: the court a quo described it as overwhelming. On the previous day a girl had brought a 25 litre can of brewed juice to the camp. Save for 2 litres, it was consumed by many but not the appellant. On the day of the killing the appellant and others had consumed the remaining two litres between them. Later the appellant went to a shebeen to which I shall presently refer.

PW2 testified that there were no signs that made him believe that the appellant was drank and he denied that the appellant was visibly drunk but he could not account for the actions of a mild mannered person like the appellant who was also referred to in the evidence as a "Zionist Prophet."

The appellant's counsel formally admitted that the appellant had killed the deceased with the gun exhibit 4 and he also admitted the facts contained in the post mortem report. The

summary of the evidence of certain witnesses was then read into the record by consent. That evidence takes the case very little further. However it should be pointed out that facts should be admitted not evidence. If the latter course is followed one could have a situation where the evidence is not entirely consistent and could, indeed, be contradictory.

The other key witness was PATRICK ZWANE (PW3) also a private. At about 1p.m. on the day when the deceased were killed he went with the appellant to a shebeen where the appellant became embroiled in an argument. At the shebeen they drank part of a 5 litre bottle of brewed juice. Earlier that day four of them including

the appellant had drunk two litres of brewed juice which remained from the previous day. The appellant was not drunk.

After they left the shebeen PW3 heard a gun shot. He and the appellant came across three men lying on the ground. The appellant said that these were the men he suspected of having guns. He added that he wanted to kill them because they had a gun and were cattle thieves. He saw the appellant loading rounds of ammunition into his gun. There is a conflict between him and PW2 as to where the ammunition came from. The witness admonished the appellant who threatened him. PW3 then ran towards the camp. While he was running he heard shots. He ran to the camp to find Sergeant Thwala, They returned to the scene of the crime only to find that the three deceased were lying dead. Sergeant Thwala asked the appellant for an explanation and he was informed by the appellant that he suspected these people of having a gun. Neither he nor the appellant was drunk.

Sergeant Thwala was PW4. When he arrived at the scene he asked the appellant why he had killed these people. The latter replied by saying that he suspected one of these people to be in possession of an AK 47 rifle inside the bag he was carrying. PW4 searched the bag only to find that it contained the remains of some fried fish. PW4 also confirmed other evidence that the appellant had not drunk any of the 25 litre brewed juice on the previous day but that the appellant and others had drunk the remaining two litres on the day of the killing. When he spoke to the appellant after the incident he did not form the impression that the appellant was abnormal: only frightened and shocked. He did not think that the appellant was drank.

Sergeant Vilane was PW7. He testified that the appellant had made an exculpatory statement to him to the effect that he had killed the deceased because four of them were carrying guns and he was defending himself. That statement was recorded before a Commissioner of Oaths, Inspector Dlamini. An objection to the admissibility of the statement was later withdrawn [at page 146 of the record.

The appellant gave evidence under oath. He testified that he was one of those who drank from the 25 litre brew and that thereafter he had more liquor at the shebeen from a 10 litre container. He said that he and Mavuso came across some people lying on the ground. When they stood up he became frightened but he shot them accidentally when his firearm mistakenly went into automatic. He added that he had taken liquor that day which he was not used to drinking.

The appellant claimed that the witnesses who said that he had not partaken of the 25 litre brew on the previous day were lying because they came from a different section but that was not put in cross-examination. He also alleged that he had been drinking heavily for some time which is not in accordance with the crown evidence. He only recalled certain matters; this was described by the learned judge a quo as his "selective memory".

The appellant admitted that he had made a statement at the police station and admitted that it was his signature thereon. But he added that Vilane was lying and that he was not taken to an inspector. But Vilane was not challenged on this point in cross-examination and defence counsel admitted the correctness of the statement

despite the appellant's evidence that he was forced to make that statement. That, too, was not put in cross-examination. Later he contradicted himself by saying that his signature was forged.

He agreed that he had suggested to the police that he was firing in self-defence. That was in conflict with the Crown case and not part of his evidence.

The court a quo rejected the evidence of the appellant as false. It was correct in doing so and it is unnecessary to dwell upon all the other imperfections in his evidence.

Having accepted the Crown evidence and rejected that of the appellant the court a quo was correct in concluding that, although the appellant had consumed some liquor and may well have been drunk, it was proved that he had the necessary intention to kill. He was not so drunk that he could not form the necessary intention.

I do not wish to belabour the point but the appellant's actions in taking the gun from the camp was a deliberate one. His exculpatory statement is quite inconsistent with a person being so drunk as not to know what he was doing. His explanations to Crown witnesses on the scene support the conclusion that he knew what he was about. Added to all this he was a lying witness.

In my judgment the court a quo was correct in convicting the appellant of murder. Having heard evidence and argument the trial court concluded that extenuating circumstances were present but nevertheless considered whether the case did not warrant the death sentence. The court said this:- "this terrible picture" made him consider whether the appellant did not deserve the death sentence, "after all", he added "why are you entitled to more mercy than you were able to show these people . Your aggressiveness and your contempt for the lives of these people is indescribable ...On reflection, however, I am prepared to show you the mercy you did not show your victims. Your sentence will be one of life not death."

The court a quo did not order the sentences to run concurrently and it must therefore be assumed that it was intended that they were to run consecutively. Counsel for the appellant submitted that this would mean that the appellant would serve 60 years imprisonment as a sentence of life imprisonment was a sentence of 20 years. He based this argument on Section 43 of the Prisons Act No. 40 of 1964. Under the heading REMISSION OF SENTENCES. Section 43 reads:-

"Remission of part of sentences of certain prisoners

Section 43(1) — Subject to this Act, criminal prisoners sentenced to imprisonment for a period exceeding one month, whether by one sentence or consecutive sentences, may by industry and good conduct, earn a remission of one third of the remaining period of such sentence.....

(2) A prisoner sentenced to imprisonment for life shall, for the purposes of this section be deemed to be a prisoner sentenced to imprisonment for twenty years,"

It was contended on behalf of the appellant by Mr. Maziya that the sentence was disturbingly severe. Even if he qualified for remission the appellant would have to be imprisoned for forty years. If not he would serve 60 years. Even though it is not suggested that the learned Chief Justice misdirected himself in any way it is urged that the sentence is so severe that this is an appropriate case in which this court should interfere with the sentence.

The learned Chief Justice was perfectly correct in regarding this as a terrible case justifying a most severe sentence. But, giving this matter the best attention that I can, I consider that a sentence of 40 years imprisonment would meet the justice of this case. That can be achieved by ordering the sentence on count 3 to run concurrently with the sentences on counts 1 and 2. This conclusion differs significantly from that of the court a quo to the extent that it justifies interfering with the sentence.

In the result the appeal against the convictions fails and the convictions are confirmed. The sentences of life imprisonment on each count are confirmed but the sentence on count 3 is ordered to run concurrently with the sentences on counts 1 and 2.

LEON, J P

I AGREE

STEYN J.A

I AGREE

TEBBUTT, J A

DATED AT MBABANE THIS 3rd DAY OF DECEMBER, 1999