IN THE COURT OF APPEAL OF SWAZILAND

CRIM. APPEAL CASE NO.26/2000

In the matter between:

GENERAL M. MSIBI APPELLANT

VS

THE KING RESPONDENT

CORAM: J. BROWDE, J.A.

J.H. STEYN, J.A.

C. E. L. BECK, J.A.

FOR THE APPELLANT: E. TWALA

FOR THE RESPONDENT: J.M. MASEKO

JUDGMENT

BECK J.A.

The appellant was charged in the High Court with having committed attempted murder on 8th November 1997.

Two further charges were also preferred against him for having had in his possession, on 9 December 1997, and in contravention of sections 11(1) and 11 (2) of the Arms and Ammunitions Act 24 of 1964, a 9 mm pistol, and one round of live ammunition for use in it without holding a licence or permit to possess the pistol. These two last-mentioned charges were withdrawn

against him before plea in the High Court because, so the trial judge was informed by Crown counsel, the appellant had already been charged, tried, convicted and sentenced in a magistrate's court for his unlicensed possession of the pistol and ammunition.

The appellant, who was represented by Mr Twala in the High Court, as well as before us in this appeal, pleaded not guilty to the charge of attempted murder. He was however, convicted of attempted murder and was sentenced to imprisonment for a period of 7 years, of which 2 years were suspended for 3 years on appropriate conditions, whereafter an appeal was noted against both conviction and sentence. The evidence established that the offence was committed on 8 December 1997, and not on 8 November 1997 as alleged in the indictment, but it is clear that the appellant was not in any way prejudiced by this error in the charge.

In his argument before us Mr Twala contended firstly that it was most irregular for the trial judge to have been informed, before the trial commenced, that the reason for withdrawing counts 2 and 3 was that the appellant had already been convicted and sentenced for his unlicensed possession of the pistol and the round of ammunition. He submitted that this information

prejudiced the appellant before the trial judge and he made the extravagant submission in his Heads of Argument that the splitting between the Magistrate's court and the High Court of the trial of the appellant on the charges laid under the Arms and Ammunition Act and on the charge of attempted murder "was carefully planned by the Crown in order to prejudice the accused. They wanted the convictions in the Magistrate's court to count as previous convictions when he finally appears in the High Court on the attempted murder charge."

There exists absolutely no reason for advancing so scandalous an allegation. It later emerged, after the conviction of the appellant on the charge of attempted murder, that the reason why he had been tried in the Magistrate's court with the Arms and Ammunition Act offences was that the appellant had in addition been charged in the Magistrate's court, and convicted, of an assault with intent to do grievous bodily harm, with which offence his possession of the pistol and its ammunition was associated. Those charges in the Magistrate's court had nothing at all to do with the events that gave rise to the charge in the High Court of attempted murder. It is in

order that no vestige of stigma should attach to the office of the Director of Public Prosecutions arising from the unwarranted aspersion cast upon it in this appeal by Mr Twala that these facts are recorded. It only remains to say that Mr Twala readily apologised in open court to Crown counsel when the court taxed Mr Twala with the impropriety of having made so baseless an assertion.

With regard to Mr Twala's submission that the appellant was actually prejudiced by Crown counsel's revelation before the trial judge of the reason why counts 2 and 3 were being withdrawn, it is in the first place quite clear from the record that the learned trial judge (Masuku J.) was in fact not in any way influenced against the appellant by that disclosure. In the second place, as Mr Twala was constrained to concede, it is obvious that if the appellant had not previously been convicted of his unlawful possession of the unlicensed pistol and ammunition, so that counts 2 and 3 would not have been withdrawn against him in the High Court, he would inevitably have had to plead guilty to those two charges. His physical possession of the pistol and its ammunition, and his use thereof as an alleged act of self-preservation, formed the very essence of his defence against the charge of attempted murder; and since, on his own admission in the course of his evidence before the High Court, he had no licence or permit for his possession of the pistol, he would have had no choice but to plead guilty to those two charges at the commencement of his trial in the High Court. In these circumstances there was nothing irregular in having prosecuted the appellant under the Arms and Ammunition Act in the Magistrate's court before his trial in the High Court on the charge of attempted murder; nor was the appellant in any way prejudiced in his trial before the High Court by the revelation at the outset of the trial that he had already been tried, convicted and sentenced for the unlicensed possession of the pistol and its round of ammunition.

Mr Twala did not direct any oral argument against the merits of the conviction of the appellant on the charge of attempted murder. In a characteristically careful and exhaustive judgment the learned trial judge analysed the evidence of the witnesses for the prosecution and that of the appellant. While fully aware of discrepancies on some points of detail in the evidence of the Crown witnesses, he found them truthful and reliable, and I can find no reason to differ from that conclusion. The appellant's evidence on the other hand he found to be unreliable and false. In particular, the

learned trial judge correctly emphasised that the very nub of the appellant's defence, namely that he allegedly fell on his back while retreating from a threatened knife attack by two companions of

the appellant and thereupon fired a warning shot in the air that accidentally, and unbeknown to the appellant, hit the complainant in the head, all emerged for the first time when the appellant himself gave evidence after the Crown had closed its case. Not only had these averments never been put to the complainant in cross-examination, nor to two Crown witnesses who, so the defence suggested, were the ones in the deceased's company when he was shot, but the appellant, when giving this crucial part of his evidence, was said by the trial judge to have exhibited obvious hesitation and discomfort and to become "highly fidgety." The learned judge referred to S v Kelly 1980 (3) S.A. 301(A.D.) at 308 C and warned himself that demeanour can be "most misleading" and that it "is, at best, a tricky horse to ride," but he was nevertheless satisfied that the appellant's "hesitation and uncomfortableness gave him away."

As I have already indicated, Mr Twala did not argue that we should come to any different conclusion on the merits of the conviction from that which was reached by the trial judge. I am entirely satisfied that it would have been purposeless for Mr Twala to have submitted otherwise - the conviction of the appellant of attempted murder was clearly correct.

Mr Twala did submit that the sentence of 7 years imprisonment, of which 2 years were suspended, creates a sense of shock. He further submitted that the sentence, which was imposed on 26 July, 2000, should have been backdated to the day of the appellant's arrest on 9 December 1997, and also that it should have been ordered to run concurrently with whatever prison sentence for the contravention of the Arms and Ammunitions Act the appellant may still have been serving.

I do not consider that the sentence of 7 years of which 2 years were suspended, is in the least excessive. The evidence established that the appellant produced the pistol and without any justification pursued the complainant as the latter fled from the threat of the firearm. The chase continued as far as a nearby house which the complainant attempted to enter but could not as the door was locked, whereupon the complainant continued to flee by running around the house only to find, upon returning to the front

of it, that the appellant had not pursued him around the house but had remained outside the front door. The appellant then shot the approaching complainant in the head, fracturing his skull, rupturing the brain and causing a 4 cm dural tear. Only immediate and skilful medical attention saved the complainant's life.

The learned trial judge gave careful consideration to the question of backdating the sentence but decided not to do so because the appellant had not been kept in custody awaiting his trial in the High Court, but had been in custody because he was serving sentences imposed on him for other offences. Consideration was also given by the trial judge as to whether or not the sentence should be ordered to run concurrently with the sentences imposed in the magistrate's court for the contravention under the Arms and Ammunition Act, and he decided not to direct that his sentence should run concurrently with those imposed in the lower court for possession of the loaded firearm because that possession was associated, not with the attempted murder, but with an assault with intent to do grievous bodily harm that was in no way related to the offence on which the appellant was tried in the High Court.

In my view the learned judge did not misdirect himself in any respect with regard to sentence. He gave well considered attention to the circumstances of the offence, to the interests of society and to the personal circumstances of the appellant, and there is no ground upon which his sentence can be interfered with.

Accordingly the appeal against both conviction and sentence is dismissed.

C. E. L. BECK J.A.

I agree

J. BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered in open Court on this 13th day of December 2000