IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No.02/2011

In the matter between:

SITHEMBISO SIMELANE	**1ST APPELLANT**
KHEHLA DLAMINI	**2ND APPELLANT**
v	
REX	**RESPONDENT**

Neutral citation: *Sithembiso Simelane and Khehla Dlamini v Rex (02/2011) [2012] SZSC 33 (30 November 2012)*

Coram: M.M. RAMODIBEDI CJ, E.A. OTA J.A. ,

P. LEVINSOHN J.A.

Heard: **2 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **Appellants were convicted on 12 counts of armed robbery one count of attempted murder and one count of unlawful possession of firearms: court a quo imposed cumulative sentence of 16 and 15 years respectively for the offences committed: appeal against sentence dismissed: obiter power of appellate court to increase sentences: duty on the Respondent to give notice to the appellant about application for enhanced sentence.**

OTA J.A.

BACKGROUND

[1] This was a case of organized crime. Between 22nd of March 2005 and 21st May 2005, a group of young men, led by the 1st Appellant **Sithembiso Simelane** who was almost always in the Company of the 2nd Appellant **Khehla Dlamini**, terrorized the nation. They organized and systematically robbed motor vehicles and their passengers. They, in some instances, hired taxis and before reaching their destination they would rob the taxi drivers of their money, cell phones and car accessories. They boarded luxurious buses and subsequently robbed the passengers. In one instance, they waylaid a kombi full of mourners on their way to a funeral, boarded the kombi and robbed the passengers. In all these robberies the 1st Appellant welded fire arms which they used to threaten their victims. On some occasions he fired his weapon into the air or on the roof of the bus threatening his victims into surrender and they would orchestrate the robberies.

[2] In the robbery of the 21st of May 2005 which occurred in the kombi driven by the complainant in the attempted murder charge, namely, PW8 Africa Zweli Tsabedze, who was conveying the passengers on board the kombi to a funeral at Engudzeni, the 1st Appellant shot the kombi driver on the arm and in the chest and the driver lost consciousness. Medical evidence shows that the injuries he suffered were life threatening. After the shooting, the Appellants proceeded to rob the passengers in the kombi of their money and cell phones whilst threatening and assaulting them.

[3] As so often happens in cases like this, the proverbial *"one day for the owner of the house"* arrived. The Appellants ran out of luck and were apprehended. They were eventually charged on 15 counts of offences ranging from robbery and attempted murder to contravening Sections 11 (1) and (2) as read with Section 11 (8) of the Arms and Ammunitions Act 24/1964 as amended. They pleaded not guilty to the charges, which engendered a full blown trial before **Banda CJ,** who on the 6th June 2009 convicted them on all counts of the offences as charged, save for counts 6 and 13 which had been withdrawn.

[4] Subsequently and still in June 2009 the learned **Chief Justice** passed the following sentence on the Appellants:-

> " The sentence will be as follows:-
> Counts 1-7 = 5 years each
> Counts 8-12 = where more violence was used the sentence will be 10 years for each Accused to run concurrently to each other. The sentences on Counts 1-7 will run concurrently to each other but will run consecutively to the concurrent sentences on counts 8-12. The first Accused will serve a sentence of 12 months each on counts 14 and 15 both will run concurrently to each other but consecutive to sentences on counts 8-12.
>
> Summary
>
> The first Accused will serve a total of 16 (sixteen) years; the second Accused will serve a total sentence of 15 years''

Grounds of Appeal

[5] It is the foregoing sentence of **Banda CJ,** that the 1st and 2nd Appellants decry in this court via Notices of Appeal embodied in letters addressed to the Registrar of the Supreme Court, which are respectively couched in similar terms and read as follows:-

> " **RE: APPLICATION FOR APPEAL CASE NO. 23/2009 GOAL NO. 751/2009 SITHEMBISO SIMELANE**
>
> I hereby humbly appeal for my 5 year sentence and my 10 year sentence to be concurred and to be granted an option of a fine for my one year sentence. These sentences were imposed upon me by Chief Justice Banda on the 16th June 2009 on armed robbery offences and illegal possession of a pistol. My main grounds for my appeal are that my 16 year sentence is too harsh and severe for me to bear considering that I am a very sick (sic) and I am a first offended here in Swaziland.

RE: APPLICATION FOR APPEAL CASE NO 23/2006, GOAL NO. 750/2009 KHEHLA DLAMINI

I hereby humbly appeal for the concurrence of my 5 years sentence and my 10 year sentence that were imposed upon me by Justice Banda – Chief Justice on the 16th June 2009 on armed robbery offences. My main grounds for my appeal is that I find my 15 year sentence is too harsh and severe for me to bear, considering the fact that I am a first offender here in Swaziland and that I am very sick''

[6] The 1st Appellant filed heads of argument which he amplified with oral argument when this appeal was heard. He avowed his remorse for the offence he committed against innocent members of the society, which remorse he says is evident from the fact that he is not appealing against his conviction. He implored the court to take cognizance of the fact that he is the bread winner of his family therefore the 16 year imprisonment if allowed to stand will be detrimental to his two minor children who solely depend on him. 1st Appellant further posited that he is a first offender in Swaziland. He asked for a second chance to start life afresh outside prison as soon as possible and to become a useful member of the society. He also called upon the court to consider that he is a sickly person and that he wants to further his

studies. That the fire arms and ammunition do not scientifically link to the crimes in question as per the report of the ballistic. He finally urged the court that a concurrent sentence of 10 years instead of the cumulative sentence of 16 years was enough for his perfect reformation and rehabilitation.

[7] For his part the 2nd Appellant also filed heads of argument and tendered oral argument along similar lines as 1st Appellant. He told the court that he is remorseful therefore he takes full responsibility for the offence committed. He said he is terminally ill and living on medication on a daily basis. He suffers from epilepsy which he developed in 2006 whilst at the Matsapha Correctional Centre. Therefore, if his 15 year sentence is not reduced he might die in prison without getting a second chance to start life afresh out of the prison. 2nd Appellant further told the court that he is the bread winner of his family with an 8 year old child who depends on him for almost all his needs, therefore his imprisonment is robbing his minor child of a bright future. He therefore contended that a 10 year sentence instead of a cumulative sentence of 15 years is sufficient for his reformation and rehabilitation as he is already reformed by his prison experience.

[8] The Respondent for it's part filed heads of argument in which it urged the court not to set aside the consecutive sentence ordered by **Banda CJ,** as the learned **Chief Justice** stated in his sentencing regime why such sentences had to be passed. It further contended that the sentences are not harsh and severe *vis a vis* the offences committed.

[9] Learned Crown counsel **Mr Makhanya** who appeared for the Respondent, also told the court that the Respondent was abandoning the issue of an enhanced sentence raised in paragraphs 5 and 6 of the Respondent heads of argument, for the offence for which the 1st Appellant was convicted in respect of count 14 *a quo*. The Respondent had in those paragraphs contended that **Banda CJ** erred in imposing a sentence of 12 months imprisonment on the 1st Appellant for the offence of contravening Section 11 (1) of the Arms and Ammunition Act 1964. It had decried this sentence premised on the contention that Section 14 (2) which is the punishment section for any offence in contravention of Section 11 (1), prescribes a sentence of 5 years or a fine of E5,000-00 for a first offender or a sentence of 10 years or a fine of E10,000-00 for a second or subsequent offender.

The Respondent therefore called upon this court to set aside the sentence of 12 months imposed by **Banda CJ** and substitute same with a sentence of 5 years or a fine of E5,000-00 as prescribed by law.

[10] This issue as I have already noted above was abandoned by the Respondent, based on the fact as urged **by Mr Makhanya**, which fact we are also alive to, that the Respondent failed to file a cross appeal raising it.

[11] Let me emphasise here for the purposes of education and the growth of the jurisprudence, that the traditional role of a Respondent in an appeal is to defend the judgment appealed against, but if he wishes to depart from this traditional role by attacking the impugned judgment in anyway, he is obliged to file a cross-appeal. Also if he does not appeal, he may desire to contend on the appeal that the decision of the court below be varied, either in any event, or in the event of the appeal being allowed in whole or in part. If he so desires, then he should give notice to that effect specifying the grounds of that contention and the precise form of the order proposed to be made.

[12] The foregoing position of our law is underpinned by the element of notice which forms part of the fundamental right of fair hearing as guaranteed by Section 21 (1) of the Constitution of Swaziland. It is therefore desirable in cases where the Respondent wishes to contend for an enhanced punishment as in this case, that the Appellant is given formal notice in order not to ambush or take him by surprise. This is because Appellant may very well decide in the face of such a development to withdraw his appeal before the hearing.

[13] This position of our law was adumberated upon by **Moore JA**, in the case of **Mbabane J Tsabedze and Another v Rex Criminal Appeal Case No. 29/2011** para 29, where he adopted paragraphs 16 and 17 of the Privy Council decision in the case of **Oliver v The Queen (The Bahamas) (2007) U.K PC 9,** as follows:-

> "[29] Their Lordships of Her Majesty's Privy Council gave clear guidelines as to the approach which should be taken by appellate courts which might be minded to increase a sentence or sentences imposed by a trial court. Their Lordships dicta- See paragraphs 16 to 17 – in this regard are both apposite and applicable to the

context of the instant appeal-They express the law of Swaziland on these matters and 1 set them out in full.

"16 The Board has considered the question of increasing sentences on several occasions since the Court of Appeal gave its decision in July 2012. The principles which have now been established can be summarized in the following propositions:

"(9) The power to increase sentence must be sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate, in all cases the reasons for exercising this drastic power must be explained. **Kailaysor v The State of Mauritius, para 9, per Lord Steyn.**

(16) An appellate court which is considering an increase in sentence should invariably give an applicant for leave to appeal or his counsel an indication to that effect and an opportunity to address the court on this increase or to ask for leave to withdraw the application. **Williams v The State, para 10, Skeete v The State, para 144**

----In **Williams** their Lordships distinguished on the latter ground the decision of the **Divisional Court in Rex v Manchester Crown Court, ex parte Welby (1981) 73Cr. APP R 248**, in which **Lord Lane CJ** stated that once the hearing of an appeal against sentence has started, it will be only in exceptional circumstances that leave to abandon it will be granted. The reason is clear, that if the law were otherwise an

appellant could attack a sentence and then, if the reaction of the appellate court was unfavourable and he appeared to be at risk of an increase, he could withdraw the appeal with impunity. Their Lordship appreciate the distinction, but consider that the same principles should apply to appeals as to applications for leave to appeal, save that leave to withdraw a full appeal should be given rather more sparingly. They have no doubt that in all cases where the appellate court is considering an increase it should give a clear indication to that effect and give the appellant or his counsel an opportunity to address them on the point, since there are specific considerations relating to a possible increase, as distinct from those relating to the imposition of the original sentence.

17 ----Moreover, it must have been apparent to the Court of Appeal that the appellant, at lease (sic) at the outset of the proceedings, suffered from some confusion about the sentences and the extent to which they were concurrent or consecutive and, possibly ignorance about the power of the court to increase sentences. In these circumstance it was incumbent on the court to make the situation as clear as possible and to give the appellant a timely warning and a full opportunity to consider his positions and make appropriate submissions. The Board is impelled to the conclusion that the absence of these safeguards denied the appellant his constitutional right to a fair trial. It must

> accordingly allow the appeal and set aside the order of the Court of Appeal revoking the sentences imposed by **Moore J** on the 21 March 2012 and varying them upwards ---'' (emphasis added)

[14] It appears to me therefore, that the Respondent was on the right track when it abandoned this issue.

Power to interfere with sentence

[15] Now, since the hub upon which this whole appeal spins is the sentence of the court *a quo vis a vis* the power of this court to interfere with same, it is apposite for me at this juncture to recount the familiar and entrenched principles that must guide this court in this adventure.

[16] The power of this court to embark on the journey which the Appellants entreat and to interfere with the sentence imposed by the court *a quo* is statutorily derived. The relevant statute is Section 5 (3) of the court of Appeal Act No. 74 of 1954, which clothes this court with the requisite authority in the following words:-

> " On an appeal against sentence the court of Appeal shall, if it thinks that a different sentence should have been passed at the trial quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal''.

[17] It is important to note that this power to interfere with the sentence of the lower court is not an absolute one. It is limited to instances where there was an improper or incorrect exercise of the lower court's discretion in sentencing. This is in recognition of the fact that sentencing is pre-eminently a matter which is within the discretion of the trial court and an appellate court will only interfere where there is a material misdirection resulting in a miscarriage of justice or irregularity or where there is a striking disparity between the sentence passed by the court *a quo* and that which would have been passed by the Court of Appeal.

[18] Jurisprudence across National borders has persistently paid homage to the foregoing principles. For instance, in the case of **Eric Makwakwa v Rex Criminal Appeal No. 2/2006, Ramodibedi JA** (as he then was) declared thus:-

" Similarly the Appellant's complaint against sentence is without any merit. This is so because sentence is pre-eminently a matter within the discretion of a trial court. A court of Appeal will not generally interfere unless there is a material misdirection resulting in a miscarriage of justice''

[19] Then there is the pronouncement of the court in the case of **Masuku v Rex (1977-1978) SLR 86,** as follows:-

" the sentence which Section 5 (3) of the Court of Appeal Act enjoins this court to pass in substitution for that of the trial court is such other sentence (as it thinks ought to have been passed). Now in the very nature of things it is impossible to lay down the mathematical precision periods or formula in what is pre-eminently a discretionary matter. Consequently, general guidelines are necessary to be employed by a court of appeal as criteria when determining what sentence "ought to have been passed----. Although an appeal is a re-hearing, in the absence of a misdirection or failure to have regard to some relevant factor, a court of appeal does not lightly interfere with a competent sentence passed by a trial court. The criteria ordinarily employed by an appeal court in deciding whether or not to alter a sentence of imprisonment have often been stated-inter alia by this court in **Thwala v Rex 1970-1976 SLR 363**"

[20] The Lesotho Court of Appeal followed the foregoing position in the case of **Matsotso v Rex (1962-1969) SLR 367**, where the court stated as follows:-

> " While no general rule can be laid down as to the circumstances in which the discretion to reduce sentence should be exercised, the nearest approach to the formulation of such a rule may be said to be that, the test is whether there was a proper exercise of discretion by the trial judge. In cases for example where a court in passing sentence has exceeded its jurisdiction or imposed a sentence which was not legally permissible for a crime, or been influenced by facts which were not appropriate for consideration in relation to the sentence, a Court of Appeal would have power to interfere. But where, as here, no such consideration enters into the matter it is not for the Court of Appeal to interfere with a sentence. Before so doing a Court of Appeal would have to be satisfied that a proper judicial discretion was not exercised by the court passing sentence".

[21] It follows from the above that for the court's sentencing discretion to be said to have been properly exercised, that discretion must be exercised not arbitrarily or capriciously, but judicially and judiciously upon facts and circumstances which show that it is just and equitable to do so. Whether the court's discretion was judicial and judicious

can be discerned from the reasons for that exercise of discretion as is extant from the record. That is why Section 294 (1) of the Criminal Procedure and Evidence Act 67/1938, as amended, enjoins the court to " *receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed*"

[22] It is also in appreciation of this principle that case law mandates the court to consider the triad of circumstances in its sentencing regime. This is the circumstances of the offender, the seriousness of the offence, the interest of the society and other mitigating and aggravating circumstances. As the court remarked in the case of **Mthaba Thabani Xaba v Rex Appeal Case No. 9/2007**

> " It is of critical importance that the sentence of an Accused person should be premised on a thorough investigation of all the relevant facts surrounding the commission of the offence. The personal circumstances of an accused person obviously needs to be taken into account. However, the degree of his moral guilt is also dependent on the gravity of the offence as well as the mitigating and aggravating features of the offence. If the court process does not elucidate these factors, the court sentencing an offender may fail to do justice to an accused, or per contra fail to ensure the protection of the public".

[23] Once the trial court's discretion is properly exercised, the position of our law is that this court will not generally interfere with that exercise of discretion unless there is a material misdirection resulting in a miscarriage of justice. See **Sam Dupoint v Rex Criminal Appeal No. 4/08, Vusumuzi Lucky Sigudla v Rex Criminial Appeal No. 01/2011, Xolani Zinhle Nyandzeni v Rex Criminal Appeal No. 29/2010.**

Sentence

[24] To my mind the first question for determination at this juncture, is, did **Banda CJ** exercise his discretion properly in ordering the sentences of 5 years, 10 years and 12 months for the respective offences *a quo*?

[25] Let me straight away state here, that after a very careful scrutiny of the continuum of the sentencing regime of **Banda CJ**, I have found no misdirection or irregularity that will entitle this Court to interfere with it. I say this because the learned **Chief Justice** carefully considered

the triad. He considered the mitigation of the Appellants, the interest of the society which demands that offenders should be punished, the fact that the offences committed are serious in that the Appellants robbed and terrorized people with a dangerous weapon. The fact that people who commit serious offences must be made to realize that crime does not pay and that a sentence must serve as a deterrent measure not just for the offender but also for those who have like minds in contemplation. **Banda CJ** also considered the Applellants' previous record of convictions for offences committed in South Africa and the fact that they displayed no remorse or contrition. There is therefore no premises for this court to interfere with the respective sentences of 5 years, 10 years and 12 months imposed for the various counts of offences a quo, as I agree that the gravity of the offences demanded such.

Consecutive Sentences

[26] We now turn to the order of the learned Chief Justice that the sentences imposed run consecutively. This resulted in an aggregate

sentence of 16 years for the 1st Appellant and 15 years for the 2nd Appellant.

[27] The Appellants complain that the cumulative sentences of 16 and 15 years respectively are too harsh and severe for them to bear. They therefore enjoin this Court to substitute the consecutive sentences for a concurrent order of sentences.

[28] The power of the court *a quo* to order consecutive sentences, lies in Section 300 (1) (2) of the Criminal Procedure and Evidence Act, 67/1938, as amended, which provides as follows:-

> "(1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted for another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case maybe, as it is competent to impose.
>
> (2) If such punishment consists of imprisonment the court shall direct whether each sentence shall be served consecutively with the remaining sentence''.

[29] It is however a general principle that consecutive sentences should not be imposed for offences which arise out of the same transaction or incident. Where the offences were committed in the same transaction, it has been held to be unjust and wrong in law to order the sentence of an accused to run consecutively see **Samkeliso Madati Tsela v Rex Criminal Appeal Case No.20/10, Anwole v The State (1965) ALL NLR 100, Willie John v The State (1966) ALL NLR 211**. It is also the position of the law that a sentencer may depart from the foregoing general principles if exceptional circumstances exist that warrant him to do so.

[30] The foregoing principles were amplified by the court in the Botswana Case of **Thapelo Motoutou Mosiiwa v The State Criminal Appeal No. 124/05 paragraphs 21 and 23, per Moore JA,** as follows:-

> "21. As a general principle, consecutive terms should not be imposed for offences which arise out of same transaction or incident, whether or not they arise out of precisely the same facts. Archibold 2000 5-45. A court may, however, depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances. But a sentencer must clearly identify the

exceptional circumstances upon which she or he seeks to justify the imposition of consecutive terms.

23. It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's, message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public a feeling that he has been unfairly and harshly treated''.

[31] Furthermore, in **Gare v The State (1990) B.L.R 74 at page 76 Livesey-Luke CJ** stated as follows:-

"It is now well established that if the offences in respect of which an accused is convicted by a court arose out of the same transaction, as a general rule, the sentences should be made concurrent---.

Another important general rule that should be mentioned is that the sentences imposed, whether concurrent or consecutive, should be so assessed that the total period of imprisonment should not be allowed to exceed what is proportionate to the overall gravity of offences''.

[32] It appears to me therefore that what will constitute exceptional circumstances that will influence a consecutive order of sentence will depend on the peculiar facts and circumstances of each case. Case law has however identified some of the factors that would constitute exceptional circumstances, which can also be extrapolated from the declarations of the courts in paragraphs (28) and (29) above. These exceptional circumstances include but are not limited to the following:-

1. Where the appropriate or maximum sentence for each offence would not protect the public from the offender for a sufficiently long time.

2. Where the aggregate term of imprisonment is not of such severity that it is wholly out of proportion to the gravity of the offences considered as a whole See **Rex v Boeski (1979 54 Cr App. Rep 519.**

3. Where at the time of passing sentence the offender is already serving another sentence of imprisonment, the sentencer may order that the new sentence imposed should run consecutively with the total period of imprisonment which had already been imposed.

[33] The list is not exhaustive. Each case must therefore be treated according to its own peculiar facts and circumstances.

[34] Now, when the pecular facts and circumstances of this case are weighed against the foregoing parameters, I do not think that the court *a quo* misdirected itself when it ordered that the concurrent sentence of 5 years imposed in counts 1-7, runs consecutively with the concurrent sentence of 10 years imposed in counts 8-12. I say this because, in the first place, though the offences therein are all of the same nature, they cannot however be said to be an integral part of the same transaction. This is because the offences in counts 1 to 7 occurred on different dates, places, circumstances and involved different Complainants from the offences as charged in counts 8-12 which occurred on the 21st of May 2005 and involved the mourners in the kombi driven by PW8. The offences charged in counts 8-12 which were more violent as clearly identified by **Banda CJ**, form an integral part of the same transactions or incident. The same story. Though the same nature of offences they are however different from the transactions in counts 1 to 7. This also goes for the offences

charged in counts 14 and 15 which are clearly part of a different transaction from those in 1-12. This state of affairs entitled the court *a quo* to the consecutive sentences ordered.

[35] Furthermore, I am also of the considered view that the aggregate sentence of 16 and 15 years imposed on the Appellants respectively, are not so disappropriate to the gravity of the offences committed as to cause a reasonable man to think that the Appellants were unfairly treated. **Banda CJ** was very much alive to the gravity of the offences in his sentencing regime. He put into the equation the fact that the Appellants violently terrorized the society with fire arms. The fact that they had previous convictions albeit in another jurisdiction. The fact that they were not remorseful and the fact that it was in the public interest that this sort of offence be adequately punished as a deterrent measure.

[36] The learned **Chief Justice** did not also leave out the personal circumstances of the Appellants as appear in their mitigation *a quo* which is on pages 66 and 67 of the record. A close perusal of the mitigating factors urged by the Appellants *a quo*, will show that they

are essentially the same mitigating factors which they parade in this appeal. Which are generally that they are remorseful, are sole breadwinners of their families, have minor children, are sickly and want to further their studies. **Banda CJ** obviously weighed these mitigating factors against the aggravating factors before he pronounced his sentence. I cannot therefore fault the reasoning of the court *a quo* in this regard.

[37] It remains for me to emphasise that the raison d'etre for the existence of a state is to protect its inhabitants and their rights. In fulfilling this sacred duty the state must treat the inhabitants justly. It must reward virtue and punish vice. It must take measures against anyone that deals unjustly toward them and to provide redress for any injustice suffered. One of these measures is to punish those individuals who act unjustly toward fellow inhabitants by trampling underfoot the law that protects their human rights and freedoms. Since laws are passed to improve living conditions of the citizens of a country the implementation and evaluation of these laws are the images of that country as are visualized in a mirror. It will therefore be correct to state that the aspirations, aims and objectives of a nation will be seen

through the lenses of the law in its implementation and execution of the Laws.

[38] A crime is an offence against the Law, and is usually also an offence against morality, against a person's social duty, responsibility or obligation to his or her fellow members of the society or societal normative values, which render the offender liable to punishment. Punishment may be defined as the totality of the legal consequences of a conviction for a crime. The one ultimate purpose of sentencing, and of all forms of punishment, is to prevent crime and or protect society (i.e public peace, welfare and security) from the anti-social activities, crafty schemes or machinatious plots of criminals and the criminally minded.

[39] In his book on jurisprudence, **Salmond** states that punishment maybe corrective, preventive, reformative, deterrent and / or retributive. In these aspects it serves as condemnation or as a stamp of public disapproval of the wrong doer's conduct, it teaches the wrongdoer that engaging in such conduct does not pay. It deters the wrongdoer and other prospective wrongdoers who have like minds in contemplation.

It reforms the wrongdoer and helps him turn into a productive and law abiding member of the society, for the good of the society. It also vindicates the victims and their rights, to assuage their injured feelings and to bring about healing, which is vital to a peaceful life and reconciliation in the society**. Banda CJ** was also alive to these factors in meting out sentence *a quo*.

[40] It is thus beyond controversy that the end product of an entire criminal trial which entails the elaborate system of procedure, the careful rules of evidence and the marshalling of first rate judicial personnel is the infliction of punishment. The peculiar circumstances of the offences involved in this case demanded retributive and deterrent measures, which will not only reform the criminals but will afford adequate protection to the society. It was thus in the interest of the society that the court condemned these offences in a manner that carries sufficient deterrent factor against their reoccurrence, especially in the face of the prevalence of armed robbery offences in the Kingdom.

[41] This frightening and unacceptable trend, and the need to discourage it, was recoginsed by **Hannah CJ** as far back as the 13th of November

1987, in the case of **Rex v Dube, Moses and others 1987-1995SLR Voll I page 152 at page 161 para d-j.** In that case when sentencing the accused to 15 years imprisonment for armed robbery, the learned Chief Justice remarked as follows:-

> " As I had occasion to say in the recent case of **The King v Clement Mabaso and Others (31/87**) there has, in recent times, been an unfortunate acceleration in the rate at which such crimes are being committed in the Kingdom. This has been confirmed by **Supt. Masango** who gave evidence before me this morning. When I first came to this country two years ago one could go into the bank and see no more than a uniformed attendant at the door. Nowadays when one goes into a bank one often sees an armed soldier or policeman and armed soldiers and policemen are frequently to be seen in shopping prescincts. I feel most uncomfortable when I see these armed men, as do most members of the public, but their presence has been made necessary by the criminal activities of people such as yourself. The courts have a duty to reflect in their sentences the public concern and outrage with this situation and, as I said in the case mentioned, to impose on those (who are prepared to terrorise innocent citizens going about their everyday tasks) swingeing sentences.
>
> In the United Kingdom, faced with an increase in cases of armed robbery of banks and the like, the courts now regard 15 years imprisonment as a starting point for a sentence (See

> **Rex v Turner (1975) 61 Cr App R67 at 91)** although in some cases there may be sufficiently strong mitigating factors which would enable the court to reduce the term. In Mabaso's case I stated that it was my view that the only realistic way in which the courts of this country can endeavor to stamp out this wave of crime was to adopt a similar policy and I see no reason to alter that view. The most serious features of this case are that the robbery was planned, you were armed and it seems likely that you still have a large sum of money cached away. However, as against that the gun was not fired and such violence as was used was minimal. Also you are a man of previous good character. It seems to me that in these circumstances the court need not go beyond the 16 years starting point I have mentioned and the sentence is one of fifteen years imprisonment to commence from 14 April 1987''(underlining added).

[42] I respectfully align myself with the foregoing exposition of **Hannah CJ.** I have no wish or desire to depart from same. In casu, the gravity of the offences committed by the Appellants in my view transcends that in the case above. The Appellants organised the crimes which they orchestrated over a period of time unleashing anarchy on the society with impunity and contumacy. They used firearms with which they shot PW8 leading to life threatening injuries. It was a reign of terror which threatened the public peace and needed

to be discouraged in the interest of the sanctity and stability of the society.

[43] The gravity of the offences was compounded by the fact that both Appellants are subsequent offenders. Both of them admitted before the court a quo that they had each been convicted for the offence of robbery by a court in South Africa and each sentenced to 15 years imprisonment on the 17th of March 2005. The mere fact that the Appellants were convicted and sentenced in South Africa as they contend, does not derogate from the potency of such a conviction. This is because a previous conviction has the same effect no matter where it takes place. It goes to demonstrate a habit. It is horrifying that notwithstanding the sentence imposed on them on the 17th March 2005 in South Africa for a similar offence of robbery, the Appellants quickly escaped to Swaziland and on the 22nd March 2005 just 5 days after they were sentenced in South Africa, they unleashed mayhem in Swaziland. The Appellants are therefore, borrowing the words of **Ramodibedi CJ** when this appeal was heard "*professional robbers*".

They are habitual and unrepentant offenders who, as **Banda CJ** correctly put it *"must be isolated from society for a long period"*.

[44] In my view the learned Chief Justice drew deeply from the well of mercy in his sentences. The offences certainly demanded heavier sentences but for the mitigating factors.

[45] I do not therefore think, taking together the totality of the foregoing, that the aggregate sentences of 16 and 15 years respectively imposed by the court *a quo*, are so disappropriate to the gravity of the offences committed, to warrant any interference with them.

[46] In the result this appeal lacks merits. It fails and is dismissed accordingly.

E. A. OTA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

Appellants in Persons

For the Respondents : Mr A. Makhanya
(Crown Counsel)