CRI/S/24/84

IN THE HIGH COURT OF LESOTHO

In the matter between

REX

v

TSOARELO JOSEPH KHADEBE

Before the Honourable Chief Justice M. Justice J P Cullinan
on the 18th day of March, 1988

For the Crown Mr S Mdhluli, Crown Attorney
For the Accused Mr N V Matete

RULING AND SENTENCE

Cases referred to
(1) R v Dlamini, P v Simelane & Anor Swaziland Review Cases 210/86, 209/86 Swaziland (Unreported)
(2) S v Baba (1967)2 P H , H 288 (E)
(3) R v Hassim (1918) TPD J/S §285
(4) R v Skokane (1921) TPD J/S §305
(5) R v Kazerani (1939) TPD J/S §234
(6) R v Hawthorne & Anor. (1980)1 SA 521
(7) R v Gilbert (1975) All E R 742
(8) R v Wilkes (1769) (1558 - 1774) /11 E R Rep 570

The accused was convicted of culpable homicide and also common assault The surrounding circumstances are detailed in a judgment delivered on 15th March, 1988

The accused was arrested on 10th June, 1981 Since then he has escaped from custody twice and has been at large for a period of four years. I calculate that in all he has spent over two years in custody He was recaptured for the second time on 9th June, 1987 Clearly the Court in passing sentence may take into consideration the fact that the accused has already spent two years

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in custody The additional consideration also arises as to whether any sentence of imprisonment can be imposed retrospective to 6th June, 1987

The learned Crown Attorney Mr Mdhluli submits that there is no power in the Court to do so, that the Court's powers in the matter are statutory, and are contained in the specific provisions of the Criminal Procedure & Evidence Act 1981 Mr Mdhluli submits that the Act empowers the court to suspend the operation of the sentence, or to impose a sentence taking effect in the future, but that there is no power to impose a retrospective sentence

Under section 301 of the Criminal Procedure & Evidence Act 1981, a court can order that punishments be served concurrently or consecutively In the latter case the date of commencement of the subsequent punishment lies in the future and may be indeterminate, as the accused may well earn remission of part of the first punishment or such punishment may be set aside on appeal, or the accused may even be pardoned Nonetheless the statutory power exists to impose such punishment in the future Again, the Court under section 304 of the Act may order imprisonment in default of payment of a fine, and such punishment may never in fact be served. Under section 31 the Court may suspend the operation of a sentence of imprisonment, the date of such operation is again indeterminate indeed the punishment may never be served

It will be seen that the High Court in the exercise of its appellate and revisional powers, may be seen to act retrospectively, Where the Court substitutes a sentence of imprisonment, whether more or less severe than that imposed by the court below, the sentence invariably runs from the date of the sentence imposed by the court below But in reality the Court is not imposing any punishment retrospectively As from the date of the sentence in the court below

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the appellant has been under such punishment the High Court in effect but adjusts the date of termination thereof In any event, the statutory powers exist under section 329 of the Criminal Procedure & Evidence Act 1981 and section 69 of the Subordinate Courts' Proclamation, for the High Court to so act

There is no specific provision however for the High Court in its appellate or revisional jurisdiction to substitute a sentence of imprisonment taking effect before the date of the sentence of the court below Similarly there is no express power in the Criminal Procedure & Evidence Act 1981 by which the High Court can, in its original jurisdiction, impose a sentence of imprisonment with retrospective effect

I have read with interest a review judgment by Hannah C J in the High Court of Swaziland in the cases of R v Dlamini, R v Simelane & Anor (1) where the learned Chief Justice ordered that sentences imposed by Magistrates' Courts be served with effect from the date of arrest Hannah C J observed at p 2

> "Looking at recent decisions of the Court of Appeal and the High Court it seems to me that the trend, if it may properly be called a trend, has been to backdate sentences to the date when an accused was first taken into custody This course has decided advantages over the alternative of taking pre-trial custody into account in a general way when arriving at an appropriate sentence Firstly, the accused can readily see that the time spent in custody has been fully recognised Secondly, it obviates the need in certain cases to make fine arithmetical adjustments to a sentence "

It will be seen however that Hannah C J. was operating within the framework of the provisions of section 318 of the Criminal Procedure & Evidence Act of Swaziland, which in part read,

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> " a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced, unless the court, on the same day on which sentence is passed, expressly orders that it shall take effect from some day prior to that on which it is pronounced "

Those provisions are practically identical to those contained in section 37 of the Penal Code of Zambia, where the practice of ante-dating a sentence of imprisonment has been given wide application, since the introduction of the Penal Code in 1931 Hannah C J observed at p 3 that "in Botswana it is the firmly established practice of the courts to backdate sentences of imprisonment "

As for the Republic of South Africa, Mr Mdhluli refers to the case of S v Faba (2) where Kotze J held that a Magistrate had no power to impose a sentence with retrospective effect, the correct course being to take into consideration any detention undergone before sentence I regret however that no reasons were given for such decision, that is, other than the observation that it was "not possible" for the Magistrate to have so acted

I have found the following passage in the work on South African Law of Criminal Procedure by Swift (1957) at p 490

> " a sentence cannot be ante-dated in our law to take effect from the date of arrest (R v Hassim (3), R v Skokane (4), R v Kazerani (5)) But the period of accused's detention may, and usually should be taken into consideration in determining sentence "

Unfortunately the reports of the above three cases ("J/S" series T P D) are not available to me Reading the above passage in context however, it seems to me that those cases were based on the provisions of sub-section (1) of section 41 of the Prisons & Reformatories Act, No 13 of 1911 of the Union of South Africa, which

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read in part

> " a sentence of imprisonment upon a conviction at common law or under any statute shall take effect from the day on which that sentence is passed . "

The sub-section thereafter contains exceptions to the above, dealing with suspension of sentence and bail pending imposition of sentence The more recent decision of S v Hawthorne & Anor (6), to the same effect as Hassim (3), Skokane (4) and Kazerani (5), was based on the provisions of section 32(1) of the Prisons Act No 8 of 1959 of the Republic of South Africa Those provisions repeat those of section 41 of the 1911 Act reproduced above

In England the situation, as far as the Crown Court is concerned, is governed by the provisions of section 11(1) of the Courts Act 1971, which read,

> "A sentence imposed, or other order made, by the Crown Court when dealing with an offender shall take effect from the beginning of the day on which it is imposed, unless the Court otherwise directs "

In the case of R v Gilbert (7) the Court of Appeal Criminal Division held that the latter words, "unless the court otherwise directs," did not empower the court to impose a sentence with retrospective effect The Court (per James L J) held at p 747 that such words were necessary in similar 1868 and 1962 legislation, "in order to preserve the common law power to the court to impose a sentence, or make an order, taking effect in future" James L J concluded that courts of assize and quarter sessions did not have power to ante-date their sentences The Lord Justice continued

> "If there were such a power there would have been no need to resort to the legal fiction under which sentences were ordered to run from the first day (of the sessions)"

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James L J observed that at common law there was "little to be gleaned from the authorities " He referred to the case of R v Wilkes (8) which, as I see it, is authority at common law for the Court's power to impose a sentence to take effect in the future on the expiration of another It would seem therefore that at common law, there is no power nin the Court to impose a sentence with retrospective effect, Wilmot C J observing in R v Wilkes (8) that

> "In general, the language of all judgments for offences, respects the time of giving the judgment "

The situation is therefore that in Swaziland, Zambia and apparently Botswana, there is statutory provision to enable the practice of the imposition of a sentence of imprisonment with retrospective effect In the Republic of South Africa there is express statutory provision which prevents such practice In England the legislation has been interpreted as not enabling such practice

In Lesotho, section 22 of the Prisons Proclamation No 30 of 1957 does not follow the South African provisions, and makes no stipulation as to the date of commencement of a sentence of imprisonment The provisions of the Criminal Procedure & Evidence Act 1981 are similarly neutral

It seems however that there are no common law powers to ante-date a sentence of imprisonment I cannot imagine that the Court has any inherent powers in the matter, such as it has in the matter of quantum at common law In the case of Hawthorne (6), for a translation of the Afrikaans text of which I am obliged to Mr S A Redelinghuys, at Attorney of this Court, Rumpff C J. (as he then was) observed at p 525 that

> "The principle that a sentence could be ante-dated to a date before the conviction of a person, cannot be supported

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because a person should not serve a sentence in respect of an offence before he has been convicted of such offence "

I have come to the conclusion therefore that there is no power in the High Court, or a Magistrates' Court, to ante-date a sentence Nonetheless I am entirely persuaded as to the benefit of such practice for the following reasons -

(i) It has been said, in most of the authorities quoted, that to take into consideration any detention before trial will relieve any sense of grievance on the part of the accused A court may well say that it has taken previous detention into consideration If the resultant punishment is more than the accused expected, then in my view the accused will remain convinced that the Court did not in fact take such detention into consideration Once a sentence is ante-dated, whether or not the sentence is longer than the accused expected, he can have no grievance as to previous detention that the Court has taken it into consideration is obvious.

(ii) If a Court merely takes previous detention into consideration, then the accused will fail to earn remission on such detention If I may take a random example for the purposes of illustration, to impose a sentence of 6 years' imprisonment on an accused in custody for 3 years, will result in the accused losing remission of 1 year's imprisonment and serving a total of 7 instead of 6 years' imprisonment James I J in Gilbert (7) observed the difficulties cast upon the Prison authorities of reckoning remission in respect of an ante-dated sentence No doubt difficulties of interpretation will arise Rumpff C J in Hawthorne (6) incidentally referred to other difficulties One of those was the fact that the prisoner on remand suffers less stringent conditions than the convicted prisoner, for

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my part I respectfully observe that if a sentence is ante-dated, that is the good fortune of the accused imprisonment under any conditions remains a severe punishment As I see it, any difficulties must be resolved in favour of the prisoner the practice of ante-dating sentences has worked elsewhere for many years now

It has been suggested that the Court might, in considering previous detention, take into account the aspect of remission That involves extremely complicated calculations, to which no doubt Hannah C J was inter alia referring in the above quoted passage in Dlamini (1), based on an unknown quantity, namely, whether or not the accused's behaviour so far has merited remission

(iii) The courts must be seen to impose appropriate sentences Not alone must the punishment fit the crime, it must be seen to fit the crime It is virtually futile for the Court to say that it takes into account previous detention Invariably the resultant sentence will be regarded by the accused as the appropriate punishment for the offence committed, and the full gravity of the offence will not have been impressed upon him In the previous example chosen, it is far more salutary to impose a sentence of 9 years' imprisonment and to ante-date it 3 years, rather than to impose a sentence of six years Again, if the appropriate sentence is, say, 2 years' imprisonment, what is a Court to do in respect of an accused in previous custody for 2 years?

(iv) The salutary effect of a sentence is far-reaching It reaches to the would-be criminal He is then exposed to the full deterrent effect of the sentence It reaches to the public and helps to satisfy the public sense of outrage or condemnation of the particular offence Whatever about the accused, it is hoping for too much to expect that the detailed reasons for the Court's sentence will be published, or if published will be digested Invariably the resultant sentence imposed is regarded by the public as the Court's view of the appropriate punishment to fit the crime

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(v) Any of the authorities I have encountered deal with accused persons in previous detention for some months I regret that I speak in terms of years, as it invariably takes between two and three years to bring an accused person to trial in the High Court Until such time as such period is drastically reduced, the advantages of ante-dating sentences will be ever magnified In the present day circumstances of the administration of justice, I am convinced that such practice is not merely appropriate it is entirely just

It is with regret therefore that I say that there is no power in the Court to ante-date a sentence Meanwhile, I would earnestly recommend that legislation similar to the Swaziland provisions be introduced

I proceed then to impose sentence in the present case Tsoarelo Joseph Khadebe, you have been convicted of the offences of culpable homicide and common assault I take into account what your learned Counsel has said on your behalf I take into account also the fact that you were but 18 or 19 years of age at the time when you committed these offences

I have taken into account the fact that you were intoxicated at the time, that is, in finding that you did not have the specific intent necessary to commit the two offences originally charged, that is, murder and assault with intent to do grievous bodily harm Nonetheless, I do not see why I should not in fairness take such intoxication into account again as a mitigating factor in assessing sentence As to your consumption of alcohol, I observe that if you cannot drink in moderation, then you must not drink at all

You have expressed your remorse here in Court on a number of occasions and have extended your sympathy to the bereaved

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relatives of both deceased Nonetheless the punishment imposed by this Court must reflect the public sense of outrage at your actions You say that you are willing to accept punishment In this respect I observe that you have escaped twice from custody, on the first occasion within a year of the commission of these offences The only way that you can settle your debt to society as a whole, is by willingly accepting the punishment imposed by this Court

I take into account the fact that you have spent altogether more than two years in custody and I will make due allowance therefor in assessing sentence

I put out of my mind the death of the second deceased You have been found guilty of common assault only, and it is for that offence that you will be punished As to the first offence, you have committed a senseless and brutal crime, and in your drunken excess you beat an elderly man to death with a shovel

Taking all those factors into account I sentence you as follows

Count 1 Six (6) years' Imprisonment
Count 2 One (1) year's Imprisonment
Both sentences will be served cumulatively

In the case of Count 1 however, I order that the operation of two (2) years' imprisonment thereof be suspended for a period of two (2) years, on condition that you are not convicted of any offence involving violence during that period

(B P CULLINAN)
CHIEF JUSTICE