IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO. 13/96

In the matter between

1. PHINEAS MASILELA

2. ENOCK HADZEBE

VS

THE KING

CORAM

: DUNN J.

: MATSEBULA J.

FOR THE APPELLANT : IN PERSON

FOR CROWN : MR. N. NDUMA

JUDGMENT(EX TEMPORE)

7TH APRIL 1996

The two appellants appeared before the acting senior magistrate Mbabane charged with two counts; the first being that of armed robbery, the second being that of possession of a firearm in contravention of Section 11(1) of Arms and Ammunitions Act.

They both pleaded not guilty to the two counts. They were, at the conclusion of the trial found guilty as charged on each count. On count one they were each sentenced to two years imprisonment and on count two they were each fined two thousand Emalangeni in default of which two years

imprisonment. It was ordered that the sentences should run consecutively.

The appellants noted an appeal against both conviction and sentence.

There is absolutely no merit in the appeal against the conviction. The two appellants were, so to speak, caught red-handed. Given all the circumstances of the case they are both fortunate to have survived and . to be alive this day. The whole community of the area where the robbery took place responded to an early alarm and gave chase which resulted in the immediate arrest of the two appellants. They had no reason or excuse for having run away and having been in the area if they were in fact not the robbers. The appeal by both the appellants against the conviction is dismissed.

Turning to the question of sentence it has been stated in numerous decisions of this Court and the Court of Appeal that there are limited grounds on which this court sitting as a court of appeal may interfere with the sentence imposed by a lower court. The appellants should consider themselves very

fortunate that they were sentenced in the manner in which they were. Firstly, the sentence of two years on count one was a very lenient sentence. There are far too many crimes of this nature being committed in the country. One does not have to look at the amount which the robbers actually get away with it is what they think, or thought they will get away with. It has been the experience of this

court from appeals from lower courts that sentences in the region of five years are imposed for this type of Offence.

In so far as count two is concerned the legislature has in its wisdom deemed it fit to impose minimum sentences for possession of arms and ammunition. The acting senior magistrate erred in not applying the penalty provisions of the Act as stipulated. The penalty clause provides for a fine of five thousand emalangeni in default of which five years imprisonment. The court does, however, have a discretion to suspend the whole or a portion of that sentence. If the magistrate was of the mind that the effective sentence should be a fine of two thousand or two years imprisonment, the approach should have been to suspend the three thousand or three years imprisonment of the stipulated minimum. This court as a court of appeal cannot allow the failure by the acting senior magistrate to impose the stipulated penalty, to stand. We will impose that sentence provided by the Act. We will substitute the sentence given by the magistrate with the following sentence-On count two, each accused is fined five thousand Emalangeni in default of which five years imprisonment. Three thousand Emalangeni or three years imprisonment of that sentence will be suspended for a period of three years on condition that the accused are not convicted of any contravention of the Arms and Ammunitions Act committed during the period of suspension.

It is ordered that the sentences will run consecutively. In effect, this means that if the accused do not pay the two thousand Emalangeni or any portion thereof the sentence of imprisonment which they are obliged to serve on count two will run consecutive to that on count one.

B. DUNN

JUDGE

I agree

J. M MATSEBULA

JUDGE