THE HIGH COURT OF SWAZILAND

APPEAL CASE NO.79/01

In the matter between:

DUMSANE MATSEBULA	Appellant
VS	
REX	Respondent
CORAM:	MAPHALALA J.
	MASUKU J.
For Appellant:	Mr A.M. Lukhele
For Respondent:	Ms N. Lukhele

JUDGEMENT 26/04/02

Masuku J,

The Appellant, to whom I shall continue to refer to as "the accused" appeared before the Manzini Senior Magistrate together with one Bheki Ntuli. They were charged with robbery, it being alleged that on or about 14th December, 2000, and at Emthanda Area in the Manzini District, they, acting in common purpose wrongfully and unlawfully assaulted Spokes Sibandze, and did take and steal from him money in cash, namely E1010.00, his property or in his lawful possession.

The learned Senior Magistrate acquitted and discharged Ntuli at the close of the Crown case but found the accused guilty as charged and sentenced him to four years imprisonment, without the option of a fine. The sentence was backdated to 18th December 2000, the date of the accused's arrest.

The accused had initially appealed against both conviction and sentence but at the commencement of the appeal hearing, Mr Lukhele indicated that he was abandoning the appeal against conviction, as it was clear that the learned Magistrate was correct in convicting the accused. This is a laudable step by Mr Lukhele as the Magistrate, on the evidence before him correctly convicted the accused. There was no misdirection or error on his part in returning that verdict. The same cannot however be said on the acquittal of Ntuli as there was a prima facie case proved by the Crown at the close of the Crown's case, particularly from the evidence of PW 2. Why the Magistrate acquitted him remains a mystery in the face of that compelling piece of evidence. We cannot however change his finding as no issue thereon was timeously or properly raised by the Crown.

PW1 the complainant testified that on the 14th December 2000, he was attacked in his bedroom by three men at around 01h00. They broke into the room, assaulted him with a spear, demanded and took away an amount E1010.00. The accused was recognised as one of the three assailants. The accused and Ntuli were subsequently arrested and an amount of E700.00 and Sibandze's wallet was recovered from them. The accused denied that the complainant was assaulted, reasoning that he only took the money from Sibandze, his uncle, who had unlawfully sold a beast belonging to Sibandze's brother and which the accused person was looking after. This Sibandze denied, maintaining that he sold his own beast. The evidence against the accused was clearly compelling.

The appeal is now against sentence. The sentence imposed is attacked by Mr Lukhele on the following

grounds;

(a) The accused was first offender;

(b) the amount stolen was negligible and a substantial portion thereof was recovered; and

(c) it induced a sense of shock.

Ms Lukhele, per contra argued that the offence of which the accused was convicted is serious and the complainant was injured in the course of the robbery. She argued further that there was an element of premeditation on the part of the accused and his compatriots in committing the offence. She further argued that the sentence served to underscore

deterrence to relatives, in particular, to warn them that they must not resort perpetrating crime on relatives with which there is an element of acrimony or misunderstanding.

The law applicable in such cases was outlined with absolute clarity by Mahomed C.J. (as he then was) in S v SHIKUNGA AND ANOTHER 2000 (1) SA 616 at 631 F- I (Nm S.C.). The learned Judge stated as follows:-

"It is trite law that the issue of sentencing is one which vests discretion in the trial Court. An Appeal Court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one or where the discretion has not been judiciously exercised. The circumstances in which a Court of appeal will interfere with the sentence imposed by the trial Court are where the trial Court has misdirected itself on the facts or the law (S v Rabie 1975 (4) SA 855 (A); or where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock (S v SNYDERS 1982 (2) SA 694 (A); is such that a patent disparity exists between the sentence that was imposed and the sentence that the Court of appeal would have imposed (S v ABT 1975 (3) SA or where there is an under-emphasis of the accused's personal circumstances (S v MASEKO 1982 (1) SA 99 (A) at 102; S v COLLETT 1990 (1) SA CR 465 (A)."

See also PAT BHIBHI MNGOMEZULU v R CRIM. APPEAL CASE NO. 41/99 (per Tebbutt J.A.) unreported.

In his reasons for sentence, the learned Magistrate considered the following - that accused was a first offender and had dependents; that complainant was injured during the attack; that the latter had not provoked the accused in anyway; that not all the money was recovered and that robbery is a prevalent offence in Manzini such that deterrence, both individual and general should be a weighty factor.

The learned Magistrate does not however seem to have considered the fact that this offence, serious as it may be, was committed by a relative on another and in which the accused claimed some wrongdoing by the complainant in respect of a family dispute. This was therefor not a usual case of robbery and this was a weighty factor in the accused's

favour. Although the learned Magistrate considered the question of the money taken, he considered that not all of it was recovered, without considering that a substantial portion thereof was recovered. He also considered that the complainant was injured but there was no medical evidence to prove the exact nature, extent and seriousness of the injuries in order to ascertain the degree of vindictivess by the accused and his partners in crime.

In the circumstances, I find it is appropriate to interfere with the sentence as it appears, regard had to all the attendant, circumstances that there is a disparity, slight as it may be between the sentence imposed

and that which this Court would impose and there was overemphasis of some factors and an under-emphasis of some others as appears above. Whereas a custodial sentence was appropriate, I am of the view that the four (4) year sentence was rather severe. Courts should be wary of imposing lengthy custodial sentences on first offenders where there are factors suggesting less severe sentences, as in casu.

The remarks by Tebbutt J.A. in NTOKOZO M. DLAMINI AND ANOTHER v THE CROWN CRIM. APP. CASE NO.10/2001 are in this instant case apposite. After considering the seriousness of the crimes wherewith the said appellants were charged, their lack of remorse, the learned Judge of Appeal stated that society would expect the Court to mete heavy sentences of incarceration. He proceeded to state as follows at page 8 :-

"Its (the Court's) sentences must also serve as a deterrent not only to the appellants to abstain from similar behaviour in the future, but to others who may have like minded schemes in contemplation. At the same time, the reformative aspect of punishment should not be over looked. The two appellants were aged 19 and 18 at the time of the offence. They are both first offenders. They must be given the chance to rehabilitate themselves into society at an age when they can still do so.

In the result, it was properly conceded that the appeal against conviction be abandoned and it is therefor confirmed. The appeal against sentence is successful to the extent that the Court substitutes the four (4) year sentence for one of three (3) years without the option of a fine. The sentence, as had been done by the Magistrate remains backdated to 18 December 2000.

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Having said this, there is nothing to gainsay that the offence you committed is a very serious one. The complainant is your relative and there was no reason for you to enlist the services of your partners in crime to terrorise and assault the complainant in the sanctity of his home. If you had any legitimate complaint about the complainant's sale of the beast in question, there is plethora of fora open to you in which you could have raised the issue, the immediate one being the extended family. There will be a breakdown of law and order if people like you allowed to do as they please, translating us back to the state of nature where life was "nasty, brutish and short" according to Thomas Hobbes in his LEVIATHAN. One can only hope that you will, during your sojourn as His Majesty's guest in the Correctional Institution learn your lesson well and that your wayward behaviour will be corrected.

T.S. MASUKU

JUDGE

I agree

S.B MAPHALALA

JUDGE