THE HIGH COURT OF SWAZILAND

CRIM. APPEAL CASE NO.22/02

FRANCE BHEKI POTGIETER — **Appellant**

And

REX — **Respondent**

CORAM : **SAPIRE C.J.**
MASUKU J.

For Appellant : **Mr. L. Gama**

For Respondent : **Ms.M.S. LaNgwenya**

JUDGEMENT
2/09/02

Masuku J.

The Appellant, to whom I will refer to as "the accused" for purposes of convenience, was found guilty of two counts of robbery by the Manzini Senior Magistrate, His Worship, Mr. N. Nkonyane. On the first count, he was sentenced to three years imprisonment without the option of a fine and to four years imprisonment without the option of a fine on the second. Both sentences were ordered to run consecutively.

The Crown, after reconsideration, abandoned a point *in limine*, to the effect that the appeal had been noted out of time. This is a laudable step, seeing that there were certain holidays falling within that period and which had not been considered by the Crown in raising the said point. Nothing further needs be said regarding this point therefor.

At the commencement of the hearing, Mr. Gama fairly conceded in my view that there was overwhelming evidence against the accused and on the basis of which the learned Magistrate correctly returned the verdict of guilty on Count 1. This is correct and for that reason, there is no need to interfere with the accused's conviction on this count and it shall therefor stand. What needs scrutiny is Count 2, which was couched in the following language:

> *"The accused persons number 1,2 and 3 are guilty of the offence of armed robbery, in that upon or about the 13th January 2001 and at or near Fairview in the Manzini Region, the said accused acting in common purpose did wrongfully and unlawfully using force and violence to induce submission by Cookie Dlamini did take out of him (sic) immediate care and possession a sum of E1, 200.00, the property of or in the lawful possession of Cookie Dlamini by threatening to shoot her with a fire-arm."*

I need only mention that as stated in the charge sheet, there were three accused persons initially. The accused was no.1 in the Court *a quo*. Accused 2 was acquitted and discharged at the conclusion of the trial, whereas no.3 was acquitted and discharged at the close of the Crown's case.

The evidence against the accused on count 2 is to be found in the sworn testimony of PW6 Cookie Dlamini, the complainant and PW8 Andrew Whyman. PW6 testified that on the 13th January 2001, at or about 07:45, she left her home in Fairview for Coates Valley, where she runs a hair salon and a bar. On arrival at the business premises, she checked and found that the money was safe and she took it. As she opened the door to go out, somebody pushed her into the bar towards the counter and pointed a firearm at her,

demanding some money from her. The money she had was E1, 200.00, consisting of coins and notes. The assailant fired a shot from the firearm, but no bullet was discharged. He pushed her and she fell down, whereupon he took the plastic bag in which the money was contained and ran away.

It was her further evidence that she picked herself up, pursued this man and raised an alarm. She described the clothes worn by her assailant but nothing turns on that. She informed the Court that the assailant was the accused, whom she saw for the first time on that day. The man and his two companions then jumped over the fence and she heard the sound of gunfire. Those who responded to her alarm informed PW6 that they knew the assailants. She thereafter telephoned the Police who came and obtained a statement from her.

The accused cross-examined PW6 regarding his identity and she informed the Court that she relied on the people who had told her that they knew the accused and that she was also seeing him in Court that day. This amounted to dock identification, which the learned Magistrate correctly rejected as an improper basis for finding the accused guilty.

PW8, on the other hand testified that some time in January 2001, he gave a lift to the three accused persons in a vehicle that he was driving. They were on the road leading to Moyamunye and asked to be dropped at Moyamunye bar, which PW8 did. It was his evidence, which was not denied, that he knew the accused person and that they grew up together in Fairview. PW8 was heading for a shop within the complex which housed the bar which the accused persons were to supposedly patronize. As PW8 walked out, he heard the bar-lady raising an alarm and he saw the accused person jumping over the fence together with one of his two companions. The third one ran around the building and as the two fled, he heard the sound of a firearm, with somebody firing into the air. PW8 testified further that the accused had shown him the firearm when they were in the vehicle and proceeded to show him the ammunition. Nothing turned on the accused's cross-examination of this witness. He however never denied any portion of PW8's evidence.

Mr. Gama's main contention in attacking the propriety of the conviction is that the evidence of PW8 does not place the accused at the scene of the offence as he testified that he left the accused and his companions at Moyamunye, whereas the robbery took place at Langwenya Bar, according to PW5. It is correct that the place where the crime was allegedly committed does not bear the same name, regard had to the evidence of PW6 and PW8. What compounds issues, according to Mr. Gama is that whereas PW6 testified about the date of the commission of the offence as that appearing on the charge sheet, namely, the 13th January, 2001, PW8 does not mention the date in his evidence, which places the Court in the danger of upholding an appeal where there is a doubt as to where and when the offence occurred.

In considering Mr. Gama's submissions, sight must not be lost of the events described by the two witnesses mentioned above. In particular, their evidence regarding the number of assailants is consistent and so is the reaction of the assailants, namely, that they jumped over the fence and ran away. Both witnesses also testified about hearing the sound of gunfire. Regarding the date, although PW8 could not recall it with precision, he did mention in his evidence that it was in January 2001. PW6 testified that it was in the morning but PW8 was not asked as to the time when the robbery took place. It is however clear from his evidence that it was in the morning as the accused told him that he was from the Why Not night club, it being a notorious fact that this club operates at night until the early hours of the morning. Furthermore, PW6 testified that as the men ran away, she shouted to raise an alarm. This was seen and heard by PW 8 as he confirms it in his evidence. These issues in my view provide further corroboration in the two pieces of evidence.

Regarding the different name ascribed by both witnesses to the scene of the offence, it is worthwhile to closely examine their testimony. According to PW6, she operated a bar at Coates Valley under the style, "Langwenya Bar". PW8 on the other hand does not mention where the bar is situate but it is apparent that it was housed in a building complex called Moyamunye where there were a number of shops and to which PW8 was

heading. Can it be said in the circumstances that both witnesses were testifying about two different places in the circumstances? I think not.

As recounted earlier, the chronology of events and the events themselves are of such striking similarity as to exclude a coincidence. Furthermore, it would appear that PW8, in referring to the Bar called it by the name of the complex, which was given by the accused when he cross-examined PW8. More importantly, the accused person never denied having been at the place where the robbery took place, whether for our purposes it was Moyamunye bar or Langwenya bar. In the face of incriminating evidence which placed him at the scene, he failed to give any reasonable explanation that carried any possibility of truth. The learned Magistrate in my view correctly rejected his story, particularly in view of the fact that PW8 knew the accused for some length of time and testified that when offering the accused a lift, the latter had shown him a firearm. He later saw the accused jumping over a fence and a bar lady, who must have been PW6 shouting. These events appear to be too much of a coincidence.

I am of the view that in the premises, the facts of the matter lead to the one and only inference, namely that the accused was one of the robbers who swooped on PW6's money on the day in question. I accordingly dismiss the appeal against conviction on Count 2 as well.

The principles applicable to appeal against sentence were stated with absolute clarity by Mahomed C.J. (as he then was) in **S vs SHIKUNGA 2000 (1) SA 616 (Nm SC)** at 631. The learned Chief Justice made the following trenchant remarks:

> *"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 VS 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 VS SNYDERS 1982 (2) SA 694 A; is such that a patent disparity exists between Sentence that the Court of Appeal would have imposed (S VS ABT 1975 (3) etc: or where there is an under-emphasis of the accused's personal circumstances (S VS MASEKO 1982 (1) SA 99 (A) @ 102; S VS COLLETT 1990 (1) SACR 465 (A))"

The only bases upon which Mr. Gama contended the Magistrate had misdirected himself was on the question that the accused was a first offender and that he was very young then. These are factors which the learned Magistrate appears to have considered, but taking into account the seriousness of the offences, he found it fit to impose the sentences that he did and further found it proper in the circumstances to order that the sentences run consecutively. In **NTOKOZO M. DLAMINI AND ANOTHER VS THE CROWN CRIM. APP. 10/2001,** Tebbutt J.A. had this to say at page 8 of the judgement:

"The seriousness of their crimes, their moral blameworthiness and their lack of remorse or regret justify lengthy sentences of imprisonment. Society would require of this Court that it marks its severe disapproval of this type of criminal behaviour by heavy sentences of incarceration. Its 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 overlooked. The two appellants were 19 and 18 at the time of the offence. They are both first offenders. They must be given the chance rehabilitate themselves into society at an age when they can still do so." (my own emphasis).

The accused was seventeen years at the time of commission of these offences and had been co-charged with persons who were at least seven years his seniors. For the above reasons, it is my view that these factors should redound to the benefit of the accused. By so doing, the Court must in no way be misconstrued to be condoning the accused's

behaviour. The offences he committed were undoubtedly serious and he must avoid being on a collision course with the law so early in his life. That both complainants sustained some injuries at the accused's hands is no light matter. You are being afforded an opportunity to soberly reflect on your actions and to resolve never to be found on the wrong side of the law again. Should you choose not to heed these wise injunctions, you will have to be dealt with no moderation.

The sentences imposed by the learned Magistrate be and are hereby confirmed but I order that they be ordered to run concurrently, in which case you are to serve the sentence meted out in Count 2. The sentences are ordered, as the Magistrate had done, to run with effect from the 19th January 2001.

T.S. MASUKU
JUDGE

I agree.

S.W. SAPIRE
CHIEF JUSTICE