IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CRIM. APPEAL CASE NO. 20/06**

In the matter between:

MOSES MPHIKELELA DLAMINI **APPELLANT**

VERSUS

REX **RESPONDENT**

CORAM: MATSEBULA J

MAMBA AJ

FOR APPELANT: MR L. GAMA

FOR RESPONDENT: MR P. DLAMINI

JUDGEMENT

22nd June, 2006

MAMBA AJ,

[1] The appellant appeared before the Manzini Magistrate's Court on two counts of house breaking with intent to steal and theft. His first appearance was on the 7th day of April 2005. There is no indication from the record of the proceedings in the court **a quo** as to when he was arrested and detained by the police. What is certain, however, is that he remained in custody pending and during his trial. He was

unrepresented.

[2] On being arraigned on the 18th August 2005, he pleaded not guilty to both counts but at the close of the case for the crown on the 22nd November, 2005 he changed his pleas and entered a plea of guilty on both counts. He immediately closed his case without leading any evidence in his defence. He was, in my view, rightly convicted as charged on both counts.

[3] On the 25th day of November 2005 he was sentenced to a custodial term of two years on each count and these sentences were ordered to run consecutively with effect from that date.

[4] The value of the goods for which he was convicted was estimated to be the sum of El3 660-00. These goods which comprised mainly household appliances and clothing were stolen at night from two different homesteads on the same night, at Moneni, on the outskirts of Manzini.

[5] On appeal before us Mr. L. Gama, who appeared on behalf of the appellant informed us that the appeal was on sentence only. He presented his argument on two points namely;

(a) that the trial court erred in failing to back-date the sentence of the accused to the date of his arrest and detention and

(b) the court **a quo** ought to have ordered that the sentences must run concurrently as the offences were similar in nature, were committed in the same neighbourhood and on the same night.

[6] The cumulative effect of the two sentences imposed by the learned Magistrate on the appellant is that the appellant is to serve a term of 4 years of imprisonment with effect from the 25th November 2005. Such a sentence, Mr Gama submitted, is too harsh and induces a sense of shock. He argued that we should hold this to be the case and therefore interfere with the sentences imposed by the court **a quo** and order that the sentences must run concurrently and further backdate it to the date when the appellant was arrested and taken into custody.

[7] In support of his argument Mr. Gama referred us to the case of **FRANCE BHEKI POTGIETER v REX, Crim. Appeal 22/02**(unreported) a judgement of this court delivered on the 2nd day of September, 2002.

[8] In Potgieter's case (supra), the appellant who was 17 years old at the time of the commission of the offences had been convicted of 2 counts of robbery. On the 1st count he had been sentenced to 3 years of imprisonment and 4 years imprisonment on the second count which sentences were ordered to run consecutively. He was a first offender. A gun had been used or brandished during the robbery and the appellant had committed these offences in the furtherance of a common purpose "with other persons who were at least seven years his seniors." f

[9] On appeal, the court held that because of the youthfulness of the appellant and the fact that he committed the offences acting in concert with persons much older

than him, and the fact that he was a first offender "these factors should redound to the benefit of the accused." The court accordingly held that the appellant "must be given the chance to rehabilitate [himself] into society at an age when [he] can still do so". The sentences were ordered to run concurrently; the effect of which was that the appellant would serve a term of 4 years imprisonment.

[10] With due respect, I do not find any fault in the manner and approach and reasoning of the court in Potgieter's case ***(supra).***

[11] In casu, the appellant was thirty-five years old. He raided and ransacked people's houses at night and stole therefrom property valued just over El3 000-00. Both offences were carefully planned and executed. He enlisted the services of the accomplice and the motorists who conveyed the stolen items away from the scenes of crime. These stolen goods were subsequently sold for gain to innocent and unsuspecting third parties.

[12] In Potgieter's case (supra), the complainant on count 2 was robbed of a sum of El200-00. It is not a paltry amount, but it is significantly less than the value of the property involved in the present case.

[13] Whilst indeed a plea of guilty should be taken into account in favour of an accused in determining sentence, care should be taken not to over-emphasize this factor. The mitigating nature or discount resulting from a plea of guilty may not be used or bandied about as a carrot to an accused to plead guilty at the expense of a fair trial. This is especially the case where the accused is undefended. Putting

undue weight on a plea of guilty as a mitigating factor tends dangerously to devalue the right of an accuse to plead not guilty.

[14] As a sign of remorse, a plea of guilty tendered as late as at the close of the case for the crown is, in my judgement, less convincing than that made on arraignment. Where for instance, restitution or restoration is possible but not made by an accused, a plea of guilty would hardly be an indication of remorse or contrition.

[15] This court, sitting as a court of appeal has to bear in mind the cardinal and salutary rule or principle 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 ...or where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock, ...is such that a patent disparity exist between the sentence that the Court of Appeal would have imposed .. .or where there is an under-emphasis of the accused's personal circumstances." See **S v SHIKUNGA, 2000 (1) SA 616 (NM) AT 631,** or put differently;
>
> > "...A Court of Appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The Court of Appeal, after careful

> consideration of all the relevant circumstances as to the nature of the offence committed and person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of Appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with." (Per **RUMPFF J A** in the case of **S v ANDERSON 1964 (3) SA 494 (A) at 495.)**

[16] I can find no fault or misdirection committed by the learned trial Magistrate herein. The cumulative sentence of 4 years imprisonment imposed by the trial court on the appellant in respect of the two counts herein does not, in the circumstances of this case induce any sense of shock to me.

[17] I would therefore dismiss the appeal on this ground.

[18] There is, however, merit in the submission that the court a quo ought to have ordered that the sentences must run with effect from the date on which the appellant was taken into custody. Mr P. Dlamini for the crown has, rightly in my view, conceded this much.

[19] It is apposite, I think, at this stage to refer to the judgement of Hannah CJ

(as he then was) in the case of **R v BENSON MASINA AND ANOTHER, 1987-1995 (1) SLR 391** where the learned Judge said: "the fact of the matter is that they spent 64 days in custody prior to their conviction and that was a factor which they were entitled to have taken into consideration either by a reduction in their sentence or by back-dating their sentence. The loss of liberty be it for 4 days or 64 days is necessarily a punishment.

In R v BHEKI DLAMINI, Review case No. 210 of 1986 (unreported) this court said;

"Although the question of when a sentence should commence is matter for the discretion of each court, in my judgement the courts of this country should, as a general rule, exercise that discretion in favour of back-dating sentences of imprisonment in those cases where an accused has been in custody awaiting trial. Such a general practice will, in my opinion, more effectively ensure not only that justice is done but that it is seen to be done. That is not to say that there will be no cases in which a court can take account of time already spent in custody in a more general way but, in my view, good reason should exist for adopting such an approach.

I may add that this practice of back-dating sentences of imprisonment has in most cases been followed not only by the High Court but also by the Court of Appeal.

The judgements of this court are binding on Magistrates' courts and it is not now open to the Magistrate who tried the case under consideration to say that the general rule is that sentences should not be back-dated. While he has a discretion in the matter good reason

must exist for a departure from the general practice."

[19] I agree with the remarks of the learned judge. For a long time now, the practice of the courts in this country has been to backdate sentences, to take account of any term that an accused has spent in custody before sentence.

[21] In the result the order I make is;

1. The sentence of 2 years imprisonment imposed by the trial court on the appellant on each count is upheld.

2. The sentences on count one and two are ordered to run consecutively with effect from the 7th day of April 2005, that being the date on which the appellant first appeared in court on remand.

MAMBA AJ

I agree

MATSEBULA J