

**IN THE HIGH COURT OF SWAZILAND  
HELD AT MBABANE**

**CRIMINAL APPEAL NO. 2/2005**

**In the matter between**

**NHLANHLA MISTEL DLAMINI**

**Appellant**

**Vs**

**REX**

**Coram: Annandale - ACJ**

**Maphalala – J**

**For the Appellant: IN PERSON**

**For the Crown: MR. S. FAKUDZE**

**JUDGMENT  
(19<sup>th</sup> September 2006)**

**Maphalala J**

[1] The Appellant appeared before the Manzini Magistrate's court co-charged with four others for a number of robberies and housebreaking with intent to steal and theft.

[2] Before commencement of their trial, one of them had his charges withdrawn, and during the trial became an accomplice witness. Another of the accused persons had his charges withdrawn by the Crown, but he did not testify during trial. Another of the Appellant's co-accused passed away during the course of trial. Therefore, only Appellant who was the 1<sup>st</sup> Accused and another of his co-accused being accused no. 4 stood charged and subsequently convicted jointly and severally in respect of two counts of robbery and one count of housebreaking with intent to steal and theft.

[3] The Appellant was convicted of all the charges whilst his co-accused was acquitted on one count of robbery and convicted of only one count of housebreaking with intent to steal and theft and subsequently sentenced to three and half (1/2) years imprisonment without an option of a fine.

[4] The Appellant was sentenced to four (4) years imprisonment for count one of robbery (count 1) three years imprisonment for count two of housebreaking with intent to steal and theft (count 2) and a further four (4) years imprisonment for another count of robbery (count 4). The sentences were ordered to run consecutively and were all backdated to the date of Appellant's arrest being the 16<sup>th</sup> September 2003.

[5] Appellant now appeals against both convictions and sentence in a Notice of Appeal of the 25<sup>th</sup> November 2004 directed to the Clerk of Court in Manzini on the following grounds:

**Ad conviction**

- 1. The evidence brought before court did not warrant a conviction.**
- 2. The Honourable Magistrate refused to recuse himself in the matter since he had an interest on the outcome of the case.**

**Ad sentence.**

- 1. The Honourable Magistrate was emotional when ordering the sentences of four (4) years and three (3) years to run consecutively with each other.**

**2. The sentence of eleven (11) years in prison without an option of a fine is too harsh and that it induces a sense of shock.**

[6] The Appellant added further grounds of appeal in his letter to the Registrar of this court dated 19<sup>th</sup> January 2005 to the effect firstly, that he made an application before the court *a quo* asking the Magistrate to recuse himself in the matter since he had an interest in it, but he refused with no reasons explained. Secondly, his legal rights to representation were explained to him when there was only one witness left to give testimony.

[7] The Crown in the court *a quo* called eight (8) witnesses, including the evidence of an accomplice witness. Further in addition to the testimonies of the witnesses, there was direct evidence linking Appellant to the offences in that quite a number of exhibits being properties belonging to the complainants were recovered from the Appellant, he did not give an explanation of how he came to possess those items. In his defence Appellant elected to remain silent notwithstanding the overwhelming evidence against him.

[8] Appellant contends that the evidence brought against him did not warrant a conviction. In my assessment of the evidence led before the court *a quo* it is **my** considered view that the Crown adduced cogent evidence of eight (8) reliable witnesses who corroborated each other, including the evidence of an accomplice witness who acquitted himself well in his testimony. Further in addition to the testimonies of the witnesses, there was direct evidence linking Appellant to the offences in that quite a number of exhibits, or rather properties belonging to the complainants were recovered from the Appellant. He did not give an explanation of how he came to possess those items.

[9] On the second ground on conviction the Appellant contends that the Magistrate in the court *a quo* refused to recuse himself in the matter since he had an interest on the outcome of the case. It appears to me that the contention by the Crown that no such application was made to the Magistrate is the correct one as there is nothing in the record that suggest that such application was made.

[10] On the third ground the Appellant contends that his legal rights to representation were explained to him when there was only one witness left to give evidence. Indeed, it appears on the record that when the learned Magistrate explained the accused rights to legal representation only his co-accused being accused no. 2, 3, 4 and 5 were in court and the Appellant was reported sick. However, on the 8<sup>th</sup> September 2004, the learned Magistrate explained the Appellant's legal representation after being prompted by the Appellant. The Appellant was further told that he had a right to instruct an attorney even at this stage if he wants to and have all the witnesses recalled. The Appellant then stated to the court that he needed time to think and will reply on 10<sup>th</sup> September 2004. On the said date Appellant stated to the court that he would conduct his own defence. In my considered view although the warning was not given at the commencement of trial his right of legal representation was explained to him during the course of trial that if he wanted to and have all witnesses recalled he would be allowed to recall them.

[11] In respect of sentence the Appellant contends that the Magistrate *a quo* was emotional when ordering the sentences of four (4) years and three (3) years to run consecutively with each other. Further, the Appellant contends that the sentence of eleven (11) years without an option of a fine is too harsh and that it induces a sense of shock.

[12] It is trite law that the question of sentence, its appropriateness and the particular form of sentence to impose is the primary function of the trial court. In the absence of misdirection or irregularity in the trial court, an appeal court should be slow in interfering, (see *Vusi Muzi Lukhele and another vs R - Criminal Appeal Case No. 23/2004 (unreported)*). In this regard I am in total agreement with the Crown that the trial court did not misdirect itself in anyway in ordering the sentences to run consecutively. Appellant it appears, had embarked on a life of crime. He committed a series of robberies and housebreaking cases over a relatively short period of time and throughout the proceedings in the court *a quo* did not show any signs of remorse for what he had done. Further I am in agreement with the Crown on the facts of this case

that the sentence imposed was appropriate and I could not detect any misdirection on the part of the learned Senior Magistrate.

[13] In the result, for the afore-going reasons, the appeal against both conviction and sentence fails.

S.B MAPHALALA -J

I agree

**J.P. ANNANDALE- ACJ**