**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL APPEAL NO. 68/2005**

**In the matter between:**

| | |
|---|---|
| **VAYELA MAGONGO** | **1st APPELLANT** |
| **THULANI MAMBA** | **2nd APPELLANT** |
| **VS** | |
| **REX** | **RESPONDENT** |

**CORAM:** **MAPHALALA J**
**MAMBA AJ**

**FOR APPELLANTS:** **IN PERSON**

**FOR RESPONDENT:** **MS MUMCY DLAMINI (ADPP)**

**JUDGEMENT ON SENTENCE**

**24th MARCH, 2006**

MAMBA AJ

[1] The first appellant is Vayela Magongo and the second appellant is Thulani Mamba. They together with two other persons were tried on a charge of Robbery by the Manzini Senior Magistrate. They were found guilty as charged and were duly sentenced to individuated and varying terms of imprisonment on the 9Ih February, 2004. The sentences were backdated to the 2nd May 2003 being the date on which they were arrested by the police.

[2] The first appellant was sentenced to a term of six years imprisonment and the second appellant to a term of 5 years imprisonment. Both have appealed against their respective sentences. They are. as they were in the court a quo, undefended.

[3] On appeal each of the appellants has argued before us that the sentence imposed upon him is too harsh and must be set aside and a proper sentence be substituted instead. Other than complaining that the sentence of 6 years imposed on the first appellant is unduly harsh, the first appellant has also argued that the trial magistrate erred in not treating him as a first offender for purposes of considering sentence in the trial below.

[4] The first appellant stated before us that whilst he had admitted having a record of previous convictions, he had in the court below, denied that he had ever been convicted of Robbery by the Nhlangano Magistrate Court on the 12lh November 1996. It is very clear from the learned Magistrate's ruling on sentence that he took this reported and now contested conviction into account in imposing the sentence of 6 years upon the P[1] appellant.

[5] At page 58 of the typed record, the learned Magistrate had this to say: "In passing sentence the court will consider against accused that he has a record of previous conviction. The court will consider the 1996 conviction only. Accused 1 was found guilty of armed robbery in 1996 by the Nhlangano Magistrate's court and sentenced to 2 years' imprisonment. Today the 1st accused is before court for sentence after he was found guilty of armed robbery again.

[6] And at page 59 the learned Magistrate stated further that : "Accused 1 and Accused 2 played active roles. Accused 3 and Accused 4 played passive roles. ...The court will also consider that Accused 1 has a record of previous convictions."

[7] On page 56 the court record reveals that immediately the trial Magistrate returned a verdict of guilty against all the accused persons, the following occurred ; "PP [Public Prosecutor] ;-Accused 1 does have a record of previous convictions. Document shown to court and read to the Accused, Accused 1 **admits the contents thereof.**

Mitigation;-

Accused 1;- On oath states as follows:-1 ask the court to give me an option to pay a fine. I ask the court to give me a suspended sentence. That's all." [the emphasis is mine].

[8] I shall take judicial notice that the proceedings before a Magistrate court in this country are recorded by hand by the presiding judicial officer and are not recorded mechanically or digitally. The record before us is accompanied by a certificate by the Clerk of the court a quo which states **inter alia** "that I have compared this (typed record) with the original record of the proceedings and that it is a true and correct copy thereof."

[9] I have read the original hand written court record of the proceedings in the court a quo and at page 137 thereof it is recorded that the first appellant admitted the contents of the document containing his previous convictions after such document had been read to him.

[10] It seems abundantly clear to me from the excerpt quoted in paragraph 7 hereof as to what occurred immediately after the verdict, that the first appellant admitted the 1996 conviction. He only pleaded for two things, first, a suspended sentence and secondly that he be given an option to pay a fine. The option to pay a fine would of course not have been legally possible since the appellant had been convicted of a Third Schedule offence.

[11] I am, I think, fortified in this conclusion by the fact that the appellant never raised this alleged irregularity in his Notice of Appeal which is dated the 14th day of February 2004. I say this not being unmindful of the fact that he was undefended and further stated in his said notice that "appellant request to have his court record to add further Heads of Arguments." If such an irregularity as that complained of took place, which irregularity resulted in him getting the longest sentence than his co-accused, surely this would have been a ground of appeal uppermost in his set of complaints.

[12] I therefore hold that the appellant admitted his conviction on a charge of Robbery, in 1996 and the learned trial Magistrate was. in law, enjoined to bring it into the reckoning in passing

sentence.

[13] The offence was planned by the accused person over a period of time prior to it being committed. Both appellants took an active part in both the planning and the execution of the plan or commission of this offence. They were armed with a fire arm. They terrorised the shop attendants and owner of the shop in broad daylight - an act of bravado. They, in the process got away with goods and money in cash worth about E60,000-00 (Sixty Thousand Emalangeni) of which about only one third was recovered.

[14] Concerning the 2nd appellant, the learned Magistrate also stated that "the evidence revealed that he was approached by Accused to help him commit the crime. Accused 2 readily agreed. It is clear to the court that the second Accused is a crime prone somebody. The court has a duty to stop him in his tracks." Whilst 1 may notionally not agree with the learned Senior Magistrate that by readily making himself available to commit the crime, the second appellant evinced or showed or revealed a propensity to commit crime, I am unable to find that the learned Magistrate committed any irregularity resulting in a failure of justice in passing sentence herein on any of the appellants.

[15] Lastly, the second appellant also submitted before us that, as he was not armed with anything when the robbery was committed, he should not have been found guilty of armed robbery but should have been found guilty of robbery. This ground cannot succeed as the Crown alleged and established a common purpose amongst the four accused. The first appellant was, to the knowledge of the second appellant armed with a gun and used such gun to commit the offence.

[16] Having said that though, it is perhaps worth mentioning that our common law knows no crime known as ARMED ROBBERY, eo nomine. ROBBERY simpliciter, yes. When the prosecutor alleges that one is guilty of the crime of Armed Robbery and a court convicts him of Armed Robbery what is being said or conveyed to the world is simply that the accused committed the offence of Robbery with the aid of or whilst armed with and or brandishing a fire arm. The accused is told that he committed a Robbery which was aggravated by the use of a fire arm. Incidentally, when a knife, knobstick or other weapon other than a firearm is used in the

commission of a robbery, it is, in this jurisdiction at least never referred to as armed Robbery.

[17] For the aforegoing reasons, I would dismiss both appeals.

## MAMBA AJ

1 agree. Both appeals are therefore dismissed.

The sentences imposed by the learned Senior Magistrate are confirmed.

## MAPHALALA J