IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO: 20/2009**

In the matter between:

MDUDUZI VINCENT VILAKATI **1st Appellant**
SELBY MASANGO **2nd Appellant**

AND

THE KING

Date of hearing: 11 August, 2009
Date of judgment: 20 August, 2009

CORAM: **BANDA C.J.**
MASUKU J.

Mr. Attorney S. Nyoni for the Appellants.
Mr. Attorney P. Mdluli for the Crown

JUDGMENT

MASUKU J.

[1] Disaster appears to have struck at noonday for one Jan Dlamini on 5 September, 2006, when he was, under threats of violence, induced to part with E51, 496.00 in cash and

E3, 258.00 in cheques. The above-named Appellants were identified as the suspects responsible therefor. They were arraigned before the Mbabane Magistrate's Court charged with a single count of robbery.

[2] The charge sheet alleged that the Appellants acting in furtherance of a common purpose, and with intent to induce submission by the said Dlamini of the amounts mentioned in paragraph [1] above, did unlawfully threaten Dlamini with a sharp object, stating that unless he consented and refrained from offering any resistance, he would be stabbed and using force and violence, the said accused persons stabbed Dlamini on the body and thereby stole the aforestated amount.

[3] The evidence, cut to the chase, acuminated to this: Dlamini a businessman proceeded to Standard Bank, Mbabane on the fateful day to deposit the aforesaid cash and cheques into an account. As he alighted from his vehicle at the Swazi Plaza parking bays, a man emerged from behind him,

produced a sharp instrument from his jacket and demanded that Dlamini hands over to him a plastic bag in which he was carrying the money referred to earlier.

[4] The man eventually snatched the bag and made away with it. It would appear that members of the public and the police eventually became alerted and gave chase to this man. He was eventually apprehended at the Industrial Sites. Some five cheques and E 16.270.00 was allegedly recovered from him. This person, it is common cause, is the 1st Appellant.

[5] The case against him, it will be seen, is virtually an open and shut case as the evidence against him was simply overwhelming. From the time he took the money, he ran away from Dlamini and was apprehended not long thereafter within the precincts of the city. He was also found with some of the booty in his possession. I should mention in this regard that although both Appellants had noted an appeal against both conviction and sentence the

appeal against conviction was abandoned and it was indicated to the Court that the appeal was confined to sentence.

[6] As indicated during the appeal hearing, the conviction of the 2nd Appellant left a bitter after taste in my mouth. This was due to the fact that his conviction was exclusively predicated on the evidence of an accomplice witness, one Mndeni Vilakati. The reasons why I find that the conviction is unsafe follow presently.

[7] Vilakati testified that sometime in 2006, with no date being specified, the 2nd Appellant visited him in the evening and Vilakati told the 2nd Appellant that the former's employer normally went to the bank to deposit money at lOhOO consistently and that this was usually on Mondays. The money was deposited at Standard Bank, Swazi Plaza. The Appellant indicated that as he was unemployed, he required some money. At that stage, Vilakati told the 2nd Appellant that it would not be

a good idea for him to rob the former's employer. It is common cause that Dlamini was Vilakati's employer.

[8] It was Vilakati's evidence that the 2nd Appellant told him that he had a friend with whom he could rob Dlamini and that this friend was a Vilakati. A few days later, the 2nd Appellant paid Vilakati, the accomplice a visit. He had the 1st Appellant in his company. Later, the accomplice got to know that the 2nd Appellant's friend was the one who he had spoken to the accomplice about. This prompted the accomplice to tell the 2nd Appellant that Dlamini, his employer, no longer banked the money, personally but had hired a security company to do so on his behalf. This, the accomplice testified, was done in order to dissuade the 2nd Appellant from conducting the robbery as intimated.

[9] About a month later, the 2nd Appellant approached the accomplice and told him that he and the 1st Appellant had robbed Dlamini. He narrated that the two miscreants had followed Dlamini when he went to the bank. 1st Appellant, he was further told, snatched the bag containing the money from Dlamini and the taxi

drivers apprehended the 1st Appellant and assaulted him severely. The 2nd Appellant told the accomplice that he would prefer that the 1st Appellant would have been killed by those who apprehended him because he was going to implicate the 2nd Appellant.

[10] In his judgment, the learned Senior Magistrate relied on the above pieces of evidence and concluded as follows at page 41 of the record of proceedings:-

> "With this evidence the Court rejects the Defence's story of both accused persons. The Court finds that the guilt of both accused persons has been proved...As for PW2 Mndeni Vilakazi, who was introduced as an accomplice witness, the Court finds that he has given evidence to the satisfaction of the Court. The Court is aware that evidence (sic) accomplice witnesses should be treated with caution. PW2 Mndeni Vilakati is rarely freed from prosecution of this case in terms of section 234 (1) of the Criminal Procedure and Evidence Act, 67/1938, as amended. That is all."

Was the learned Magistrate's approach to the accomplice evidence proper and complete?

[11] In order to answer the above question, it would be in order to have recourse to one of the best formulations on the cautionary rule, powerfully delivered by the

legendary-Holmes J.A. in S *v Hlapezula and Others* 1965 (4) SA 439 (A) at 440 D-H. The learned Judge of Appeal said:-

> "It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly...there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him;
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> see in particular *R v Ncanana* 1948 (4) SA 399 (A) at 405-406; *R V Gumede,* 1949 (3) SA 749 (A) at 758; *R v Nqamtweni and another* 1959 (1) SA 894 (A) at 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

[12] In their work entitled, the *South African Law of Evidence,* Lexis Nexis, 2003 at page 203, Zeffert *et al* say:

> "Before relying upon the evidence of an accomplice the court should find some circumstance which can properly be regarded as reducing the danger that it might convict the wrong person. Corroboration is the best known and perhaps the most satisfactory of such safeguards."

It would appear to me that there are basically two stages to be followed in accomplice evidence. The first is for Court to make a ruling on the credibility of the witness with regard to the evidence of accused implicated thereby; his cross-examination thereon. The second, is to establish whether the evidence of the accomplice is corroborated in order to reduce the risk of wrong conviction. If the witness is not credible, there is no point in dealing with corroboration. See *Masuku v State* [2000] 1 B.L.R. 389 (HC).

[13] In the instant case, I am not satisfied that the Magistrate was correct in finding PW2 a credible witness. I say so primarily with regard to his evidence about the 2nd Appellant's first visit. His account is that when the 2nd

Appellant paid him the visit, it was him, Vilakati the accomplice, who initiated the story about his employer banking money on Mondays and alone. It was not the 2nd Appellant. When the 2nd Appellant said he wanted money as he was not employed, he said "I told the accused 2 that it would not be a good idea that he robs my employer because I would loose (sic) my job. I told accused 2 that if he is caught he would implicate me." See page 17 of the record.

[14] In the 2nd Appellant's cross-examination of Vilakati, the following exchange took place.

Q: Did I tell you that I would take part in robbing your employer.

A: Correct because you told me that you wanted money because you were not employed.

Q: Did I say that I wanted your employer's money

A: You did not say that you wanted my employer's money but I assume that you wanted my employer's money because we were talking about it.

Q: After you were told that your employer was robbed what did you think

A: You told me Accused 1 had robbed my employer.

Q: In other words you agree with me that I did not take part in the robbery.

A: I do agree because you told me that it is accused 1 who took the moneybag. See pp. 18-19.

[15] There are some curious features about Vilakati's evidence. In the first place, he was the one who raised the issue of his employer doing banking and describing all pertinent details. It was not the 2nd Appellant who initiated that. Secondly, when the 2nd Appellant indicated that he wanted money because he was unemployed it was Vilakati who asked the 2nd Appellant not to rob his employer when the latter had made no mention of robbing Dlamini at all. Once again, Vilakati initiated this conversation on his own. This casts doubts on his truthfulness and his true role in this saga.

[16] Furthermore, there is no evidence that the 2nd Appellant was ever at the scene as narrated by Vilakati. Dlamini

the complainant only saw the 1st Appellant. If both were involved in the robbery, both of them would have fled, risking both being apprehended. Another startling feature is that Vilakati did not give any dates, either of the visits nor the information that the robbery had taken place. His evidence is therefor not credible and therefore suspect.

[17] In this regard, and in light of the above finding, there was no need to establish corroboration. It is however, clear that there was no independent corroboration of Vilakati's evidence. The evidence of the 2nd Appellant regarding his movements on the date of the robbery may well be true. On his arrest two days after the robbery, there is nothing that was found on him that in any way implicated him or connected him to the offence. It is my view that it was not safe in the circumstances, to predicate the 2nd Appellant's conviction solely on the evidence of PW2, which was not only not credible but which was also uncorroborated. The evidence was thus tenuous, rendering the certitude of guilt returned insupportable in the circumstances. Mr. Mdluli, for the Crown also conceded that the conviction of the 2nd Appellant, cannot, in view of the foregoing, be sustained.

[18] I now turn to the issue of sentence. This, as it will now be apparent, will be considered only in so far as it concerns the 1st Appellant. The pith of the submissions advanced by Mr. Nyoni, was that the Court *a quo* erred in so far as it held that the offence was accompanied by violence. He contended further that as a result of that erroneous finding, the Court imposed the sentence that it did, which on the facts of the case, properly construed and weighed, was not justified.

[19] I should, mention at this stage, that the law that governs the approach by an appellate Court to the issue of sentence, is now fairly settled. It was stated succinctly in the case of S *v Shikunga* 2000 (1) SA 616 (NmSC) at 631 where the following was stated:-

> "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 the Court of Appeal would have imposed *{S v ABT* 1975 (3) etc: or where there in an under-emphasis of the accused's personal circumstances *{S v Maseko* 1982 (1) SA 99 (A) @ 102; S *v Collett* 1990 (1) SACR 465 (A))"

[20] I am the first to agree that the allegation contained in the charge sheet of actual violence, was not supported by the evidence adduced. PW1, Dlamini never made any mention of any violence perpetrated on him by his assailant. From my reading of the judgment, the Court *a quo* did not rule that this particular case was visited by actual violence, as alleged in the charge sheet. The statement he made in the judgment about violence was clearly a general statement made obiter.

[21] It has also been submitted that the Court *a quo* merely found that the offence was serious without due regard for the setting in which the crime was committed. This submission, in my view, does serious disservice to the learned Senior Magistrate. I say so because he considered that an elaborate planning was carried out before the 1st Appellant, like a sudden bolt of lighting struck. It is also clear that some extensive research about Dlamini and his movements had been done and that he must have been under surveillance.

[22] There can also be no gainsaying that such offences are prevalent and serious. For persons who toil to get money and for that money to be taken away in an instant due to violence or threats of violence is a serious matter which calls upon the Courts to bring an assurance that those found guilty of having committed such crimes will be given appropriately stiff sentences in order to deter them and like-minded miscreants from committing such offences and at the same time, pacify the restless minds and hearts of the law-abiding public.

[23] Another factor is that not all the money was recovered. Although there is no evidence that the Appellant took the same, one issue is however clear, it was as a result of his actions that the amount in question went missing. That some money was recovered is cold comfort to the complainant.

[24] In *Mosiiwa v The State* [2006] 2 B.L.R. 214 (C.A.) at 219, Moore J.A., writing for the majority of the Court said the following in relation to sentence:-

> "It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the Court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public a feeling that he has been unfairly and harshly treated."

[25] The offence in instant case was both serious and prevalent and violence was threatened. Furthermore, it was committed in broad day light in circumstances in which the inference that it was well researched and orchestrated is not far-fetched. Some money which was in the complainant's possession was not recovered. A stiff sentence is in the circumstances, called for. The business community must be assured that the Court adequately safeguards their interests and property. In contradistinction and only for purposes of comparison, in the Republic of Botswana, such an offence would attract a mandatory minimum sentence of 10 years' imprisonment, unless some exceptional extenuating circumstances can be found. They appear to be absent in the instant case.

[26] On the whole, there can be no legitimate and well-founded feeling that the Appellant herein was harshly treated. In my view, the trial Magistrate properly exercised his sentencing discretion and there is no room therefor for this Court to interfere with the sentence imposed.

[27] In the premises, I propose the following Order be given on the entire matrix of the evidence:-

27.1 The conviction of the 2nd Appellant *Selby Masango* for the offence of robbery be and is hereby quashed.

27.2 The sentence of seven (7) years' imprisonment imposed upon him by the trial Court be and is hereby set aside.

27.3 Both the conviction and sentence of the 1st Appellant be and are hereby confirmed.

27.4 Should the 1st Appellant be minded to appeal against his sentence, he is ordered to apply in writing for a certificate to appeal to the Supreme Court within 14 days of the delivery of this judgment.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 20th DAY OF AUGUST, 2009.

T.S. MASUKU

JUDGE

I agree and it is so ordered.

R.A. BANDA

CHIEF JUSTICE