IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CRIMINAL APPEAL NO. 22/07**
DISTRICT CASE NO. 317/03
MANZINI.

In the appeal of:

SABELO NGWENYAMA

VS

REX

CORAM	BANDA, CJ
	MONAGENG, J
FOR CROWN	MR. BRYAN MAGAGULA
ACCUSED	IMPERSON

JUDGMENT
MARCH
2009

MONAGENG J

[1] The appellant, one Sabelo Ngwenyama appeared before the Manzini Magistrate's Court, co-charged with four other people for a number of robberies and unlawful possession of arms

and ammunition. At the end of the trial, some of his co-accused had been acquitted and one had been used as an accomplice witness.

[2] In Count 1 the Crown alleged that on the 4th February 2003 at or near Manzini Club Sun, the accused unlawfully and with the intention of inducing submission by Te-His Sun threatened the said.Te-His Sun with shooting him with a pistol. The threat was to induce- him into surrendering his property, which the accused forcibly- took. The property is listed on Rider "A" and is valued at E23, 600.00. Among the things he allegedly stole were a 9mm Astra Pistol and six live rounds of ammunition.

[3] In Count 2, he is.alleged tp. have used threats to dispossess one Mandla Ngudu Simelarie of his property listed under this Count and valued at E5, 961.92.

[4] In Count 4, he was alleged to. have been in unlawful possession of the pistol subject matter of Count 1 and in Count 5 he was alleged to have been in unlawful possession of the ammunition subject matter of Count 1.

[5] Initially his appeal against both convictions and sentence was noted by attorney Magongp, but when the appeal was heard, his attorney had withdrawn'as attorney of record. This meant that he made his ,pwn submissions. When Mr. Magongo

noted the appeal, in the first count, he noted that the Crown had not led evidence that proved beyond any reasonable doubt that the appellant participated in the robbery, where property listed on Rider A was stolen.

In proof of this Count, the Crown called PW 12 Te-His Sun the complainant, who related how the robbery took place and also identified some of the recovered, items. >'

[6] Of importance in the exercise of recovery was the Nokia mobile 3310, which was positively identified by PW 12 as his, and this is the Nokia that is listed on Rider A. This phone was actually found in the possession of PW 2 who led the police to the appellant. PW 2 is a member of the community police in the Maliyaduma area, who also Owns a shop. The appellant, he said', used to charge his cellular phones at his shop, but that on this day. he had borrowed this particular Nokia from the appellant for his own use.. The phone bore the appellant's names.

It is clear that the Crown relied mainly on circumstantial evidence and as aptly stated in the case of ***R v Kimera*** 198286 S L R at page 125:

> "*In reasoning by inference, the inference sought to be drawn must be consistent with all proved facts, and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn*".

[7] This direction falls squarely into the circumstances of this case. The mobile was stolen from PW 12 who positively identified it, after it was found with PW'2, who got it from the appellant. The only reasonable inference that can be drawn, especially in the absence of any believable explanation from the appellant, is that the appellant is the person who stole it from the complainant. This is' further solidified by the fact that the appellant sought to distance himself from the Nokia by saying that he got it from a- former'.co-accused, a certain Mr. Dikiza, who asked him to take it to PW 2, Mkhonta, thanking him for something he had done for him.

[8] This information was never put to the witness, PW 2, and the accused says that he only .remembered this after his attorney had finished cross examining the witness. This Court concludes that this is an afterthought, designed to deceive the Court. As correctly found by the Learned Magistrate, PW 2's version of events is more credible, especially that the appellant had actually put his name inside the said cellular phone. Whichever waj£ one looks at the facts, there is no way the appellant can distance himself from the cellular phone at this point in time.

[9] This Court has no doubt that PW 2 positively linked the appellant to the Nokia cell phone, that was positively identified by the complainant PW 12; :as having been stolen from him, together with other property,.during the robbery.

[10] In the result, the Court finds that the appellant was found in recent possession of the cellular phone, and the possession was occasioned by him stealing it through threats from PW 12. It is trite that recent possession of stolen goods is always regarded as a presumption that the person in whose possession they are, stole them, or received them knowing them to have been stolen.

[11] With regard to Count 2, the.complainant, Simelane was a patron at Zwide Wine and Malt Bar on the 24th March 2003. He asked the employees to charge his Nokia 3310, serial number 350888203116938 for him. Shortly thereafter, the bar was robbed and his phone was stolen. PW 3, an accomplice witness confirmed being given the phone by the appellant to sell for him for E400.00 which he did. The buyer paid E300.00. Before the balance was paid, the appellant came for the cellular phone in the company of the police.

[12] In his defence, the appellant told the Court that Dikiza had given him the cellular phone. It is noteworthy mentioning that PW 3's evidence was not challenged under cross examination, and the accused confirms that it was not challenged by his attorney. He says that he also forgot to ask the attorney to challenge it. This failure was found by the Magistrate to be an afterthought designed to hoodwink the Court, and he rightly

rejected it. It is also noteworthy that this Dikiza was not called as a witness by the.accused.

[13] It is trite that the accused person need only give a reasonably plausible explanation, not. a$_y$ true explanation, but this does not mean that the accused should tell the Court an untruth. It is the view of this Court; that considering the totality of the evidence adduced by the .Crown, and the failure of the accused to challenge; the Crown's evidence, the inevitable conclusion is the one that. was reached by the Magistrate, which this Court confirms.-. The Court finds that the appellant has been properly tied to this cellular phone and its robbery. r

[14] The appellant also painted out ammunition subject matter of count 4 when he took the police to the graveyard.

[15] In Count 5, it is also clear that the appellant pointed out two firearms, a 9mm Star .pistol, serial number 1664530, subject matter of Count 1 and another pistol a 9mm Astra serial number 4843. The second pistol belonged to one Themba Prince Dlamini, who identified it with a Certificate of Registration of Firearms. He Conceded that he did not hold valid licences or permits to possess such arms and ammunition, although in his evidence he again sought to shift the blame to Duma Dikiza, saying that he was keeping the arms and ammunition for him. ;

[16] He said that on arrest, he told the police that the arms and ammunition belonged to Dikiza, although both his attorney and him forgot to put that to the police witnesses who gave evidence in Court, and' actually said that when they arrested him and asked him about the arms and ammunition, he immediately led them to a graveyard, pointed these out and the police retrieved them.

[17] Quite obviously and, as correctly observed by the trial magistrate, the charges in Count '4 and 5 are unlawful possession, contrary to Section 11 (2) and 11 (1) of the Arms and Ammunition Act 24/1964 respectively. This Court finds that the accused person was correctly convicted of these two offences.

[18] With respect to sentence, the appellant submits that the Honourable Magistrate should have backdated his sentence to the 16th April 2003,- when he was first incarcerated. This Court notes- that his warrant of committal indicates clearly that the prison terms shall take effect from the date of his arrest, so that this submission is of no force or effect.

[19] The Court also t,akes note of the Crown's submission to the effect that despite the fact that the robberies in Counts 1 and 2 took place within virtually the same time, that is on the 4th February 2003 and 24th March 2003, they were committed

against two different people. To that extent, the Crown argued vigorously[1]* that they should not, attract concurrent sentences. It is trite law that appellate Courts should not be quick to interfere with the sentence imposed by the trial Court, unless the trial Court has misdirected itself or if there was an irregularity at the trial or if the sentence imposed was such as to induce^ a sense of shock. The Crown submits that the sentence meted out by^the learned magistrate meets this criterion. This Court was referred to the cases of ***Vusimuzi Lukhele and another v Rex*** Criminal Appeal 23/2004 (unreported) ***Nhlanhla Mistel Dlamini v Rex*** Criminal Appeal 2/2005 .(unreported) and ***Douglas Mfanukhona Msibi v ReX*** Criminal Appeal 1/2006 (unreported).

[20] This Court notes that sentence is a matter for the discretion of the Court of first instance - see ***Vusimuzi Lukhele and Mbongeni Shayufu Dlarhini*** supra at page 3. The Court further notes the factors that the learned magistrate took into account as aggravating these offences e.g. the prevalence of robbery in the district and the need to protect society and the seriousness of the offences. Nevertheless, the Court is of the view that Counts 1 and 2, for purposes of sentencing should be regarded as one offence, given the short period that elapsed between the commissions of the said offences. The Court further cdncludes'that these are similar offences that should be regarded as such-":

[21] The result is that,' although this undefended
appellant did not raise the issue of concurrency of sentences, the Court has decided to exercise its discretion and vary the sentence as follows:

1. Count 1 - the accused is sentenced to 5 years imprisonment.

2. Count 2 - he is sentenced to 5 years imprisonment.

3. The sentences in Counts 1 and 2 shall run concurrently.

4. Count 4 - the sentence of 5 months imprisonment or E500.00 fine in lieu of imprisonment is confirmed.

5. Count 5 - the sentence of 5 years imprisonment with the option of a fine of E5, 000.00 is confirmed.

6. The sentences in Counts 4 and 5 shall run concurrently.

7. The concurrent sentences in Counts 1 and 2 shall run consecutively to the concurrent sentences in Counts 4 and 5 in case of a default in the payment of the fines.

8. The sentences shall take effect from 16th April 1, 2003.

The Appellant has a right of appeal to the Supreme Court.

S.M MONAGENG
JUDGE

I agree.

R.A. BANDA
CHIEF JUSTICE