

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 63/10

In the matter between:

SIFISO DLAMINI

1st APPELLANT

MFANAWENKHOSI DLAMINI

2nd APPELLANT

AND

THE KING

CORAM

SEY, J

FOR THE CROWN

MR PHILA DLAMINI

FOR THE ACCUSED

IN PERSON

J U D G M E N T

SEYJ

[1] It is apparent from the record of proceedings that on count 1 both Appellants named herein were charged with the offence of House Breaking with intent to steal and Theft. On count 2, the 1st Appellant was charged (together with Accused No. 3 who has not filed an appeal) with the crime of Robbery.

[2] At the conclusion of the trial the 1st Appellant was convicted of both count 1 and count 2 whereas the 2nd Appellant was convicted of count 1. The 1st Appellant was on count 1 sentenced to four (4) years imprisonment without an option of a fine and on count 2 sentenced to six (6) years imprisonment without an option of a fine. The sentences are to run concurrently.

[3] The 2nd Appellant was sentenced to four (4) years imprisonment without an option of a fine. However, when the matter came up for hearing before this Court on the 28 day of April, 2011, the 2nd Appellant intimated that the matter he was complaining about had been resolved

and that he wished to withdraw his appeal. At that stage the 2ⁿ Appellant's appeal was thereby struck out.

[4] The 1st Appellant now appeals against both his conviction and sentence. He argued that he was wrongly convicted for a crime he did not commit. He said that on a date in October 2008, he was from his house en route to the shop when he was assaulted by community police officers who had accused him of stealing a black wallet. He said the black wallet belonged to him and he argued that the complainant had told the Court that his wallet was brown in colour. The 1st Appellant also argued that the bush knife belonged to him and that the witnesses had lied against him. He also challenged the evidence of the witnesses as conflicting because PW3 had stated that he was slim whereas PW4 had said he was able to identify him because he was fat.

[5] Briefly put, the facts are as follows. Some days later after PW4 Muzi Simelane was robbed, he saw the 1st Appellant in Manzini town carrying

the Sagem cell phone stolen from his house. He was giving the cell phone to someone but on realizing that PW4 was looking at him, he took the cell phone and ran away. PW4 then traced the 1st Appellant to New Village where he found him. He reported the matter to the community police who assisted him in apprehending the 1st Appellant. He was searched and PW4 found his wallet in his back pocket.

[6] The evidence of PW4 with regard to the cell phone was not challenged under cross examination. It is trite law that what is not challenged as evidence stands. Moreover, I find that PW4's testimony is corroborated by that of PW3 Sindi Ndzimandze. At page 6 of the record she testified as follows:

"My cell phone that he took was a Sagem. He also took my other cell phone, a Sony Ericsson, towel with stripes, black wallet Al is the one who told me to liedown and was carrying a bush knife".

[7] I have also found the evidence of PW2 quite telling. He stated that he was a taxi man and he had got to know the 1st Appellant through his brother who had trained him. He testified that at 12 midnight on the 29th October, 2008, he had conveyed the 1st Appellant and his friends from Mncozini area to New Village. They were carrying plastic bags full of grocery items which were later found by PW4 who took them to the police station. These items were later identified by PW1 as the ones stolen from her shop.

[8] I have considered the 1st Appellant's argument and the grounds of his application but in my view the application lacks merit. I am in agreement with the Respondent's submission that the court a quo did not commit any error and/or misdirect itself in finding the 1st Appellant guilty as charged on both counts. I am satisfied that the 1st Appellant was correctly convicted.

[9] The Respondent has submitted that there is no misdirection or irregularity on the Magistrate's exercise of his discretion on sentence and therefore no grounds upon which this Appellate Court can be invited or persuaded to interfere with the sentence meted out on the Appellant.

Counsel referred the Court to the

case of **Thwala v Rex 1970 -76 SLR 363 at 364** where **Ogilvie**

Thompson P stated as follows:

"there is also a further principle that the sentence should only be altered on appeal if the discretion has not been judicially and properly exercised; and the criterion applied in relation to that is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate."

See also **Masuku v Rex 1977 - 78 SLR 86**

Mduduzi Sithole v Rex CA 3/1987

[10] As a general rule, the determination of an appropriate sentence lies within the discretion of the trial Court. An appellate Court will only

interfere if the sentence imposed by the trial Court is substantially different from the sentence it would have imposed, or if the trial Court has misdirected itself or has imposed an improper sentence.

[11] In the case of **Musa Bhondi Nkambule v Rex criminal Appeal No. 6/09 Ramodibedi, AC J** (as he then was) stated:

"In several of its decisions this Court has upheld the principle that the imposition of sentence is a matter which primarily lies within the discretion of the trial court. An appellate court will not generally interfere with such a sentence unless there is a material misdirection resulting in a miscarriage of justice. Put differently, an appellate court will not interfere unless the sentence is so grossly harsh or excessive as to warrant interference in the interests of justice."

[12] In this appeal, I must state that I do not find the sentence of four (4) years imprisonment and six (6) years imprisonment, to run concurrently, vitiated by irregularity or misdirection or disturbingly inappropriate. There is also no other basis for interfering with the said sentences.

[13] In the result, it is hereby ordered that the I^s Appellant's appeal against conviction and sentence be and is hereby dismissed.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

....7th.....DAY OF JUNE, 2011

M.M. SEY(MRS)

JUDGE OF THE HIGH COURT