



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal App. Case No. 79/11

In the matter between

SIFISO DLAMINI

Appellant

and

REX

Respondent

Neutral citation: *Sifiso Dlamini v Rex (79/11)* [2012] SZHC 121
(11 JUNE 2012)

Coram: Mamba J

Heard: **30 April 2012**

Delivered: **11 June 2012**

[1] Criminal law – two or more accomplice witnesses whose evidence is credible

and satisfactory may collaborate one another.

[2] Criminal law and procedure – Appeal on sentence – Sentence is a matter predominantly for

the discretion of the trial court. Court on appeal may only interfere with the exercise of such

a discretion where it is shown or proven that the trial court committed a misdirection or an

irregularity resulting in a failure or miscarriage of justice, or if the sentence imposed induces a sense of shock or is one that no court acting judiciously and judicially could have imposed.

- [1] The appellant, a 27 year old male was tried, convicted and sentenced to a term of seven years of imprisonment on a charge of robbery. He was co-charged with four other persons and he appeared as the fifth accused in the court below. The trial principal magistrate ordered that a total of 174 days must be deducted by the prison authorities from the period of imprisonment imposed on the appellant. This was to compensate him for the period he had already spent in custody before sentencing, otherwise his sentence was ordered to commence on the day he was sentenced; 26th February 2010.
- [2] The offence, the crown alleged, was committed at Makhwekhweti on 30th March 2006. It was alleged and indeed proved or established by the crown that certain persons had on the night in question attacked and robbed Thembinkosi Matsebula, a school teacher, of various household goods or items valued at about E13 000-00.

- [3] The crown alleged and at the end established beyond any reasonable doubt that the complainant was attacked and stabbed on the night in question as he lay in his house with his girlfriend and his attackers removed various items from his house. Most of these items were recovered and restored to the possession of the complainant. The evidence of the complainant was virtually not challenged regarding the actual occurrence of the robbery. Each of the accused denied his involvement in it.
- [4] Initially, there were 7 persons charged with the crime but later two of these, namely Mfanmpela Mpandlane Dlamini and Fana Ngwenyama, who gave evidence as Pw2 and Pw3 respectively, were made crown witnesses. They gave evidence and were introduced as accomplice witnesses.
- [5] The appellant's sole complaint regarding his conviction may, in the absence of his notice of appeal, be found in his counsel's heads of argument and it is this; " ...the court erred in relying on the evidence of two accomplice witnesses who were not properly cautioned. [And] ...the evidence of Pw2 was contradictory in many respects and the court a quo did not consider this factor, [and it was] necessary to obtain corroboration on material aspects before accepting evidence of an accomplice."

- [6] In argument before me and indeed on the court record, counsel for the appellant was unable to point out to me any contradiction in the evidence of Pw2. Pw2 stated in his evidence that he was first approached by A3 who told him that he needed to conduct a certain “deal” at around Sithobelweni on a certain teacher or with a certain teacher. He was told by A3 that the finer details of the operation or deal were known by A2 who was from Makhwekhweti area where the teacher lived. The evidence established that Sithobelweni is near Makhwekhweti. This witness was told by A3 that A2 had told him what goods they would get or steal from the teacher in question and some of these items could and would be sold so that Pw2 would get money to pay for the monthly rentals at his house where he stayed in Matsapha.
- [7] On the next day A1, A3, A4 and A5 and Pw2 met around Matsapha at the house of A1 and readied themselves to travel to Sithobelweni where they were to join A2 who had gone on a reconnaissance mission or surveillance ahead of them. It was arranged and agreed that the group would travel to Sithobelweni in A1’s motor vehicle, and the time of departure was set at 5 pm.

- [8] When they reached Siphofaneni, A3 and A5 alighted from the motor vehicle in order to telephone A2 to find out where he was and generally to be appraised of whether their plans were still on track. A2 gave them the green light and informed them that they would find him at a certain shopping complex at Sithobelweni. They got to the rendezvous and after waiting for sometime, they were joined by A2. This was just some minutes before midnight and A2 advised that their would-be-victim was still in church and would be in his house at around midnight and that would be the appropriate time for them to strike or invade his house. The accused were armed with a motley of weapons, including knives and bushknives.
- [9] At the appointed time; midnight, they attacked their victim after travelling from Sithobelweni to Makhwekhweti, of course. A2 and A1 remained in the motor vehicle. A2 told the group that he could not go to the teacher's house as he was well known to him. A1 remained in the motor vehicle in order for him to be ready to spirit the group away should they have to make a hasty escape from the scene. A5 was part of the gang that went on the attack on the teacher. He returned to the motor vehicle with at least four mobile telephones taken from their victim.

[10] On their return journey to Matsapha the next morning, the motor vehicle they travel in went out of petrol and it was A5 who gave this witness and A4 money to purchase the necessary petrol for the vehicle. On their return to Matsapha some of the property was retained and eventually disposed of by A5. These items included a Samsung D600 mobile telephone and a television set. This piece of evidence on the possession and final destination or disposal of the items in question is corroborated by the evidence of the other accomplice witness; Pw3, Fana Ngwenyama. This witness was not involved in the actual robbery. He operated a taxi service in Matsapha and surrounding areas and helped some of the accused, including the appellant in transporting the stolen goods. He was introduced as an accomplice witness, I would guess, because he transported these goods under circumstances that showed that he knew or at least ought to have known that they were stolen.

[11] The evidence of these witnesses, was, the learned trial magistrate found, credible and the witnesses reliable and creditworthy. This finding is, in my judgment, unassailable. There is ample if not overwhelming justification for such finding. The appellant, who was represented by counsel in the trial, was unable to show or indicate any reason proving that these

witnesses were not reliable and therefore ought not to be believed. The appellant's version was a complete or blanket denial of involvement in the robbery. He explained, unsuccessfully, that the Samsung D600 mobile telephone had been sold not by him but by his namesake Siphiso Sifiso Dlamini with whom he stayed in their rented house in Matsapha. The learned trial Magistrate was perfectly correct in rejecting this evidence as false in view of the strong evidence by the two accomplice witnesses.

[12] In terms of the law, a court is entitled to convict even on the evidence of a single accomplice witness and, two or more accomplice witnesses whose testimony is credible and satisfactory may corroborate one another. (Vide *R v Maziya Matolomane and another, 1987-1995 (2) SLR 320*). There is therefore no merit at all in the appellant's ground of appeal on this point.

[13] At the end of the day all the crown witnesses implicated the appellant with the commission of this crime. His own co-accused testified that he had in fact instigated the robbery alleging that he was trying to get his girlfriend from the robbery victim. They all put him at the scene of crime on the relevant night. His only

response was that they were fabricating this story against him because they were bitter that his parents had failed to hire an attorney to represent them during the trial.

[14] Lastly, in mitigation of sentence, the appellant pleaded that he would not commit such a crime again.

[15] For the above reasons, his appeal on the conviction fails and it is dismissed and his conviction is hereby confirmed.

[16] On the issue of sentence, the appellant complains that he should have been granted an option to pay a fine. He has not pointed out any irregularity or misdirection that was committed by the trial court in this regard. It is trite law that the issue of sentence is a matter that is within the domain or discretion of the trial court. Because of this fact, an appeal court may only interfere with the exercise of such discretion where the trial court has committed a misdirection or irregularity which irregularity or misdirection results in a miscarriage or a failure of justice; or where the sentence passed by the trial court is such that it induces a sense of shock or is one that no court could have imposed in the circumstances of the case. The appellant has not shown any such factors in this appeal. See *Jango Lontos*

Mkhavela v R, High Court Criminal Appeal 3/2009 (unreported judgment delivered on 20th August 2009).

[17] Again, his appeal on sentence lacks merit and is hereby dismissed.

[18] When the matter first appeared before me on 13th February 2012, I indicated to counsel for the appellant and ordered that the appellant must show cause, if any, why, in the event his appeal on conviction is dismissed, I should not increase the sentence of 7 years as it appeared to me prima facie too lenient. However, when the matter returned to court and was argued, another counsel appeared for the appellant and when I raised this issue with him he informed me that he was not aware of my invitation on this aspect of the matter. This is not acceptable, but I do not think that in the circumstances of this case this lapse should prejudice the appellant; even if I consider the sentence desperately lenient. I consider that the appellant should have been properly advised and given the opportunity to address the issue before I could consider increasing the sentence. For this reason the matter will rest there.

MAMBA J

For Appellant:

Mr. Jele

For Respondent:

Mr. B. Magagula