



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Crim. Appeal No: 98/2011

In the matter between:

NONSIKELELO GWEBU

APPELLANT

and

THE KING

RESPONDENT

Neutral citation : Nonsikelelo Gwebu v The King (98/2011) [2013] SZHC 134
(11TH JULY 2013)

Coram : MABUZA J

Delivered : 11/07/2013

Summary : **Review against conviction and sentence from Magistrates Court.**

Law of Evidence – Admission(s) made to a community police – Person in authority – Whether admissible or not whether made freely and voluntary – Magistrate failed to test admission in trial within a trial - Review well noted – Appeal against both sentence and conviction upheld.

JUDGMENT

MABUZA J

[1] The Appellant was charged in the Magistrates Court sitting at Manzini. Two charges were preferred against her namely:

Count 1: She was charged with the offence of housebreaking with intent to steal and theft in that on the 18/5/2011 she unlawfully and intentionally broke into and entered the house of Simon Khumalo at Mbhuleni, Manzini and stole the sum of E2,700.00 the property of or in the lawful possession of Simon Khumalo.

Count 2: She charged with the offence of housebreaking with intent to commit a crime to the prosecutor unknown in that on the 13/6/2011 she wrongfully, unlawfully and intentionally broke into the house of Simon Khumalo with the intent to commit a crime to the prosecutor unknown.

- [2] She was found guilty in respect of both counts and sentenced to three (3) years imprisonment without an option of a fine in count 1 and in count 2, she was sentenced to one (1) year imprisonment without an option of a fine.
- [3] She filed an appeal against the conviction and sentence in respect of both counts. She is currently out on bail for which she paid E6,000.00 (Six thousand Emalangeneni).
- [4] The Crown led the evidence of three witnesses. The complainant Simon Khumalo (PW1) stated that since 2011 he had been missing money from his house and had always suspected his children. Until one day he found the Accused inside his house. She had used a key to gain access into the house. The complainant knew her as she was a sister to his neighbor with whom he and his wife used to leave their house key when they were at work so that she could give their children when they returned from school.
- [5] The complainant says that he lost the sum of E2,700.00 but was unable to state the date on which he lost this money. In fact he was unable to state whether this money was lost on the 18/5/2011 as alleged on the charge sheet

nor was he able to state how much was lost on the 18/5/2011. He did not state on which date he found the complainant in his house.

[6] It is stated in count 2 that she committed the said crime on the 13/6/2011 but the complainant has not stated in his evidence what date he found the appellant in his house. In fact his evidence as recorded by the Magistrate is too scanty to be helpful to the court.

[7] PW2, Mau-Mau Thulane Sibandze who is a community policeman testified that on the 13/6/11 at 10:00 a.m. he received a call from the complainant who reported that someone was in his house and had used a key to open it. He went there with two community policemen and found the Appellant sitting outside with other tenants. They asked her what she was doing and she said that she had stolen items inside the house on three different occasions. On the first occasion she stole E700.00, the second time E1,500.00 and the third time E1,500.00 she stated that she got the key as the complainant used to leave the keys with her and she had cut a copy at the radio shop in Manzini.

[8] The status of community policemen is well known. They service the community like police officers and consequently are regarded as persons of authority in their respective communities who more often than not are capable of and do influence the course of the prosecution. In *casu* PW2 effected an arrest on the person of the Accused noted her admission and handed her over to the Royal Swaziland Police. He gave evidence at her trial with regard to the admissions she had made to him. The requirements for admissibility are that any admissions and or confessions made to a person of authority should be made freely and voluntarily. The admission which was made to PW2 was obtained without due process of law and the learned Magistrate should not have admitted it without subjecting it to the requirements of admissibility in a trial within a trial. In addition it must be excluded because it was obtained in violation of the Accused's constitutional right to remain silent and her right to legal representation. Finally she was not cautioned in terms of the judges' rules. The failure to caution her led her to making an incriminating statement to PW2 which statement is inadmissible against her. In the event the admission is hereby held to be inadmissible and set aside.

[9] The third and final witness was 3458 Detective Constable S. Mavuso who was the investigating officer. He testified that on the 18/5/11 PW1 reported that a sum of E2,700.00 went missing from his home and that on the 13/6/11 he received a report that the Accused was found in the complainant's home who called the community police who came and took her to the police station. PW3 charged the Accused with the two counts and handed in the key that was found in her possession as an exhibit.

[10] Having set aside the evidence of PW2 is there evidence remaining upon which the Accused can be convicted on count one? I submit that there is none. The three different dates on which the different amounts of money were stolen has not been proved. There is no evidence to prove that it was the Accused that stole the money. There is no evidence of a breaking and entry into the complainant's house nor that all of the E2,700.00 was stolen on the 18/5/11.

[11] In the circumstances it is my finding that the Crown has failed to prove a case beyond a reasonable doubt against the Accused in respect of Count 1.

[12] Equally in respect of Count 2, the Crown has not proved that the Accused is guilty of breaking and entry to commit a crime unknown to the prosecutor. There was no break in on the contrary she entered the premises with a key. Because of the arrangement between her sister and the complainant she was privy to the whereabouts of the complainant's key. At worst she is guilty of trespassing but she is not charged with this offence in the alternative nor is it a competent verdict to the charge herein. Consequently it is my finding that the Crown has failed to prove a case beyond a reasonable doubt against the Accused in respect of Count 2.

[13] In the event the convictions and sentences against the Accused in respect of Count 1 and Count 2 are hereby set aside and dismissed and the appeal succeeds. The bail deposit is to be returned to the Accused.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. S. Motsa

For the Respondent : Miss N. Masuku

