IN THE HIGH COURT OF SWAZILAND

Case no. 08/2013

In the matter between:-

SIMON ANDREW MALIBA **Appellant**

and

REX **Respondent**

Neutral citation: *Simon Andrew Maliba v Rex* (08/13) [2013] SZHC263(23rd November 2013)

Coram: HLOPHE J
Date Heard: 09/10/2013
Date Delivered 23/11/2013

Summary:

Appeal against conviction and sentence – Appellant and two others convicted of robbery and sentenced to seven years imprisonment – Grounds of appeal – Allegedly no tangible evidence to justify conviction – Grounds of appeal eventually amended – Initial grounds abandoned – Contention now being that

Appellant not explained his rights to legal representation and not afforded time to secure representation when trial proceeded with –Appellant convicted and sentenced accordingly – Sentence too severe in the circumstances when considering sentencing test – A suspended portion of the sentence should have been considered – Sentencing a preserve of Court effecting it – Interfered with only in case of a misdirection or illegality – This interpreted to mean whether sentence is unlawful or induces a sense of shock.

JUDGMENT

[1] On the 23rd December 2011, the Appellant and his two co-accused were convicted by the Learned Magistrate sitting in Piggs Peak, of robbery and sentenced to seven years imprisonment, without either the option of a fine or a portion of the sentence being suspended.

[2] A month later the Appellant noted an appeal to this Court contending *inter alia* that there was no, what he called, tangible or substantial material or evidence placed before Court, linking him to the commission of the offence with which he had been charged and eventually convicted. To this end, he contended that the Learned Magistrate committed an error by convicting him as he was allegedly innocent of the offence. He thus noted an appeal against both conviction and sentence.

[3] The matter had already been allocated a hearing date when instead of proceeding with it the Appellant, through his newly appointed attorney,

filed amended grounds of appeal. The filing of these grounds was not opposed except to necessitate a postponement of the matter to some future date which was allowed. These amended grounds were that:-

1. (a) The Learned Magistrate in the Court *a quo* erred in law by failing to at all or adequately explain to the Appellant his right to legal representation.

(b) The Learned Magistrate in the Court *a quo* erred in law in not affording the Appellant (an) opportunity to secure legal representation by refusing or not providing him a postponement.

2. (a) The conviction by the Learned Magistrate in the Court a quo was not supported by the strength and weight of the (evidence?) led.

3. (a) The sentence imposed on the Appellant did not take into account all the circumstances of the case particularly the fact that most of the items lost by complainant were recovered very soon after the alleged commission of the offence.

[4] On the day the appeal hearing was meant to commence Appellant's attorney informed the Court that the appeal against conviction was no longer being pursued, which meant that same was on the facts placed

before Court, being accepted. This had the effect of confirming that the findings by the Court *a quo* on the facts, were not in dispute.

[5] The facts as found by the Court *a quo*, were that on or about the 18th July 2011, the Appellant and his two co-accused had, whilst acting in furtherance of a common purpose, robbed the complainant, Philile Dlamini of her items which included a sum of E7000.00 in cash, a twelve bore shot gun with serial number 0105458 as well as 45 rounds of ammunition which however the evidence in Court established amounted to 76 as opposed to 45. When committing the said crime, the Court found, the Appellant and his co-accused, whilst acting in furtherance of a common purpose, had gone to the complainant's house, where the second and third accused forced their way into the house whilst the Appellant remained outside where he was later heard calling his companions telling them to speed up what they were doing inside the house. The car used in driving the accused to and from the scene including to ferry the loot, Appellant, who was himself in attendance.

[6] Otherwise having staged the robbery concerned and as found by the Learned Magistrate, the Appellant and his co-accused were eventually halted at a roadblock, placed along the road at Lomahasha where the third accused managed to escape only to be captured later whilst the other two accused persons including the Appellant, were arrested at that place.

[7] The Appellant and his co-accused were produced in Court on the 25th July 2011 with the trial date being set for the next day, the 26th July 2011. On this day the then accused persons, including the Appellant, had according to the record of proceedings, had their right to legal representation explained to them. In fact according to the record of proceedings, particularly the handwritten manuscript, it is clearly captured therein that when asked if they each understood the said right and what they chose to do, the accused persons, indicated that they understood their rights and indicated they chose to be represented by an attorney. Otherwise their matter ended up not being proceeded with.

[8] Instead on this day the trial date was set as the 5th September 2011. It is common cause that even on this day, and following a discussion and or an arrangement between the Appellant's attorney and the Public Prosecutor involved, it was agreed that the matter be postponed to the 3rd November 2011.

[9] However on this day, the Appellant's attorney was not present in Court. This time around however there was no arrangement or agreement between the two opposing counsels on how the matter was to be proceeded with, it sufficing that same was meant for trial on that day. Asked by the Court on the whereabouts of his attorney, the Appellant responded by saying that he had been informed that he was sick or that he was not well and had gone to hospital. Other than the Appellant's say so there was no other form of proof that indeed the attorney concerned had fallen sick or that he had gone to hospital.

[10] Citing the previous incident of his not attending Court on the 5th September 2011, the Learned Magistrate refused to have the matter postponed contending that there was no proof that the concerned attorney was not in Court because of any sickness and that it was now the second time the matter was not to be proceeded with at the instance of the Appellant's said attorney which was not acceptable. The Court further stated that the matter had to be proceeded with because the Honourable Chief Justice had issued a directive to all magistrates instructing them to proceed with or to hear all cases whether or not the attorneys involved were in attendance.

[11] It has to be understood in context that at the said time, and as revealed in the magistrates' reasons for his decision, attorneys were engaged on a strike where they were boycotting Courts because of some alleged concerns on their part allegedly relating to the Administration of Justice. It was allegedly in response to the said directive, among other reasons, that the magistrate attributed his decision not to postpone the matter to.

[12] It was argued on behalf of the Appellants that the Learned Magistrate failed at first to advise fully the Appellant and his co-accused of their rights to legal representation including what the said rights entailed. It was argued there was no use in the magistrate informing the accused about the existence of a right to legal representation if there was no explanation on what it entailed. It was argued further that the Learned

Magistrate went beyond a mere failure to advise the Appellant of his right to legal representation and failed to afford the Appellant an opportunity to secure legal representation, particularly after, it became clear that the Appellant's hitherto attorney of record was not available. It was argued that the Appellant should at least have been put to terms before a decision to proceed with the matter in the absence of his attorney was taken. The argument went, invariably there was a need to postpone the matter until such time, that the Appellant would have been put to the said times.

[13] As concerns sentence, it was argued that the sentence imposed did not consider the fact that most of the stolen items were recovered shortly after the commission of the crime and therefore that no actual prejudice had been suffered by the complainants which allegedly meant that a lesser sentence than the one imposed was meted out.

[14] Responding to the contention about the Appellant not having been advised of his rights to legal representation , it was contended by Mr. Nxumalo on the Respondent's behalf that there was no merit to this contention because the record of proceedings revealed that the Appellant and his co-accused's rights to legal representation were explained to them. In fact the record goes on to reveal that the Appellant confirmed to have understood the said rights.

[15] I agree with Mr. Nxumalo that there is no merit in this contention. Clearly the Appellant's rights to legal representation were according to

the record fully explained to the Appellant who went on to confirm having understood such right. I agree that since that right was fully explained on the very first day of the Appellant's appearance in Court, there was no need to explain it in every other appearance by the Appellant in Court.

[16] On the contention that the Learned Magistrate did not afford the Appellant an opportunity to be represented by and attorney of his choice in so far as he was not at least put to terms to ensure that he avails his attorney on a subsequent occasion failing which the matter was to be proceeded with, Mr. Nxumalo contended that it was, on the particular date encumbent upon the Appellant to ensure that this time around his attorney was present in Court given that on the previous occasion the matter could not be proceeded because the attorney was not in Court. There was therefore no need for the Appellant to be put to terms because the postponement of the matter on that previous appearance of it in Court took care of the putting of the Appellant to terms. In any event, Respondent argued it was clear that the Appellant's attorney was not in Court in response to the boycott of the Court's call by the Law Society of Swaziland, of which he was a member and that the alleged sickness was a mere smokescreen particularly because no proof of such illness was placed before Court.

[17] I cannot agree with Mr. Nxumalo in this ground. There is no proof that the attorney in question was not in Court because he was answering to the call by the Law Society to boycott the Courts. Whilst this did form

the basis of a strong suspicion he was responding to such a call by his not being present in Court, I cannot say it meant that the Appellant's matter be proceeded with in the absence of his attorney where he had not been put to terms. It need not be over emphasized that legal representation is a cornerstone of fair legal process. It therefore has to be dispensed with in the clearest of situations that the matter can no longer be postponed without the interests of justice being defeated and the whole process being viewed as a mockery. One should not be understood as elevating the right to legal representation above other rights that entails the hearing of matters. In any matter where it becomes clear that such a right is being unjustifiably elevated above others, there can be no doubt that a Court would be entitled to proceed with the matter particularly where the accused had either been warned or he had been put to terms. The point being made here is the fact that each matter should turn on its own peculiar circumstances so as to determine whether or not to postpone it, and the absence of an attorney may not be used to stall the genuine hearing of matters where it is clear that such absence is a stratagem to ensure a failure to proceed with the matter.

[18] On the facts of this matter it perhaps is clear that the record of proceedings does not indicate a putting of the Appellant to terms that the matter would be proceeded with or without his attorney on a subsequent occasion. The postponement of the 5th September 2011 to the 3rd November 2011 has no such a condition *ex facie* the record. Were this the only consideration in the matter, I would not have

hesitated to find for the Appellant on this ground. In short I would have so found if the matter had been heard and finalized on the 3rd day of November 2011, which was not the case herein. In the matter at hand, however, the matter was not finalized on the 3rd November 2011 but was postponed to the 17th, 22nd and 28th November 2011 as well as to the 22nd December 2011. On none of these subsequent days to the 3rd November 2011, did the Appellant's attorney appear in Court. It defeats logic why the said attorney would not have appeared in Court on these subsequent days if his problem was merely one of health on the 3rd November 2011. Even if the Appellant's attorney taken sick on the 3rd November 2011 was still not available, there clearly is no reason why he would not have found another one for the subsequent days. Surely such an attorney would have had an array of considerations including an application to recall witnesses already called on the 3rd November 2011 for the Court *a quo* to deal with, in considering whether or not to grant same, so that if same was being unduly refused, an appeal to this Court would have been made for this Court to determine whether or not such was in accord with the law.

[19] It is for this reason that I would say that even though it may have been unfair for the Court *a quo* to proceed with the matter in the absence of the Appellant's attorney on the 3rd November 2011, such a shortcoming was cured when the Appellant could not avail his attorneys for the subsequent dates mentioned above where whatever shortcomings would have been cured as stated above.

[20] I am convinced that on the basis of these considerations, no case has been made for this Court to interfere with the decision of the Court a quo in this matter as regards the propriety or otherwise of the Appellant's conviction.

[21] As regards the issue of sentence I have to construe in Appellant's favour that on this ground he is contending that the sentence imposed was excessive or that it was so harsh that it induced a sense of shock or even that it amounted to a misdirection or that it was illegal. Otherwise there would be no case made for me sitting as an appellate Court to interfere with the sentence in this matter. I say this because the position is now settled that sentencing is a matter reserved for the trial Court, with the result that this Court, as an appeal Court, will only interfere where it is shown that there is a misdirection or that the said sentence is illegal. See in this regard the case of ***Rex v Ndusha Themba Zwane 1970 -76 SLR 106*** as well as that of ***Sifiso Zwane v Rex Criminal Appeal Case No. 5/2008***.

[22] In the same ***Rex v Ndusha Themba Zwane*** (supra) case, it was stated by this Court per Nathan CJ while considering the case ***S v De Jaager 1965 (2) SA 616 at 629*** that there would be a misdirection where the sentence is shown to be inducing a sense of shock. A sentence induces a sense of shock where there is a huge disparity between the sentence imposed by the Court *a quo* and the one this Court would have imposed were it dealing with the matter.

[23] I am of the view that the sentence imposed by the Court *a quo* had a marked disparity or difference to the one I would have imposed had I dealt with the sentencing in the matter. I say this having considered all the facts and circumstances of the matter including the person of the accused, as these are the issues be considered by the Appeal Court as stated in ***S v Anderson 1964 (3) SA 494 (A) at 495 G-H***, where the position was put as follows:-

> *"The Court of Appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be. If the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial Court acted unreasonably and therefore improperly, the Court of Appeal will alter the sentence. If there is not that degree of difference, the sentence will not be interfered with."*

I am convinced, five years would have been appropriate, purely when considering that all the items stolen were promptly recovered together with the Appellant's being a first offender.

[24] Consequently I make the following order which substitutes that of the Court *a quo*:-

(i) The conviction of the Appellant by this Court be and is hereby confirmed.

(ii) The accused (now Appellant) is sentenced to five years imprisonment.

(iii) This sentence shall be construed so as to take into account the period already spent in custody by the Appellant.

Delivered in open Court on this……day of November 2013.

N. J. HLOPHE
JUDGE – HIGH COURT

For the Appellant: Mr. K. Vilakati

For the Respondant: Mr. M. Nxumalo