



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 7/13

In the matter between:

FOLOMANE DLAMINI AND ANOTHER

APPELLANT

v

THE KING

RESPONDENT

Neutral citation : Folomane Dlamini and Another v Rex (7/13) SZHC 36 [11TH
MARCH 2014]

Coram : Q.M. MABUZA J

Heard : 11TH DECEMBER 2013

Delivered : 11TH MARCH 2014

Summary : *This is an appeal against sentence from the Magistrates Court, PiggsPeak. Appellant seeks to have the sentences in Count 4 ordered to run concurrently with the sentence in Count 1, 2 and 3. Appeal succeeds in part. The sentence in Count 1, 2 and 3 are ordered to run concurrently and the sentence in Count 4 is ordered to run consecutively with the altered sentence in respect of Count 1, 2 and 3.*

JUDGMENT

MABUZA -J

- [1] The Appellant was convicted and sentenced on the 12th March 2012 by the Magistrate sitting at Piggs Peak.
- [2] He was charged with three crimes of housebreaking and theft; the fourth count relates to contravening section 11 (8) of the Arms and Ammunition Act 24/1064 as amended.
- [3] The charges and sentencing against the Appellant are briefly set out hereunder:

Count 1: Robbery

The Appellant is alleged to have on the 7th January 2011 intentionally and unlawfully robbed Welcome Dlamini at gunpoint of property to the value of E18,050.00. He was convicted and sentenced to two years imprisonment without an option of a fine.

Count 2: Robbery

The Appellant is alleged to have on the 7th January 2011 intentionally and unlawfully robbed Zakhele Mkhonta at gunpoint of property valued at E1,800.00. He was convicted and sentenced to two years imprisonment without an option of a fine.

Count 3: Robbery

The Appellant is alleged to have on the 7th January 2011 intentionally and unlawfully robbed Thembinkosi Dlamini at

gunpoint of property the value whereof is not stated. He was sentenced to two years imprisonment without an option of a fine.

Count 4

The Appellant was charged with contravening section 11 (8) of the Arms and Ammunition Act 24/1964 as amended in that on the 11th May 2011 he wrongfully and unlawfully possessed a firearm without a permit or a licence.

He was sentenced to the payment of a fine of E5,000.00 and in default of payment to five (5) years imprisonment.

- [4] The sentences were ordered to run consecutively. The Appellant has appealed against these sentences on the ground that the order that they run consecutively make them harsh and severe for him to bear. He wants the court to order the 5 year sentence in respect of Count 4 to run concurrently with the sentences in Counts 1, 2 and 3.
- [5] The robbery offences with which the Appellant is charged were committed on the 7th January, 2011 at Nginamadvoloareain the Hhohho District at the home of Welcome Dlamini who is the complainant in Count1. Zakhele Mkhonta is the complainant in Count 2 and Thembinkosi Dlamini is the complainant in Count 3. Both Zakhele and Thembinkosi were at the house of Welcome Dlamini when they were both robbed by the Appellant and his cohorts. Zakhele was robbed of a

cellphone worth E1,800.00 and Thembinkosi was robbed of a cellphone whose value is not stated.

[6] The person who seems to have got the brunt end of the stick was Welcome Dlamini. He says that the assailants broke a window and entered the room where he was sleeping with his wife. When the assailants entered his room one pointed a firearm at him, while another tied his hands with a rope behind his back. They demanded money from him and one of them hit him with a stick. His wife awoke and they tied her hands behind her back with her head scarf. We are not told what the extent of the injuries were if any caused by the stick. Since Dlamini was not taken to the hospital for any treatment my conclusion is that these injuries were relatively minor. There were no lasting injuries caused by the rope which was used to tie his wrists nor were there any significant injuries sustained by his wife either. The gun was not fired at them it was used to frighten the complainant and his wife. The Appellant was not charged with the (statutory) offence of pointing a firearm at the complainant, and of course more of his property was stolen compared to the property in Count 2 and Count 3.

[7] Zakhele Mkhonta the complainant in Count 2 narrated that one assailant attacked him in a separate bedroom to where Dlamini and his wife were asleep. The assailant demanded a cellphone, took food off the table and

threw it into his face and further tied his hands behind his back with a T-shirt. He says that he was threatened with a knife. Mkhonta did not inform the court *a quo* whether or not he saw the knife and whether or not it was placed against any part of his body. It is noteworthy that the Appellant was charged with having used the firearm in Count 2 and yet the evidence does not support this fact.

[8] Thembinkosi Dlamini the complainant in Count 3 narrated that he too was at Welcome Dlamini's home on the 7th January 2011. He testified that when he was at the gate two people came to them and these people beat them up and took his cell phone and E50.00. The assailants tied them up. He got injured on the head. He too did not make much of the head injury presumably because it was not major. He did not mention any use of the firearm or any weapon used on him to induce him to submit to the assailant's demand. His evidence does not support the charge in Count 3.

[9] One gets the impression that the offences took place in different areas within the homestead. Count 1 took place in the main bedroom, Count 2 in the second bedroom and Count 3 outside the house at the gate.

[10] The sentences are all uniform irrespective of the value of the goods and the circumstances surrounding the occurrences of the offences. I have already set out the circumstances surrounding the offences and need not

repeat myself. However, the value of the goods in Count 1 totals E18,050.00 and in Count 2 and 3 the value does not exceed E2000.00 per count and yet the sentences are the same. Logic dictates that the sentence ought to be higher in respect of Count 1 than in Counts 2 and 3.

[11] Having stated that the evidence shows that the firearm was used only in Count 1 and not Count 2 and 3 I would submit that the sentences meted out are not commensurate with the evidence led and this consequently calls for my intervention. My intervention is based on the dictum in the case of **Sithembiso Simelane and Another v The King**, Criminal Appeal Case No. 2/2011 unreported where it was held:

“As a general principle, consecutive terms should not be imposed for offences which arise out of same transaction or incident, whether or not they arise out of precisely the same facts. A court may however depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances. But a sentence must clearly identify the exceptional circumstances upon which she or he seeks to justify the imposition of consecutive terms.”

[12] In **casu** the evidence shows that the offences in Count 1, 2 and 3 arose out of the same transaction or incident. Even though the court **a quo** when passing sentence departed from the principle stated above, it did not clearly identify the exceptional circumstances upon which it sought to justify the imposition of consecutive terms.

[13] In the event the appeal succeeds in part and I hold as follows:

- (a) Count 1, 2 and 3 are hereby ordered to run concurrently; and
- (b) Count 4 remains unaltered and is hereby ordered to run consecutively with the sentences in Count 1, 2 and 3.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Appellant : In person
For the Respondent : Mr. K. Masango