

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE No. 309/2023**

In Matter between:

**THULASIZWE GININDZA**

**APPELLANT**

And

**REX**

**RESPONDENT**

**Neutral citation:** *Thulasizwe Ginindza v Rex (311/2023)*  
*SZHC 241 [2023] (28.08.2023)*

**CORUM:** Makhanya A. J

**Date heard:** 17.08.2023

**Date delivered:** 28.08.2023

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## JUDGMENT

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- [1] The appellants were charged with his co-accused in the Pigg's Peak Magistrate court on two counts. The first count related to robbery which was alleged to have been committed on the 14<sup>th</sup> January, 2022 at or near Vusweni area in the Hhohho region.
- [2] The second count related to the Appellant only. He was alleged to have contravened section 7 as read with Section 8 (1) of the Opium and Habit Forming Drug Act no. 37 of 1922.
- [3] On arraignment, both the Appellant and his co-accused, who has not appealed before this court, pleaded not guilty to the robbery count. Appellant pleaded guilty to count 2, the possession of dagga.

### Summary of the state's evidence

- [4] Thokozani Mcondi Magagula, the only witness who placed the Appellant and his co-accused in the crime scene on the day in question.
- [5] It was his evidence that he knows both accused persons from the same area Lugungu. This piece of evidence is not in dispute.
- [6] On the day of the incident, he was from South Africa where he had gone to sell dagga. He arrived in the country at around 15:10 hrs. He dropped off at the junction to Vusweni along Pigg's Peak/ Matsamo road.
- [7] He then proceeded to buy food at a shop situated at the junction. The Appellant on seeing him stood up. He came to him as he sat outside the shop to eat his food.
- [8] Appellant told him to give him some money. He responded that he did not have money. Appellant told him that he was lying since he was from South Africa from selling dagga.
- [9] Complainant went to a nearby garage where he bought 3x750ml beer and gave Appellant. He joined them and the other patrons.
- [10] While the complainant was eating his food, Appellant's co-accused came to him, he asked for money from him and told him that he wanted to go to Manzini.

- [11] He told him that he does not have money, Appellant's co-accused, went to Appellant, they communicated in a language which complainant did not understand.
- [12] The complainant (Pw1) told the court *aqou* that Appellant the made a call to someone, he told the person to come as there was a person who was carrying R200.00 notes.
- [13] Appellant and his co-accused were seated with his girlfriend, Tengetile who was staying at a Kunene's homestead.
- [14] The said Tengetile warned (Pw1) that he must not drink alcohol, the Appellant and his co-accused were planning to rob him.
- [15] Complainant (Pw1) took heed of Tengetile's advice. He left the place and proceeded across the road towards the Kunene's homestead.
- [16] When he was about to exit the second gate to enter into another Kunene's homestead, Appellant approached him. He told him that ever since he started selling dagga, he thinks he is clever. He then hit him with an open hand on the chest. He pretended to be leaving.
- [17] Appellant's co-accused, approached from behind immediately when Appellant was leaving. He put a fire-arm on Pw1's stomach. He held Pw1 with his track suit and ordered him to move towards a river.
- [18] At the river side, he ordered Pw1 to remove all his clothes and was left with only a BVD underwear.
- [19] Complainant had kept his money in a plastic bag in his tracksuit pocket. Appellant's co-accused after he had stripped Pw1 and taken his money and the clothes, he told him to wait then he would come with some beer.
- [20] The properties that were forcefully taken from Pw1 were his tracksuits, his canvas shoes, T-shirt and E28 000-00 (Twenty-Eight Thousand Emalangi).
- [21] Pw1 after he had been robbed, he proceeded to the Kunene's homestead where he borrowed some clothes to wear. He then met someone who gave him E20.00 for transport as he went to report the robbery to the police at Ngonini.
- [22] Appellant when cross-examining Pw1, he did not deny that he participated in the robbery. He further did not deny that he hit him with

an open hand on the chest. He did not deny even when cross-examining the investigator. Refer to page 21 of the record of proceedings.

- [23] It is common cause that the Appellant met with Pw1 at the junction store where he asked him to give him money. Pw1 informed the court that he bought 3x750ml beer and gave the Appellant. Appellant admitted only one beer in court. He denied that he ever left the shop until arrival of Mthunzi Colani Kunene who then informed them that the complainant had been robbed. He further stated that he left for home and stayed at Vusweni until he was arrested on the 27<sup>th</sup> July, 2022. This was an afterthought, he never put it to any of the Crown witnesses.
- [24] Appellant in mitigation he apologised to the court for committing the offence and told the court that he will never commit a similar offence.
- [25] The Learned Magistrate convicted and sentenced the Appellant to five (5) years imprisonment without an option of a fine on count1. On the second count, he was sentenced to E 1 000.00 fine or 10 months imprisonment. The sentences were ordered to run consecutively.
- [26] The Appellant is aggrieved by the decision of the court *aquo*. He wrote a letter on the 6<sup>th</sup> April, 2023 to the Registrar of this court challenging the conviction.
- [27] Appellant's main ground of appeal is that, he was wrongfully convicted. He did not commit the offence. It was committed by his co-accused who pleaded guilty.
- [28] The Appellant was not represented throughout the trial. His legal representative only filed the Heads of Arguments which were combined with the grounds of appeal.
- [29] Appellant's other ground of appeal is that the court erred in law and in fact in holding that the Crown had established beyond reasonable doubt the existence of a common purpose.
- [30] Counsel for the Appellant argued that the Appellant did not work at any stage participate in the robbery. He cited the South Africa Author Snymen who defines the doctrine of common purpose as follows;

*"If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the*

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*conduct of each of them in the executive of that purpose is imported to the others"*

- [31] He further cited the case of **Phillip Wagawaga Ngcamphalala and Others v Rex Criminal appeal Case no. 17/2002**. Where the elements of common purpose are defined.
- [32] Counsel for the respondent argued that the learned Magistrate correctly convicted the Appellant. She referred the court to page 29, last paragraph of the record of proceedings and also at paragraph 6, paragraph 3.
- [33] She further contended that Appellant participated both physically and by words.

#### **Evidence of a Single Witness**

- [34] Section 236 of the Criminal Procedure and Evidence Act 67/1938 as amended states:

*"The court by which any person prosecuted for any offence is tried, May convict him of any offence alleged against him in the indictment or summons on a single evidence of any competent and credible witnesses"*

- [35] In the present matter, it is common cause that the evidence of Thokozani Mcondi Magagula (Pw1) was that of a single witness regarding the robbery by the Appellant and his co-accused.
- [36] It is indeed so that the evidence of a single, competent and credible witness in a case such as this, involving as it does the testimony of a single witness, the merits of the witness must be weighed against factors which initiate against credibility.
- [37] Dealing with a single witness's testimony, the court in **S v Sauls and Others 1981 (3) SA 172 (A)** held:
- "The trial Judge will weigh (her) evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, (he) is satisfied that the truth has been told".*
- [38] Thokozani Mcondisi Magagula (Pw1) told the truth and he was corroborated by Pw3 who told the court that he had to borrow him some clothes to wear as he came to him wearing only a BVD after the robbery.

## DOCTRINE OF COMMON PURPOSE.

- [39] There is evidence that appellant requested Pw1 to buy him beer. There is further evidence that Appellant made a call to someone that that person must come as there was someone who had R200.00 notes.
- [40] There is further the evidence of Pw1 that Appellant knew that Pw1 had sold dagga in South Africa. Appellant told Pw1 to give him some money, Pw1 Respondent by saying he had no money. Refer to page 6 paragraph 3 of the record of proceedings.
- [41] Appellant and his co-accused were alleged to have acted in furtherance of a common purpose.
- [42] In **R v Duma and Another 1945 AD 410**. Tindal JA stated at page 415:

*"The liability of persons who assist in the carrying out of a common criminal purpose was considered in **R v Garnsworthy and Others (1923 W.L.D 17)** and, in my opinion, the principles applicable were formulated with substantial accuracy by, Dove – Wilson JP, in the following terms – Where two or more persons continue in an undertaking for an illegal purpose, each one of them is liable for anything done by the other, or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known would be a probable result of their endeavouring to achieve their object. If on the other hand, what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being-liable, but if what is done is just what anybody engaging in this illegal combination would naturally, or ought naturally to know, would be obvious and probable result of what they were doing, then all responsible.*

- [43] The Appellant assaulted Pw1 on the chest, he told him, (Pw1) that since he started selling dagga, he thinks he is clever immediately thereafter, Appellants co-accused came from behind Pw1 and placed his fire-arm on Pw1's stomach. This act shows that Appellant and his co-accused had planned the robbery. It was not a co-incidence, they acted in common purpose.

[44] Counsel for the Respondent contended further that the Learned Magistrate correctly convicted Appellant and his co-accused. I agree with her.

[45] The court *aquo* found Pw1 to be a credible witness. There was no suggestion by Appellant as to why Pw1 would lie against him. The offence was committed during the day and identity was not in dispute.

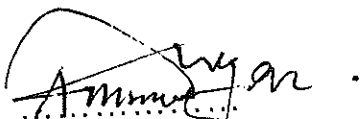
[46] The Appellant's Counsel argued that there was no evidence that Appellant participated in the offence. Appellant in the mitigation, he also apologised to the court and stated he will never commit a similar offence.

[47] In my opinion, the Learned Magistrate did not commit any error in convicting the Appellant and his co-accused. He correctly found that the prosecution had proved its case beyond reasonable doubt.

[48] Appellant did not challenge the sentence imposed by the court *aquo*.

[49] In the results, the following is made.

1. The appeal against conviction is dismissed.
2. Appellant's sentence is backdated to the 27<sup>th</sup> July, 2022, the date of his arrest.



**A.Makhanya**

**Acting Judge of the High Court**

**Appearances:**

For the Appellant – S.Zwane

For the Respondent – N.Dlamini