



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 727/23**

In the matter between:

**THE KING**

**VS**

**MCEBO NKOSINGIPHILE MAMBA**

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**JUDGEMENT**

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**Neutral citation:** *The King vs Mcebo Nkosingiphile Mamba (727/22023) SZHC 129 (11<sup>th</sup> June 2024).*

**Coram:** *S.M. MASUKU J*

**Date of heard:** *13/03/2024, 18/03/2024 & 25/03/2024*

**Date delivered:** *11<sup>th</sup> June 2024*

**Summary:** *Criminal Law- Criminal Law and Procedure. The accused charged with the crime of Robbery in that*

*he unlawfully and with the intention of inducing submission by using an air pistol took a Quantum mini bus and E1600 (One thousand six hundred emalangeni) from the complainant. Accused pleaded guilty as charged and sentenced accordingly.*

**Held:**

*The sentence took into account that this case is distinguishable from cases where a firearm is used to commit the offence. In casu the convicted person admitted to have used an air pistol for which ballistic experts testified it is not a firearm. The convicted person sentenced to five (5) years imprisonment without an option of a fine on account of his other string of theft previous convictions.*

- [1] The accused is charged with crime of Robbery, in that upon or about the month of 30<sup>th</sup> October 2022 at or near Nhlanguano Region, at Sitila River Shiselweni Region, the said accused person unlawfully and with intention of inducing submission by one Tandla Shiba to the taking by the Accused a white Quantum Mini Bus registered KSD 94 BH valued at E204 000 (Two hundred and four thousand emalangeni only) plus money in cash of E1 600-00 (One thousand six hundred emalangeni). It is said he threatened the said Tandla Shiba that unless he consented to the taking by the accused or refrain from offering resistance to him in the taking of the property, he would then and there shoot him with a gun and did then take and steal from



him the said property which was in Tandla Shiba's or his lawful possession and did rob him of the same

- [2] On the first date of trial, the court explained to the accused, his rights to be represented by an attorney of his choice and was given an opportunity to find one before commencement of the trial should he required one. The accused chose to represent himself in the case. The charges were read to the accused for the record.
- [3] The accused was asked if he understood the charges and how he pleaded to the charges. He pleaded guilty as charged. The Prosecution and the accused prepared a statement of agreed facts which was also read for the record.
- [4] It was agreed between the Prosecution and the accused that on the 30<sup>th</sup> October 2022 there was a Robbery staged by the accused on the complainant Tandla Shiba (Shiba) a kombi driver wherein he was robbed a white Toyota Quantum Mini Bus registered KSD 940 BH valued E204 000 (Two hundred and four thousand emalangeni) plus money in cash amounting to E1600 (One thousand six hundred emalangeni) all property in the hands of Shiba.
- [5] The accused agreed to have used an Air Pistol one 4.5 mm caliber, tippmann air pistol, model Tipx, serial number 0074538 with two magazines. Four (4) gas canisters were also retrieved from the accused. Shiba surrendered the quantum and the cash money in fear of being shot at by the accused.
- [6] It was agreed between the Prosecution and the accused that the motor vehicle was moved to South Africa through Lavumisa Border where the air pistol was given to Don David Matsenjwa (Matsenjwa) plus the cash money after the accused had asked him to help cross the motor vehicle to the South



African side. He was given E700 (Seven hundred emalangi) for the service.

- [7] The motor vehicle was later recovered from South Africa at Vryheid Police Station and pictures of the vehicle were taken. The motor vehicle being a white Toyota Quantum registered KSD 940 BH, Chassis number AHTSX22P107015305 and engine number 2tR18651804.
- [8] The Prosecution and accused agreed to hand over to the court, the statement of agreed facts, a photo album of the vehicle, the air pistol and money bag, police ballistic report, records of previous convictions and a copy of the motor vehicle Registration certificate (Certified copy).
- [9] The accused admitted in the statement that he robbed Shiba by inducing submission with an air pistol and took from his immediate care a kombi and cash money. The *nexus connectus* between him and the robbery are the recovered exhibits and the Toyota Quantum KSD 940 BH.
- [10] On the strength of the accused plea of guilty and the admission of the statement of agreed facts with the exhibits, the court accordingly found the accused guilty of the crime of Robbery.
- [11] The Prosecution handed in a previous conviction sheet and read to the record a series of accused previous convictions these includes;
- Theft by false pretence conviction and sentence of E5000 fine or 2 years imprisonment on the 14<sup>th</sup> November 2016.
  - A theft conviction and sentence of E2000 (Two thousand) or 1 year imprisonment on the 14<sup>th</sup> November 2016.



- A theft conviction and sentence of E300 (Three hundred emalangeni) or 6 months imprisonment on the 14<sup>th</sup> November 2016.
- A theft conviction and sentence of E800 or six months imprisonment on the 14<sup>th</sup> November 2016.
- The last being a theft conviction and sentence on E800 (Eight hundred emalangeni) or six months imprisonment on the 14<sup>th</sup> November 2016.

[12] In mitigation of sentence, the accused submitted that he apologises and regrets his actions. Whilst in custody waiting for his sentence, he has learnt his lessons. He has three children, his mother and grandmother that are depended on him for the court's lenience. He is remorseful and said he will attend bible studies to reform.

[13] In passing sentence the court is to take into account the personal circumstances of the accused person, the nature and seriousness of the offence together with the interest of society. This is in line with the triad procedure as it has been developed through practice over the years. See the case of S v Zinn 1959 (2) SA 525 and also S v Rabi (4) 870 as well as S v Qamata 1987 (1) SA 479 AT 480.

[14] The Triad Principle has been followed constantly in this jurisdiction in a number of cases. In this regard see Rex v General Mbutfo Msibi criminal case 194/1998 and Rex v Nhlonipho Simelane Criminal case 370/11 amongst many others.

[15] Ota J in the case of Rex v Nhlonipho Sithole (*supra*) had this to say;



*“Punishment should fit the criminal as well as the crimes, be fair to society and be blended with a measure of mercy according to the circumstances”.*

- [16] His Lordship Mamba J A in the case of Johannes Mfankhona Dlamini and Another v The King (18/2018) [2023] SZHC 5 (23 February 2023 stated:-

*“It has been repeatedly stated that the issue of sentences is a matter pre-eminently within the discretion of the sentencing court... In deciding what would be appropriate sentence in each case, the court must always bear in mind the competing interest of society, the accused and the offence for which the accused has been convicted. To say that, the court ought to take into account the whole circumstances pertaining the offence.”*

- [17] In aggravation, the Prosecution submitted that the convicted person had committed a serious crime of Robbery involving the use of a firearm. That Robbery victims are always traumatized and usually a custodial sentence is imposed. The court was referred to *R V Mkoko* Case No.124/2019 where a firearm was used by the convicted person. The complainant in *casu* loss his property being money in the tune of E1600 (One thousand six hundred emalangi) and the Quantum KSD 940 BH which was later recovered.

- [18] The Prosecution submitted a number of cases to persuade the court to impose a sentence that is fairly and just in the circumstances. See Rex v Kenneth Gamedze and two others Criminal Case No. 127/2002, where the High Court imposed a sentence fifteen (15) years imprisonment to the accused for Robbery involving the use of a firearm. A fine was said not to be suitable for Robbery cases. In Senzi Dlamini and two others v Rex Criminal case 18/1977 the court imposed a sentence seven years imprisonment without an option of a fine despite that the accused tendered a



plea of guilty. In Mduduzi Dlamini v Rex Criminal cases No.12 of 2008, the High Court confirmed a sentence of four (4) years imprisonment without an option of a fine. The court also held that sentences in such offences of Robbery cannot be suspended.

- [19] I take into cognance that sentencing is discretionary. It is incumbent upon the trial court to exercise such discretion fairly and justly considering the entire case and its circumstances. The Prosecution referred this court to cases where a firearm was used by the convicted persons to commit the offences. The cases are distinguishable to the case in *casu* in that, the statement of agreed facts reflect that the convicted person admitted to have used a spray gun or an air 'pistol to induce the complainant into surrendering the Quantum Bus and the cash money.
- [20] Detective Sergeant 3623 Willard S. Simelane in his ballistic affidavit identified the weapon used as an air pistol manufactured and designed to discharge pellet type of ammunition by means of compressed gas and it is not a firearm (underlining mine).
- [21] In considering the appropriate sentence in this regard where spray guns, toy guns which are not firearms are used to induce the complainant into surrendering property, I came across a selected Supreme Court judgements as a guide.
- [22] In the case of Nkosana Petros Dlamini v Rex (20/12) [2012] SZSC 45 (30 November 2012) in considering what aggravated robberies were ("*in obiter dictum*") Moore JA referred to the English Theft Act 1968 which he pointed out that it was referred to because it provided useful examples where the offence creating statute itself provided examples of aggravating



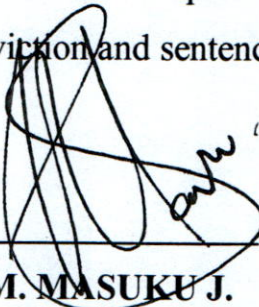
circumstances prescribed in the Act. Let me hasten to say we do not have such statute in our jurisdiction but this is to demonstrate that in the English Act a 'firearm' includes an air gun or air pistol, and 'irritation firearm' means anything which has the appearance of being a firearm, whether capable of being discharged or not.

- [23] We do not however have the liberty of extending the definition of the weapon used by the convicted person to that enunciated in by the English Act. The ballistic report says the air pistol used by the convicted person is not a firearm, contrary to what the Prosecution submitted.
- [24] Robbery is defined as the theft of property by intentionally using violence or threats of violence to induce submission to its taking (*see S.V Maneli* 2009 (1) SACR 509 (SCA) paragraph 6. See also *Sandile Mata Mavuso and another v Rex* (08/2015) [2016]SZHC 52 (30 June 2016). The convicted person in *casu* in the process stole a Toyota Quantum and cash in the amount of E1 600 (One thousand six hundred emalangeni).
- [25] Section 3 (1) read together with section 14 (2) of the Theft of Motor vehicle Act 1991 provides that any person who steals a motor vehicle ... 'is guilty of an offence and liable to a conviction to imprisonment not less than two years in respect of first offender without an option of a fine or (5) years, in respect of a subsequent offender without an option of a fine.' Section 14 (2) reads; 'no sentences for theft of motor vehicles or part of a sentence under the Act may be suspended.'
- [26] The convicted person's conviction in *casu* includes the theft of E1 600(One thousand six hundred emalangeni) from the Complainant. It all happened at



the same time when the Toyota Quantum was taken. The incidents should not be separated for purposes of sentencing.

- [27] The court should also take into account that the convicted person has a string of previous theft convictions. At least five (5) of the recorded ones were for five counts handed down in the same case number and same date the 14<sup>th</sup> November 2016.
- [28] In the circumstances of the convicted person's case and taking into account his personal circumstances, the court sentences him to five years (5) imprisonment without an option of a fine. The Robbery which resulted in the theft of the Toyota Quantum and the cash amount occurred under the same charge and at the same time hence not regarded as separate incidents. His sentence should take into account the period for which he has spent in custody awaiting his trial, conviction and sentence.



S.M. MASUKU J.

**JUDGE - OF THE HIGH COURT**

**Prosecuting Counsel- Fakazi Mngometulu from the DPP'S Chambers.**

**Accused appeared in person-**