(IN THE APPEAL COURT OF SWAZILAND)

In the matter of: APP. NO. 6/81

REX

vs.

SIPHO MPUNGOSE

CORAM: MAISELS J P

ISAACS J A

NATHAN C.J.

FOR RESP.: MR. FLYNN

FOR APPEL.: IN PERSON

(Delivered on 27/1/31)

Maisels, J P:

The Appellant was charged with. 3 other persons with the crime of house-breaking with intent to steal and theft. He was the second accused. The first Accused pleaded guilty. All the Other Accused including the Appellant pleaded not guilty. The Learned trial Judge thereupon seperated the trial of the first accused guilty and duly sentenced him. The learned Judge found the appellant and the other 2 accused all of whom who pleaded not guilty, guilty. The Appellant has appealed against the finding of guilty and the sentence imposed upon him which was one of 4- years imprisonment. It is clear that there was a house-breaking with intent to steal and theft on the 22nd July 1980 at a shop known as the ABC stores in Mbabane. The question is whether the Appellant was a party to that house-breaking and theft. The main and most important witness against the Appellant was one John Mhlanga. The learned trial Judge was impressed with this witness as an honest witness. He found that there was no reason for this witness wishing unjustly to implicate the Appellant.

The evidence of this witness, Mr Mhlanga was to the following effect:

He said that in the early morning of 23rd July some where about 2 o'clock, he was awakened by the appellant who was in company of a person who was the original accused No. 1 namely the appellant's brother-in-law one Sam Madondo. The purpose of awaking him up at that hour of the morning was according to the evidence of Mr Mhlanga, to persuade him to drive the appellant and his brother-in-law to Mbabane in order to take a sick person to hospital, They agreed to pay him E10 towards his petrol. The witness stated that he eventually agreed to take this person as requested but he was diverted from the road that he was taking and told to park his car in the parking area between the Central Bank and the offices of the Town Council. He explained that he was threatened and indeed shaken and ordered in a rough and harsh voice to do as he was told. The car stopped in the parking area. The person who was the first accused namely the appellant's brother-in-law, got out of the car first, followed minutes thereafter by the appellant and each of them returned carrying 2 suit-cases. All the suit-cases were packed in this car and he was told to go and hid these suit-cases and return. Regretably for the appellant he did not carry out the request and instead he went to the police station and made a report to a police officer and the goods were recovered and placed in the police station.

There is further evidence given in this case to show that three more suit-cases were taken to the premises of the appellant. These were carried there by the appellant and his brother-in-law original accused No.1 There is no

doubt that Mhlanga told the truth about what happened and it is necessary to see whether the version put up by the appellant in any way Casts Toubt: upon the truthfulness of Mhlanga's evidence.

3

According to the evidence given "by the appellant and what he has told us in this Court, he was awakened early in the morning "by his brother-in-law who asked him to awake Mr Mhlanga. He did not enquire from his brother-in-law why Mr Mhlanga should be awakened. Appellant was to "be awakened as it subsequently transfered because the use of Mr Mhlanga's car was wanted for a certain purpose. The appellant says he did not ask his brother-in-law for what purpose the car was wanted. He told us that he didn't ask his brother-in-law nor Mhlanga for what purpose was the car wanted nor did he ask his "brother -in-law why Mhlanga should be awakened at that hour of the night. However uncurious a nature the appellant may "be possessed of, it is impossible to believe that if he was innocently asleep and he was awakened by his brother-in-law in the early hours of the morning that he wouldn't have enquired from him why he was being awakened in this way and why the services of Mhlanga's car were required. It was only later that he apparently

ascertained that the purpose was to use a car to remove the goods to a certain place to Matsapa. According to the appellant, he did not want to go on this trip at all, but Mhlanga requested him to do so because he din not really know the appellant's brother-in-law and the appellant obligingly went along in the middle of the night in order to fetch the suit-cases. He had ascertained at some stage or another according to what he told us to day, from his brother-in-law that the latter had bought these goods in Johannesburg which consisted of women's clothing and that they had been brought to Mbabane by a van and dropped at an open space behind some bushes where they could not be seen by any passer-by . All this of course happened in the early hours of the morning, when a drive of a mile would have enable a transporter to take the goods to the house where they were eventually dropped by the

4

appellant and his brother-in-law. If these goods were innocently obtained and if the appellant thought they were innocently obtained, it is difficult to see the necessity for this midnight or after midnight journey in the middle of winter in order to obtain the suit-cases which were apparently concealed behind some bushes. It must be borne in mind that if the brother-in-law story was true, the brother-in-law walked all the way up to where the appellant lived, leaving the suit-cases behind in order to enlist the services of the Appellant to obtain the use of a motor car to transport the goods. 0n examination of all the evidence together with the police evidence leaves one in no doubt that there was this housebreaking by that I mean the breaking into the shop and the stealing of the articles to which the Complainant deposed. It is impossible to believe that the Appellant's role in this whole picture was merely that of a carrier of the goods. In my view the inference to be drawn and the only inference to be drawn from the evidence is that he assisted and was a party to No.1 Accused, his brother-in-law breaking into the store and stealing the goods in question. Putting it very simply, both of them broke into the store and stole the goods. This was the finding of the learned trial Judge, and in my opinion he was fully justified in coming to this conclusion.

With regard to the sentence imposed on the Appellant, 4 years imprisonment, having regard to his record of previous convictions, I consider the Appellant was fortunate in having sentence of only 4 years imprisonment imposed upon him. The crime of house breaking and theft is a very serious one. The goods stolen were of considerable value and had the Judge imposed a more severe sentence he would have been perfectly entitled to do so.

5

There is, however, one matter to which reference must be made. At a certain stage of proceedings, the Appellant was released on bail and for good and sufficient reasons which it is not necessary to detail the bail was cancelled. At the end of the trial, the lear d trial Judge ordered that the bail of E100-00 should be forfeited to the State. There does not appear from the record to have been any application made on behalf of the Crown for this forfeiture or rather for an order for this forfeiture.

Mr. Flynn who appeared for the Crown in the Court aquo and who also appeared before us today, stated that although he thought he had applied for forfeiture, he was not certain that he had indeed alone so. The record reveals that at a certain stage of the proceedings, the question of the forfeiture bail could be considered and would stand over. There is nothing from the record to indicate that an application for forfeiture was made as I have already said, and Mr. Flynn very properly and fairly, in my opinion, has adopted the attitude that in view of the fact the record does not show an application for forfeiture had .g been made, he could not really support the order of the trial Judge that the bail money should be forfeited or as, it is sometimes called, estreated.

As a result, therefore, (in my judgment) the appeal against conviction and sentence fails and should be dismissed but the order estreating the bail money should be set aside.

I agree :......................

(I. ISAACS) JUDGE OF APPEAL

I agree :..........................

(C. J. M. NATHAN.) JUDGE OF APPEAL

There will be an order, therefore, in the following terms :

The Appeal fails and the conviction and sentence are Confirmed. The order forfeiting the bail of E100-00 is set aside.

(I.A. MAISELS.)

JUDGE PRESIDENT