

IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO.17/96

In the matter between:

JABULANI M. HLOPHE 1ST APPELLANT

SIPHO M. MAGAGULA 2ND APPELLANT

VS

REX

CORAM

: S.W. SAPIRE A.C.J.

:J.M. MATSEBULA A.J.

FOR THE CROWN : MISS S. NDERI

FOR THE DEFENCE : IN PERSONS

JUDGMENT

16/04/96

The two appellants Jabulane M. Hlophe and Sipho M. Magagula designated for convenient sake as appellant one and two respectively, were jointly charged with various counts for housebreaking with intent to steal and theft and other charges under the provisions of the ARMS AND AMMUNITION ACT.

Before the commencement of the trial, the Crown withdrew count five against all the accused according to the record. This withdrawal should have been against appellant two and accused no.7 as the two were the only ones featuring on count five and not all the accused.

Accused no.8 Themba Dlamini was not present at the

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commencement of the proceedings and there is no indication on the record why he was not present.

Miss S. Nderi who appeared on behalf of the Crown at the hearing of the appeal submitted that the Crown ought to have had the charges withdrawn against the absent accused formally. Miss Nderi was correct in that respect.

The appellants and the other co-accused pleaded not guilty to their respective charges and; the second appellant was convicted on count one of housebreaking with intent to steal and theft and sentenced to three years imprisonment. On count two, first and second appellant were convicted of housebreaking with intent to steal and theft and sentenced to three years imprisonment each. The sentences were ordered to run concurrently with other sentences on count one in respect of appellant no.2.

The appellants have now noted an appeal against both the conviction and sentence. The appeal against convictions and sentences were allowed on the 17th April 1996 by the Learned Judge Sapire

A.C.J. and I concurred. The appellants were informed that a written judgement on appeal would follow, the judgement now follows.

At the commencement of the hearing we drew the attention of the Crown to the unsatisfactory evidence of pointing out

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allegedly made by the accused at their trial. The Crown's attention was also drawn to the evidence of PW10 Detective Constable Mkhonta who in the course of giving his evidence stated and I quote,

"On further interrogation of the stolen items accused one, two and Themba Dlamini led me to SCOT in Mbabane. At SCOT they showed me Fanuzile Dlamini who handed to me two CDs and a coat."

Under cross examination of PW10 by appellant no.1, PW10 stated that appellant one, two and Themba Dlamini had not in fact taken him to SCOT and said they had only gave him information.

Miss Nderi addressed the court in details pinpointing conflicting evidence relating to the pointing out evidence and submitted correctly, in my mind, that the convictions could not be sustained. There is very unsatisfactory manner which investigating officers employ in giving evidence, that is, making a blanket statement to the effect that a number of people took the investigating officer to a house and the occupants of the house then handed over certain items which were subsequently identified by the complainant. The person who handed over these items is not called as a witness and the Crown relies on the fact that the group of accused who took the investigating officer to the house were guilty. No evidence of how the goods came to be in possession of the

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person who had custody was led, in casu the only evidence linking the appellants was that of PW10 who gave conflicting evidence about whether or not the appellants had taken him to the house in SCOT. In the result the appellants were wrongly convicted and the appeal succeeds and I so order.

J .M. MATSEBULA S.W SAPIRE

ACTING JUDGE ACTING CHIEF JUSTICE