

CRIMINAL APPEAL NO.69/98**In the matter between:**

Obed Mduduzi Dlamini
PIUS VUSI ZULU
VS
REX

CORAM	:	MATSEBULA J
		MAPHALALA J
FOR THE APPELLANTS	:	IN PERSON
FOR THE CROWN	:	MR. NGARUA

JUDGMENT

Matsebula J:

The two appellants appeared before the Magistrate sitting at a periodic court in the Lubombo area. They were charged with robbery and the allegation being that they intentionally using force and violence to induce submission from Nomathemba Mavimbela did take and steal from her property valued at E70 500 00. The property is listed in Rider "A" and I do not propose to read out the items.

The appellants were not represented but their legal rights had been fully explained and had indicated that they will conduct their own defence.

The Crown led the evidence of PW1 who is the daughter of the complainant. She stated that on this day in question, two strangers arrived at her homestead. She described what they did and that they were armed. They took her to different places looking for the ignition keys of the motor vehicle which was parked in the garage. She was apparently with other children and they were all ordered to lie down. This happened during the day at plus minus twelve noon and the duration of the time, according to her was twenty minutes as this was going on. She was not only able to describe what the two persons were wearing but also that one of them had disfigurement of the hands. As Ms. Nderi has pointed out, the question of identity does not come in here because this happened during the day she was able to recognise them even though she had seen them for the first time. By using force and threats they succeeded in obtaining the keys of the van that was parked in the garage and

loaded some of the goods which belonged to the complainant. They drove away in the van that belongs to the complainant. PW1's mother came back after the report was made she reported the matter to the police. The police investigated the matter, and in the process of their investigation, the two appellants were arrested. The two appellants had at one stage taken the police to places amongst others, to an uncle of appellant no.2 where certain goods identified by PW2 were found. The appellants got in touch with certain persons who were called as witnesses Ellie Simelane, Sampie Mngometulu. They gave evidence as accomplice witnesses implicating the two appellants and they also implicated the two appellants in connection with a bluish Toyota vehicle. The two appellants at one stage offered the motor vehicle for sale. Again, the question of identity does not come in because the items that had been removed from PW2's homestead were found and identified by her. The evidence was overwhelming that they were the people who came there and robbed the complainant of her property.

The learned Magistrate analysed the reasons for judgment in details and came to the conclusion that it had been proved beyond reasonable doubt that the two persons who robbed the complainant of her property were the two appellants. He accordingly found them guilty as charged and sentenced each one to an imprisonment of seven years without an option of a fine.

It is against that conviction and sentence that the appellants have appealed. The grounds are as follows: Appellant Mduduzi Dlamini stated his grounds:

1. That the evidence led against him does not prove him guilty therefore he should not have been convicted. He says there are no reasons why the Magistrate should have convicted him.
2. That the accomplice witnesses were selected. He says in this matter, the case is highly questionable and according to him, they do not qualify to be accomplice witnesses.
3. That he successfully disproved on cross-examination all the witnesses whom testified against him.

There is no merit at all about the fact mentioned by him that there was no evidence against him as I have pointed out that there is overwhelming evidence against both appellants. The accomplice witnesses gave evidence to the satisfaction of the Magistrate and they had not been charged, as the appellants have argued this morning, does not take the case any further on their behalf. The appellants had cross-examined the witnesses but they stood their grounds and in the Magistrate's view which I'm in agreement of, they were not shaken and therefore the Magistrate accepted their evidence.

Similarly, the second appellant Vusi Zulu also brings into issue the question of the selection of accomplices. Whatever that means, if it means they ought not to have been selected or asked to give evidence because they were also involved in this then I would like to tell the appellants that that is not the law.

On ground no.2 the second appellant says there was contradiction of PW2 and PW3 with regards to the clothes they are said to have been wearing. That would have come into question if the question of identity was in doubt. Beside the fact that this was during the day, subsequent to the commission of this crime, the goods were found and some of these goods were pointed out by the appellants and some explanation ought to have been forthcoming from them how they came to be in possession of these goods. The Magistrate in my view drew an inference from all the surrounding circumstances and found that these were the persons who committed the crime.

The second appellant also challenges the question of the prosecutor. I do not know exactly what he means by that but when he argued this morning, he complained that the prosecutors were helping each other. Perhaps by that he means that one prosecutor was trying to whisper to the other who was conducting this and I say again there is absolutely nothing wrong with that.

On ground no.4, the second appellant states that what he submitted apparently at the end of the defence and Crown case, the Magistrate was not recording. I did indicate when the appellant was addressing us this morning that that is not necessary because the Magistrate can merely listen to your submissions and at the end of the trial give his ruling.

Amongst the items stolen from the complainant were cassettes and appellant no.2 says the Magistrate mentioned 43 whereas the prosecutor had talked about 44 cassettes. Again, as I indicated this morning that is immaterial especially in this particular case as one of the cassettes had a name of the complainant and was identified by the complainant as one of the cassettes that went missing. According to appellant no.2 he had given an explanation on how he had obtained the goods amongst others a television set which were at his uncle's place. He says the Magistrate ought to have accepted this as a reasonable explanation. It is obvious the Magistrate did not accept this on reasons which are clear that there is overwhelming evidence against the appellants and I am in agreement with the Magistrate that he was correct in not accepting the explanation given by the appellant.

In my view, therefore, there is no misdirection that the Magistrate committed in so far as the conviction is concerned. I would reject the appellant's appeal against the conviction.

The appellants are also appealing against the sentence. They say that the sentence of 7 years is too severe and they state reasons. Some of the reasons are that appellant no.1, says he is a father of two children who are wholly depended on him. One of these children is asthmatic and he asked that the sentence on those reasons be interfered with.

Appellant no.2 says he intended going back to college to further his studies and he states that he is the oldest in his family and his father is deceased. He is therefore responsible for the maintenance and support of the dependants.

Miss Nderi has pointed out that it is a pity that some of these cases are placed before a

Magistrate with limited jurisdiction and in this particular case the Magistrate could only sentence them to 7 years not more. In the manner they committed this robbery they ought to have been sentenced to more than the seven years because it is not a case of someone who feels the pang of hunger and then decide to break into a house to get food to feed them. This was a well-planned robbery and there is a very strong suspicion that they knew that the woman was a widow and that they could do as they please because there was no man there.

I therefore find in my judgment that there is no merit at all in regard to the conviction and there is also no merit at all that this court could be called upon to interfere with the sentence imposed by the Magistrate. In my judgement, I would therefore dismiss the appeal against conviction and sentence and uphold the conviction and sentence passed by the Magistrate.

J.M. MATSEBULA

JUDGE

I AGREE

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S.B. MAPHALALA

JUDGE