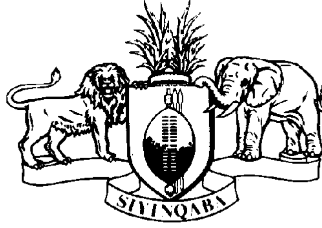

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IN THE HIGH COURT OF SWAZILAND

MAXWELL MBONGENI NDWANDWE
APPELLANT

V

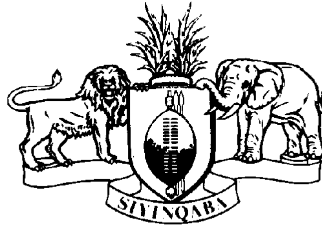
REX

CRI. APPEAL NO. 33/98

CORAM	**:**	**S.W. Sapire, CJ; Matsebula, J**
FOR THE APPELLANT	**:**	**In Person**
FOR THE RESPONDENT	**:**	**Ms Langwenya**

JUDGEMENT
(20/07/99)

The appellant was charged at the Magistrate Court at Mbabane in the District of Hhohho and it is alleged that on the 25th of May he committed a robbery at or near the Royal Swazi sun filling station and he stole a plastic container containing E1 168.45 in cash and he threatened Siphiwe Gugu Shabangu in order to obtain this money from her. He was armed with a bush knife and threatened to use it on her. The crown led the evidence of the complainant and another woman who was in the shop who corroborated each other and gave evidence to the effect of the allegations in the charge sheet. They were cross examined by the accused, as he then was, and the cross examination did not disturb the evidence they had given and he certainly did not put to them what he has argued in this court, namely that at the time of the offence he was not there because he was in jail. That is clearly an after-thought and did not even appear in the Notice of Appeal. Certainly it does not appear in the record. The offence was proved and there was no serious evidence on the part of the appellant



to again say what had been said. In our view the Magistrate was clearly correct in coming to the appellant committed the offence beyond any reasonable doubt. In fact there is no doubt at all and the appeal on the conviction must fail. The appellant also seeks a reduction in the sentence claiming that the sentence imposed was excessively harsh to such an extent that it induces a sense of shock When one looks at the Magistrate's reasons for imposing such a sentence one cannot find any misdirection by the Magistrate. He considered all the relevant facts, he considered the accused arm possession, he considered the not inconsiderable list of previous convictions which did not appear to have deterred the appellant from his behavior and he imposed **a** sentence which, having regard to the circumstances and having regard to the expectations of the public in regard to the criminals cannot be said to be shocking. The appeal court will not interfere with the sentence of the Magistrate unless there are misdirections or unless the sentence is so excessive as to, as it has been said, induce the sense of shock The appeal does not come up to this standard and there is no reason for interfering with the sentence. I therefore recommend that the appeal both on conviction and on sentence be dismissed. The appeal is accordingly dismissed.

SAPIRE, CJ

I agree
MATSEBULA, J

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.13_2000

In the matter between:

MAXWELL MBONGENI NDWANDWE
VS
REX

CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BECK JA**
FOR THE APPELLANT	**:**	
FOR THE RESPONDENT	**:**	

JUDGMENT

Steyn JA:

This appeal raises the question as to how an appeal to this Court from a decision of the High Court dismissing an appeal from a lower court in a criminal matter has to be dealt with.

Section 4(2) of the Court of Appeal Act 74/1954 provides as follows:-

> "(2) A person aggrieved by a judgment of the High Court given or made in its criminal appellate jurisdiction may appeal to the Court of Appeal –
>
> (a) On a ground of appeal which involves a question of law alone, or,
>
> (b) With the leave of the Court of Appeal or upon a certificate of the Judge who heard the appeal –
>
> (i) on a ground of appeal which involves a question of fact alone or a question of mixed law and fact, or
>
> (ii) on any ground (including the severity of sentence) which appears to the Court of Appeal or Judge, as the case may be, to be a sufficient ground of appeal."

It follows from these provisions that on a question of fact alone or a question of mixed law and fact, there are two channels through which an aggrieved person can obtain access to the Court of Appeal. He can either do so upon a certificate of the court which heard the appeal or he can apply to this Court for leave to appeal.

Without in any way derogating from an aggrieved person's right to approach this court for leave to appeal, but in order to ensure consistent and efficient practice, it is our view that a person who wishes to pursue an appeal in terms of Section 4(2)(b) should exercise his rights as follows:

1. He should first seek a certificate from the court which heard his appeal from the lower court. Should a certificate be granted; i.e. if the High Court is of the view that there are reasonable prospects of success on appeal, it will grant him leave to appeal to this Court.
2. In the event of the High Court refusing him leave to appeal, he may then petition this Court for leave to appeal.

In the present case the appellant did, in a letter dated 29th July 1999, apply to the High Court for leave to appeal to this Court. His letter in so far as it is relevant for present purposes reads as follows:

> "I the undersigned, Maxwell M. Ndwandwe do hereby make an application for leave to appeal my case further to the court of appeal.

I was tried, convicted and sentenced to seven (7) years' imprisonment for an alleged crime of robbery by a Magistrate court on 11th February, 1998. I then appealed to the High Court before which I appeared which respectively in July 1998, August 1998, 17th September 1998 and finally 20th July 1999.

The High Court dismissed my appeal. I am, however not satisfied with the judgment of the High Court and hence my plea to be granted yet another chance to present my case before the court of appeal for consideration."

Unfortunately, it does not appear that this application was ever forwarded to the Court that heard and dismissed his appeal. Consequently, consideration was never given to the question as to whether leave to appeal should be granted or not.

The Registrar set the appeal down before this Court even though there was no application for leave to appeal made to this Court, apparently construing appellant's letter of 29th July 1999 as such an application. In view of the fact that his application to the High Court had not received consideration, we decided to hear him on the question whether he should be granted leave or not.

The grounds of appeal set out in his letter are the following:

> "1 The High Court refused to accept the fact that I was in lawful custody for a certain matter on the date on which this particular case is said to have taken place. Even the prosecutor failed to disprove this fact.

2 The High Court did not want to believe me when I told it the truth that some of the things which I told the Magistrate, including the very fact that I was in lawful custody on the date on which the crime was alleged to have been committed, were not written down by the Magistrate and as an accused person, I could not have dictated to him what to write and what not to write.

3 The High Court rejected the fact that the court record is itself deficient in the sense that some of the things which I said in court do not appear on it. In the other hand, there were things in the court record which I never said.

4 The High Court did not take into consideration the fact there were no exhibits to substantiate the allegations levelled against me.

5 The High Court misdirected itself by considering the Swazi National Court convictions."

Appellant was convicted in the Magistrate's Court on a charge of a robbery committed at the Royal Swazi Sun petrol station. The appellant was known to the complainant. He visited her "almost every day." An independent witness was called who corroborated the complainant's evidence. This witness runs a taxi business from the hotel. He chased after the appellant, and when he and a security guard found him they attempted to block him. The appellant threatened them with a knife. The witness recognised appellant as a caddy at the Royal Swazi Sun.

In his cross-examination it would appear that the appellant admitted that he was in the shop on the day in question, but that he had not committed the robbery. The record reflects that he put the following to the complainants:
"I put it to you that I bade you farewell telling you that I was leaving…"

The appellant did not testify but made an unsworn statement. In it he said the following:

"On my arrival at the shop I bade PW2 farewell telling her that I was leaving…. I never committed the offence, the witnesses have talked about and

my sin was to go to the shop, stay for the time and then left them."

At no stage did he put it to the witnesses that he could not have committed the offence because he was in jail at the time. Neither did he say so in his unsworn statement. Moreover at the hearing of the appeal in the High Court, Crown counsel informed the court that she had investigated the matter by going to the Magistrate's court and

looking up the records. She ascertained that at the time the appellant committed the offence he was a fugitive from justice and had escaped from custody.

It is clear, as the High Court also found, that the allegation that appellant was in jail was an afterthought and was untrue.

None of the other grounds of appeal have substance. The sentence of seven years imprisonment is severe but fully justified in view of appellant's previous convictions.

For these reasons leave to appeal is refused and the appeal is struck from the roll.

The Registrar is instructed to process all future applications for leave to appeal in respect of a matter falling under Section 4(2)(b) of the Court of Appeal Act in

accordance with the directions set out in this judgment.

J.H. STEYN JA

I AGREE : J. BROWDE JA

I AGREE : C.E.L. BECK JA

Delivered on this day of December 2000.