



IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO.39/00

In the matter between:

**NICOLUS BHEKIFA KUNENE
VS
REX**

| | | |
|--------------------------|----------|--------------------|
| CORAM | : | MATSEBULA J |
| | : | MASUKU J |
| FOR THE APPELLANT | : | IN PERSON |
| FOR THE CROWN | : | |

JUDGMENT

Matsebula J:

The appellant and two others were charged on two counts of housebreaking with intent to steal and theft. Accused no.1 was convicted on both counts and accused no.2 was acquitted and discharged on both counts.

Accused no.3 was convicted on count two only. Accused no.1 was sentenced to an imprisonment of two years on each count without an option of a fine/.

Accused no.3 was sentenced to an imprisonment of one (1) year without an option of fine.

In respect of accused no.1 the sentences were ordered to run consecutively and

backdated to the 22nd September 1999 apparently being the date when he was first taken into custody.

Accused no.3's sentence was backdated to the 27th October 1999.

Accused no.1 to whom I shall henceforth continue to refer to as the appellant noted an appeal against the sentence only. The appeal seems to have been noted timeously, even though the Magistrate omitted to record that the appellant's rights to review and appeal were explained. Magistrates are enjoined to record such explanation if indeed the explanation was made.

The appellant has appealed against the sentence. The grounds for the appeal are stated in a form of a sentence as follows:

"I was convicted and sentenced in Malkerns Magistrate Court as a first offender where I now ask the court of appeal to change my sentence and make it run concurrently or give me a suspended sentence or grant me an option of a fine as I was sentenced to two years on each count.

Hope my request will reach the warmest heart of the court of appeal."

*In a most recent judgment delivered by Masuku J sitting with Matsebula J, who concurred with that judgment, the learned Judge quoting one of the pronouncement of the eminent the late Mahomed CJ in **S VS SHIKUNGA 2000(1) SA616 NMSC @631** the following:-*

"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. On appeal court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one or where the discretion has not been judiciously exercised.

*The circumstances in which a court of appeal will interfere with sentence imposed by the trial court are where the trial court has misdirected itself on the facts or the law (**S VS RABIE 1975(4) 855A**); where the sentence is imposed is one which is manifestly inappropriate and induces a sense of shock (**S VS SNYDERS 1982(2) SA694(A)**) is such that a patent disparity exists between the sentence that was imposed and that the Court of Appeal would have imposed (**S VS VABT 1975(3) SA214(A)**; **S VS VAN WYK 1992(1) SACR 147 NM @165 D-G**; **S VS DE JAGER AND ANOTHER 1965(2) SA616(A) @629 A-B**; **R VS ZULU AND OTHERS 1951(1) SA489(N) 497 C-D**; **S VS BOLUS AND ANOTHER 1966(4) SA575A @581 E-H**; **S VS PETKAR 1988(3) SA571(A) @574C** where there is an over emphasis of the*

accused's personal circumstances (S VS MASEKO 1982(1) SA99 @102; S VS COLLETT 1990 SACR 465(A)."

I have read the sentence and reasons by the learned Magistrate. He has dealt in details as a trial Magistrate what he considered as aggravating circumstances in respect of appellant's behaviour in the commission of the crime. The appellant was described as the ring leader in the offences, he was the master mind. The appellant sold the spoils and received money therefor and the purchasers suffered a loss in the process and they have not been compensated.

On count 2 the whole groceries were lost. The Court took into account that the stock on count two was totally disposed of by the appellant and the complainant suffered an irreparable loss.

In my view, the learned Magistrate properly applied his mind when considering the question of sentence. He treated accused no.2 slightly different from accused no.1 because accused no.2 was the youngest and was under the influence of appellant no.1.

On a question of fact, I can find no misdirection in the exercise of the Magistrate's discretion. This court sitting as a court of appeal will not interfere with the sentence imposed. In the result the appeal is dismissed and the Magistrate's finding upheld.

J.M. MATSEBULA

I concur. However I wish to add the following:

Cases of housebreaking and theft are on the increase in this nation. Many innocent people who have to for a long time to amass their goods lose them in a few minutes once thieves like you pounce. This has necessitated that property owners install burglar proofs, thus becoming prisoners in their own property. They no longer enjoy the freedom of their property. That some safety gadgets have been installed on the premises serves as no deterrent to you. Surely, in such circumstances, the Courts must mete stiff sentences to those adjudged guilty if the Courts must continue to enjoy the confidence of the public. This is what the Magistrate did in this matter. Other similarly inclined delinquents must get the message that the Courts will not leniently treat thieves like you. It is also worthy of note that the value of the properties stolen is around E22,000.00. The properties stolen were quite substantial and

took a lot of planning e.g. as to how to carry these away from the promises. This is not a case where one can say you were tempted but, with stealth, malice and great insensitivity, you deprived the complainants of their hard earned property.

T.S. MASUKU

JUDGE