



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal Appeal Case No: 04/2014

In the appeal between:

**SIBUSISO GCINA MCHUNU**

**APPELLANT**

**VS**

**REX**

**RESPONDENT**

Neutral citation: *Sibusiso Gcina Mchunu vs Rex (04/2014) [2014] SZSC06 (30 May 2014)*

**CORAM:**

**M.M. RAMODIBEDI, CJ  
M.C.B. MAPHALALA, JA  
DR. B.J. ODOKI, JA**

Heard  
Delivered

05 May 2014  
30 May 2014

**Summary**

Criminal Appeal – contravening the Arms and Ammunition Act 24/1964 as amended, Robbery, Indecent Assault and Housebreaking with Intent to Steal and Theft – court *a quo* confirmed the sentences imposed by the Magistrate’s Court on the basis that there was no misdirection or irregularity resulting in a failure of justice – principles governing appeals on sentence considered – held that the court *a quo* did not misdirect itself in dismissing the appeal on sentence – appeal accordingly dismissed.

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**JUDGMENT**

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**M.C.B. MAPHALALA, JA**

- [1] The appellant was charged and convicted by the Magistrate's Court on the 31<sup>st</sup> October 2011 on four counts of Robbery, one count of Housebreaking with intent to Steal and Theft, two counts of Indecent Assault, one count of contravening section 11 (1) as read with section 11 (8) (a) (i) of the Arms and Ammunition Act 24/1964 as amended as well as one count of contravening section 11 (2) as read with section 11 (8) (c) (ii) of the Arms and Ammunition Act 24/1964 as amended. His Worship the Learned Magistrate sentenced the appellant to a total effective period of twenty-seven years imprisonment after he had ordered certain sentences to run concurrently and another sentence was wholly suspended for three years on condition that he was not convicted of a similar offence during the period of suspension.
- [2] The appellant filed an appeal before the court *a quo* against sentence on the 11<sup>th</sup> November 2011; however, His Lordship Justice Stanley Maphalala PJ dismissed the appeal on the basis that there was no misdirection or irregularity resulting in a miscarriage of justice.
- [3] The facts of the case are common cause. The appellant attacked the complainants at night in their homesteads armed with a pistol and robbed them of their valuable property including laptops, Panasonic video cameras, cellphones, watches and money in cash. In one instance he attempted to

sexually assault a complainant but was dissuaded after she told him that she was suffering from HIV/Aids; then he advanced to the complainant's daughter and indecently assaulted her after failing to sexually assault her on the basis that she was young. In all the robberies committed, the appellant did not cover his face; hence, the complainants were able to identify him with ease during the identification parade held at Pigg's Peak Correctional Institution. Similarly, he lit the house when attacking his victims, which was another factor which made his identification to be easy.

[4] The police recovered the stolen items that were still in the possession of the appellant as well as those which he had sold to other people. The appellant further led the police to the second accused's apartment where the pistol and seven live rounds of ammunition were recovered; the second accused was acquitted of all charges. The complainants were able to identify all the exhibits in court during the trial. The Crown led eleven witnesses in court after the appellant had pleaded not guilty to all the counts charged.

[5] His Worship the Learned Magistrate, when convicting the appellant, correctly summarised the conduct of the appellant at page 80 of the Record of Proceedings as follows:

**“You have been convicted of a serious crime. You possessed a gun and robbed the complainants at gunpoint. You attacked them at night and in their houses. Surely this behaviour invites a harsh sentence. In passing**

**sentence the court has taken into account your personal circumstances, the prevalence of such cases, the seriousness of such crimes as well as the interest of society.”**

[6] In his application for leave to appeal against the judgment of the court *a quo*, the appellant contends that Justice Stanley Maphalala PJ should have upheld the appeal on the basis that the Magistrate did not order that the sentences should run concurrently. He further contends, as a basis of the appeal before this court, that the sentence imposed by the court is too harsh and induces a sense of shock.

[7] In the case of *Elvis Mandlenkhosi Dlamini v. Rex* Criminal Appeal No. 30/2011 at para 29, I dealt extensively with the legal principles regarding appeals on sentence:

**“29. It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A court of appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the court of appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this court over many years and it serves as the yardstick for the determination of appeals brought before this court.”**

See the following cases where this principle has been applied:

- *Musa Bhondi Nkambule v. Rex* Criminal Appeal No. 6/2009
- *Nkosinathi Bright Thomo v. Rex* Criminal Appeal No.12/2012
- *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007
- *Vusi Muzi Lukhele v. Rex* Criminal Appeal No. 23/2004

[8] The judge in the court *a quo* was correct that there are only two grounds to be established before an appeal court could interfere with a sentence imposed by a lower court: firstly, where there is a misdirection or irregularity resulting in a miscarriage of justice; secondly, where there is a striking disparity between the sentence passed by the court *a quo* and that which would have been passed by the appeal court. To that extent His Lordship Justice Stanley Maphalala PJ was correct in concluding as he did that the appellant had not established the legal grounds which would have called for his intervention.

[9] The Magistrate was alive to the principles guiding consecutive and concurrent sentences when he ordered the sentence in count 2 to run concurrently with the sentence in count 1; he further ordered that the sentence in count 6 should run concurrently with the sentence in count 5. The Magistrate further imposed a wholly suspended sentence in count 7 for a period of 3 years on condition that the appellant was not convicted of a similar offence during the period of suspension. His Worship ordered that the sentence of twenty-seven years imprisonment should commence on the date of arrest on the 30<sup>th</sup> December 2010. To that extent the Magistrate complied with section 300 (1) and (2) of the Criminal Procedure and Evidence Act 67/1938 which provides the following:

**“300. (1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.**

**(2) If such punishment consists of imprisonment the Court shall direct whether each sentence shall be served consecutively with the remaining sentence.”**

[10] In the case of *Nkosinaye Samuel Sacolo v. Rex* Criminal Appeal No. 37/2011 at para 8, I quoted with approval a decision of *Justice Moore JA* sitting in the Court of Appeal of Botswana in the case of *Mosiwa v. The State* (2006) 1 B.L.R. at page 219:

**“As a general principle, consecutive terms should not be imposed for offences which arise out of the same transaction or indictment, whether or not they arise out of precisely the same facts.... A court may, however, depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances upon which she or he seeks to justify the imposition of consecutive terms.**

**Where an offender is convicted of two or more counts of an indictment, the court should normally pass a separate sentence upon each of the individual counts in the indictment. The sentences passed may be ordered to run concurrently with one another, or consecutively or there may be a mixture of concurrent and consecutive sentences. The court has a duty to indicate clearly the sentence imposed in respect of each count of the indictment upon which a finding of guilt has been made.”**

[11] In sentencing the appellant to twenty-seven years imprisonment, the Learned Magistrate took into account the triad consisting of the crime, the offender and the interests of society as laid down in *S. v. Zinn* 1969 (2) SA 537 (A). He further took into account the prevalence of violent crimes of Robbery and Housebreaking using a firearm, the seriousness of such offences and the need to protect members of the public from violent crimes. The personal circumstances of the appellant were considered and in particular that he is a relatively young man who was thirty years old at the time of the commission of the offence in 2010, that he is the sole breadwinner in his family, that he is married with two minor children to support, and, that he is suffering from asthma.

[12] From a reading of the application for leave to appeal as well as the appellant's heads of argument, it is apparent that he was under the misconception that he was sentenced to an effective period of thirty years imprisonment. The court *a quo* also misdirected itself at page 82 of the Record of Proceedings when it stated that the period of imprisonment was thirty years when it was twenty-seven years.

**“Summary: (i) Applicant convicted and sentenced to a number of counts of robbery, house-breaking with intent to steal and theft and crimes in contravention of the Arms and Ammunition Act to a period totalling thirty (30) years imprisonment in the Pigg’s Peak Magistrate’s Court.”**

[13] His Lordship further misdirected himself at page 89 of the Record of Proceedings at para 15, when he confused the concurrent nature of the sentences imposed by the Magistrate by stating the following:

**“15. It is trite law in sentencing that the cumulative effect imposed on more than one count may be such that a combination of two sentences can be shocking. In the present case the learned Magistrate in the Court *a quo* was alive to this legal principle where he ordered sentences in counts 2 to run concurrently with count 1. Counts 3, 4, 5 and 6 to run concurrently with count 5. Count 7 to run concurrently with count 5. This in my view toned down the harshness of the sentence not to run one after the other but bundled together by the Magistrate *a quo*...”**

[14] It is true that the Learned Magistrate ordered that the sentence in count 1 should run concurrently with the sentence in count 2. However, it is not correct as His Lordship held that the sentences in counts 3, 4, 5, and 6 were ordered to run concurrently with the sentence in count 5 or that the sentence in count 7 was ordered to run concurrently with the sentence in count 5. The correct position is that the sentence in count 6 was ordered to run concurrently with the sentence in count 5, and the sentence in count 7 was wholly suspended for a period of 3 years on condition that he is not convicted of a similar offence during the period of suspension. Furthermore, His Lordship failed to mention two (2) more counts, namely, that in count 8 the appellant was sentenced to 5 years imprisonment. In count 9 he was sentenced to 3 years imprisonment.



Accordingly, the appellant was sentenced to an effective term of imprisonment of twenty-seven years imprisonment.

[15] However, I am in agreement with what His Lordship said at paragraph 16 of his judgment:

**“16. Appellant together with his co-accused went about in a rampage, terrorising ordinary people in the comfort of their homes taking their valuables at ungodly hours. Therefore, the sentences imposed by the court *a quo* cannot be faulted (sic) in the circumstances of this case.”**

[16] There is no merit in this appeal, and, it is accordingly dismissed. The sentence of twenty-seven years imprisonment is hereby confirmed commencing on the 30<sup>th</sup> December 2010.

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree

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M.M. RAMODIBEDI  
CHIEF JUSTICE \_\_\_\_\_

I agree

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DR. B.J. ODOKI  
JUSTICE OF APPEAL

For Appellant

For Crown

In person

Senior Crown Counsel  
Macebo Nxumalo

DELIVERED IN OPEN COURT ON 30 MAY 2014