Dlamini, Wonder Timothy

1st appellant

Magagula, Mveli Wilfred

2nd appellant

v

The King

Cr. Appeal No. 68/1996

Coram: **S.W. Sapire, ACJ**
B. Dunn, J

Judgment

17/10/96

The appellants in this case, Wonder Timothy Dlamini and Mveli Wilfred Magagula have appealed to this court from a conviction in the Subordinate Court for the Manzini Region held at Manzini. The 1st Appellant who is described as a young man of 20 years of the Magomini area and the 2nd Appellant is a man of 30 years of Malkerns.

They were charged with robbery. It is alleged that on or about the 20th of April, 1994 and at or near Malkerns Valley grocery the said accused each one or both of them did unlawfully assault Edward Simpson with a tomahawk on the forehead and

by intentionally using force and violence to induce submission by Edward Simpson to take and steal from his person or his presence out of his immediate care and protection, certain property to wit a sum of E3 000.00 in cash and a red Mazda Magnum with registration number SD 183 YH which is valued at E34 000 his property or in his lawful possession, and did rob him of the same.

Edward Simpson to whom I will refer to as the complainant gave evidence of how his property was taken from him. The persons entered his home where he was with his wife. He was tied up with his hands in front. The second person produced the rope while the first person tied him up. First person held him roughly and asked for the keys. He kept up his assault on the complainant . The complainant also said that the keys were handed over he lost consciousness and he recognised the `1st appellant who used to work with him at one time. He also identified some of the exhibits before court. The robbery was proved beyond doubt and there was sufficient other evidence of the finding of the stolen goods and the association of the two appellants to convince the Magistrate quite rightly that the two appellants were the persons who committed this robbery.

There is no point at this stage of reviewing the evidence which has been summarised fully by the Magistrate. We cannot find it possible to come to any conclusion other than that at which the Magistrate arrived. We would have dismissed the appeal as far as the conviction is concerned out of hand but there is a portion of the judgment which gave rise to some concern. In concluding his judgment the Magistrate said as follows:

> *" The crown also handed to this Court certain statements allegedly made by the accused e not relied on these statements when preparing my judgment, I would have relied on them had they been introduced into the evidence in a trial within a trial."*

What gives rise to our concern is whether it is possible for a Magistrate to wholly disabuse himself of knowledge of a inadmissible statement by the accused. There are cases and there may be many cases where the other evidence linking the accused person with the offence is not as strong as it is in this case. One cannot help speculating whether a Magistrate or other Judicial Officer in marginal cases in convicting the accused is not comforted by the knowledge that the accused has made a

confession.

As I say this is not such a case and the other evidence in the case is so strong that there can be no doubt of the appellants guilt.

However, we draw specifically to the attention of Magistrates and Prosecutors that where a statement by an accused person is to be tendered the correct procedure must be followed. One presumes that a Prosecutor or a state Counsel knows the contents of the statement he has in his possession and should know whether its admissibility is questionable. The Prosecutor should show to the defence the statement which it is proposed to introduce and if there is an objection, the admissibility should then and there be determined by the trial-within-trial procedure. The very fact that in this case the Magistrate said I would have relied on them had they been introduced into the evidence the trial within a trial means that he was conscious of the contents of the statement. And had the evidence against the appellant been less cogent than it is this court would probably have been constrained to set aside the conviction. This is the danger which the prosecution must protect against. As it is as in this case apart from his confessions there is more than ample evidence on which the Magistrate correctly convicted the accused.

As far as the sentence is concerned the accused were treated as first offenders. Every consideration in their favour was taken into account but those who contemplate arming themselves and so equipped proceed to rob others must know that they will face a severe sentence if caught and convicted.

There is no cross appeal against the sentence. Had there been such a cross appeal very serious consideration would have to be given to whether the sentence should not have been increased. The Magistrate did not misdirect himself in any way and it is legally not possible for us to interfere with the sentence he imposed.

I refer to the notice of appeal the appellant said that the Magistrate failed to attach sufficient way to the beneficial effect of imposing a suspended sentence I can see no beneficial effect of having armed robbers running around loose after having been convicted. It is also said in a notice of appeal that the sentence upon the appellant is severely harsh under the circumstances of the case and it leads to essential shock.

The only shocking thing is that the accused have not been jailed for a much longer period. The third ground of appeal is an appeal to mercy but mercy is hardly appropriate in a case where people break into a house and commit an armed robbery. For these reasons the appeal must fall both as the conviction and sentence.

Accordingly the appeal is dismissed.

S.W. Sapire
Acting Chief Justice

B. Dunn
Judge Of The High Court