IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 851 OF 2008
District Record No. MP 390 of 2008

In the matter between:

THE KING

VERSUS

SIBONISO DLAMINI PHINDA SIMELANE

Date of consideration: 29 January, 2009
Date of order: 9 February, 2009 Date of delivery: 2 July, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] On the 16th October, 2008, two young men herein called the 1st and 2nd Accused or the accused persons, aged 17 and 16 years respectively, appeared before the First Class

Magistrate's Court. They were charged with single count of the offence of house-breaking with intent to steal and theft. The Crown alleged that on 17 September, 2008, the said accused persons wrongfully, unlawfully and intentionally broke into the house of Malamlela Ndzimandze, situate in the Bethany area and there entered and stole various items valued at E2, 234.00.

[2] The 1st Accused pleaded not guilty, whereas the 2nd Accused pleaded guilty to the offence. The learned Magistrate, in his wisdom, decided to allow the prosecution to deal with both accused persons as if they had both pleaded not guilty. After evidence was led, both were found guilty and sentenced to 18 months' imprisonment, which was conditionally suspended for a period of three years.

[3] I interpolate to observe that the procedure that normally follows when more than one accused persons is arraigned and the accused persons proffer different pleas, is to apply for a separation of trials, as envisaged by section 170 of the Criminal Procedure and Evidence Act No.67 of 1938. In that circumstance, the one who pleads guilty is dealt with separately from his counter-part. It shocks my sense of justice

to compel an accused person who has timeously indicated that he intends to plead guilty to the offence charged, to run the entire gauntlet of a fully blown trial. He should be dealt with in terms of his plea and punished accordingly.

[4] In the instant matter, I am of the view that disregarding his plea of guilty had some prejudicial consequences at the time of the sentence and I will endeavour to demonstrate this when I turn to consider the judgment on sentence later in the course of this judgment.

[5] The evidence upon which the accused persons were convicted was supplied by three witnesses who adduced sworn evidence. PW1 was the complainant, Malamlela Sicelo Ndzimandze. The upshot of his evidence was that whilst at work on 17 September, 2008 he received a telephone call

from Bheki Vilakati advising that his house at Bethany had been broken into. He proceeded to his house and on arrival found the burglar door had been broken. He found certain items there missing and reported the incident to the Matsapa police. He was later called to identify his items at Matsapa police station. These he positively identified as belonging to him.

Nothing of consequence was asked by either accused in cross-examination. I should mention in this regard though that there were one or two questions asked by accused 2 which were possibly of an incriminating nature. Though that was apparent, the learned Magistrate did not caution the said accused person, unrepresented as he was, of the possibly calamitous consequences of asking potentially incriminating questions. Judicial Officers should be astute and warn accused persons, especially unrepresented ones, of the danger of posing questions which may have incriminating answers attaching to them. Happily, I am of the view that in the instant matter, Accused 2 was not prejudiced in the conduct of his defence and his subsequent conviction, subject of course to what I say later in the judgment.

[7] PW2 was Bongani Malinga who testified that on the day in question, he saw the two accused persons breaking into and entering PWl's house, the latter being his neighbour. When he heard the burglar bar being forced open, he called other neighours. Together with the other neighbours, they found the Accused persons in *flagrante delicto* as it were, inside PWl's house and had packaged some items inside the house in readiness for spiriting them away.

[8] It appears that the Accused persons were subsequently assaulted and severely so by PWl's neighbours. The police were called to the scene and the Accused persons were handed over to the police together with items collected from PWl's house. It emerged from the cross-examination of PW2, however, that upon being caught in *flagrante delicto* by PW2 and his companions, the accused persons fled from PWl's house through a window. PW2 and company gave chase and apprehended the Accused persons and it is at that stage that they assaulted the Accused persons, including submerging Accused 2 under water in a pond where he was apprehended. The fact of the assault, as I say, is common cause and was admitted by PW2 and PW3 the investigating officer.

[9] PW3 was 5529 Constable Z. Dlamini a duly attested member of the Royal Swaziland Police. His evidence largely dovetailed with PW1 and PW2's. In particular, it was his evidence that he found the accused persons already apprehended by PW2 and company. The exhibits were also in the hands of PW2 and his neighbours. PW3 collected both Accused persons and the exhibits, took them to Matsapha police station where he preferred the charge in question against the Accused persons.

[10] It was on the basis of the foregoing evidence that the certitude of guilt was returned by the learned Magistrate. I have, for the moment, one criticism regarding the judgment. After narrating the evidence and having reached a crescendo

> in which he had to state the reasons why he found the accused persons guilty and possibly why their evidence was rejected, the learned Magistrate merely said;-
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> > "*From the evidence brought before Court it is not in dispute that the crime charged was committed by both accused. The Court will not waste any of its time but return a verdict of guilty against both accused as all the elements of the crime charged has (sic) been proven beyond reasonable doubt.*"

[11] I will deal with correctness of the latter statement shortly. What I do need to say at this juncture though is that it is not a waste of the Court's time to explain the reasons why it finds an accused person, particularly one who pleaded not guilty, guilty of an offence. The Accused, the appellate Court, the complainant and the society at large need to know the reasons

behind a conviction or an acquittal. All these parties must be informed of what was operating in the mind of the

Court in returning the verdict it did; why certain pieces of evidence were accepted or rejected, as the case may be and why, in the context of a conviction in the face of a plea of not guilty, the Court rejected the accused person's version.

[12] In his work entitled "Why Write Judgments" Sir Kitto said the following:-

> "*Publicity in the soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying, on trial.*"

It is therefore important for judgments, particularly those which impinge on the liberty of the subject to be reasoned. The reasoning need not be lengthy in every case but any reader must be left in no doubt as to why the court returned the verdict it did. It is therefore not a waste of the Court's time for it to do so but a duty thrust upon the Court, remembering as we must that Courts" must be and be seen to

be accountable. Part of that accountability is translated in rendering reasoned judgments which will state the reason(s)

why the Court arrived at the judgment it did. Justice it must be remembered is not a cloistered virtue. It must be open and available for all to see and hopefully, appreciate.

[13] That said, I now proceed to the thorny issue whether, as the learned Magistrate held, "*all the elements of the crime charged had (sic) been proven beyond reasonable doubt.*" It must be recalled that for the charge of house-breaking with intent to steal and theft to hold, the prosecution must prove indubitably that the house was broken into and that in so breaking, the miscreants harboured the intention to steal. That is not all. It must be proved beyond reasonable doubt that the separate crime of theft with all its constituent ingredients was committed in its fullness.

[14] It is trite learning that the constituent elements for the offence in question, excluding the theft aspect, are the following in (a) breaking; (b) entering; (c) premises: (d) unlawfully and (e) intent. See P.M.A. Hunt, South African Criminal Law and Procedure, Volume II, 2nd Ed, 1982 at page 707. Regarding the last element the learned author says at page 715:-

"*Mere unlawful breaking and entering does not constitute the crime of housebreaking. There must be an intention thereby to commit an offence, common law or statutory. This offence is usually theft, but it may be rape, or assault; or malicious injury to property or trespass or any other offence, even by statute, ^an offence' to the prosecutor unknown.*"

It is in evidence that the Accused persons did not actually remove the goods produced in Court as exhibits from PWl's house. From PW2's evidence, it emerged that the arrival of PW2 and his fellow neighbours effectively, hamstrung the accused persons' intention to remove the same totally from the premises. The question is whether the Magistrate was correct in finding that the offence of theft was choate in the light of the non-removal of the items from PWl's house or can one argue that this is a case of attempted theft?

[16] The learned author Hunt *(op cit)* submits, by reference to decided cases, that according to Roman-Dutch Law and South African Law, the element of removal of the items, it not necessary. See page 605 - 606. In particular the learned author refers to the case of **R VS MLOOI 1925 AD 131** at **152.** By the same token, a mere touching of the item is not

enough, unless it amounts to an assumption of control - **R VS BRAND 1960 (3) SA 637 (A.D).**

[17] It would appear, in the instant case that the crime of theft was committed as the accused had already packaged the goods and had thereby exercised some control over them; more than merely touching them. Although the Magistrate did not consider these vexing issues, it would appear to me that his conclusion was wholesome and must be confirmed as having been correct.

[18] On the question of the sentence, the procedure of submitting both accused persons to a trial hit Accused 1 hardest. I say so for the reason that Courts will normally take into account the fact that a person pleaded guilty and such a fact normally enures to that accused person's benefit at the stage of sentencing. The plea of guilty is normally rewarded as it is in many cases (but not always so) considered as an *indicium* of remorse.

[19] The approach of dealing with an accused person who pleads guilty on the same terms as one who pleads not guilty may serve as a disincentive for persons to plead guilty, which it is

common cause redeems the Court's time and saves witnesses from treading the harrowing experiences of narrating their trauma, reliving as it were, some very painful experiences. Unless there are compelling circumstances to be disclosed by the Court, I am of the opinion that a plea of guilty must be correctly rewarded.

[20] I would, in view of the foregoing, remit the matter as it relates to Accused 1 to the trial Magistrate, for him to consider the issue of sentence afresh.

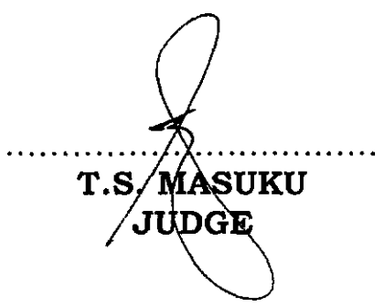
[21] I should also make the observation that trial Magistrates should always record, the dates on which they deal with cases whatever the nature of the hearing. If at all possible, this should be at the beginning and end of each day during which the matter serves before Court. This would give a sense of accountability regarding the pace at which cases are dealt with. In the instant case, I can only assume that the trial, conviction, mitigation and sentence all took place on 16 October, 2008 as there is no date at the end of the process.

[22] After preparing judgment, I made attempts to have the Directorate of Public Prosecutions make submissions regarding

whether the offence charged was choate. I have waited for those submissions to no avail. I have, in the circumstances, decided not to delay delivery of this judgment any longer.

I therefore remit this matter back to the trial Magistrate to consider the sentence of Accused 1 afresh, taking into account the observations made in this judgment

DELIVERED IN MBABANE ON THIS THE 2nd JULY, 2009.



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T.S. MASUKU
JUDGE