IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE | CRIMINAL APPEAL NO.12/2008
DISTRICT CASE NO. MANZINI 389/2008

In the appeal of:

MDUDUZI DLAMINI

V

REX

CORAM | ANNANDALE J AND
MONAGENG J

FOR THE ACCUSED | MR MAGONGO
FOR THE CROWN | MS LUKHELE

JUDGMENT 11th MARCH 2009

Annandale J

[1] The appellant appeared in the Magistrate's Court of Manzini, charged with the crime of Robbery. He was appraised of his rights to legal representation and chose to conduct his own defence. He pleaded guilty and the crown adduced evidence *aliunde* to prove the commission of the offence. In the process of doing so, the guilt of the accused was also established.

[2] The learned magistrate handed down a written judgment in which the evidence was considered and he then entered a conviction. Thereafter, a custodial sentence of four years imprisonment was imposed.

[3] In his Notice of Appeal, the appellant's attorney attacked the conviction on the averred basis that guilt had not been proven beyond reasonable doubt, that the court further erred in convicting the accused as there was *no evidence at all* (emphasis added) against him, and finally that the appellant's version should not have been rejected as it could reasonably be true.

[4] After having instructed a different attorney, the grounds of appeal against conviction were seemingly changed, as the heads of argument attack the conviction on totally different grounds, presumably as the initial grounds of appeal held no water.

[5] Mr. Magongo was intent to argue that a failure of justice resulted in an erroneous conviction as firstly, the accused was not appraised of his *"rights"* to cross-examine. That this is not so, is clear from the record.

[6] The court a *quo* kept a manuscript record of proceedings. For obvious practical reasons, a *verbatim* recording of the explanation of the aim and purpose of cross-examination is not written into the record.

Instead, the trial magistrate recorded that *"rights to cross-examination explained to the accused who states that he understands his rights."*

[7] Good practice in the lower courts where records are manually kept by the presiding magistrate usually incorporates a *pro forma* form which details the precise explanation in this regard. The present record does not contain such form, and one cannot glean from the record exactly what was indeed explained. However, it cannot be said that the accused was left in the dark as to his inherent right to cross-examine witnesses, nor as to what it entails, in the absence of further elucidation of this aspect.

[8] The decision in S *v Maseko 1993 (2) SACR 579 (A)* lends authority for a comprehensive explanation to be given to an undefended accused regarding the aim and purpose of cross -examination, the consequences pertaining to unchallenged evidence, and so forth. In practice, it is especially important to again bring the latter aspect, that of unchallenged evidence, to the attention of the unrepresented accused, when he indicates that he has no more questions or statements of contradictory facts to a witness, while incriminating evidence was left unchallenged. This secondary explanation must, by necessity, be recorded.

[9] Presently, in the absence of anything more than a mere bold allegation, this phase of the attack on the conviction, as contained in the

appellant's heads of argument, does not warrant a finding of procedural or substantial unfairness in the trial.

[10] A further unsubstantiated attack on the proceedings in the court below is focused on the alleged failure of the accused to follow the proceedings against him. It is alleged that from the record, *"there is no indication that the interpreter interpreted the testimony given in chief and during cross-examination. It is not clear in what language the proceedings were conducted."*

[11] Again, this statement of fact is not substantiated. The record clearly reflects that one Mrs. Hlophe acted as interpreter during the proceedings. The record is kept in English, the official language of record in our criminal justice courts.

[12] None of the records commonly filed in appeals include a recording of what language a witness used, or the fact that it was translated or interpreted into any other specific language.

[13] In addition, from the questions asked by the accused under cross-examination, it is clear that he indeed must have understood what was testified, in order to formulate his questions. Equally, his own evidence in chief bears this out.

[14] The second attack on procedure also stands to fail, over and above that it is not a point raised in his Notice of Appeal but mere

embellishment by Mr. Magongo, his second attorney, in his heads of argument.

[15] Mr. Magongo further attempted to attack the conviction, as was also done in the Notice of Appeal, on the basis that the offence was not proven by the evidence.

[16] The complainant testified that the accused produced a knife in the course of the robbery and threatened to stab her to death if she did not let him have her money and her cellphone. In cross examination, she disavowed a suggestion that his accomplices produced the knife. She said *"You produced the knife."* He did not challenge or dispute her direct, straight to the point answer. It was only in his own evidence that he made such denial, yet under cross-examination, he said that he *"used force" to* take the items.

[17] In cross-examination, as referred to above, he suggested to the complainant that one of his friends produced the knife. His own evidence has it that he was not alone at the time and that his friend may have taken the complainant's bag and money, "as / *was not alone."* In cross-examination, he said that he was alone at the time.

[18] Obviously, his credibility was not assessed by the trial court to be of such high caliber that his bare denial of using a knife during the incident could reasonably possibly be accepted as the truth. The

court *a quo* rightly rejected such notion as was held out on appeal to be sufficient to vitiate the conviction.

[19] It is my considered opinion that none of the various grounds of appeal against conviction, from whichever source, has any meritorious power of persuasion and the conviction should accordingly stand. Furthermore, in the course of the hearing of the appeal before us, Mr. Magongo wisely decided to abandon the appeal against the conviction of robbery.

[20] The focus of the appeal argued before us centered on the custodial sentence of four years imprisonment.

[21] Initially, according to the Notice of Appeal, it was stated that:

> *"The Court a quo erred in sentencing the appellant to a prison term, in that it failed to apply its mind properly to the surrendering (sic) circumstances of the case sufficiently to realize that a suspended sentence or time would be in order. The Court a quo erred in failing to take into account appellant's and the other circumstances of the case in sentencing the appellant".*

Before us, Mr. Magongo argued that a sentence of four years for property valued less than E1 000.00 is very harsh and that it was as

if the Court adopted a vengeful attitude, hence committing an irregularity.

[22] For this contention, the appellant relies on S v Harrington 1989 (2) *SA 348 (ZSC) at 362,* where Dumbutshena *CJ observed:*

> *"It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient. In arriving at a just and fair sentence, the Court should never assume a vengeful attitude. Frances Bacon said in his essay "On Revenge": 'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought the law to weed it out'".*

[23] While the sermon on revenge is quite true and an integral part of penal justice, it cannot loosely be applied to the left, right and centre when sentencing issues come to the fore. One would firstly have to substantiate the premise that the current sentence indeed smacks of vengeance before it is attacked on that basis.

[24] It requires to be considered that the complainant *in casu* is of the weaker sex, a female of unknown age. The appellant acted in

concert with fellow criminals to forcibly steal her property that she carried on her person.

[25] In the process, the appellant used a knife to induce her into submission. She was threatened with death if she did not let go of her property, adding insult to injury. Fortunately for the appellant, as it was not a part of the indictment against him, the evidence was that the complainant was subjected to further humiliation and fear when, after the dispossession of her property, she feared of being raped as well. She testified that the robbers, including the accused, dragged her and that the accused then started to remove her trousers. By deception, she managed to let his greed for money supercede his lust, after she told him that his accomplices were moving off with the money. He then let go of her and took off.

[26] She was not examined on the extent of her ordeal insofar as the psychological consequences go. She suffered no physical injury. She lost property. Nevertheless, it would be naTve to think away the after effects that the robbery had on the innocent victim.

[27] The appellant is a young man of 22 years, in the prime of his life. He is single and has no children. He used to earn a living by selling chickens but it remains unknown how much he earned and for how long he has done it.

[28] In his reasons for sentence, the learned trial magistrate articulated his reasons for imposing the sentence. He considered that the accused before him had no record of previous convictions and that he pleaded guilty. He also noted that as a young man, he had prospects of reform and to become a law abiding citizen. In the course of considering the triad of sentencing factors, he, by necessity, took into account that robbery is indeed a serious crime, which is prevalent in the city of Manzini and its surrounds, especially so with groups of young men accosting people in order to rob them of money and cell phones. The crime was committed in concert with others, an intimidating gang. The life of the complainant was endangered through the use of a lethal weapon, a knife.

[29] The trial court sought and managed to achieve a balanced sentence which also took into account the interests of the community and the accused himself. There is no ground to say that the attempted removal of the complainant's trousers was unduly elevated to an aggravating factor. Especially so, there is no justification for holding that the imposed sentence smacks of a vengeful attitude, as was argued before us.

[30] It has been repeatedly stated in this jurisdiction, on par with sentencing principles and judgments on appeal in comparable jurisdictions, that the imposition of appropriate sentences lies primarily within the discretion of the trial court. A court of appeal is

generally loathe to interfere with that discretion unless there is a misdirection resulting in a miscarriage of justice. As one of many such authorities the recent decision of the Supreme Court in (unreported) *Criminal Appeal Case No. 14/2008- Vusi Madzalule Masilela v Rex* - yet again restates this principle. The *triad* of sentencing factors referred to above have been clearly elucidated in S *v Zinn 1969 (2) SA 537 (A)* at *540,* and accepted as the overriding median factors in numerous subsequent decisions, such as *Sam Du Pont,* (unreported) *Criminal Appeal Case No. 4/2008, S v Rabie 1975 (4) SA 855 (A) and Lucky Sicelo Ndlangamandla and two others,* (unreported) *Criminal Appeal Case No. 8/2008,* to mention a few.

[31] The refrain remains the same - if the trial Court properly applied its mind and made no misdirection, and if the Court hearing the appeal itself would not have imposed a sentence which is startlingly disproportionate with the imposed sentence, and no other irregularity has been committed or convincingly argued to have been inappropriate, a Court of Appeal would be most reluctant to interfere with the discretion exercised by the court below.

[32] The initial Notice of Appeal, instead of endeavoring to simply state that the Court below committed an alleged irregularity by adopting a fancied *"vengeful attitude",* attacked the sentence on equally unascertainable grounds.

[33] It was there stated that the *"court erred by failing to realise that a suspended sentence or time (sic) would be in order".* Had the Court below shared the same misconceived approach, it indeed would have been irregular and rendered the sentence due for revision on review or appeal. Our Criminal Code expressly forbids suspension of sentences in respect of a *numerus clausus* of stated crimes, inclusive of robbery. *Section 313(2) of the Criminal Procedure and Evidence Act of 1938 (Act 67 of 1938) reads that-*

> *"If a person is convicted before the High Court or any magistrate's court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or part of such sentence be suspended for a period.*

[34] The Third Schedule lists offences in connection whereof the offender *cannot* be dealt with under section 313. Robbery or any conspiracy, incitement or attempt to commit robbery is one of the three scheduled offences.

[35] The contention on behalf of the appellant that the court a *quo* should have exercised its discretion by ordering a suspension, either partially or fully, is thus clearly misplaced and improper as it offends against the unambiguous provisions of the Criminal Code.

[36]

Havin d to the abovestated factors, this court holds that the sentence is not

g hadof such disproportionate duration that any interference on appeal is

regar justified. No misdirection or

irregularity has been committed. Any argument, that an affordable fine should have been imposed would have equally been out of place.

[37] In the event, it is ordered that the appeal against both the conviction and sentence be dismissed. The conviction and sentence recorded by the Magistrates' Court of Manzini is confirmed.

JACOBUS P ANNANDALE
JUDGE OF THE HIGH COURT

I agree

S. MONAGENG

JUDGE OF THE HIGH COURT