IN THE HIGH COURT OF SWAZILAND

Criminal Case No: 14/2012

In the matter between:

THABO DLAMINI	**APPLICANT**
AND	
SITEKI SENIOR MAGISTRATE DONALD MAVUSO NO	**FIRST RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND RESPONDENT**
THE ATTORNEY GENERAL	**THIRD RESPONDENT**

Neutral citation: *Thabo Dlamini v Siteki Senior Magistrate & 2 Others (14/2012) [2013] SZHC36 (2013)*

Coram: **M.C.B. MAPHALALA, J**

For Applicant Attorney Osborne Nzima
For Respondent Senior Crown Counsel Q. Zwane

Summary

Criminal Law and Procedure – an application to review, correct and/or set aside the sentence imposed by the court *a quo* on the basis of gross irregularity, illegality or misdirection resulting in a failure of justice – Court found that there was no legal basis for interfering with the decision of the court *a quo* – application dismissed.

JUDGMENT
6TH MARCH 2013

[1] The applicant was charged and subsequently convicted of Robbery by the court *a quo;* he was sentenced to seven years imprisonment without the option of a fine on the 4th January 2011. The sentence was backdated to the 25th May 2009 being his first day of appearance in court.

[2] According to the charge sheet, the applicant and one Sifiso Shongwe were charged with Robbery and, the Crown alleged that on the 23rd May 2009 and at Siphofaneni Crucifix, either one or both of them acting jointly and in the furtherance of a common purpose unlawfully and wrongfully assaulted Thembi Mdluli by intentionally using force and violence with a slasher in order to induce submission to the stealing and taking from her of money in cash amounting to E11 607.00 (eleven thousand six hundred and seven emalangeni). The applicant was consequently convicted of the offence.

[3] On the 15th February 2012 the applicant lodged an application for "reviewing, correcting and/or setting aside the sentence imposed by the first respondent. However, it is strange that in his Founding Affidavit, the applicant shifts his focus from reviewing, correcting and/or setting aside the sentence imposed to challenging his conviction.

[4] The applicant argued that the crown's evidence did not warrant conviction; and, that the Crown had failed to prove the commission of the offence beyond reasonable doubt. He argued that the Crown's evidence was contradictory and insufficient and did not meet the standard required in criminal proceedings to warrant a conviction.

[5] He also argued that the procedure used in making Ntokozo Sihlongonyane and Sifiso Shongwe accomplice witnesses was flawed; however, no basis was advanced in this regard to substantiate this allegation.

[6] Similarly, he argued that the sentence imposed by the learned Magistrate of seven years without an option of a fine induces a sense a shock. Incidentally, in his Founding Affidavit, he seeks to be released on bail even though no such prayer is sought in the Notice of Motion.

[7] With regard to the review proceedings before this court, section 4 of the High Court Act No. 20 of 1954 provides the following:

> **"4. (1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same.**

(2) Such power, jurisdiction and authority may be exercised in open court or in chambers in the discretion of the judge."

[8] Rule 53 of the High Court sets out the procedure to be followed in the review of all proceedings of inferior courts. The applicant should file a Notice of Motion setting out the decision or proceedings sought to be reviewed, and shall be supported by an affidavit setting out the grounds, the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.

[9] The procedure for review provides a wholesome curb upon any possibly misdirected, arbitrary or despotic exercise of the functions of the lower courts; it seeks to correct irregularities or illegalities which may have occurred during the proceedings resulting in a failure of justice, and whether the proceedings were conducted honestly, properly and in accordance with justice. It does not concern itself with the correctness of the decision under review; and, it will not interfere with the discretion of the lower Court in the absence of an irregularity or illegality in the proceedings which show that there has been a failure of justice and not just a mere possibility of prejudice:

See the following authorities:

- *South African Criminal Law and Procedure Vol. V, Alfred Lansdown et al, Juta and Co*. Ltd, 1982 at pages 677-679
- *S v Lubisi* 1980 (1) SA 187 (T) at
- *Wahlhaus and Others v. Additional Magistrate, Johannesburg and Other* 1959 3) SA 113 (A)

[10] The review powers of a Superior Court are not confined to cases which have been finalised but extend even to pending cases. There exists an inherent power in a Superior Court to correct the proceedings of an inferior court at any stage if it appears to be in the interests of justice; in a proper case, the Superior Court may grant relief by way of review, interdict or mandamus against the decision of an inferior court given before conviction. However, the authorities are in agreement that this power should be exercised where grave injustice would result. See the cases of *Wahlhaus and others v. Additional Magistrate, Johannesburg and Another* (supra) at 119-120.

[11] Gross irregularity in the proceedings is one of the recognised grounds of judicial review of decisions of inferior courts. See the South African Criminal Law and Procedure vol. V (supra) at p. 695, *Chetty and Another v. Cronje NO and Another* 1979 (1) SA OPD 294 at 297 – 298 (Full bench).

[12] The applicant argued that the substitution of the accomplice witness Ntokozo Sihlongonyane with the first accused Sifiso Shongwe constituted an irregularity. It is common cause that Ntokozo Sihlongonyane was not in attendance in court during the first day of trial, and, the prosecutor attempted to substitute him with Sifiso Shongwe; the presiding Magistrate was not amused, and, he acquitted the first accused. The accomplice witness, Sifiso Shongwe, was subsequently produced in court and he testified accordingly.

[13] It is within the discretion of the prosecution to decide or choose an accomplice witness. Section 234 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

> **"234. (1) If any person who ..... to the knowledge of the public prosecutor has been an accomplice, either as principal or accessory, in the commission of any offence alleged in any indictment or summons, or the subject of a preparatory examination, is produced as a witness by and on behalf of such public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all lawful questions put to him while under examination, he shall thereby be absolutely freed and discharged from liability to prosecution for such offence, either at the public instance or at the instance of any private party; or, when he had been produced as a witness by and on behalf of any private prosecutor who is aware of**

such person's complicity, from all prosecution for such offence at the instance of any such private prosecutor."

[14] The prosecution was at liberty to choose either Ntokozo Sihlongonyane or Sifiso Shongwe to be an accomplice witness; and, in the event that Ntokozo Sihlongonyane was not in attendance during the trial, the prosecution was at liberty to substitute him with Sifiso shongwe.

[15] It is a trite principle of our law that mere proof of an irregularity or illegality will not necessarily entitle the applicant for review to succeed; the further overriding requirement is that a failure of justice must have resulted from the alleged irregularity or illegality. See the case of *S v. Bernardus* 1965 (3) SA 287 (AD) at 299.

[16] Similarly, a superior court has a duty in review proceedings in ensuring that justice is done to both the accused as well as the state; the Court has to ascertain that the proceedings are in accordance with real and substantial justice. For this purpose, it may be necessary to alter a conviction to one of a more serious nature or remit the matter to the court *a quo* to impose a competent sentence which may be more serious than that under review. See the cases of *S v. Tuge* 1966 (4) SA 565 (AD) at 568; *S. v. Jusuf* 1968 (2) SA 52 (AD) at 57 A-F; *S. v. Zulu* 1967 (4) SA 499 (T) at 501.

[17] *Holmes JA* in *S. v. Tuge* (supra) at 568 stated the following:

> **"Once it is held that there was an irregularity or defect in the record of the proceedings, the next inquiry, enjoined by statute, is whether 'it appears to the court of appeal that there was a resultant failure of justice warranting interference with the conviction or sentence .... In *S. v. Bernardus,* 1965 (3) SA 287, this court held that what a court of appeal really has to do is to decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt.' "**

[18] *Holmes JA* in *S. v. Yusuf* 1968 (2) SA 52 AD at 57 stated the following:

> "... **in *S. v. Tuge*, 1966 (4) SA 565 AD, this court moved from the former test of inevitable conviction by a notional reasonable trial court in deciding whether the irregularity had resulted in a failure of justice. Instead, it applied its own view that, on the remaining evidence unaffected by the irregularity, there was proof of guilt beyond reasonable doubt. The advantage of this approach lies in its directness of thinking, as well as in its application of a traditional legal concept, namely, proof of guilt beyond reasonable doubt. And where the irregularity is such as to preclude a valid assessment of the available evidence, e.g. where cross-examination has been wrongly disallowed the Court of Appeal can hold directly that there was a failure of justice, and need not come to this conclusion via the supposed inevitable thinking of a notional reasonable trial court."**

[19] The trial court has an advantage over a superior court of seeing and hearing the witnesses and by reason of being steeped in the atmosphere of trial, a Superior Court will not generally question the decision of the court *a quo* on the facts.

- See the case of *S. v. Madlala* 1969 (2) SA 637 AD at 640

[20] I will now deal with the allegation by the applicant that the court *a quo* committed an irregularity by convicting him in the absence of proof of evidence beyond reasonable doubt. He argued that the complainant could not remember the clothes worn by her assailant; and, that she could not say whether her assailant was in the court-room notwithstanding that she had earlier testified that it was not dark when the offence was committed and that her assailant was not covering his face.

[21] The complainant conceded in her evidence in-chief that she did not see her attacker's face since he was wearing a woollen hat and a jacket. She further told the court that there was E11 670.00 (eleven thousand six hundred and seventy emalangeni) in her bag when it was taken which was in both South African and Swaziland currency; that the applicant handed E3 800.00 (three thousand eight hundred emalangeni) to the police in her presence; and, that during trial the money recovered was a total of E5 730.05 (five thousand seven hundred and thirty emalangeni five cent). Another important aspect

of her evidence was that after the first accused was arrested, he phoned the second accused in the presence of the police and herself to come to the scene; and, he did come and was thereafter arrested. The applicant then produced money from his pocket in the sum of E3 830.00 (three thousand eight hundred and thirty emalangeni) and handed it to the police. She maintained her evidence under cross-examination.

[22] It is important to note that the applicant did not dispute the evidence of the complainant that he surrendered voluntarily E5 730.05 (five thousand seven hundred and thirty emalangeni five cent) to the police at the scene upon his arrest or that the money formed part of the money taken from the complainant. Similarly, he did not dispute the complainant's evidence that the first accused after being arrested telephoned him to come to the scene where he was similarly arrested.

[23] The evidence of PW2 Gideon Mndzebele about the pointing out by the applicant of money hidden in his house is crucial in determining the present review proceedings. During cross-examination the applicant alleged that he was tortured by the police to admit to the robbery; and, that the pointing out was done as a result of the torture. However, there was no trial within a trial in which the pointing out was challenged.

[24] The accomplice witness PW3 Ntokozo Andrew Sihlongonyane analysed in detail the role he played in the commission of the offence. He further told the court how the applicant became part of the plot to commit the offence; and that he actually convinced the applicant to take part in the commission of the crime. He explained how the applicant was tasked to commit the offence using a slasher as his weapon. He further explained the role played by Sifiso Shongwe and how the applicant was arrested when the police ordered Sifiso Shongwe to call him to come to the scene and bring him money.

[25] PW3 further identified the slasher used in the commission of the offence as well as the clothes worn by the applicant during the day in question. He maintained his evidence under cross-examination. He disclosed that Sifiso Shongwe had promised him E1 500.00 (one thousand five hundred emalangeni) in getting the applicant to commit the offence, but he could not get the money since the applicant and Sifiso Shongwe were subsequently arrested.

[26] PW3 satisfied the requirements of section 234 of the Criminal Procedure and Evidence Act by answering to the satisfaction of the court all lawful questions put to him; hence, he was freed and discharged from liability to prosecution for such offence. He was not evasive or defensive but

disclosed fully his role in the commission of the offence. I have no reason to doubt the veracity of his evidence.

[27] It is apparent from the evidence of the complainant that violence and threats of violence were used to induce submission to the taking of the complainant's bag; and, that the slasher was used as a weapon in the commission of the offence. The bag was subsequently found by PW4 and a relative of the complainant in a nearby mountain together with the other contents of the bag; the money in the amount of E11 607.00 (eleven thousand six hundred and seven emalangeni) was missing.

[28] PW5 Detective Sergeant Bheka Mabuza corroborated the evidence of the accomplice witness as to how they were arrested with Sifiso Shongwe; he further explained how the applicant was tricked to come to Sifiso Shongwe's house where he was arrested. The applicant was duly cautioned in terms of the Judges' Rules as did the others who were arrested.

[29] Notwithstanding a second caution against self-incrimination, the applicant produced and handed to the police money hidden in his underwear and on the right side of the trouser pocket amounting to E3 800.00 (three thousand eight hundred emalangeni); an amount of E150.00 (one hundred and fifty

emalangeni) recovered from a taxi driver hired to transport the applicant from Manzini to Siphofaneni.

[30] The applicant further led the police to Lugegedze mountain, a small mountain behind the scene of crime; this is where the bag and the other contents thereof were found by PW4. They did not find any items on the mountain since PW4 and the other boy related to the complainant had found the said items.

[31] PW5 further corroborated the evidence of PW2 Gideon Mndzebele with regard to the pointing out by the applicant of money in the sum of E1 800.00 (one thousand eight hundred emalangeni) hidden in the roof of a house in the applicant's homestead; in addition, the applicant led the police to another house within the homestead where certain clothes were found which were worn by the applicant during the commission of the offence. The clothes further matched the description made by the complainant to PW5. During the pointing out both PW2 and Mduduzi Njabulo Ngwenya, a local community police, were present. During the Pointing of both police and Mduduzi Njabulo Ngwenya were present.

[32] Exhibits handed as evidence included the slasher used to induce submission by the complainant of her bag, E3 800.00 (three thousand eight hundred

emalangeni) retrieved from the applicant's underwear, E30.05 (thirty emalangeni five cent) produced by the applicant from his right trouser pocket, money taken from the taxi driver amounting to E150.00 (one hundred and fifty emalangeni), money retrieved from the rafters of a house in the applicant's homestead amounting to E1 800.00 (one thousand eight hundred emalangeni), the maroon bag and its contents as well as the clothes worn by the applicant during the commission of the offence.

[33] Under cross-examination, the applicant conceded that he didn't dispute the evidence of Ntokozo Sihlongonyane that they had agreed with the applicant to commit the offence when they were at a bar; thereafter, he gave the applicant a cellphone number of Sifiso Shongwe so that they could discuss the matter. The three men eventually met at Crucifix Undertakers where they concluded the plot to commit the robbery. The applicant failed to explain why he produced the money in his possession to the police as well as the money hidden in his homestead if it belonged to him.

[34] The applicant's story is not only improbable but false. He paraded himself as a businessman coming to buy cattle at Siphofaneni; however, he didn't even know the person selling the cattle. On his first trip he didn't have money and was only given E20.00 (twenty emalangeni) by PW3 to by food. On the next day the applicant had lots of money in his possession hidden in

his underwear as well as in the pocket of his right trouser; in addition, he had money hidden in the roof of a house in his homestead.

[35] Similarly, the applicant lied that he had to leave Siphofaneni in the morning of the 23rd May 2009 to Matsapha where he was conducting the business of selling cigarettes; subsequently, he contradicted himself and stated that he was going to Matsapha to explore opportunities of starting the same business in order to escape the high competition in Manzini where his business was based.

[36] Section 237 of the Criminal Procedure and Evidence Act provides the following:

> "**Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:**
>
> **Provided that such offence has by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been actually committed."**

[37] It is evident from the preceding paragraphs that there is evidence of commission of the offence by the applicant other than the evidence of the accomplice witness. In the circumstances the trial court did not commit any

irregularity. The evidence adduced does prove the guilt of the accused beyond reasonable doubt.

[38] The applicant further argued that the sentence of seven years without an option of a fine imposed by the court *a quo* induces a sense of shock. Admittedly, the applicant is a first offender and a breadwinner in his family. He was twenty seven years of age at the time of sentence on the 4th January 2011, and clearly, he is capable of reform. About half of the money was recovered; in addition, he is sickly after being tortured by the police on his genitals, and attends hospital often.

[39] The crime for which the applicant was convicted is very serious and is listed in the Third Schedule as an offence for which section 313 of the Criminal Procedure and Evidence Act is not applicable; the sentence for Robbery cannot be suspended or postponed, and it is not subject to a fine.

[40] Similarly, I share the sentiments of the court *a quo* that the interests of society demand that an appropriate harsh sentence be imposed as a deterrent in offences of this nature as reflected in previous judgments of this court in *Mndzebele Mcoshwa v. R* 1987-1995 (3) SLR 177, *Mngomezulu Sibusiso and Others v R* 1987-1995 (3) SLR 179, *Boy Norman Bothman v R* 1976 SLR 137, *R v Dlamini Douglas and Another* 1987-1995

(1) SLR 147, *R v Msibi Cobra and Others* 1987-1995 (2) SLR 350 and *R v Ginindza Nhlanhla* 1987-1995 (4) SLR 172.

[41] It is trite law that a superior court sitting on review or appeal jurisdiction cannot interfere with a sentence passed on an accused person by the court below unless the court has misdirected itself or the sentence has breached a statutory compulsory minimum sentence or the sentence was unduly severe or lenient, as to run counter to the guidelines set by the appellate court. See the case of *Phumlani Masuku v Rex* Criminal Appeal No. 33/ 2011.

[42] In the case of *Melusi Maseko v Rex* Criminal Appeal No. 43/2011 at para 3, Supreme Court of Swaziland, I had occasion when dealing with the issue of sentence to state the following:

> "**This court has repeatedly stated that sentence is pre-eminently a matter within the discretion of a trial court. An appellate court will not generally interfere unless there is a material misdirection resulting in a miscarriage of justice or that the sentence was wrong in principle or that it was shockingly harsh or that it is a sentence which induces a sense of shock."**

[43] The applicant has not shown the existence of any misdirection; on the contrary, the court *a quo* took into account the triad in arriving to at the appropriate sentence. The crime of Robbery is on the increase in this

country to the detriment of law abiding individuals and businesses; and, it is the duty of this court to protect society against this criminal invasion.

[44] Accordingly, I dismiss this application.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT