IN THE HIGH COURT OF SWAZILAND

HOLDEN AT MBABANE **CRIM. APP. NO. 9/09**

In the matter between:

NKULULEKO NGWENYAMA **1st Appellant**

SIFISO DLAMINI **2nd Appellant**

And

REX Respondent

Date of hearing: 11 August, 2009

Date of judgment: 20 August, 2009

CORAM: **BANDA C.J.**

MASUKU J.

Appellants in person

Mr. Attorney B. Magagula for the Respondent

JUDGMENT

MASUKU J.

[1] The above-named Appellants are young men who fell precipitously on the wrong side of the law. They were arraigned before the Manzini Magistrate's Court charged with a staggering seven counts. Five of the counts were in relation to the offence of house-breaking with intent to steal and theft whereas the balance was in respect of the offence of theft from a motor vehicle.

[2] Upon arraignment, the accused persons pleaded guilty to the said offences save counts 6 and *7* , which were in relation to a single count of theft from a motor vehicle and a single count of house-breaking with intent and theft, respectively. In count 6, only the 2nd Appellant had been charged, whereas in relation to count 7, both had been charged and the 1st Appellant pleaded guilty but the 2nd Appellant pleaded not guilty. The learned Magistrate was astute in ascertaining, to

some extent that their respective pleas of guilty were indeed unequivocal by putting certain questions to them regarding the commission of the offences by them.

[3] In respect of the two counts to which they pleaded not guilty, the Crown offered no evidence and the Court accordingly acquitted and discharged them. In respect of the balance and to which guilty pleas were entered, the Court *a quo* returned a certitude of guilt and sentenced each of them to a fine of E2,000.00 and in default of payment thereof, to two years' imprisonment. The sentences imposed were ordered to run consecutively. It would appear that the Appellants failed to pay the fines imposed and are presently in custody serving the custodial sentences imposed. In sum, the 1st appellant was to serve a sentence of ten (10) years imprisonment, whereas his partner was to serve (8) years imprisonment.

[4] The Appellants noted an appeal against the sentence only and I may add, timeously. The bone of contention, as one would read from their respective letters of appeal is this: they ask of this Court to "concur" their sentences. This, it would appear, is

an attempt on their part to move this Court to order their respective sentences to run concurrently, as opposed to consecutively as the learned Magistrate ordered in his judgment on sentence.

[5] The starting point in matters where an appeal is noted against sentence, is to recognize that the matter of sentencing is one that primarily lies within the discretion of the trial Court. Consequently, an appellate Court does not lightly interfere with the exercise of that discretion unless certain imperatives are met. The exercise of the trial Court's discretion is almost sacrosanct to the extent that an appellate Court would normally defer and may not readily interfere with the sentence imposed only for the reason that if it had sat as a trial Court, it may have, on the same facts and circumstances, come to a different sentence as being condign.

[6] One of the leading authorities on this subject, and which in my view the above position was comprehensively stated, is the

judgment of Holmes J.A., in S *v de Jager And Another* 1965 (2) S.A. 616 (AD) at 629, where the Appellate Division stated the applicable principles in the following language:

> "It would not appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable Court would have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited." See also *Shaun Koopman u S (CA* & R 91/07 [2008] ZANCH 1; *S u Kgosimore* 1999 (2)
> SACR 238 (SCA); *S v Kibido* 1998 (2) SACR 213 and S *v Shikunga* 2000 (1) S.A. 616 (NmSC) at 631.

[7] When the legal position stated above, was explained to the Appellants during the appeal hearing, they indicated that in their view, the Court *a quo* did not err in any of the manners

stated above. That notwithstanding, they still implored this Court to come to their aid, pointing out certain personal circumstances, which in their view, merited that this Court should interfere with the sentence imposed by the Court *a quo.*

[8] A reading of the judgment of the Court *a quo* may be a good starting point in determining whether or not the trial Court correctly exercised its discretion. At page 4 of the record, the learned Magistrate had the following to say in his judgment on sentence:

> "Society is not safe from thieves like the accused who just take anything they come across without the consent of the owner. Accused need to be punished so that they realize their wrong behavior. That the accused are school going pupils is no excuse in their criminal behavior. Members of the society who are law abiding citizens need protection from the courts from unscrupulous people like the accused who just break into premises and motor vehicles and steal hard earned property. These law abiding citizens should have recourse to the law when their rights to acquire, accumulate, enjoy and use property is violated."

[9] Although the learned Magistrate did state that he would take the personal circumstances of the Appellants into account in his judgment, it would appear to me that a reading of the sentence itself would suggest that these were not sufficiently taken into account nor were they given due weight. In point of fact, that the Appellants were young persons and who were in addition, attending school and these factors the Magistrate found, did not excuse their behavior. Whilst that may be correct, does not mean that these are factors not to be put into the equation and given due weight in arriving at a condign sentence.

[10] It would also appear to me that the fact that the Appellants pleaded guilty did not come into consideration at all. I say so because Courts normally consider a plea of guilty as a sign of remorse or penitence and which in addition, serves to redeem the Court's time whilst at the same time saving the witnesses from the trauma and stresses associated with the Court atmosphere. The pleas of guilty entered by the Appellants should have been appropriately considered and should have served to discount the sentence further in the circumstances. This failure, on the part of

the learned Magistrate to consider the pleas in the light I have mentioned above constitutes an irregularity in my view.

[11] A reading of the judgment on sentence would also seem to suggest that the learned Magistrate appeared to overemphasise the retributive aspect of punishment and paying little regard, if any, to the rehabilitative aspect. The latter object should be given due weight particularly where the accused persons are young as the Appellants are and are also first offenders. That the trial Court gave emphasis to retribution can be seen from the statement quoted above in which learned Magistrate stated that the Appellants needed to be "punished so that they realize their wrong behavior".

[12] Whilst there can be no doubt that the crimes committed by the Appellants were serious and prevalent, still, their personal circumstances, including that they were first offenders who pleaded guilty and, who could not be said to be beyond the reach of rehabilitation, would suggest that the sentence

meted to them was harsh indeed. It is my opinion that this Court would have imposed a markedly lesser effective sentence, given their personal circumstances in particular. This would therefore show that the sentence imposed by the Court *a quo* induces a sense of shock, therefore enabling this Court to interfere with the exercise of the sentencing discretion by the trial Court.

[13] In the Botswana case of *Mosiiwa v The State* [2006] 1 B.L.R. 214 at 219 B-C, Moore J.A. threw the following words of caution to judicial officers in exercising their sentencing powers:

> "It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. <u>By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated."</u> (Emphasis added).

In the present matter, I cannot help but come to the conclusion that the sentence meted out by the trial Court was out of all proportion to the offences in question and also served to break the young persons, making them despondent and therefore unable to lift themselves by their bootstraps from the precipice of crime into which they had slipped. What was particularly telling in this case was the decision by the trial Court to order all the sentences to run consecutively, resulting in cumulative sentences that are harsh in the extreme.

[14] By all accounts, this is a case in which this Court, as stated earlier, ought to intervene. Mr. Magagula, who appeared for the Crown also did not support the severe cumulative effect of the sentences eventually imposed. In the circumstances, we are at large to consider afresh what a condign sentence that brings all the competing interests to equilibrium is in the respective circumstances of the Appellants.

[15] What should also not be allowed to sink into oblivion, notwithstanding the seriousness of the offences, is that the learned Magistrate was minded and correctly so, to give the Appellants first, an option to pay a fine, which was a noble recognition in the first instance that young as they were and being first offenders, it was imperative to keep them away from the forbidding walls of prison as much as possible. They appear to have been impecunious, hence they were unable to afford the steep cumulative fines imposed on them.

In the premises, I set aside the order that the sentences imposed by the trial Court shall run consecutively and substitute the same with the following:

1st Appellant

Count 1.

The sentence imposed in count 1 is hereby confirmed.

The sentences imposed in respect of counts 2 and 3 be and are hereby ordered to run concurrently with the sentence in count 1.

Half of the sentence in count 4 is suspended for a period of 3 years on condition that the Appellant is not, during the period of suspension, found guilty of an offence of which theft and/or breaking is an element.

The sentence in count 5 is wholly suspended for a period of 3 years on condition that the Appellant is not found guilty of an offence of which theft and/or breaking is an element during the period of suspension.

2nd Appellant

The sentence on count 3 be and is hereby confirmed.

The sentences in counts 4 and 5 be and are hereby ordered to run concurrently with the sentence in count 3.

The sentence in count 7 be and is hereby wholly suspended for a period of 3 years on condition that the 2nd Appellant is not, during the period of suspension found guilty of an offence of which theft and / or breaking is an element.

[17] For the avoidance of doubt and confusion, the cumulative effect of the sentences imposed on the respective Appellants, which is hereby ordered to run from the date of arrest is as follows:-

17.1 The 1st Appellant is sentenced to a fine of E3,000 and in default of the payment thereof, to an effective prison term of 3 years' imprisonment.

17.2 The 2nd Appellant is sentenced to a fine of E2,000 and in default of the payment thereof, to an effective prison term of 2 years' imprisonment.

Appellants in person

Mr. Attorney B. Magagula for the Respondent.

T.S. Masuku

Judge

I agree

R.A. Banda

Chief Justice