



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 09/13

In the matter between:

THOKOZANI MTHANDAZODLAMINI

APPELLANT

V

THE KING

RESPONDENT

Neutral citation : ThokozaniMthandazoDlamini v The King
King (09/13) SZHC 12 [18/2/2014]

Coram : MABUZA J

Heard : 2/12/2013

Delivered : 18/2/2014

Summary : This is an appeal against sentence from the Magistrates Court, Manzini. Appellant seeks to have sentences ordered to run concurrently instead of concurrently as ordered by the Learned Magistrate. Reference made to section 238 of the Criminal Procedure and Evidence Act No. 67/1938. The appeal succeeds in part.

[1] The Appellant was charged in the Magistrate's Court sitting at Manzini together with five others for crimes of housebreaking with intent to

stealand theft from various homes in and around Magengeni area in the Hhohho District.

[2] Appellant was charged with eight counts in respect of the offences. He pleaded guilty to 6 counts and not guilty to two counts. He was convicted in respect of all eight counts.

[3] The charges against the Appellant are briefly set out hereunder:

Count 1

Housebreaking with intent to steal and theft of goods belonging to Makhosini Mamba on the 27th July 2009 at Magengeni area, Hhohho district valued at E8500.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 2

Housebreaking with intent to steal and theft of goods belonging to Makhosini Mamba on the 2nd December 2009 at Magengeni area, Hhohho district valued at E2350.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 3

Housebreaking with intent to steal and theft of goods belonging to Makhosini Mamba on the 26th February 2010 at Magengeni area, Hhohho district valued at E12,000.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 4

Housebreaking with intent to steal and theft of goods belonging to SaneleMagagula on the 6th February 2010 at Masheleleni area, Hhohho district valued at E4,950.00. He pleaded not guilty and was convicted and sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 6

Housebreaking with intent to steal and theft of goods belonging to SibongileShongwe on the 31st December 2009 at Ntabinezimpisi area, Hhohho district, valued at E1,000.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 7

Housebreaking with intent to steal and theft of goods belonging to SandileShabangu on the 18th February 2010 at Herefords, Hhohho district, valued at E10,300.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 8

Housebreaking with intent to steal and theft of goods belonging to GcinaNdwandwe on the 5th January 2010 at Mpofu area, Hhohho district valued at E10,300.00. He pleaded guilty and was sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

Count 9

Housebreaking with intent to commit a crime unknown to the Prosecutor broke into and entered a house belonging to NkosinathiSibiya on the

21stDecember 2009 at Mkhuzweni area, Hhohho district. He pleaded not guilty and was convicted and sentenced to a fine of E2,000.00 and in default of payment to two years imprisonment.

[4] The total fine amounts to E16,000.00(sixteen thousand) and the custodial sentence amounts to 16 years imprisonment. The sentences were ordered to run consecutively and backdated to 6th December 2010. He failed to pay the fine and is currently serving the custodial sentence.

[5] He has appealed against the sentence on the ground that the 16 year imprisonment sentence is too harsh and severe considering that he is a first offender. He prays that the sentences be ordered to run concurrently.

[6] Miss Matsebula for the Crown opposes the appeal and argues that all the offences that the Appellant was convicted for were committed on different dates and to different complainants except the first three counts which were committed against the same complainants but on different dates. She contends that the Appellant cannot take advantage of the general principle espoused in the case of **Sithembiso Simelane and Another v The King** criminal appeal case No. 02/2011 (unreported) where it was held:

“It is however a general principle that consecutive sentences should not be imposed for offences which arise out of the same transaction or incident. Where the offences were committed in the same

transaction it has been held to be unjust and wrong in law to order the sentence of an accused, to run consecutively”.

I agree with her statement of the law and her observation with regard to the offences having been committed on different dates and except in three counts committed against different people.

[7] She argued further that if the sentences are ordered to run concurrently this will mean that the Appellant will serve a sentence of two years only. This she opines, is undesirable taking into account the seriousness of the offences that the Appellant committed. I agree with her submission namely that two years is too short; but 16 years is equally too long; is too severe and induces a sense of shock, primarily because the Appellant is a first offender and he pleaded guilty to all but two of the offences. This in my view calls for my intervention.

[8] Initially the Appellant pleaded guilty to counts 1,2,3,6,7 and 8 and not guilty to counts 4 and 9. However, the record shows that the Prosecutor did not accept the plea of guilty he instead applied to proceed on a plea of not guilty on all counts and proceeded to lead evidence of the commission of the offences.

[9] It would seem to me that the pleas of guilty resonated with the learned Magistrate and he accepted them because the sentences meted out are

commensurate with section 238 (1) (b) of the Criminal Procedure & Evidence Act No. 67/1938 which states:

“If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is charged, and the prosecutor has accepted such plea, the court may, if it is –

(a) ...

(b) a magistrate’s court **other than a principal magistrate’s court**, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed: (Amended, A. 4/2004)

Provided that if the offence to which he has pleaded guilty is such that the court is of opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding **two thousand Emalangeni**, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding **two thousand Emalangeni**, or it may deal with him otherwise in accordance with law. (Amended, A.4/2004)”.

[10] I say this because the sentences are all uniform irrespective of the value of the goods, forexample the value of the stolen goods in Count 3 is E12,000.00 (Twelve thousand Emalangi) and in Count 6, E1,000.00 (One thousand Emalangi) and yet the sentences are the same. Logic dictates that the sentence ought to be higher in respect of Count 3 than in Count 6.

[11] In my considered opinion this is another reason that justifies my intervention and the appeal succeeds in part as follows:

(a) Count 1, 2 and 3

The sentences in respect of the above Counts are hereby ordered to run concurrently.

(b) Count 4

The sentence in Count 4 is hereby set aside and replaced with the following: “the Appellant is sentenced to a fine of E1,000.00 and in default of payment to 1 year imprisonment”

(c) Count 6

The sentence in Count 6 is hereby set aside and replaced with the following: “the Appellant is sentenced to a fine of E1,000.00 and in default of payment to 1 year imprisonment.

(d) Count 7

Count 7 remains unaltered.

(e) Count 8

Count 8 remains unaltered.

(f) Count 9

The sentence in Count 9 is hereby set aside and replaced with the following: “The Appellant is cautioned and discharged.”

[12] This means that the Appellant’s sentence has now been reduced to a total fine of E8,000.00 and in default of payment to 8 years imprisonment. The effective custodial sentence is 8 years imprisonment backdated to 9th March 2010.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Appellant : In person

For the Respondent : Miss Matsebula