IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 302/2017**

In the matter between:

MZWANDILE KHETHABAHLE SIYAYA **Appellant**

And

REX **Respondent**

Neutral citation: **Mzwandile K. Siyaya vs Rex (302/17) [2017] SZHC 238 [2017]**

CORAM **J.S MAGAGULA J**

HEARD: **1st AUGUST 2017**

DELIVERED: **14th November 2017**

Summary: ***Criminal law – accused charged and convicted of possession of firearm, ammunition and magazine belonging to the same firearm – whether accused properly charged and convicted for possession of magazine – whether accused properly sentenced below prescribed minimum sentence- whether trial court bound to give option of a fine once provided for in statute.***

[1] This is an appeal against conviction and sentence.

The Appellant appeared before the Shiselweni Magistrate's court charged with four counts as follows:

COUNT ONE

The accused person is charged with the offence of **Contravening Section 11 (1) as read with section 11 (8) of The Arms and Ammunition Act 6/1988 as amended.**

In that upon (or about) the 15th of July 2017 and at or near Hluti Police Station in the Shiselweni region the said accused person, not being a holder of a licence or permit, did wrongfully possess a 9mm Colt Pistol with serial number (wiped off) and did thereby contravene the said Act.

COUNT TWO

The accused person is charged with the offence of **Contravening Section 11 (2) as read with section 11 (8) of The Arms and Ammunition Act 6/1988 as amended.**

In that upon (or about) the 15th of July 2017 and at or near Hluti Police Station in the Shiselweni region, the said accused person, not being a holder of a licence or permit, did wrongfully possess eighteen (18) live rounds of 9mm ammunition, and did thereby contravene the said Act.

COUNT THREE

The accused person is charged with the offence of **Contravening Section 11 (3) as read with section 11 (8) of The Arms and Ammunition Act 6/1988 as amended.**

In that upon (or about) the 15th of July 2017 and at or near Hluti Police Station in the Shiselweni region, the said accused person, not being a holder of a licence or permit, did wrongfully possess a firearm magazine, and did thereby contravene the said Act.

COUNT FOUR

The accused person is charged with the offence of Contravening section 14(2) (f) of The Immigration Act 17/1982.

In that upon (or about) the 15th of July, 2017 and at (or near) Hluti Police Station in the Shiselweni Region, the said accused person not being a holder of a licence or permit, did unlawfully and intentionally enter and remain in the Kingdom of Swaziland and did thereby contravene the said Act.

[2] Upon arrainment he pleaded guilty to all the charges preferred against him. The crown led evidence in proof of the charges preferred against the accused. At the close of both cases for the crown and the accused who was not represented, the Magistrate sentenced the Appellant as follows:

Count 1 – 2 years imprisonment without the option of a fine.

Count 2 – 6 months imprisonment without an option of a fine.

Count 3 – 2 years imprisonment with an option to pay fine of E2000.00

Count 4 – 5 months imprisonment with a option to pay a fine of E500.00

[3] The effect of the sentence is that if the Appellant is unable to pay a fine on those sentences that have such option, he will have to spend four (4) years and eleven (11) months in custody. However if he pays the fine he will have to spend two (2) years and six (6) months in custody since the sentences are to run consecutively.

[4] The Appellant has noted an appeal to this court and the grounds of appeal are as follows:

> ***"1. The sentence issued by the Court a quo in respect in of count 1 and count 2 induces a sense of shock as it was severe in the cirumstances for the following reasons:***
>
> ***1.1 The offences which the accused was convicted of in respect of Count 1 and Count 2 are statutory offences and the penalty clauses in respect of both offences provide for an option of a fine.***
>
> ***1.1.1 The Court a quo therefore erred in law and in fact in sentencing the Appellant to a custodial sentence without an option of a fine in respect of both Count 1 and Count***
>
> ***2.***

2. The Court a quo erred in law and in fact by allowing Count 1 and Count 3 to be split into 2 separate Count on the following grounds;

2.1 The fire arm magazine in respect of Count 3 belongs to the firearm in respect of Count 1, and it is not a separate component as it were. The Court a quo erred in law and in fact in allowing the " disassembling"of the firearm and having the Appellant charged and convicted for the component of the firearm that forms part of the firearm separately.

2.1.1 The Court a quo should not have convicted the Appellant in respect of Count 3 as same was not proved to have been committed during the leading of evidence, regardless of the fact that the Appellant had pleaded guilty. No evidence was led to the effect that the magazine did not form part of the firearm in Count 1, but rather evidence led was to the effect that it formed part of the firearm.

3. The Court a quo erred in law and in fact in not ordering that the sentences in respect of Count 1 and Count 2 should run concurrently as they are interrelated and emanate from the same subject matter and were committed at the same time.

3.1 The Court a quo erred in law and in fact in not considering and/or in not ordering that the sentences in respect of Count 1 and Count 2 should run concurrently as they are interrelated and emanate from the same subject matter and were committed at the same time.

3.1.1 The Appellant was a first offender.

3.1.2 The Appellant pleaded guilty to all charges, and in as much as evidence was led he did not waste the Court's precious time which is clear sign of neing remorseful".

[5] Under ground number1. the decision of the magistrate is challenged on the basis that the sentence is too harsh and that although the Act under which the Appellant was charged provides for an option of a fine, the Magistrate failed to afford the Appellant such option.

[6] As evident from paragraph [1] hereof under count 1 the accused is charged with illegal possession of a fire arm in terms of section 11 (1) of the Arms and Ammunition Act 1988 as amended. The penalty for such offence is stipulated in section 14 (2) of the same Act to be

imprisonment for a period not less than five (5) years or a fine not less , than E5000 – 00 (Five Thousand Emalangeni) in respect of a first offence. Clearly the Magistrate erred in imposing a sentence of less than five (5) years imprisonment and this court is duty bound to correct such error. The maximum sentence is twenty years and a fine not exceeding E20,000-00 (Twenty Thousand Emalangeni) irrespective of whether the accused is a first or subsequent offender.

[7] Appellants counsel conceded that the Magistrate made an error in imposing a sentence of less than (5) years but also contended that the Magistrate equally made an error in not granting an option to pay a fine.

[8] I am unable to agree with Mr . Fakudze's argument regarding the option to pay a fine. I am not aware of any legal requirement that once a prescribed sentence provides for the option of a fine, the court is compelled to give such option. It is a trite principle of sentencing that sentencing is a primary function of the trial court. The trial court enjoys a wide discretion to determine the type and severity of sentence on a case by case basis. This means that a trial court has a discretion to decide to impose only a custodial sentence or provide for the option to pay a fine where such is allowed by a statute.

[9] In determining sentences courts follow judge made broad sentencing principles known as the **" *triad*"**. These principles require that in determining sentences trial courts consider three things namely:

a)the gravity of the offence.

b)the circumstances of the offender ; and

c) the public interest.

It could just be that in ***casu*** the trial court did not consider it to be in the public interest that the Appallent, being a foreigner, found in possession of a dangerous weapon should be allowed to pay a fine and released from custody. I therefore do not find anything wrong with the trial court imposing a sentence without the option of a fine.

[10] In any event there is legal authority to the effect that the fact that the contravened Act provides for the option of a fine does not mean that the court is bound to give such option. In the Namibian case of THE STATE v LUKAS (CC 15-2013) [2015] NHCMD 186 DAMASEL. JP took time to specifically deal with this subject under a subheading;

" Implication of penalty clause reading:

Fine or imprisonment".

[11] At paragraph [11] of his judgment the learned judge refers to the South African case of S v Mali and others and states:" In the case of S v MALI AND OTHERS accused 3 was found guilty of pointing a firearm in contravention of section 39 (1) (i) of Act 75 of 1969. In this case the matter went for review after the magistrate imposed direct imprisonment as a sentence.

The relevant penalty clause reads;

" A fine not exceeding R500 or imprisonment for a period not exceeding six months."

After concluding that the decision in Mali's case was erroneous in light of other authorities on the subject the learned judge states at paragraph [13]:

> ***" The result of this conclusion is that penal provisions of section 39 (2) (d) of Act 75 of 1969 should have been interpreted in Mali's case to mean that those provisions give the court a discretion to impose either a fine not exceeding R500 or imprisonment for a period not exceeding six months, which means that it is competent to impose a period of imprisonment without the option of a fine. That is the plain meaning of the words used in the section and is the meaning which should be given to them.That is also the proper approach to be followed in Namibia."***
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> (See also S v NKWANE; S v TAKWANA 1982 (1) SA 330 AT 232 D-E and S v ARENDS 1988 (4) SA 792 at 794 G-J)

[12] For the foregoing reasons there is no doubt in any mind that it was competent for the court a quo to impose a sentence of imprisonment without the option of a fine. I accordingly find no merit in this ground of appeal.

[13] Another ground of Appeal put forth by the Appellant is the court a quo erred by allowing count 1 and count 3 to be split into separate counts.

Appellant contends that the firearm magazine referred to in count 3 is a component of the firearm for which the appellant is charged under count 1. The magazine did not belong to a separate firearm.

[14] In his evidence in Chief PW 1 who is 3993 Detective Inspector M. Sibandze stated the following relating to what transpired at the time appellant was arrested.

> ***" I asked 2263 Inspector Dlamini to go check the mat. When he lifted the mat I saw the pistol under the mat. The accused then said this is his pistol and the others do not know about it. He further informed one that there are live rounds of ammunition below the mat. I then unloaded the firearm. The magazine was loaded with 16 live rounds".***
>
> This witness handed into court during his testimony two exhibits being:
>
> Exhibit MS 1 – Pistol
>
> Exhibit MS 2 – 18 live rounds

[15] From the foregoing it is clear that the 3rd count relating to the magazine was erroneous. The magazine was a component of the firearm. The Appellant was therefore wrongly charged and convicted for the possession of the firearm magazine, This ground of appeal is accordingly upheld.

[16] Under the third ground of appeal the appellant contends that the court a quo erred in not ordering that the sentences in respect of count 1 and 2 should run concurrently. Appellant argues that these offences are interrelated and they emanate from the same subject matter. They were also committed at the same time.

[17] The record reveals that the live rounds of ammunition were for the firearm referred to in count 1. The ammunition was together with the firearm. The ammunition and the firearm were discovered at the same time, place and in one incident. Although the Appellant was correctly charged with separate counts but since the offences were all committed in one incident and the firearm and the ammunition are related logic dictates that the sentences should have indeed been ordered to run concurrently. This ground of appeal is also upheld.

[19] In summary therefore grounds of appeal numbers 1, 1.1, and 1.1.1 are dismissed. Grounds of appeal numbers 2, 2.1, 2.1.1, 3, and 3.1 are upheld.

[20] It is trite law that sentencing is a prerogative of the trial court. An appeal court will however interfere with the sentence imposed by the trial court where there is a material misdirection on the part of the trial court. The other instance where the appeal court will interfere with the sentence is where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can be properly

described as " ***shocking", "starting" or "disturbingly inappropriate".***

(See S v MALGAS 2001 (1) SACR 469 (SCA) at paragraph [21].

[21] In ***casu*** there is a manifest and serious misdirection on the part of the trial court. For this reason this court shall interfere and impose the correct sentence. Both counsel are in agreement that the sentence in respect of count 1 is erroneous.

[22] For the foregoing reasons the sentence of the trial court is set aside and substituted with the following:

Count 1 – 5 years imprisonment without the option of a fine;

Count 2 – 6 months imprisonment without the option of a fine

Count 4 – 5 months or E500 fine option.

The sentences are to run concurrently.

The appellant is acquitted on count 3.

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J.S MAGAGULA J

For the Crown: **Mr H. Sibandze**

For the Appellant: **Mr T. Fakudze**