IN THE HIGH COURT OF ESWATINI

Held at Mbabane Cases No.: 890/2018

In the matter between

JUSTICE MOFELI CHERE **Applicant**

AND

PHILSIWE DLAMINI N.O. **1st Respondent**

THE ATTORNEY GENERAL **2nd Respondent**

Neutral Citation: *Justice Mofeli Chere And Philsiwe Dlamini N.O & Another (890/2018) [2018] SZHC 144 (6th July 2018)*

Coram: Hlophe J.

For the Applicant: Miss C. Simelane

For the Respondent: Miss K. Masilela

Dates Heard: 15th and 18th June 2018

Date Judgement Handed Down: 06th July 2018

Summary

Review proceedings –Agreed that court a quo misdirected itself on sentence – Court requested to interfere with sentence and impose an appropriate one – Considerations on why court should interfere with the sentence imposed – Circumstances of the matter justify court to substitute its sentence for that of the Learned Senior Magistrate –Sentence considered appropriate imposed by this Court.

JUDGMENT

[1] On the 25th May 2018, the Magistrate sitting in Nhlangano convicted the applicant of contravening sections 41(1) as read with 41(2) of the Money Laundering And Financing of Terrrorism (Prevention) Act of 2011. The sentence imposed was a sentence of 5 years imprisonment or a fine of E30 000.00. It would appear from the facts of the matter that the applicant paid the required fine and then challenged the proceedings on review before this court, hence these proceedings.

[2] The facts of the matter are that on the 24th May 2018, the applicant entered the Kingdom of Eswatini through the Sicunusa Border Post, where upon he

failed to declare a sum of E27,150.00 he had on his person or in his possession.

[3] The applicant was subsequently charged with the offence referred to above and was eventually convicted and sentenced as stated. It was in reaction to the said conviction and sentence that the applicant instituted the current application where he sought a review of the proceedings and decision of the court a quo.

[4] It was contended by the applicant that the matter was reviewable because the learned Magistrate had misdirected herself in at least two ways, namely that she had imposed the maximum sentence as provided by the statute notwithstanding that he was a first offender and that she had gone to impose the sentence of a fine of E30, 000.00 notwithstanding that she in terms of the Magistrates Act, which is the law that establishes that Court, she could not impose a sentence exceeding E15, 000.00 fine.

[5] Otherwise on why the money was possessed by the applicant he contended that same was a dividend due to him and his friend from a stokvel the two of them had joined whilst working at Verreneging in the Republic of South Africa. This friend of his was one Mncedisi, whose full particulars he did not recall, except that he was residing in Swaziland. They were calling each other on the phone. He clarified further that he would have declared the said amount of money had he been aware of such a legal requirement and even had there been a notice displayed inside the Border offices to that effect.

[6] When the matter was called before me, Counsel for the Respondents Miss Masilela, from the Attorney General's Chambers informed the court that the application was not being opposed. I found such a statement neither sufficient nor helpful. I held this view because it was not clear to me what the meaning of that was that is, did it mean upholding the application and then directing that the applicant as the accused in the court a quo was then acquitted and discharged or did it mean that the matter be referred to the court a quo to consider what it had not considered resulting in the review or did it mean that this Court should after reviewing the decision concerned, correct same by replacing the decision by the court a quo with its own decision?

[7] I postponed the matter and directed the parties to file their Heads of Argument together with what authorities they had on a way forward. I also clarified I required them to address me on the day to which was being postponed to on the issues I have referred to in the foregoing paragraph.

[8] From the papers received, it seemed that only applicants counsel, Miss C. Simelane, heeded my call as she filed her Heads of Argument together with some authorities on which she relied. In her Heads of Argument she maintained her ground for review as a midsection by the court a quo on the sentence imposed, namely that a maximum sentence had been imposed by the court a quo against a first offender. She referred to, without making emphasis, to the ground the that Learned Magistrate had imposed a sentence above her statutory sentence of 15 years imprisonment. Whatever the conclusion I reach on the alleged misdirection by the court a quo on the sentence. I am of the view the ground on the Learned Magistrate having exceed her authority or power should be considered fully and with equal force.

[9] Before resorting to these points raised by the Applicant in his founding affidavit, I must say I note an issue which warrants comment from this court. The learned Magistrate did not state any reasons ex facie the record on why she had to impose the sentence she imposed did. Given that she imposed the maximum sentence provided for in the Act, one resist a conclusion that the Learned Judicial Officer laboured under the impression that simply because the Act fixed a maximum sentence in those particular terms, she then felt obliged to impose such a sentence obliged to impose. This would be wrong and would no doubt the warrants the setting aside of the sentence imposed by the Learned Magistrate. To what effect, I will have to revert thereto after I would have dealt with the other grounds of review referred to above.

[10] Reverting to the ground for review concerning the imposition of a maximum sentence which is related to the last one referred to above, particularly against a first offender, it is my considered view that this was harsh firstly on the principle of sentencing that an offender must be given a sentence that gives him an opportunity to learn from his wrong doing so as not to repeat same in future. It is obvious it would be a hard way of learning for a first offender to be given the same sentence as a fifth or whatever time repeat offender. Given that the Act did give the Learned Magistrate a

discretion to impose a graduating sentence up to the maximum one, it is my considered view that this discretion was not properly exercised which would call for the sentence to be set aside. Commenting on the propriety or otherwise of sentencing a First offender to a straight custodial sentence, this Court per Mamba J, had the following to say in **Philile Dlamini and Another V The Senior Magistrate N.O. (Nhlangano) and Another, High Court Case No.4345/07**:-

> "*As a general rule in this Jurisdiction, first offenders should normally be afforded the opportunity to pay fine instead of being given straight custodial sentence. The fine imposed must also be within the capacity of the offender to pay. This is a salutary rule aimed at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offenders and recidivists. In the case off SV Mkhina and Others 1966 (1) SA 814 (NPD) at 818 F-H, Farrin J had this to say:*
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> > *"In most cases the first offender should, in my opinion, be given the opportunity of paying a fine which is within his capacity to pay. Where there have been many cases of the possession of dagga*

coming before the courts something must obviously be done discourage people from smoking and using dagga unlawfully. In such cases punishment may properly be stepped up, even for first offenders, but it seems to me that the object of discouraging such persons from offending the second time will best be served by imposing upon them fines sufficiently heavy to hurt, but which they can afford to pay, and by adding a period of imprisonment suspended upon suitable conditions. This method of dealing with offenders…will achieve two important purposes. The first will be to keep a first offender out of goal, and this is nearby always desirable. The second will be that the unlawful user of dagga will be punished for his Contravention of the law and will be discouraged for at any rate the period of suspension from offending again."

[11] Although the case the Learned Judge dealt with concerned the possession of dagga, it cannot be denied that with the principles raised applied generally, they are apposite to the case as at hand and they apply with equal force.

[12] Where a court finds a reason to depart from this general rule, then, in my respectful view it must specifically say so and state that reason or reasons. In enacting Section 12 (1) (a) of the Act, the Legislature in its wisdom specifically set out the maximum sentence that may be imposed on a first offender. The legislature was, no doubt mindful of the fact that a first offender may be found in possession of a large quantity or consignment of dagga as in the present case, but it still provided that such first offenders be given the option to pay a fine and only undergo a custodial sentence on failure to pay such fine.

[13] By analogy the above considerations are in my view synonymous with what happened in the offender is that of the maximum sentence having been imposed against the present matter where a first offender was sentenced to a maximum sentence for having failed to declare a sum of E27,150.00 upon entry at the Border Gate. The question that comes to mind is if this offender

was given such a sentence what would an offender in similar circumstances but found in possession of say ten (10) times the said amount of money have been sentenced to where the maximum sentence was E30,000.00 or 5 years imprisonment. Faced with these considerations in **Rex V Bonginkosi Kunene and 2 Others, Review Case Numbers:20/10; 21/10 & 24/10**, Justice M.D. Mamba had the following to say at paragraph 14 which I find to be apposite herein:-

> *"The two accused persons were found in possession of a substantial quantity of dagga; 59.9 kg to be precise. They were ordered after suspension of part (I dare add, half) of their sentences to pay a sum of E6000.00 failing which to serve a term of 6 years in prison. The sentence of E12,000.00 or twelve (12) years of imprisonment is too harsh in my judgement. It is too close to the maximum sentence stipulated in the law and one immediately wonders what sentence would the learned Magistrate have imposed if he had immediately after this case dealt with two similarly situated individuals but who*

were in possession of double the quantity of dagga, 120 kg? I fail to understand why a first offender convicted of possessing 60 kg or 20 kg of dagga should be visited with the maximum sentence stipulated for first offenders..”

I find these comments on point in this matter even though they concerned a case of dagga possession. It is clear the principles on sentencing are similar. These emboldened my conclusion that the sentence as imposed by the Learned Magistrate should be set aside, with this court having to revert later on what should happen after the setting aside of the sentence.

[14] On the contention that the court a quo misdirected itself by imposing a sentence that exceeded the one it was empowered to impose by the Act establishing the Court itself, namely the Magistrates Court Act (as Amended), I note from the pleadings that it was not disputed or denied that whereas the jurisdiction of a Senior Magistrate was, in terms of the Amendment to Section 72 of the Magistrates Court Act No.66 of 1938, as brought about by Section 6 of the 2011 Amendment, imprisonment for a period not exceeding 10 years or not exceeding 15 Thousand Emalangeni, in

the case of a Senior Magistrate, the Learned Magistrate herein had imposed a sentence that required a fine of E30, 000.00, which is obviously above her statutory limit.

[15] I agree with the Applicant's Counsel that, in terms of established authority, it was irregular or improper for the Learned Magistrate to do so. Commenting on a similar position in **Rex V Bonginkosi Kunene And 2 Others, Review Case Nos.20/110, 21/10 and 24/10**, the Honourable Justice M.D.Mamba put the position as follows at paragraphs 9-11 of the unreported judgement:-

> *"9.So much for the Charge Sheet and now for the sentences meted out by the learned Senior Magistrate. His jurisdiction regarding sentence in criminal matters is regulated by the empowering or enabling legislation. In terms of Legal Notice Number 57 of 1988 a Senior Magistrate may not impose a sentence in excess of 7 years (it shall be noted this legislation was later amended by Legal Notice No.29 of 2011, which fixed such limit at 10 years or E15,000.00) However, it is not uncommon*

that a particular Act of Parliament may in specified cases specifically empower a Magistrate with additional or increased jurisdiction regarding sentence. I have not seen any provision in the relevant Act herein or in any other piece of Legislation that specifically confers increased sentencing jurisdiction on a Senior Magistrate in dealing with cases under the Pharmacy Act. The Legislature could for example have said any court convicting an accused for any contravention of the Act shall have the power to impose any of the penalties stipulated in the Act; if the desire was to cloth a Magistrate Court with increased sentencing powers in respect of contravention of the Act.

10. In the case of RV Sanele Vilane and Another Review Cases No.55 and 57 of 2009, dealing with the same point, I had occasion to say the following which I hereby re-say:

> *"If parliament wanted to empower a Magistrate with jurisdiction to impose the stated maximum sentence or a more severe sentence it would have*

specifically said so. Words such as "Notwithstanding any other law regarding the Criminal jurisdiction of the Court, or words to that effect are often used to express such legislative intent."

See also Rex V Mangaliso Samson Mazibuko Review Case No.18/10, a judgement by this court dated 10th May, 2010. A provision in point is Section 19 of the Stock Theft Act 5 of 1982 (as amended) which specifically provides:

"19.Notwithstanding anything in any other law, a Magistrate's Court of the First Class shall have jurisdiction to impose upon a person convicted of an offence in Respect of which the Penalty is prescribed in Section 18(1) in accordance with that section and to order the payment of any compensation under section 20.

11.For the foregoing reasons, the sentence passed by the Court in each of these cases under review cannot be

allowed to stand. Each sentence is set aside. The conviction in each case is however, upheld."

[16] Although the cases that Justice Mamba dealt were all in respect of a sentence with regards the Contravention of the Pharmacy Act and the Stock Theft Act respectively; I have no doubt that the principles referred to apply with equal force in the present matter where the sentence relates to the Contravention of the Money Laundering And Financing of Terrorism (Prevention) Act, 2011. The point is that a Senior Magistrate enforcing the latter Act cannot exceed the sentencing Jurisdiction accorded him by the Magistrate's Court Act as amended which is the Empowering or Enabling Act unless the Money Laundering And Financing of Terrorism (Prevention) Act, 2011, had a section that empowers the Learned Magistrate to sentence beyond the maximum limit accorded her by the Act establishing her.

[17] I also agree that had the Legislature intended it to operate differently, it would, at the time of establishing the Money Laundering And Financing of Terrorism (Prevention) Act, 2011, couched the penalty section or clause in a way that makes it clear that the said Magistrate had the power to exceed the

sentence as set out in its establishing Act as suggested by the reference to the Stock Theft Act in the excerpt referred to above.

[18] Returning to the facts of this matter, and having acknowledged that the Money Laundering and Financing of Terrorism (Prevention) Act which is at the heart of these proceedings was not couched in a language that clearly or specifically accorded it power to exceed the sentence as provided for in the Magistrates Act as the one that established the office of the Senior Magistrate together with its sentencing jurisdiction; it is clear that it was not open to the Honourable Magistrate to sentence beyond the E15,00.00 fine accorded it by the Magistrates Courts Act as Amended. This being the case, it is inescapable to conclude that the sentence cannot stand and should be set aside.

[19] It is evident that I have, on the overall, come to the conclusion that the sentence imposed by the Learned Magistrate cannot stand on a number of grounds. The point is really what should happen to the matter. This is where I had requested the parties counsel to address me, particularly after they had indicated from day one that it was agreed the court should review

the proceedings. It is regrettable that both Counsels were not much helpful in this regard. Whereas the Respondent's Counsel had apparently thrown the matter and left it in the hands of the Court, the applicant's counsel had remained adamant the sentence as it stood was rather too harsh and could not stand.

[20] The reality is that the starting point in review proceedings is to revert the matter back to the court that heard it whenever the decision was reviewed. This however is not a rule of thumb as the review court has a discretion to exercise provided there are grounds to do so. This position was expressed in the following words in the book Etienne Du Toit tittled, **Commentary On The Criminal Procedure Act, 1996 Edition, Juta & Company at page 304**, where he deals with the Powers of the review Court.

> *"…A review Court has unusually wide powers. Apart from the explicit powers of confirmation, amendment or setting aside of the sentences, orders and convictions of Magistrates' Courts and many others Section 304(1) (c) (iv) grants seemingly unlimited powers to the review Court. According to this particular provision, the court*

of review may, when the proceedings were not in accordance with justice, deliver the judgement or the order or impose the sentence which the Magistrate's Court should have delivered or imposed. See SV Addabba and others, 1992(2) SACR 325 (T)."

[21] Although I could be reverting the matter back to the Learned Magistrate who heard it, I am of the view that may not be warranted in a matter brought to court on an urgent basis like the present, seeking an urgent remedy. Further still I am convinced that given the conclusion reached I could just be reverting to the court a quo the inevitable; which may be against the foundations of the powers of the review court. I have all the facts that would enable me impose a fair sentence at my avail and I shall therefore go ahead to impose it.

[22] I note that the case against the accused was just failure to declare money found in his possession. There was no suggestion whatsoever that the said money was meant to be used in the commission of an offence or for any

ulterior or untoward purpose. The issue of forfeiture had also not arisen and was never applied for. The Learned Magistrate had herself not clarified in her decision why she imposed the sentence she did. Other than that it was a maximum sentence provided by the Act, no other reason was put forward. An unavoidable conclusion in my view is that the Learned Magistrate had imposed the sentence because she labored under a misapprehension that she was supposed to impose that sentence. It has been shown in the foregoing paragraphs and on the basis of living authority that such an approach was wrong on her part.

[23] Firstly it has been shown that, that was not the way to sentence a first offender. Secondly the amount involved may also not have allowed the imposition of a maximum sentence. Thirdly and more importantly, the Learned Magistrate had exceeded her statutory limit in a matter where the statute in question did not allow her to do so. I also note that she had for no reason given chosen not to suspend a portion of the sentence in circumstances that called upon her to do so considering she was dealing with a first offender.

[24] Having said all I have above, I am convinced that the following would be an appropriate sentence after setting aside the one imposed by the Learned Magistrate in the Court below:-

24.1. The Applicant, the accused in the court a quo, be and is hereby sentenced to 2 years imprisonment or to a fine of E5,000.00.

24.2. Half the sentence is suspended for a period of three (3) years on condition he is not convicted of a similar offence.

24.3. In the event the amount of money referred to in the sentence imposed by the Court a quo had been paid, the Applicant should be refunded same or a pro rata of it taking into account todays fine.