IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 117/18

In the matter between:

SIMISO SIKHONDZE Applicant

And

THE KING Respondent

Neutral citation: *Simiso Sikhondze v The King (117/2018) (2018) SZHC 159 [20/07/2018]*

Coram: **MAPHANGA J**

Heard: 26/04/2018

Delivered: 20/07/2018

Summary: ***Application for bail pending appeal; grounds for application essentially similar to grounds for appeal in the notice of appeal; No material misdirections in the proceedings a quo; Application failing to show good prospects of success in impending appeal; application dismissed with costs.***

JUDGMENT

[1] This matter comes before this Court primarily as an application pending an appeal. The Appellant was arraigned before the Siteki Magistrates Court on a charge of theft. In the amended indictment it is alleged that the Appellant:

> ***"did wrongfully and intentionally steal items listed under Article 'A' valued at E3, 382.00, the property of or in the lawful possession of Bongi Vilane and did thereby commit the said crime"***

[2] He pleaded guilty to the charge but nonetheless the Crown proceeded to lead evidence to prove the commission of the offence. At the conclusion of the Crown case the Applicant elected to close his case without leading any evidence.

[3] At that stage the trial court convicted the accused based on the State's case and the evidence placed before the court. Consequently it sentenced the Appellant to a sentence of *'two years imprisonment without an option of a fine; half of the sentence…… suspended for two years on condition that the accused is not found guilty of an offence where theft is an element during the period of suspension*".

[4] She has thus lodged an appeal against both the conviction and sentence in tandem with the application for bail pending appeal to which she has attached a copy of her Notice of Appeal. Although an application for bail post-conviction is both competent and avails the Applicant/Appellant in both the common law and the Criminal Procedure and Evidence Act (CPEA) it gives rise to certain practical considerations where the record of the proceedings a quo is available and there exists no reason why the appeal could not be dealt with at once.

[5] In my view, and I believe this has also been the approach of this Court, it is for pragmatic reasons in the interests of justice as it also does make for sound and expedient administration of justice that the appeal be brought forth expeditously and as such the appeal should take precedence. This is by reason of the obvious consideration of the fact that the issues around the prospects of success in the appeal that the court would have to determine in the bail-pending-appeal hearing are much the same as the issues in enquiry the court would have to enter into in evaluating or assessing the evidence a quo in adjudicating the merits of the appeal. It is therefore most expedient and pragmatic to deal with the substance of the appeal which equally lies within the jurisdiction of this court.

[6] However as this approach and option was not put to the parties as a consideration during the hearing of submissions in the application for bail to afford them an opportunity to hear their submissions, I propose to deal with the bail application as presented and the submissions as received.

The Application

[7] The Applicant has in his bid for post-conviction bail set out his case that he has good prospects in the appeal as follows:

> ***'7.1 The Hounourable Court misdirected itself when convicting me with the offence of theft in that the Crown failed to prove the case beyond reasonable doubt in the circumstances of the case.***
>
> ***7.2 the evidence adduced by the Crown does not establish beyond reasonable doubt that I actually committed the crime of theft on the said date and time.***

7.3 the honourable court misdirected itself when imposing an excessively high and shocking sentence taking into accout that this is a custodial sentence without the option of a fine.

7.4 the Hounourable Court misdirected itself by not giving me an option of a fine in the circumstances of the case bearing in mind that this is a first conviction meted out against me"

Prospects of success

[8] It is noteworthy that in her affidavit the applicant does not lay out the basis of her challenge to the judgment of the court a quo on conviction or to support her assertion that she has favourable prospects of success on appeal *vis-a-vis* the evidence adduced against her during the trial. Indeed it appears that of the two witnesses called by the Crown being the Complainant PW1 Bongi Vilane who was the employer of the Applicant, and PW2 the investigating officer, the accused did not seek to challenge their testimonies whatsoever nor did she cross-examine them in the course of their evidence.

[9] In the final analysis the evidence against the Applicant which was led a quo although circumstantial, appear to me to have been correctly considered by the court a quo as sufficient to prove the guilt of the accused beyond reasonable doubt. Key among the evidence is the testimory of PW2 which turned on the pointing out and production of some of the stolen items by the Applicant at her flat. Given that this evidence was neither challenged nor disputed by the Applicant during the trial I am not persuaded that the accused has any viable prospects of success in regard to the merits or her conviction for the offence.

[10] It is now trite that an appeal court should be charry to interfere in the sentence of the trial court and should only do so under very limited circumstances but not on the basis that the appeal court would itself have reached a different conclusion. Put differently the sentencing discretion of a trial court can only be set aside on review where it can be shown that the court acted grossly unprocedurally or capriciously as to be deemed to have exceeded its jurisdiction, or where the sentence was 'disproportionally inappropriate' or excessive. (See ***Mancoba Ndzimandze and Ano. v The King (M56/2012) [2013] SZSC 67; Mandla Maxwell Gadlela v Rex Criminal Appeal Case No. 31/12 in particular the judgment of the court at para 6)***

[11] It appears from the record that the Applicant did not have the facility of legal representation and as such the Court took care at each stage to apprise her of her rights and the standard cautions in the conduct of her case. Before passing sentence she was given an opportunity to lead evidence in mitigation. It is also evident that the Court a quo took into account her personal circumstances including her state of health noting that she was heavy with child, in passing sentence. The court was at large to take stock as it did of other considerations such as the interests of society and the seriousness crime with which she was convicted. No less the learned Magistrates appears to have had due regard to the element of breach of trust in the

crime in that the appeallant was an employee of the complainant and committed the offence in her employment scope which are no doubt legitimate considerations.

In Sipho Magalela Nkomondze v Rex Criminal Appeal No. 4/2009 the Supreme Court in reference to imposition of custodial sentences as measure of disapproval and deterrence, considered a custodial sentence of 3 years for the theft of bicycles by an employee as appropriate and within the discretion of the trial court.

Again I am not persuaded that the accused's prospects are any good even in this regard.

[12] For the above reasons I find the present application unmeritourius and accordingly dismiss it.

MAPHANGA J

Appearances:

For the Applicant: Mr. O. Nzima

For the Respondent: Ms. B. Ndlela