IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 124/19

In the matter between:

MONDLI MKOKO **APPELLANT**

AND

THE KING **RESPONDENT**

Neutral citation: *Mondli Mkoko vs The King* [124/19] *[2019] SZHC 59 (7th May, 2019)*

Coram: FAKUDZE, J

Heard: 23rd April, 2019

Delivered: 4th June, 2019

CRIMINAL APPEAL

Summary: *Criminal review – Appellant wants sentence reduced because court aquo did not consider the fact that accused was young – record shows that this was considered – Appellant's case dismissed – no misdirection.*

Brief History

[1] The Appellant was charged together with one Thembela Collen Sihlongonyane and convicted of one count of Robbery by the Manzini Magistrate's Court. They were both sentenced to three (3) years imprisonment without the option of a fine on or about the 8th March, 2019 and the sentence was backdated to the day of their arrest.

[2] On the 27th of March, 2019, the Appellant noted an Appeal wherein he challenged only the sentence. He thereafter instituted an urgent application on the 28th March, 2019 wherein he was praying for an order to be admitted to bail pending the prosecution of his appeal. The respondent opposed the liberation of the Applicant and hence it was agreed that the court be approached for a date to prosecute the appeal once and for all.

THE PARTIES' CONTENTION

The Appellant

[3] The Appellant's contention is that he is a Swati who is 19 years old. He was a student at Mhlatane High School at the time he was arrested and charged

with the crime of Robbery. At the commencement of the trial, the Appellant willingly pleaded guilty to the crime and did not waste the court's time. The Appellant together with the co-accused were on the 8th March, 2019 found guilty pursuant to a fully blown trial and were both sentenced to three (3) years imprisonment without the option of a fine.

[4] The Appellant contends that the 2nd accused person showed no remorse and persisted with the plea of not guilty thereby delaying and wasting the court's time. The sentence meted out by the Magistrate was one size fits all in that it did not give any consideration to the personal circumstances (age, drunken mental state, influence by 2nd accused and the fact that the accused is a student). Also the attitudes adopted during the trial were not the same for both accused. The Appellant showed remorse by entering a plea of guilty and did not waste the court's time. When mitigating, the Appellant stated that he was a first offender and a teenager of ninenteen (19) years of age and that he is a student. However, the court failed to exercise its discretion judiciously by ignoring these mitigating factors.

The Respondent

[5] The Respondent raises a contrary argument when it states that the record of the proceedings of the court *aquo* show that the Appellant acted in concert with the co-accused in that he played a pivotal role during the robbery. He is the one who pick pocketed the complainant after the complainant had been ordered to stand still.

[6] Further, the sentence imposed by the court *aquo* does not induce a sense of shock as it is not even too harsh when compared to other similar offences. In the case of **Mduduzi Dlamini v Rex Appeal case No. 12/2008**, the High Court confirmed a custodial sentence of four (4) years for a robbery whereby the Appellant had robbed the victim a cellphone of less than E1000.00. The Appellant had used a knife and threats to induce submission of the victim and no injury was sustained. In *casu,* the cellphone taken was worth E900.00 while the crack-filling chemical was worth E350.00. It is the Respondent's submission that the sentence of (3) years without the option of a fine was very lenient in the circumstances as the chemical was never recovered.

[7] The Respondent contends that the Learned Magistrate, when sentencing the accused persons, accordingly considered the triad as per the record at page 39. She considered that the accused persons were first offenders, both of them are still young and that the Appellant is a student even though there was no proof of such as Appellant never mentioned his school's name and the grade in which he was at that time. There was therefore no misdirection which culminated into a miscarriage of justice. The trial court sought and managed to achieve a balanced sentence which also took into account the interests of the community and the accused person. Therefore, the factors urged by the Appellant in mitigation cannot override the gravity of the offence committed. Robbery victims are always left traumatised and usually a custodial sentence is imposed by the courts.

[8] Finally, the Respondent contends that robbery is a species of offences which are listed under the Third (3rd) schedule in our criminal code of 1938. It is an offence where the offender cannot have his sentence suspended in part or wholly or be postponed for a certain period. This shows how serious the offence of robbery is.

The Applicable Law

[9] The well entrenched position of the law states that pre-eminently a discretion lying in the trial court will only be interfered with by an Appellate court where there has been an improper exercise of that discretion occasioning a miscarriage of justice. In **Mandla Maxwell Gadlela v Rex, Criminal Appeal Case No. 31/12** at paragraph [6] Dr. Twum J.A. observed as follows:

"[6] A sentencing judge exercises a judicial discretion when he/she is passing sentence. A judicial discretion is not exercised capriciously. Rather its exercise must be based on principles evolved and settled by the final courts of the land. One such principle is that sentencing is predominately within the domain of the trial court who saw and heard the witnesses who testified before it. It is that court which had the opportunity to observe their demeanor, that is how they answered questions, particularly, under cross examination. It is therefore for that court to decide on the evidence and the personal performance of the witnesses which of them to believe as witnesses of truth. Therefore, unless, there is evidence that the Trial Judge was biased or otherwise acted

unlawfully or illegally or that the trial itself was characterised by procedural irregularities, or that the trial court exceeded its jurisdiction or that the sentence was startingly or disproportionately inappropriate an appellate court would not set aside a sentence passed by the trial court even if the appellate court would probably have given a lesser sentence than that passed by the trial court."

[10] Likewise in **Xolani Zinhle Nyandzeni v Rex Criminal Appeal case 29/2010**, at pages 11 and 12, His Lordship Ramodibedi CJ said:-

"……. this Court has repeatedly stressed the fundamental principle that the imposition of sentence is primarily a matter which lies within the discretion of the trial court. This is however, a judicial discretion which must be exercised upon a consideration of all relevant factors. In particular the trial court is enjoined to have regard to the triad consisting of the offence, the offender and the interests of society. See ***S v Zihn 1969(2) S. 537(A)***. *This court will generally not interfere with that discretion in the absence of a material misdirection resulting in a miscarriage of justice……."*

[11] In **Sithembiso Simelane and Another v Rex (02/2011) [2012] SZSC** at page 14, it was held:

"It is important to note that this power to interfere with the sentence of a lower court is not an absolute one. It is limited to instances where

there was an improper or incorrect exercise of the lower court's discretion in sentencing. This is in recognition of the fact that sentencing is pre-eminently a matter which is within the discretion of the trial court and an appellate court will only interfere where there is a material misdirection resulting in a miscarriage of justice or irregularity or where there is a striking disparity between the sentence passed by the court aquo and that which would have been passed by the Court of Appeal."

[12] Finally, in **Mancoba Ndzimandze and Another v The King Criminal Appeal Case No. M56/2012**, the court stated that although one may be youthful, he cannot be regarded as a juvenile especially if the appellant is above the age of 18 years. Ota J. observed as follows:

"Regarding the age of the appellant, the record shows that they were 22 and 20 years respectively when this offence was committed. Though still youthful, they cannot however be regarded as juveniles since they were both above the age of 18 years……. I have carefully considered the factors urged in mitigation by the Appellants and I find that they cannot override the gravity of the offence committed. The court aquo obviously and rightly so, emphasised the seriousness of the offence committed."

COURT'S ANALYSIS AND CONCLUSION

[13] The Appellant's contention is that he is 19 years old and a student. The court *aquo* did not take this fact into account when sentencing him to three (3) years imprisonment, notwithstanding that he had pleaded guilty to robbery. The 2nd accused had pleaded not guilty. The Appellant and the 2nd accused were both subjected to a fully blown trial resulting in their conviction of three (3) years without an option of a fine. Alternatively, the court *aquo* should have granted him the benefit of his plea and the fact that he also showed remorse by suspending part of the sentence.

[14] The Respondent's case is that the court did take into account the fact that the Appellant was still young. Page 39 of the record of proceedings reflects this position. The Respondent further contends that the Appellant is charged with a serious offence. The court *aquo* was very lenient in sentencing the appellant to three (3) years imprisonment. He finally contends that the Appellant's sentence cannot be suspended under Section 313 of the Criminal Code. It is also a serious offence.

[15] In its analysis and conclusion this court is inclined to agree with Respondent's contention. At page 39 of the record of proceedings of the court *aquo*, the Learned Magistrate states as follows:

"<u>Sentence</u>

The Court in passing the sentence, it considers that the accused persons are first offenders. Both of them are still young and are scholars. They co-operated with the police especially accused no. 1."

The court then went further to consider the seriousness of the offence in the light of the Appellant's personal circumstances. It therefore came to the conclusion that the seriousness of the offence outweighed the personal circumstances of the Appellant, hence it imposed the penalty of three (3) years.

[16] On the issue that the appellant was ninenteen (19) years at the time of the commission of the offence, I wish to borrow what Ota J said in **Mancoba Ndzimandze v Rex** (Supra) where the Learned Judge observed that:

> *"Regarding the age of the Appellants, the record shows that they were 22 and 20 years respectively when the offence was committed. Though still youthful, they cannot however be regarded as juveniles since they were both above the age of 18 years."*

So the fact the Appellant is ninenteen (19) does not suggest that he is a juvenile as he is above the age of 18 years. The court cannot even suspend any part or the whole of the sentence.

[17] Having considered all the facts above, the Appellant's case is dismissed and the sentence meted out by the court *aquo* stands.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Appellant: M. Ndlangamandla

Respondent: M. S. Dlamini