IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 166/19

HELD AT MBABANE

In the matter between:

AGRIPPA MAKHILIGI SHONGWE **APPLICANT**

And

THE KING **RESPONDENT**

Neutral Citation: *Agrippa Makhiligi Shongwe vs The King [166/19] [2020] SZHC 113 (24 June 2020)*

Coram: M. LANGWENYA J

Heard: 3 July 2019; 13 December 2019

Delivered: 24 June 2020

Summary: *Sentence-imposition of-appellant sentenced to thirty years imprisonment for two counts of contravening People Trafficking and People Smuggling (Prohibition) Act No. 7/2009 by magistrate court-seriousness of the offence and the interests of society over-emphasized-trial court failing to*

balance the mitigating factors against the interests of society and those of crime-trial court failing to have regard to the cumulative effect of the sentences-on appeal-the sentence reduced to nine years imprisonment-sentence to run concurrently.

JUDGMENT

Introduction

[1] Initially this matter served before me as an urgent application for bail pending appeal on 18 July 2019. The application is opposed. At the instance of Ms. Mabuza who represented the applicant, the matter was removed from the roll to facilitate it being heard as an appeal when all papers were filed. Timelines were given for the filing of papers to enable prosecution of the appeal. The appeal was argued on 13 December 2019.

Background

[2] The appellant stood trial on three charges in the Nhlangano Magistrate court. He was convicted on two charges namely contravening section 12(1)(e) and on the second count contravening section 19 of the People Trafficking and Smuggling (Prohibition) Act No. 7/2009. On the third count, the appellant was charged with assault with intent to cause grievous bodily harm. He was sentenced to fifteen (15) years imprisonment in respect of each of the counts

he was convicted for. For completeness, I set out hereunder the charges appellant faced and was convicted for before the trial court:

Count One

The accused person is charged with contravening section 12(1)(e) of the People Trafficking and People Smuggling (Prohibition) Act No. 7/2009.

In that upon or about the period between the months of May 2015 and February 2016 at or near Thabazimbi area in the Republic of South Africa, the said accused did unlawfully recruit, transport and employ one Thato Xaba aged 19 years to work at Nsingizini area in Swaziland for the purpose of exploitation.

Count Two

The accused person is charged with the offence of contravening section 19 of the People Trafficking and People Smuggling Prohibition Act 7/2009.

In that upon or about the month of May 2015 and at or near Ngwenya border gate, the said accused did unlawfully arrange the illegal entry of one Thato Xaba from South Africa to Swaziland in order to obtain financial or other material benefit.

Appellant's grounds of appeal

[3] The appellant appeals against the judgment of the trial court on the following grounds:

1. The trial court erred in both law and fact by convicting the appellant of the offences charged when the evidence did not support the conviction;
2. The trial court erred both in law and in fact in failing to consider the 'triad' before it arrived at a proper sentence to be meted out to the appellant;

3. The trial court erred both in fact and in law by failing to order that the sentences meted out on the appellant should run concurrently when the offences he was charged with arise from one transaction; and
4. The cumulative sentence of thirty (30) years imprisonment without the option of paying a fine imposed by the trial court *a quo* is harsh and induces a sense of shock.

[4] When the matter was argued before me, Ms. N. Ndlangamandla submitted that the appellant has abandoned the appeal against conviction.

[5] **Respondent's reasons for opposing appeal**

1. In opposing the appeal, the respondents argued that the trial court did consider the 'triad'. The learned magistrate did not have to repeat verbatim what defence counsel had submitted on behalf of the accused in mitigation of sentence-so the respondent argued.
2. It was also submitted on behalf of the respondent that count one and count two were separate and distinct from each other as they concern incidents that are unrelated in terms of time and place and they therefore do not form an integral part of the same transaction. The trial court was therefore justified to order the sentences to run consecutively. The Crown submitted that count one occurred between the months of May 2015 and February 2016 while count two took place in May 2015[1]. Even without going into the detail of this

[1] See paragraph 3.1 of respondents' heads of argument.

argument, it would appear from this submission that both count one and count two were committed at the same time- that is in May 2015.

3. It is submitted by the respondents that the aggregate sentence meted out by the trial court in this matter is justified by the circumstances of the offences. The Crown contends that there were exceptional circumstances which justified the trial court meting out a cumulative sentence of thirty years and ordering the sentences to run consecutively. According to the Crown the exceptional circumstances included the following: that the victim who is from Lesotho was deceived by the accused while in the Republic of South Africa that he was being taken to Mpumalanga when he was taken to ESwatini; that the victim was smuggled into eSwatini; that he was paid a salary only once; he was assaulted and was subjected to poor living conditions and to difficult working conditions.

Sentencing Principles

[6] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or when the sentence imposed by the trial court is shocking and startlingly inappropriate[2].

[7] In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that ‘punishment should fit the criminal as

[2] *S v Malgas* 2001 (1) SACR 469(SCA) para 12.

well as the crime, be fair to society and be blended with a measure of mercy[3]. In addition to that the court must also consider the main purposes of punishment, which are deterrent, preventative, reformative and retributive[4].

[8] In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others[5].

[9] The determination of an equitable quantum punishment must bear a relationship to the moral blameworthiness of the offender. There is, however no injustice where in weighing the offence(s), the interest of the offender and the interest of society, more weight is attached to one or another of these; unless there is over-emphasis of one which leads to disregard of the other. The court should not be over-influenced by the seriousness of the type of the offence and fail to pay sufficient attention to other factors which are of no less importance in the case before court. It follows therefore that, the over-emphasis of a wrongdoer's crimes and the under-estimation of his person constitutes a misdirection which justifies the substitution of the sentence.

[3] Per Holmes JA in *S v Rabie* 1975 (4) SA 855(A) at 862G-H.
[4] See *R v Swanepoel* 1945 AD 444 at 445; *S v Banda* 1991 (2) SA 352(BG) at 354E-G.
[5] *S v Banda* 1991(2) SA 352 at 355A-B.

[10] While deterrence is a valid consideration, a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterred. The sentence must suit the offence and the offender. If would-be offenders are to be deterred, they should be deterred by a deserved sentence and not by one which over-emphasizes deterrence and punishes the offender beyond the level his offence deserves.

[11] The sentencing court is obliged to consider the cumulative effect of the sentences to be served, especially where the charges are part of the same course of action. Where therefore, the cumulative effect is likely to be disproportionate to the blameworthiness in relation to the offences committed, or will be so excessive as to evoke a sense of shock, the individual sentences can significantly be ameliorated by ordering the sentences to run concurrently.

[12] That count one and count two were committed at about the same period-May 2015 and against the same complainant; that the intention to recruit, transport and employ the complainant albeit unlawful resulted in the smuggling of the complainant who would later be employed, without much pay by the accused is enough to show that count one and count two were committed contemporaneously. The judgment of the trial court with respect, fails to consider that counts one and two are closely related in *modus operandi*, time and intention that these two counts could properly be regarded as one crime in substance and that the court should have followed

one or more of the following courses in this regard: (a) take the two convictions together for the purpose of sentence; (b) order that the sentence imposed on count two or part thereof, should run together with that of count one. It is my respectful view that the failure of the trial court to consider and to apply the well-established principle of sentencing set out above amounts to misdirection. Accordingly this court is justified to consider a more appropriate sentence in light of all the facts and circumstances of the case.

[13] The reasons for sentence handed down by the trial court are brief and are captured in seven sentences. I restate them hereunder:

> **In passing sentence the court has considered interest of the accused, interest of the law and society. Accused pleaded not guilty to the charges. He has no record of previous conviction. However the offences convicted of are serious and prevalent offences. They show the existence of modern day slavery which is not acceptable globally thus the existence of the Protocol to help wipe out the scourge in every country in the world. Swaziland has enacted the relevant legislation which has penalty provisos for the offences therein court invoked the penalty as provided by the statute but according to its sentencing jurisdiction. The sentences mete (sic) fit and proper and to serve as deterrent to accused and would be offenders.**

[14] In my view, there was misdirection on the part of the sentencing court. The trial court failed to have regard to the mitigating factors operating in favour of the accused. The trial court committed the classic error of merely reciting the well- established principles that ought to be taken into account when determining an appropriate sentence, but failed to properly apply these principles to the particular circumstances of this matter. The accused was arrested on 27 February 2016 and released on bail on 29 February 2016. He

spent two days in pre-trial incarceration. The trial court did not take this fact into account.

[15] It was submitted on behalf of the accused that he is unsophisticated as he went up to grade 2 with formal education; it was also stated that his level of literacy had a direct effect in him committing the offences he was found guilty of. The trial court was told that the accused was not aware that he was committing an offence. While ignorance of the law is not an excuse, the trial court ought to have considered in favour of the accused that he was unsophisticated as he went as far as grade 2 at school. He is also a first offender. There is evidence to the effect that prior to his incarceration the accused worked in the mines in South Africa. The chances that he will be without a job when he finishes serving his prison term are great given the fact that he does not have any meaningful professional qualification to his credit. Considerable mercy was therefore called for in view of his personal circumstances.

[16] What the fifty-nine year old accused person exposed the complainant to will forever be etched on complainant's memory and will most likely define his future in a negative way. The conduct of the accused in committing the offences he was found guilty of is reprehensible.

[17] The accused person subjected the complainant to deplorable and harmful living and working conditions and in the process betrayed the community's

trust by failing to look out for the vulnerable young man and not to exploit him. The accused betrayed the community's trust that adults should protect the young people in their community and not turn them into slaves.

[18] The interest of society demands that the accused serve a substantial term of imprisonment. All would-be offenders who are inclined to engage in acts of people trafficking and people smuggling in the manner the accused has done must know that the courts will not look kindly upon such conduct. To temper the harshness of the sentence with mercy, I will make the sentences of both count one and count two to run concurrently. I will also suspend a portion of it as a disincentive for the accused to engage in such conduct in the future.

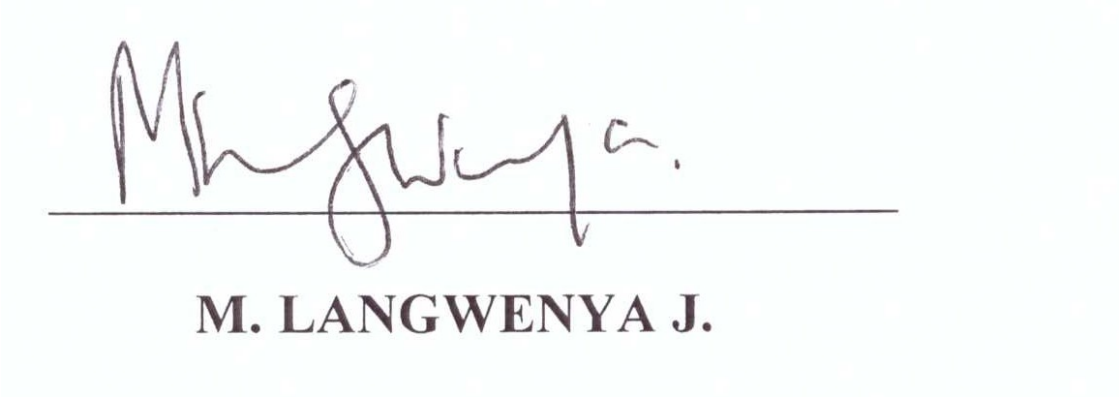
[19] In the result, the following order is made:

The sentences on count one and count two are set aside and the following order is substituted: In respect of people trafficking conviction which is count one I sentence the appellant to five (5) years imprisonment of which one year is suspended on condition that the appellant is not convicted of people trafficking during the period of suspension.

[20] In respect of people smuggling conviction which is count two I sentence the appellant to four years imprisonment of which one year suspended on

condition that the appellant is not convicted of people smuggling during the period of suspension.

[21] The sentences for both counts will run concurrently.



M. LANGWENYA J.

For Appellant: Ms. N. Ndlangamandla

For Respondent: Ms. L. Hlophe