IN THE HIGH·coURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 315/2020**

In the matter between:

WALISO BOYSIE MALANDZELA **Appellant**

And

THE KING **Respondent**

Neutral citation : Wa/iso *Boysie Malandzela v The King (315/2020) SZHC 173 (11/09/2020).*

Coram: MAPHANGA J

Heard : 07/08/2020 and 14/08/2020

Delivered: 11/09/20

Summary: ***Criminal Law - Appeal against sentence on grounds of disproportionate severity of sentence - custodial sentences without fine option ordered to run consecutively - in effect Appellant sentenced to a two year prison sentence without the option of a fine - sentence reviewed and attenuated to include a fine option.***

MAPHANGAJ

[1] This is an appeal against sentence upon the appellant's conviction by the Magistrates Court of Mbabane on two counts of Housebreaking and Theft coupled with three counts of theft. He was sentenced to two years without the option of a fine with one year suspended on each of the two counts of housebreaking and theft and further to five months imprisonment with an option of a E500.00 fine on the third count of theft, then I year sentences each with an option of E2000.00 fine on the remaining two counts of theft.

[2] The Learned Magistrates ordered that the sentences on the 3 counts of the lesser offences of theft ought to run concurrently. In effect the count *a quo* sentenced him to consecutive one year custodial sentences the housebreaking and theft charges; effectively a two year custodial sentence for those offences.

[3] He seeks to appeal against the sentence on the following basis:

3.1 that the count *a quo* failed to take into account in mitigation the age of the appellant when passing sentences; and

3.2 erred both in fact and in law by not granting the appellant the option of paying a fine in regard to the house breaking and theft counts (counts 1 and 2) notwithstanding that the offences are not listed as scheduled offences and regardless of the fact that the articles of

property involved in those offences were subsequently recovered; but also;

3.3 that taken in whole the sentence imposed by the Court a *quo* on the appellant was so harsh as to induce a sense of shock.

[4] At the inception of the hearing the appellant withdrew a separate circumstantial ground of appeal where he averred the Magistrate had erred in not disclosing the reason for not suspending the whole sentence I respect of the record count of housebreaking and theft when the whole sentence in respect of Court I was suspended. It is to the remaining grounds that I turn.

Age as a *mitigating factor.*

[5] In this regard the Appellant contends that although the record reflects that the learned Magistrate makes reference in his judgment on sentence to the submissions in mitigation indicating the youth of the appellant, such reference was a mere mention and thus a passing or cursory reference which merely paid "lip-service" to the consideration. It is argued that the Court made no further reference to the bearing of this factor on sentence.

[6] In regard to the appellant's age the learned Magistrate made the following remarks in regard to his age (21):

> ***"The accused are both relatively young men of 21 years and 19 years respectfully (sic). The accused have chosen a wrong path in life and thus resolved to breaking into people's houses and stealing their valuable items....."***

[7] No further reference as to his age appears in mitigation. I note that the reference to the age is made amid sentences in what appears to be a consideration of

aggravating factors and not as a mitigating circumstance. It leads to an inescapable reference that the Court a *quo* sought to disregard this factor.

In not ordering a *fine option on the counts of Housebreaking and Theft.*

[8] The appellant contends that the sentence of an effective 1 year in custody without a fine option in regard to each of the first two counts relating to House breaking & Theft charges, were excessive, inappropriate and harsh, thus inducing a sense of shock regard being had to a number of factors including:

The value of the property involved in the theft being E8000.00;

b) The appellant being a first offender

c) The appellant pleaded guilty to all counts and were remorseful of their offences

c) Most of the stolen items were recovered.

[9] It is now trite that the trial Court reserves the sentencing discretion and the appellant Court should be charry to interfere with a sentence of the lower count unless there are extraordinary, or exceptional circumstances indicating a serious misdirection on the part of the sentencing Court, or the sentence so imposed is relative to the circumstances of the mine, the accused and all relevant factors was patently inappropriate, excessive and disproportionate (See also list of authorities referenced in the *Braai Dlamini* case)

[10] In the unreported case of ***Lindokuh/e Braai Dlamini v Rex*** **(1545/17) SZHC 122 (2018) [12th June 2018,** I have had occasion to traverse and review the critical legal standards applied by the Courts on appeals against sentence. I do not propose to reiterate them here. **(See also *Elvis Mandlenkhosi Dlamini v Rex* (30/2011)(2013) SZSC 06 (31st May 2013); *S v Ma/gas* 2001 (SACR) 469 SCA; *S v Rabie* 1975(4) SA855 (AD) p.6.)** I do consider that in the instant case the appellant's personal circumstances, especially his age and that this appears to

be his first conviction *ex facie* the record, these factors should count to his credit. The factors do not appear to be reflected in the consideration of the sentence by the learned Magistrate other than meriting a passing reference.

[11] That said, I am mindful that the learned Magistrate did temper with the sentence in regard to the house-breaking and theft charges by suspending half of the sentences of imprisonment and further that the Court a *quo* appears to have relied on some precedence for the reference. However, the precedence is not helpful at all as nowhere is there a comparative analysis of the relevant circumstances and a single case reference is not a useful guide without a review of a few similar cases to set a meaningful sentencing trend for like offences.

[12] I consider that the sentence imposed on the said first two counts should have, in taking into account the age of and record of the appellant, could have bore more than a mere mention of these factors but should have reflected a measure of mercy regard also to the reflected contrition of the appellant. A fine option at a sum sufficiently deterrent could have achieved this purpose.

[13] In the result I am prepared to reconsider and set aside the sentence duly in the following respect.

13.1 I order that the sentence passed on the Appellant for count 1 and 2 reads as follows:

COUNT1

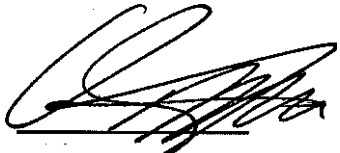
13.1.1 The accused is sentenced to a term of two years imprisonment subject to ½ the sentence being wholly suspended for one year on condition that he is not convicted of a similar offence during the said period; and;

13.1.2 On the residual prison term the appellant is granted an option of a E2000.00 fine

COUNT2

13.1.3 The accused is sentenced to a term of two years imprisonment subject to ½ the sentence being wholly suspended for one year on condition that he is not convicted of a similar offence during the said period; and on the residual prison term, the appellant is granted an option of an E2000.00 fine.

13.2 The rest of the sentence remains intact.



MAPHANGA J

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Mr N. Ndlangamandla
Mabila Attorneys in Association

For Respondent: Ms. B. Fakudze
Prosecuting Counsel - DPPs Office.