IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 100/2021

HELD IN MBABANE

IN THE MATTER BETWEEN

MAKHOSONKHE KHOSO DLAMINI **APPELLANT**

AND

THE KING **RESPONDENT**

NEUTRAL CITATION: ***MAKHOSONKHE KHOSO DLAMINI VS THE KING (100/2021) SZHC –100 [15/07/2022]***

CORAM: **B W MAGAGULA J**

HEARD: **21/04/2022**

DELIVERED: **15/07/2022**

SUMMARY *Criminal Procedure – Sentencing – Appellant convicted of twelve of varying counts of theft; including contravening Section 12 Sub-Section (2) of the theft of motor vehicles Act Number 16 of 1991 – The sentence amounts to accumulative period of forty three (43) years imprisonment without the option of paying a fine - Principles of appeal against a sentence considered – Section 238 of Sub-Section 1 (b) of The Criminal Procedure and Evidence Act 67/1938 applicable - The Triad Principle reconsidered. Instances where the court should interfere with the discretion awarded to a lower court also considered.*

Held - Appeal upheld with regard to the sentencing only. The aspect of the appeal relating to the sentences running consecutively dismissed. The sentences imposed by the court a quo are interfered with and replaced by those of this court.

JUDGMENT

Background

[1] This is an appeal from a decision of Principal Magistrate P. Mdluli, as he then was. There were two Accused persons that initially appeared before His Worship this appeal is in respect of only one of the Accused person's which is Accused number one.

[2] The Appellant was convicted and sentenced as follows;

2.1 Contravening Section 12 (2) of the Theft of Motor Vehicle Act No. 16/1991 – Two (2) years imprisonment without the option of paying a fine.

2.2 Theft – Five (5) years imprisonment without the option of paying a fine.

2.3 House Breaking with intent to steal and theft – Five (5) years imprisonment without the option of paying a fine.

2.4 House Breaking with intent to steal and theft – Five (5) years imprisonment without the option of paying a fine.

2.5 Contravening Section 3 (a) as read with Section 18 (1) of the Stock Theft Act 5/1982 – Two (2) years imprisonment without the option of paying a fine.

2.6 Contravening Section 3 (a) as read with Section 18 (1) of the Stock Theft Act 5/1982 - Two (2) years imprisonment without the option of paying a fine.

2.7 Theft – Three (3) years imprisonment without the option of paying a fine.

2.8 Theft - Three (3) years imprisonment without the option of paying a fine.

2.9 House Breaking with intent to steal and theft – Five (5) years imprisonment without the option of paying a fine.

2.10 House Breaking with intent to steal and theft – Five (5) years imprisonment without the option of paying a fine.

2.11 Theft – Three (3) years imprisonment without the option of paying a fine.

[3] The Appellant has appealed against the sentences on the following grounds;

2.1 *The court a quo erred both in fact and in law by failing to consider the triad when arriving at a proper sentence to be meted out on the Appellant.*

2.2 The court a quo erred both in fact and in law by failing to give reasons why the Appellant could not be given the option of paying a fine in respect of the offence of House Breaking with intent to steal and Theft, when he was a first offender;

2.3 The sentence imposed by the court a quo is harsh and induces a sense of shock and it is one which the above Honorable Court would not ordinarily impose.

[4] The Appellant at the time of the commission of the offence was 27 years of age. His co-Accused had been much younger than him, he was 19 years of age.

[5] It is also common cause that the appeal is squarely lodged only on the harshness of the cumulative effect of the sentences. The conviction element is

DID THE COURT A QUO ERR BY FAILING TO CONSIDER THE TRIAD

[9] One of the grounds of the appeal of the Appellant is that the court *a quo* erred both in fact and in laws by failing to consider the triad in arriving at a proper sentence to be meted out on the Appellant.

[10] The Appellant's Counsel Miss Ndlangamandla during the arguments argued strenuously that the Learned Principal Magistrates paid a lip service to the principle of triad. In as much as from the record, it appears that he alluded to balancing the crime, the Accused and interest of society. But it does not appear from the record itself, in what respect did he give consideration to each of the three.

[11] It is worth considering the specific reasons given by the Principal Magistrate, to ascertain if the criticism levelled against his reasoning is warranted.

[12] At page 67 of the record, the Magistrate dedicated a specific paragraph in respect of sentencing and reasoning. This is how the Honorable Principal Magistrate worded his reasons.

SENTENCING AND REASONS

In sentencing both Accused the court has duly considered all the mitigating circumstances tabled before court by Accused number 1's Attorney/Defence Counsel and Accused number 2 of his behalf. Both Accused persons are relatively young and they entitled to sum extend to be given the opportunity to rehabilitate correct and mend their wayward indispositions. They are both

first time offenders hence sum degree of leniency need to be given albeit sparingly.

TRIAD

[13] The Appellant counsel has correctly argued in her heads of argument that the concept of triad was visited upon in the matter of **F Vs Zinn 1969 (2) SA 537 (A)** where the Appellate division held that in imposing a sentence, what has to be considered as triad consist of the crime, the offender and the interests of society. These factors must be considered equally and one should not be heavily relied upon over the other.

[14] The principle of triad was also recognize in our jurisdiction in the matter of **Rex Vs Millington Mkhwanazi**[1]

[15] I will now consider the record to see whether the Learned Magistrate did consider the crime, the offender and interest of society.

[16] Although the Learned Magistrate tabulated his reasons in a point form, without much elucidation, this is what he recorded;

The Court:

- ***Constructive thief***
- ***Strategist thief waits for the best opportunity to steal***

[1] High Court Case No 397/14 (unreported)

- *Huge quantities of items evidence in large amounts*
- *Loss to the victims*
- *Interest of society*
- *Prevalence of house breaking and theft in Eswatini in particular Manzini*
- *Only way to balance this interest is by imposition of proper and equitable sentences.*
- *Gone are the days when house breaking and theft still had the options of fine.*
- *Accused needs to be corrected for a long period once at the same time (this is the punishment for his crimes).*

[17] In his reasoning which is briefly captured above, I am convinced that the Magistrate traversed on the crime its self. He clearly stated that the housebreaking and theft in Swaziland, particularly in Manzini is prevalent.

[18] On the issue of the offender, I am also satisfied that he did consider his age youthfulness, educational level, personal circumstances, marital status and period of remand.[2]

[19] On the issue of the interest of society, the Learned Principal Magistrate, did traverse on it in passing the sentence. I can only assume he must have

[2] This remarks were made in the quote of appearing in paragraph 12 of this judgment.

considered it, as he expressly referred to the victims and in no specific words referred to the interest of society. Although it does not appear *ex facie* what exactly did he consider as the interest of society specifically with regard to the matter at hand.

[20] It may not appear from the record the extent to which these factors were balanced. However, there is no out right jurisdiction from the record that one was unfairly considered over the other.

FAILURE TO GIVE REASONS WHY APPELANT COULD NOT BE GIVEN THE OPTIONS FOR FINE

[21] It is also part of the Appellants ground for appeal that the court *a quo* erred in fact and in law by failing to give reasons why the Appellant could not be given an option of paying a fine. [3] This ground of appeal is made specifically in relation of the offence of house breaking with intent to steal, yet the Appellant was a first offender.

[22] The starting point would be to ascertain from the record, if as a matter of fact the Learned Principal Magistrate failed to state the reasons why the Appellant could not be given the option of paying a fine in respect of house breaking with intent to steal and theft.

The sentencing and reasons of the Learned Magistrate appear on page 67 of record and they are stated as follows;

> *In sentencing both Accused the court had duly considered all the mitigating circumstances tabled before court by Accused 1's*

[3] See paragraph 2.2 of the Appellants notice of appeal.

attorney/defence counsel and Accused 2 on his behalf. Both Accused persons are relatively young and entitled to some extent to be given the opportunity to rehabilitate correct and mend their wayward indispositions. They are both first-offenders hence some degree of lenience ... need to be given albeit sparingly. Accused 2 has been implicated and found guilty on only two (2) of the counts and those were for the stock theft of goats on two occasions. He will accordingly be sentenced as follows;

In as much as the Learned Principal Magistrate traverses on the issue that both Accused persons were relatively young and are entitled to some extent to be given the opportunity rehabilitate correct and mend their wayward indispositions. However there are no reasons appearing *ex-facie* as to why he preferred the custodial sentence as composed to the option of paying a fine.

[23] In the matter **of Vika Velabo Dlamini Vs The King, Criminal Appeal Case 19/2012 (at paragraph 29) the Supreme Court** stated as follows;

"As a general rule in this jurisdiction, first offenders should normally be afforded the opportunity to pay a fine..."

"The fine imposed must also be within the capacity of the offender to pay. This is a salutary rule at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offender's recidivists".

[24] Where there is a deviation from the general rule as stated in the Vika Velabo Dlamini case, it is important to give reasons thereof.[4]

[4] See also the case of Mzwandile Khethabakhe Siyaya Vs The Director of Public Prosecution Supreme Court Case No. 20/2018 the comments by His Lordship J Mavuso AJA at paragraph 17 of that judgment

[25] **His Lordship Bosiele JA** in the matter of **Mokela Vs The State [2011] ZASCA** stated the following at paragraph 12;

"This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that the courts do not act arbitrarily, but base their decision on rationale grounds. Of even greater significance is that it is only fair to every Accused person to know why the court has not taken a particular decision, particularly where such a decision has adverse consequences for such an Accused person".

The court went on further to state;

"The giving of reasons becomes even more critical if not obligatory where one Judicial Officer interferes with an order or ruling made by another Judicial Officer. To my mind this underpins the important principles of fairness to the parties. I find it unjudicial for a Judicial Officer to interfere with an order made by another court particularly where such an order is based on the exercise of a discretion without giving any reasons therefore".

[26] The above sentiments are exactly what will propel me to state why I will interfere with the discretion exercised by **His Worship Principal Magistrate P. Mdluli**, as he then was. He failed to state reasons why he could not grant the Appellant an option of paying a fine. It was incumbent upon him to do so. More especially since the Appellant was a first offender. It is exactly on that basis that this court will interfere with his discretion and consider the circumstances of the Accused person afresh. He is a young man, who must be rehabilitated back into society. He was a first offender who should have been given an option to pay a fine in respect of those charges where the statute allowed an option of paying a fine. In as much it is incumbent on the court to balance the triad, which is the seriousness of the offence committed, the interest of the society, the interest of the Accused person himself. The present matter is not telling why should the option of ordering the Accused to pay a fine not be a deterrent enough on its own. In fact, the Learned Principal Magistrate could have added a suspended sentence. This could have fixed a period, within which the Accused should not be found to have committed the same offence.

[27] In the matter of **Sifiso Ndwandwe Vs Rex** Supreme Court No. 05/2012 **His Lordship Otta JA** stated as follows, with regard to sentencing at paragraph 14

> *"The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The court must be conscious and deliberate in his choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the results it is expected to achieve. The choice of applicable principles and the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the Accused. Other mitigating factors and often times a selection between or application of competing objectives or principles of punishment".*

[28] The lack of good and sufficient reasons given by the Learned Principal Magistrate on why he ordered consecutive sentences in respect of the charges faced by the Accused, is without merit. The charges he faced were different and the acts of criminality were committed independent of each other.

[29] The other ground that is being advanced by the Appellant before this court on why the decision of the court *a quo* should be set aside is that the sentence imposed by the court *a quo* is harsh and induces a sense of shock. It is one which the above Honorable court would not ordinarily impose.

[30] The rationale behind the above ground of appeal is that the cumulative sentence to forty three (43) years without an option of paying a fine, is harsh and it induces a sense of shock.

[31] The question which this court must decide is whether the facts and circumstances of the case as considered by the court *a quo,* justify the cumulative sentence of 43 years imposed subsequent to the consecutive application of the sentences?

[32] **Section 300 (i) (ii) of the Criminal Procedure and Evidence Act 67/1938**, as amended provides as follows;

i. **If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or such last offence, as the case maybe, as it is competent to impose.**
ii. **If such punishment consists of imprisonment the court shall direct whether each sentence shall be saved consecutively or the remaining sentences.**

[33] It is clear from the above caption of the Criminal Procedure and Evidence Act, that the law permits a court to pass concurrent or consecutive sentences in appropriate cases. The discretion to pass a consecutive sentence is however exercised within certain perimeters. As the general rule, consecutive sentences are ordered in respect of offences that do not form an integral part of the same transaction[5]. There is a rider though. They must have been committed on different dates, in different circumstances and are of a wholly different character. **See Rex Vs Berry (1976) 63 Criminal Appeal; Samkeliso Madadi Tsela Vs Rex 20/2010** where the offences were committed in the same transaction. It was it was unjust and wrong in law, to order the sentence of an Accused to run consecutively.

[34] In the case of **Samkeliso Madadi Tsela Vs Rex (Supra) Moore JA** stated the following in relation to the doctrine of *res gestae* stated as follows;

> 35. The editors of Cross on Evidence Forth Edition at page 502 state that;

[5] See Sifiso Ndwandwe Vs Rex Supreme Court Appeal Case No. 05/2012 at paragraph 20

"Unlike most of the principles of the law of evidence, the doctrine of the res gestae is inclusionary ...the assertion that an item of evidence forms part of the res gestae roughly means that it is relevant on account of its contemporaneity with the matters under investigation. It is part of the story".

Page 517, the authors recite that:

"Facts are sometimes allowed to be proved on the footing that they form part of the res gestae. In the context, the phrase seems merely to denote relevance on account of contemporaneity. We saw, however, in Chapter XIV, that it had a further implication in that evidence of facts forming part of the same transaction as that under inquiry may be excluded if it does no more than show that someone is disposed to commit crimes or civil wrongs in general, or even crimes or civil wrongs of the kind into which the court is inquiring Contemporaneity, continuity or the fact that a number of incidents are closely connected with each other gives the evidence an added relevance which renders it admissible inspite of its prejudicial tendencies".

36. *The doctrine of Res Gestae, and particularly its contemporaneity elements, has also been employed by courts in determining whether the course of events grounding several counts in an indictment are so closely inter-related in terms of time and surrounding circumstances as to form integral parts of a single transaction warranting the imposition of concurrent sentences, or so disparate and unrelated or segmented as to justify the imposition of consecutive sentences which, from their nature, are more punitive and severe. The application of the res gestae principles lend additional justification for treating the events grounding the two counts as being so homogenous and inter related as to render the imposition of consecutive sentences wholly inappropriate.*

CONSECUTIVE EFFECTS OF THE SENTENCING BY THE TRIAL COURT

[35] It was argued strenuously by the Appellant's Counsel Ms. Ndlangamandla that there was no good and sufficient reason given by the Principal Magistrates in the court *a quo,* on why he ordered the sentences to run consecutively. Counsel buttressed her arguments by submitting that the charges that the Accused person was convicted of, were committed within a short space from each other and against the same Complainant.

[36] Although the Accused counsel did not contextualize her argument in respect of in which of these charges did the Accused commit within a short space from each other. I say this because when one considers all the charges broadly as they are, definitely they were not committed within a short space of each other except those that were committed in Madonsa. Unfortunately, I cannot tell from the argument in respect of which of the charges is the argument being made pertaining to the short space of time. Otherwise when you look at the charges they were committed against different Complainants. Especially charge one, which was committed in Hhelehhele where a car broken into while parked next to the main road. In Madonsa, a bicycle was stolen, shoes were stolen in Coates Valley against other Complainants. In my view, there is no compelling reason why I should fault the Principal Magistrate on why he treated the sentence separate. Hence, he then decided to apply the consecutive reasoning because there were separate incidences, separate Complainants, and some of them on separate dates.

[37] Having said so, where I am persuaded is with regard to the application of the consecutive sentences when looked cumulatively brings an effective term of forty three (43) years imprisonment imposed on the Appellant. In my mind, the cumulative effect of this sentence definitely has the effect of severity. In the circumstances I am inclined to apply the same reasoning as applied **by Ramodibedi CJ sitting with Ibrahim JA and Moore JA** concurring when deciding the case of Vusumuzi **Lucky Sigudla Vs Rex Criminal Appeal No. 01/2011.** In that case, the court ordered part of the sentence that had been imposed by the court *a quo* to run concurrently. The court did this solely on the basis of ameliorating the harshness of the cumulative effect of a sentence, which had totaled to 26 years imprisonment. In the matter at hand, the cumulative effect of the sentencing is even higher it is 43 years.

CONCLUSION

[38] In the final analysis, there is no doubt in my mind that the conduct of the Accused person of committing the offences with impunity and opprobrium weighed heavily in the mind of the court when meting out the sentences, in the manner in which it did. That is why I cannot subscribe to the Appellant's proposition that the Learned Magistrate was wrong to take the offences as having been committed separately, just because some of them were committed on the same day. The Accused was on a frolic of his own. He violated people's rights at whim on different occasions. This to me, are clearly different acts of criminality, they should be punished separately.

[39] The Learned Principal Magistrate was perfectly entitled to treat the charges separately and I cannot fault on his own application of the law. Where I find that he erred, is with regard to the articulation of the reasons. First, on why he could not afford him the option of a fine after he decided to convict him separately for each of the charges he was facing. Second, he also failed to state his reasons for not considering that sentencing pertained to the different act of criminality and when the sentences are added up, the cumulative effect renders them to have a stinging effect. It is the harshness of the cumulative effect in my view was then supposed to be blended with a dose of mercy.

[40] The individual sentencing as I have already determined, was correct and appropriate. There is however, a necessity to ameliorate the effect of the cumulative sentence of 43 years[6].

[41] Due to the aforegoing, in order to ameliorate the harshness of cumulative sentence 43 years imposed by the Learned Principal Magistrate, I make the following orders;

41.1 That the Appeal succeeds.

[6] This is the same reasoning that was adopted by Otta JA in the matter of Sifiso Ndwandwe Vs Rex Criminal Appeal Case 05/2012

41.2 That the sentence meted out by the court a quo is hereby set aside and substituted with the following sentences;

41.3 The sentence in count 1 is substituted with that of two (2) years imprisonment with the option of paying a fine of E2 000-00 (Two Thousand Emalangeni).

41.4 The sentence in count 2 is substituted with that of two (2) years without the option of paying a fine.

41.5 The sentence in count 3 is substituted with that of two (2) years imprisonment without the option of paying a fine.

41.6 The sentence in count 4 is substituted with that of two (2) years imprisonment without the option of paying a fine.

41.7 The sentence in count 7 is substituted with that of three (3) years imprisonment with the option of paying a fine of E3 000-00 (Three Thousand Emalangeni).

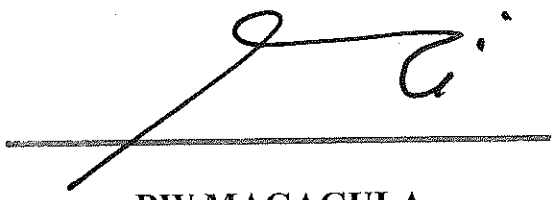
41.8 The sentence in count 8 is substituted with that of three (3) years imprisonment with the option of paying a fine of E3 000-00 (Three Thousand Emalangeni).

41.9 The sentence in count 9 is substituted with that of two (2) years imprisonment with the option of paying a fine of E2 000-00 (Two Thousand Emalangeni).

41.10 The sentence in count 10 is substituted with that of two (2) years imprisonment with the option of paying a fine of E2 000-00 (Two Thousand Emalangeni).

41.11 The sentence in count 11 is substituted with that of two (2) years imprisonment with the option of paying a fine of E2 000-00 (Two Thousand Emalangeni).

41.12 The sentence in count 12 is substituted with that of two (2) years imprisonment with the option of paying a fine of E2 000-00 (Two Thousand Emalangeni).



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Appellant:	N. Ndlangamandla
	(Mabila Attorneys in Association with N. Ndlangamandla & S. Jele)
For the Crown:	K. Mngomezulu
	The Director of Public Prosecutions