IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 151/2021

HELD IN MBABANE

IN THE MATTER BETWEEN

ZAKHELE MKHABELA **APPELLANT**

AND

THE KING **RESPONDENT**

NEUTRAL CITATION: ***ZAKHELE MKHABELA VS THE KING (151/2021) SZHC – 157 [19/07/2022]***

CORAM: **B W MAGAGULA J**

HEARD: **07/07 /2022**

DELIVERED: **19/07/2022**

SUMMARY *Criminal law – Appeal from a decision of the subordinate court from the district of Manzini. Appellant charged with the offence of theft, being first offender who pleaded guilty to the charges. The appeal is premised on the ground that the custodial sentence imposed by the Learned Magistrate is harsh. The court also did not state any reasons why the Appellant could not be afforded an option of paying a fine.*

Held - In as much as sentencing is the domain of the trial court, the court is expected to give reasons for exercising its discretion not *to give an option of paying a fine.*

Held further – Appeal upheld. Appellant given the option of paying a fine.

JUDGMENT

INTRODUCTION

[1] The matter came before me initially on a certificate of urgency. The Appellant being the Applicant in the application for bail, sought to be granted bail pending the appeal.

[2] The Crown took a more practical view, that the court must deal with the matter holistically and allocate a date of hearing for the main matter which is the appeal. This was done to expedite the finality of the matter in its entirety.

[3] Subsequent thereto, the court was advised that the Respondents Counsel was more inclined to concede to a consent order, being that the appeal be allowed and the Appellant be given an option of paying a fine. The court *mero motu* raised certain questions pertaining to the consideration of the now infamous triad principle. In particular, the Crown Counsel was asked if she had considered the prevalence of the offence. It is common cause that the Appellant had been convicted for theft of copper. This court was concerned about it's impact on society and on business sector disruption. Let alone the financial drain it was having.

[4] It is after this dialogue that the Learned Crown Counsel expressed reluctance to engage the court in answers, as that would be tantamount to her defending the Appellant yet she represent the Crown in the matter at hand. This dialogue took place in one of the court appearances, which is on the 06th of May 2022. Subsequent thereto, the Respondent filed heads of argument in support of the opposition of the appeal. That is how the urgent application for bail fell away and what took the centre stage, was the main appeal. The matter was then postponed to the 07th of July for arguments.

[5] Despite that the representatives of both parties were in attendance when the date for arguments was set, counsel for the Respondent was not in attendance when the matter was argued on the 07th July 2022. The court was not favored with an explanation regarding her absence. Counsel for the Appellant, Ms N. Ndlangamandla, only advised that she had made futile attempts when calling her on her cellular phone. I take a dim view of such a conduct from Counsel. It should not be encouraged.

[6] The matter proceeded to be argued by the Counsel for Appellant in the physical absence of the Crown Counsel. Fortunately for her the Respondent's Counsel had filed comprehensive heads of arguments which I have considered in the judgment.

BRIEF BACKGROUND FACTS

[7] The focus of this appeal falls on the sentence imposed by the trial court. The Appellant being dissatisfied by the custodial sentence of two (2) years, has escalated the matter to this court.

[8] The genesis of this matter is that the Appellant then appearing with his co-Accused, Mfundo Dlamini, appeared before the Learned Magistrate at Matsapha Circuit Court on the 13th April 2022.

[9] After the Prosecutor had put charges to the Appellants, who were undefended then, both pleaded guilty.

[10] Despite their plea of guilty, the Prosecutor applied to call PW1 who is Thobile Dlamini, an employee of the Complainant. (Eswatini Postal Telecommunications Company).

[11] The charge that the Accused persons were facing is couched in the following manner;

"RIDER "A"

Accused person, one and two are charged with the offence of theft. In that upon or on the 04th April 2022 at /or near KaHlobile area in the Manzini District, the said Accused persons each or both of them acting jointly in the furtherance of a common purpose, did wrongfully, unlawfully and intentionally steal copper cables about 100meters, valued at Twenty Four Thousand Seven Hundred and Thirty Eight Emalangeni (E24 738.00), the property in the lawful possession of Thobile Dlamini (SPTC) and thus committed the said offence"

Accused person 1 and 2 are charged with the offence of Theft

[12] In her evidence before the court *a quo*, the witness confirmed that she is an employee of the Complainant. She further alluded to the fact that the copper belonged to her employer and the value was the sum of Thirty Seven Thousand One Hundred and Seven Emalangeni (E37 107.00). She submitted the exhibit and the Learned Magistrate noted it on the court record, which he described as two cables of copper. He accordingly marked the exhibit as exhibit "P1". After the witness had completed her examination in chief, she was asked only one question by the Appellant. The question is as follows;

Q – *"Why do you say you were responsible for theft at Mbhuleni yet we took you to KaHlobile area"*

The answer that the witness gave, is illegible from the record.

[13] That is all the Appellant was asked in cross examination. It appears though, that he did not dispute offence as he had already pleaded guilty to the charge. I suppose the Accused was questioning the accuracy of the place where the copper wire was stolen. In my view, he was correct to do so. He pleaded guilty to theft that took place at KaHlobile not at Mbikwakhe as per the version of the witness.

GROUNDS FOR APPEAL

[14] The grounds of appeal were initially three (3). The Appellant's Counsel in her wisdom decided not to pursue the first ground and only pursued the last two.

The grounds of Appeal are captured as follows;

1. *The Appellant was convicted at the Manzini Magistrates' Court for theft and sentenced to two (2) years without the option of paying a fine.*

2. *The grounds of appeal as appears the Notice of Appeal are as follows;*

   2.1 The court a quo erred both in fact an in law by convicting the Appellant of the offence of robbery when there was no proof beyond reasonable doubt that he indeed committed the offence he was charged with.

   2.2 The sentence imposed by the court a quo is harsh and induces a sense of shock and it is one the above Honourable Court would not ordinarily impose. The court a quo did not state any reasons why the Appellant could not be afforded the option of paying a fine since he was a first offender.

   2.3 The court a quo erred both in fact and in law by failing to properly balance the three (3) competing aspects of the triad when arriving at a proper sentence to be meted out on the Appellant. The court a quo under emphasized the personal circumstances of the Appellant, especially the age of the Appellant whereas age is an important consideration in mitigation.

APPELLANT'S ARGUMENTS

[15] The Appellant argues that the Learned Magistrate meted out a harsh sentence in respect of the charge of theft. The custodial sentence that was handed down induces a sense of shock.

[16] The Appellant cites the case of **Lindokuhle Braai Dlamini Vs The King**[1], where **Maphanga J** held as follows;

> *"In the realm and range of crimes committed across this land where abhorrent and violent crimes abound, I am unable to come to agree with the Learned Magistrate's conclusion that the offence to which the Appellant readily made an admission and plea of guilty is of such severity as would have warranted a mandatory custodial sentence unless the offender was shown to be recidivist; this particularly in light of the Appellant's relative youth, contrition and that this being his first offence."*

[17] The Appellant argue that the Magistrate should have considered the principles of triad. In that he should have taken into consideration the interest of the Accused being his youth and that he had pleaded guilty and didn't waste the court's time. He was also a first offender and an option of a fine should have been considered.

[1] High Court Case No. 545/2017 (Unreported)

RESPONDENT'S ARGUMENT

[18] The Respondent filed comprehensive heads of argument for which this court is indebted.

[19] The basis of the Respondent's contention is that sentencing is in the discretion of the trial court. The Appeal court should only interfere with the exercise of such discretion if the sentence induces a sense of shock; or if there is a material misdirection which warrant the interference by the Appellate court.

[20] The Respondent further contents that where appeals are premised on sentence only, the Appellant have an obligation to prove to the satisfaction of the Appellate court, that the sentence is harsh and induces a sense of shock and that there is also a material misdirection on the part of the trial court which warrant interference.

[21] The Respondent cited the decision of **Elvis Mandlenkhosi Vs Rex**[2]. Where the court at paragraph 29 stated the following;

> *"It is trite law that the imposition of sentence lies within the discretion of the trial court, and that an Appellate court will on interfere with such a sentence if there has been a misdirection resulting in a miscarriage of justice. It is the duty of the Appellant to satisfy the Appellate court that the sentence is so grossly harsh or excessive that it induces a sense of shock, to warrant interference in the interest of justice. The court of appeal will also interfere with the sentence where there is a striking disparity between the sentence which was infact passed by the trial court, and the sentence with the court of appeal would have itself passed; this means the same thing as the sentence which induces a*

[2] (30/2011) 2013) SZC 06 (31 May 2013)

sense of shock. This principle has been followed and applied consistently by this court over many years."

[22] The Respondent referred this court to more authorities which include **Mancoba Lebogang Mokoena Vs Rex**[3].

[23] The Respondent continues to argue that the mere fact, that an Appellant is a first offender with a clean record of previous convictions, does not necessarily mean that the trial court should be faulted for imposing a custodial sentence. In this regard, the decision of **Sandile Njabulo Shabalala Vs Rex Case No. 20/29** was cited, where **Mamba J** held as follows;

"I know of no law in this jurisdiction, which enjoins the court to grant an option of a fine, simple because the Accused is a first offender."

[24] The import of the Appellant's arguments is that, the mere fact that the Appellant in this court is a first offender with no records of previous conviction, does not necessarily mean that this court should interfere with the decision of the Magistrate.

ANALYSIS AND CONCLUSION

[25] The import of the first ground of appeal as articulated by the Appellant, is not only that the sentence imposed by the court a quo is harsh and induces a sense of shock. But the Appellant goes further, to state that the court a quo did not state any reasons why the Appellant could not be afforded the option of paying a fine, as he was a first offender.

[3] Criminal Appeal No. 10/2013

[26] It is therefore important that in assessing whether this ground of appeal has merit, to first survey the reasoning of the court *a quo* to ascertain what were the factors it considered when arriving at the decision of not affording the Accused an option of paying a fine. The sentencing and reasons appear from the record. The specific paragraph relating to such, is captured as follows;

> *"In passing the sentence the court has noted the seriousness of the offence. I have considered their ages. I have noted their profuse apologies. I have considered that most of the items were never recovered. I have considered that they have pleaded guilty to the offence. Accused did not waste the courts time. I have noted that the offence is prevalent and the correct message has to be sent to others doing or considering to do the same habit they once commit, they will be no leniency. I have considered all their mitigation."*

[27] There is no law that imposes a custodial sentence in respect of a charge of Theft. It therefore follows that the Accused persons at least, needed to know why they could not be afforded an option of a fine. I say so mindful of the fact that it is within the discretion of the court *a quo*, to impose a custodial sentence. The point though, is that it must be accompanied by reasons.

[28] In the matter of **Vika Velabo Dlamini Vs The King**[4]. At paragraph 29 the court stated the following;

> *"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*

[4] Criminal Appel Case No. 19/2011 (Supreme Court)

aimed at giving the first offenders a chance not to go to jail and be contaminated by hardened and serious offenders...."

[29] Where there is a deviation from the general rule as stated in the Vika Velabo Dlamini case (supra) it is important that the trial court must give reasons for the deviation.[5]

[30] I take cognizance of the fact that an Appellate court should be slow to alter a sentence duly passed by the trial court. However, I am more inclined to find that the Learned Magistrate did not state reasons why he could not consider the option of a fine. This omission constitute exceptional circumstances based on which this court should interfere with the sentence given by the Learned.

[31] It is also my view that since the Appellant is a first offender, and is of youthful age. The Learned Magistrate was enjoined to blend the sentence that he gave with a splash of mercy. Especially because the Appellant readily pleaded guilty. He should have at least, if he insisted on exercising his discretion, in favour of a custodial sentence, he should have his reasons for doing so. I agree fully with the argument that, there is no law that entitles first offenders to an automatic fine. But, the rider here is that it must appear from the judgment and reasoning of the Magistrate why he is inclined in favour of a custodial sentence, when a fine is an option.

[32] If the Learned Magistrate had stated the reasons, surely in my view the position would have been different. Depending of course why the Learned Magistrate would insist that a first offender who is 27 years of age should be exposed to more hardened criminals in prison, who may contaminate him. I am also cognizant of the fact that the Accused person committed a serious offence. The theft of copper is prevalent. It does not need be emphasized that

[5] Criminal Appeal Case No. 19/2012

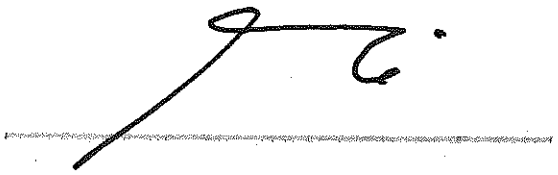
the consequences of copper theft is drastic on the economy. It hinders economic growth. The disruption that is caused by the copper theft is unparalleled and it affects quite a number of communication platforms, including data and voice. I agree that the sentence that courts must make should send a warning to other prospective offenders.

[33] Be that as it may, the trial court should not lose sight of the purpose of sentencing. It must not only be retributive, but it must also be rehabilitative. There is no explanation on the judgment *ex facie,* why the payment of a fine, including a suspended sentence was not considered as a deterrent.

[34] It is on that basis that I uphold the appeal.

[35] The Appellant has already spend time in custody. He must have learnt by now that committing crime has dire consequences. Accordingly, I order that he be given a suspended sentence. He should not be found to have committed a similar offence in the period of two years. I therefore order that the ruling by the Learned Magistrate, be replaced with the following order;

i) The Appellant is sentenced to a period of 2 years imprisonment with the option of paying a fine of Two Thousand Emalangeni (E2 000-00). He is not be found to have committed a similar offence within the period of two years.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

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