IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 11/2023**

In the matter between:

FANAFANA MAZIYA **APPELLANT**

And

REX **RESPONDENT**

Neutral citation : *Fanafana Maziya v Rex (11/2023) [2023] SZHC 118 (30/05/2023)*

CORAM: **B.S. DLAMINI J**

DATE HEARD: 24 March 2023

DATE DELIVERED 30 May 2023

JUDGMENT ON APPEAL

INTRODUCTION

[1] This is an appeal from a decision of the Magistrates' Court delivered on the 15th December 2022. The Appellant, who was the accused person in the Court *a quo*, was found guilty on Two (2) charges of House Breaking and Theft.

[2] The Appellant was sentenced to Four (4) years' imprisonment in respect of Count 1, with half of the sentence being suspended for a period of Three (3) years on condition that Appellant is not found to have committed a similar offence. On Count 2, the Appellant was sentenced to Four (4) years' imprisonment with half of the sentence suspended for Three (3) years on condition that Appellant is not convicted of a similar offence. The sentences were ordered to run consecutively. This effectively means the Appellant was sentenced to Four (4) years' imprisonment without the option of a fine.

[3] It is against this sentence that the Appellant noted an appeal to this Court. The grounds of appeal as contained in the Notice of Appeal are as follows;

"1. **The court a quo erred both in fact and in law by failing to give reasons why the Appellant could not be afforded the option of paying a fine when he was a first offender.**

2. **The court a quo erred both in fact and in law by failing to properly balance the three competing aspect of the trial before coming to a proper sentence to be meted on the Appellant.**

3. **The sentence meted out by the court a quo is harsh and induces a sense of shock and it is one which the above Honourable Court would not ordinarily impose."**

APPELLANT'S SUBMISSIONS

[4] On behalf of the Appellant, it was argued that the Court *a quo* committed an irregularity by not stating in the ruling on sentence the reasons for not affording the Appellant the opportunity to pay a fine

especially given that he is a first offender. In this regard, it is argued on behalf of the Appellant that;

"**The failure to give reasons why the Appellant could not be afforded the option of paying a fine when he was a first offender amounts to an irregularity and thus the above Honourable Court may intervene in the matter because as stated in the above case [France Bheki Dlamini v Rex, Criminal Appeal Case No.22/2002],** ***"[The Court] may interfere with the sentence where the trial court has misdirected itself on the facts or the law, where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock or where there is an under-emphasis of the Accused's personal circumstances"...***"

[5] It was also submitted on behalf of the Appellant that the Court *a quo* did not practically give effect to the triad principle when sentencing the Appellant. In buttressing this point, the Appellant's legal representative stated that;

"**[7]. In S v Zinn 1969 (2) SA 537 (A) at 541 it was stated as follows:**

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which is his task and the objects of coming to the sentencing, the respondent merely paid lip service to the three competing aspects of the triad and did not properly apply himself.

[8] On perusal of the record it is clear that the Court did not consider the Appellant's personal circumstances but only deal with the interests of society and, the nature of the crime and its prevalence.

[9] The Court failed to take into account the fact that the Appellant showed remorse by apologizing to the complainants and by pleading guilty and he also apologized to the Court and the circumstances which led him to commit such offences in that he is unemployed and has to take care of his mother and his five (5) children who are all dependent on him for support and maintenance."

[6] The Respondent on the other hand, is vigorously opposing the appeal. The Crown submitted that;

"[6.1] It shall be submitted by the Crown that sentence always lie within the discretion of the trial court. In the case of Sam Du Pont v Rex, Criminal Appeal No.4/2008 at page 9, His Lordship Banda CJ (as he then was), stated that;

"It is now settled that the imposition of sentence is a matter [that] predominantly lies within the discretion of the trial court. An Appellate Court id generally loath to interfere with the trial court exercise of discretion in the absence of a misdirection resulting in a failure of justice."

[6.2] In the case of *Bheki Amos Mkhaliphi v Rex, Criminal Appeal No.30/2012 at page10* where His Lordship Levinsohn JA stated as follows;

"An appeal court does not have a general equitable jurisdiction to ameliorate sentences. Its power to interfere with sentence is confirmed [confined] to well recognized principles, namely where there the sentence imposed induces a sense of shock, where there is material misdirection and where, as indicated above, there is a striking disparity between the sentence passed by the court and the sentence

that could have been passed by the appeal court had it been sitting at first instance."

[7] On the issue of the alleged failure by the Court *a quo* to give proper effect to the triad principle, it is submitted by the Crown that;

"[7.1] The Respondent submits that the triad principle has [been] properly balanced by the Court before impose [imposing] its sentence. The court took into account that Appellant has pleaded guilty to the charges without wasting the court's time. The court further considered that Appellant was a first offender. It is submitted that those were the personal interests of Appellant."

ANALYSIS AND CONCLUSION

[8] The Court is required to determine if there was any misdirection on the part of the Court *a quo* in sentencing the Appellant in the manner it did. In our jurisdiction, there exists a very old piece of legislation which is still in force called the **'The crimes Act of 1889.'**

[9] In terms of this legislation, under the heading '*Housebreaking and Like Offences'*, it is provided in section 62 that;

"Any person who breaks and enters any dwelling house at night with intent to commit an offence therein shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand emalangeni or imprisonment not exceeding fourteen years and if such person is a male to whipping not exceeding twenty-four strokes in addition to such imprisonment."

[10] The legislation makes provision for two types of sanctions or types of punishment that the Court hearing a case of house breaking and theft may impose. The first of these options is a fine (no matter what the value of the stolen item is) of E 1,000.00 (One Thousand Emalangeni). The second option is a custodial sentence not exceeding Fourteen (14) years. It therefore follows logically that any Court opting for one type of sentence over the other must, as a matter of law and principle, explain its decision in detail. This is particularly so if the Court opts to go for the more severe and harsher sentence of imprisonment.

[11] In the Appeal Court case of **Zakhe Mabuza v Rex (377/17) [2018] SZHC 224 (29 November 2018)**, the Appellant had been convicted

[11] In the Appeal Court case of **Zakhe Mabuza v Rex (377/17) [2018] SZHC 224 (29 November 2018)**, the Appellant had been convicted by the Magistrates' Court in respect of Counts 3 and 4 (being theft offences) to a combined 8 years' imprisonment without the option of a fine. On appeal to the High Court, the offences were treated as one and the Appellant was sentenced to 2 years' imprisonment with the option to pay a fine of E 2,000.00. The value of the items involved in these counts which were later treated as one, was the sum of E 25,000.00 (Twenty Five Thousand Emalangeni). In the matter at hand, the combined value of the items is the sum of E 12,000.00 as per the evidence of PW1, Mfanukhona Richard Tsela.

[12] In the case of **Mncube v S (A71/2017) [2019] ZAMPMHC 7 (15 October 2019)**, it was held by the Court that;

"I am inclined to agree with the views expressed by Stegman J in S v Maunye and Others 2002 (1) SACR 266 (T), when held that an incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with housebreaking as a factor that tends to

aggravate the seriousness of the offence and therefore the severity of the sentence."

[13] In the *Mncube case [supra]*, the items allegedly stolen had a value of R 5,200.00. The Accused had been sentenced to an effective 8 years' imprisonment without the option of a fine. The trial Court imposed such sentence because the accused had many previous convictions. On appeal to the High Court, the sentence of 8 years' imprisonment was reduced to 19 months' imprisonment. In the present matter, the Appellant has no previous conviction.

[14] In the local case **of Dlamini v Rex (1545 of 2017) [2018] SZHC 112 (17 June 2018),** the Court held;

"[23]The Appellant who was a minor at 19 years old at the time of the theft, produced and handed over the stolen articles. He was a first offender and it appears from the record that he was driven by financial privation intending to sell the items and get cash for his needs. He owned up to the school for his

transgressions and sought pardon; which it is noted, was extended to him...

[25] There is no doubt that house breaking is quite a common or prevalent crime that warrants sufficiently serious deterrent sentences in the best interests of society. However the balanced principled approach that the courts have adopted emphasize the need to temper a robust sentencing stance with consideration of proportionality and the broader social interests as well as the condition of the criminal in such a way that;

a) the sentence [takes into account the seriousness] of the crime.

b) the sentence should not be so harsh as to be manifestly unjust."

[15] Similarly, in the present matter the Appellant is a first offender. He showed positive signs of being remorseful for his wayward behavior by pleading guilty to the charges. From the evidence, it does appear that the Appellant is genuinely sorry for his actions. It does appear

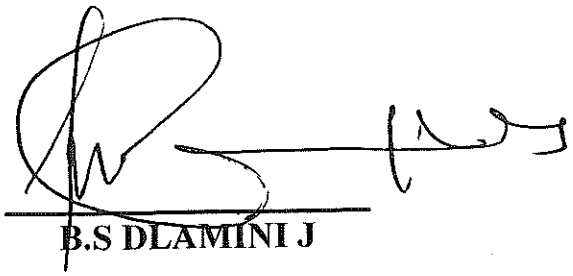
to be in the interest of justice and fairness that he be given a second chance to self-correct. It is to be noted that all the items were fully recovered and returned to their lawful owner.

[16] In the circumstances the Court substitutes the sentence imposed by the Court *a quo* with the following sentence;

(a) In Count 1, the Appellant is hereby sentenced to two years' imprisonment with the option to pay a fine a fine of E 2,000.00. Half of the sentence is suspended for 3 years on condition that Appellant is not convicted of a similar offence.

(b) In Count 2, the Appellant is sentenced to two years' imprisonment with the option to pay a fine of E 2,000.00. Half of the sentence is suspended for a period of 3 years on condition that Appellant is not convicted of a similar offence.

(c) The sentences are not to be backdated and it is ordered that the sentences are to run consecutively.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For the Appellant: *Miss. N. Ndlangamandla (Mabila Attorneys)*

For the Crown; *Miss B. Fakudze (D.P.P's Chambers)*