IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No.M56/2012

In the matter between:

MANCOBA NDZIMANDZE	**1ST APPELLANT**
BHEKITHEMBA TSABEDZE	**2ND APPELLANT**

AND

THE KING	**RESPONDENT**

Neutral citation: *Mancoba Ndzimandze and Another v The King (M56/2012) [2013] SZSC 67 (27March 2013)*

Coram: **OTA J**

Heard: **18 MARCH 2013**

Delivered: **28 MARCH 2013**

Summary: **Appeal against sentence: no misdirection found: appeal dismissed.**

[1] The Appellants were tried by the Manzini Magistrates Court per **S. Ndlela-Kunene** for the offence of theft.

[2] The indictment alleged that both Appellants as Accused persons:-

> "acting in furtherance of a common purpose did wrongfully, unlawfully and intentionally steal two bicycles and a pair of safety shoes all valued at E11-250.00 the property of or in the lawful possession of Sven Kummer"

[3] Both Appellants pleaded guilty to the charge on arraignment. Thereafter, evidence was led by the Complainant in proof of commission.

[4] At the end of the trial, the *court a quo* sentenced both Appellants as follows:-

> "<u>SENTENCE</u>

The Court sentences Accused persons to 3 years imprisonment without option of a fine. Aggravating factors, stealing from an employer is a very serious offence. Sentence is deterrent"

[5] It is the aforegoing sentence that both Appellants challenge in this appeal upon identical grounds to wit:

1. The learned Magistrate erred in fact and in law in sentencing the Appellants to a custodial sentence without the option of a fine.

2. The learned Magistrate erred in fact and in law when she failed to take into sufficient account the personal and other surrounding circumstances of the Appellants e.g. their age, education, family background, that the stolen goods were recovered almost immediately, that the Appellants were first offenders, the socoi-economic circumstances of the Appellants and that they pleaded guilty to the charge.

3. The sentence is too harsh as to cause a sense of shock.

[6] Now, let us return to first principles and re-visit the well entrenched position of the law which states that sentencing is pre-eminently a discretion in the province of the trial court and an appellate court will only interfere where there has been an improper exercise of that discretion occasioning a miscarriage of justice.

[7] Commenting on this position of our law in the case of **Mandla Maxwell Gadlela v Rex Criminal Appeal Case No. 31/12 paragraph [6], Dr Twum JA** declared as follows:-

> "A sentencing judge exercises a judicial discretion when he/she is passing sentence. A judicial discretion is not exercised capriciously. Rather its exercise must be based on principles evolved and settled by the final courts of the land. One such principle is that sentencing is predominantly within the domain of the trial court who saw and heard the witnesses who testified before it. It is that court which had the opportunity to observe their demeanor, i.e. how they answered questions, particularly, under cross-examination. It is therefore for that court to decide on the evidence and the personal performance of the witnesses which of them to believe as witnesses of truth. Therefore, unless there is evidence that the Trial judge was biased or otherwise acted unlawfully or illegally or that the trial itself was characterized by the procedural irregularities, or that the trial court

> exceeded its jurisdiction or that the sentence was startlingly or disproportionately inappropriate, an appellate court would not set aside a sentence passed by the trial court even if the appellate court would probably have given a lesser sentence than that passed by the trial court".

[8] *In casu*, the Appellants complain that the court a quo did not take cognizance of their personal circumstances in imposing sentence. A misdirection will arise in this regard from the failure of the trial court to call for evidence in mitigation from the Appellants either under oath or affirmation or unsworn from the dock before passing sentence.

[9] This is however not such a case. The record shows that the court a quo took evidence in mitigation from the Appellants before proceeding to sentence. The factors urged in mitigation by the Appellants were that they pleaded guilty, were first offenders and had pleaded for leniency. These were the factors before the court a quo as is demonstrated by the record. Regarding the age of the Appellants, the record shows that they were 22 years and 20 years respectively when this offence was committed. Though still youthful they cannot however be regarded as juveniles since they were both above

the age of 18 years. The issue of the education of the Appellants and their family background which are now urged in this appeal by defence counsel, to my mind hold little or no water. These are factors that should have been demonstrated by the Appellants in their mitigation a quo and not communicated to the court via heads of argument or embellishing oral submissions of counsel from the bar. There is no evidence whatsoever to substantiate the allegation that the Appellants are school going youths, when one considers the fact that they were not in school but rather in employment when they committed the offence, As **Dr Twum JA** observed in **Maxwel Gadlela** (supra) paragraph 5.

> "I only wish to add that an appellate court may properly ignore the litany of matters which are told a sentencing judge (or for that matter, the appellate court itself) either by counsel in court (from the bar) or by the appellant, in person (from the dock) for reduction in sentence unless there is legal proof of them. Speaking for myself, I must say, I am only nominally persuaded by so-called "Heads of Arguments" written from prisons or even by lawyers on behalf of appellants, which commence with alleged "feeling of remorse, followed immediately by lamentations

that the terms of imprisonment are too harsh and severe for them to bear. Then follows a plea for leniency"

[10] I have carefully considered the factors urged in mitigation by the Appellants and I find that they cannot override the gravity of the offence committed. The court a quo obviously and rightly so, emphasised the seriousness of the offence committed.

[11] I say this because the record shows that the Appellants stole two bicycles from their employer just two week after they had been employed by him. Upon realizing that the Appellants had stolen the bicycles, the Complainant informed the police and a search was mounted for the Appellants who abandoned the bicycles and attempted to run away on seeing the Complainants vehicle. A chase ensued and the Appellants were eventually apprehended.

[12] Theft by an employer from his employee is a grave offence one that would attract a custodial sentence. It is akin to an offence of breach of trust by a public servant or officer. The Gambia Court of Appeal

emphasized this principle in the case of **Joof v The State (1960-1993) GR 280,** where it stated as follows:-

> "It is reasonable therefore to infer that the learned judge did not disregard the actual sum found to have been stolen. Nevertheless, he gave due, and in our respectful view, proper consideration to the accused's official position, the fact that his conduct is bound to reflect in public confidence in the police force, that the offence was indefensible, that it was a clear breach of the public trust in the Accused as a police officer, that he was a first offender with family responsibilities, factors he considered ought to be taken into consideration in mitigating sentence for the detestable offence made punishable by imprisonment for seven years. For the stated reasons he imposed four years imprisonment with hard labour. We do not think the learned judge exercised his discretion with respect to sentence wrongly. In our view, the amount in fact stolen, is not the only criterion for fixing punishment, all the attendant circumstances deserved to be considered as was done by the learned judge including especially the Appellant's breach of trust, his fiduciary position, the fact that he stole part of the money forming the subject – matter of the alleged bank robbery which, he was himself investigating". (emphasis added)

See **Sipho Magalela Nkomondze vs Rex Criminal Appeal No 4/2009 paragraph (6)** where The Supreme Court expressed a grave disapproval for such offence.

[13] *In casu*, the Appellants stole the two bicycles entrusted in their care by their employer. In my respectful view, the court a quo was in order to emphasise the seriousness of the offence committed and to impose a custodial sentence of 3 years as a deterrent. It has since been brought to my attention that the sentencing jurisdiction of the trial magistrate has been amended, and increased from 2 years to 7 years by the Magistrates Court Amendment Act of 2011. I cannot therefore fault the sentence imposed.

[14] In light of the totality of the foregoing, the Appeal is unmeritorious. It fails and is dismissed accordingly.

For the Appellant: L. Malinga

For the Respondents: N. Masuku
(Crown Counsel)

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE ………………..DAY OF ……..……………………..2013

OTA J

JUDGE OF THE HIGH COURT