

IN THE HIGH COURT OF SWAZILAND

APPEAL CASE No. 16/08

MANZINI DISTRICT CASE NO. MP 213/08

In the matter between:

1. Myalo Tsabedze	1 st Appellant
2. Moses Dlamini	2 nd Appellant
3. Mzikayifani Moses Dlamini	3 rd Appellant

VS

REX

Coram: S.M. Monageng J
J.P. Annandale J

For the Crown: Mr. T. Masina

For Accused: Mr. Leo Gama
Mr. Vusi Kunene
Mr. Piliso

JUDGEMENT
17th OCTOBER 2008

Monageng J

[1] This is an appeal against sentence only.

[2] The three appellants pleaded guilty to theft of two tonnes (fourty and a half bags) of pig super grower valued at E7,000.00. The super grower was stolen on the 3rd May 2008 and it belonged to a company called Arrow Feeds, based in Matsapha. Arrow Feeds produces animal feed for domestic and wild animals, for commercial purposes.

[2] Arrow Feeds contracted another company to transport the pig feed and the first accused Myalo Tsabedze was the driver of this truck. The second appellant, Moses Dlamini worked at Arrow Feeds as a security man, so did the third appellant, Mzikayifani Moses Mdluli.

[3] The brief facts of the case are that on the night of the 3rd May 2008, the three men, acting in concert, filled 40 bags with the pig feed illegally and unlawfully, loaded it in the truck that was driven by 1st appellant and removed it from the premises of its lawful owner Arrow Feeds.

[4] The following morning, the factory manager discovered, from reading the packaging machine, that 40 $\frac{1}{2}$ bags had been filled from the stock, and that the 40 $\frac{1}{2}$ bags were mixed between 8.40pm and 9.00pm the previous night.

[5] The factory Manager informed the General Manager and they located the $\frac{1}{2}$ bag on the premises, but the rest were not found.

[6] The missing stock was valued at E7,000.00. The

matter was reported to the police and investigations led to the recovery of 38 bags and to the arrest of the three men. They pleaded guilty to the criminal charge. The Crown adduced evidence to prove both the commission of the offence as well as the guilt of each accused person. They were sentenced to a period of 2 years imprisonment each, of which 8 months were suspended, without an option of a fine.

[7] The convicts are appealing against sentence on the following grounds:

1. That the presiding Magistrate misdirected herself, in particular with regard to the 1st Appellant, when she said that by using his employer's truck to transport the stolen feed he intended crippling the business of his employer;
2. That with regard to all the convicts, the Magistrate did not take their personal circumstances into consideration;
3. That they are first offenders who should not be sentenced to prison terms;
4. That they lost their jobs as a result of this theft;
5. That this was a one off transgression; and
6. That the value of the feed was only E7,000.00 and that the bulk was recovered and restored to the custody of the lawful owners.

[8] The Appellant's attorneys also argued that the Magistrate did not take into account the fact that they pleaded guilty to the charge and thus saving the Court valuable time. In response to the above, Counsel for the Crown avered that the appellants have not shown any misdirection on the part of the Magistrate, and that they have failed to show that the sentence induces a sense of shock. With regard to the 1st Appellant, Counsel stated that what the Magistrate was saying

was that the action of the accused compromised the integrity of his employers, the owners of the truck, who were contracted to Arrow Feeds and that this is not a misdirection nor an exaggeration.

[9] Counsel referred to the blameworthiness of the three accused persons and factors that militated against their personal antecedents, as raised by the Magistrate, and was of the view that this Court should not interfere with the sentence.

[10] It is trite that sentencing is the sole discretion of the judicial officer and that appellate Courts should be slow to interfere with such discretion, unless it is shown that the lower court misdirected itself and did not exercise its discretion judiciously.

[11] Further the appellate Court can interfere with the sentence if it is shown that the sentence is so manifestly wrong that it induces a sense of shock, or that the sentence is inappropriate in the circumstances - see **Sit hole, Mduduzi v R** S L Reports 1987-1995 Vol. 214.

7. Regarding the suggestion that the 1st Appellant did not intend crippling his employer by using his truck, putting aside the fact that he used the truck illegally and unlawfully, although the loss cannot be quantified, there is no doubt that someone who is especially in a position of trust uses this truck, a truck that is used or should be used to bring financial gain for its owner and instead uses it for his own financial gain, the user can only have the intention of crippling the truck owner. The intention might not have been direct, but if not, it inevitably had to have been foreseen.

8. As rightly submitted by Counsel for the Crown, the crippling does not only mean direct financial crippling but also means compromising the truck owner's integrity in the eyes of Arrow Feeds, the legitimate user of the truck. To this extent, the argument that 1st Appellant did not intend crippling Arrow Feeds cannot stand.

3. The learned Magistrate, with the greatest of respect to Counsel for the appellants, and reading her sentence, cannot be said to have ignored the accused persons' antecedents. She took into account the fact that they were first offenders, who pleaded guilty. She also considered that most of the bags were recovered and then sold by the owner. But the judicial officer quite rightly applied her mind to negative factors that made her come to the conclusion that such negative factors outweighed the effective positive factors.

[12] The appellants seem to underplay the value of the goods and the fact that the accused were in a position of trust, and instead say that because this was a one off and since the goods were recovered, then their blameworthiness should be ignored, so to say.

[13] In the opinion of this Court, the Magistrate took into consideration the accuseds' circumstances and correctly weighed them against the negative factors. Indeed,

a proper reading of the sentence indicates that the Magistrate gave the accused persons credit for their mitigating antecedents by suspending part of the sentence. It is a fact that first offenders should be kept out of prison as much as

possible, but every case has to be looked at on its own merits. This is a peculiar case, where employees planned and executed a deed which was meant to enrich them and disenfranchise or impoverish their employers.

[14] The Court finds that, in the circumstances, this appeal does not meet the standards set by the law, entitling an appellate Court to interfere with the decision of the lower Court. The Magistrate exercised her discretion judiciously. As a result, the appeal fails in its entirety. The sentence of the Magistrate's Court is confirmed. The appellants, who were out on bail, pending their appeal, have to start serving their sentences with immediate effect.

S. M. MONAGENG

JUDGE

I agree

J.P. ANNANDALE

JUDGE