



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 89/2022

In the matter between:

BONGINKHOSI MNISI

Applicant

vs

THE KING

Respondent

Neutral Citation:

*Bonginkhosi Mnisi vs The King 34 (89/2022 [2024] SZHC 34
(14 March 2024)*

CORAM:

N.M. MASEKO J

APPELLANT:

IN PERSON

FOR THE CROWN:

L. DLAMINI

DATE HEARD:

04/08/2022

DATE DELIVERED:

14/03/2024

Preamble: Criminal Law and Procedure – Sentence – Factors to be taken into account during sentencing – the triad – whether the sentence is excessive, harsh and induces a sense of shock and the factors considered to determine a harsh sentence not proportionate to the crime committed – factors to be taken into account when a Court orders sentences to run consecutively or concurrently.

JUDGMENT

MASEKO J

[1] On the 11th May 2018 the Appellant was convicted by Senior Magistrate Hhohho District and sentenced to almost thirty (30) years imprisonment without the option of a fine. The sentences were all backdated to the 15th September 2015, being the date of his arrest.

[2] The offences for which the Appellant was convicted are as follows:

- Count 1** - Four (4) years imprisonment without option of a fine.
- Count 2** - Four (4) years imprisonment without option of a fine.
- Count 3** - Four (4) years imprisonment without option of a fine.
- Count 4** - Four (4) years imprisonment without option of a fine.
- Count 5** - One (1) year imprisonment without option of a fine.
- Count 6** - Two (2) years imprisonment without option of a fine.
- Count 7** - Two (2) years imprisonment without option of a fine.
- Count 8** - Two (2) years imprisonment without option of a fine.
- Count 9** - Two (2) years imprisonment without option of a fine.
- Count 10** - Two (2) years imprisonment without option of a fine.
- Count 11** - Two (2) years imprisonment without option of a fine.
- Count 12** - Two (2) years imprisonment without option of a fine.
- Count 13** - Two (2) years imprisonment without option of a fine.

Count 5 - Will run concurrently with all other counts

Counts 8-9 - Are to run concurrently.

Counts 12-13 - Are also to run concurrently.

All sentences are backdated to 15th September 2015.

- [3] The Record of Proceedings indicate *ex facie* that the learned Senior Magistrate dully explained the Appellant's rights of appeal and review.

GROUND OF APPEAL AGAINST SENTENCE ONLY

- [4] The main ground of appeal against sentence only as drafted by the Appellant in his Notice of Appeal dated the 10th March 2022 is as follows:-

"My main ground of appeal is that the totality of my sentences which is 30 years in prison is too severe and harsh for me to bear and is also much destructive, demoralizing and punitive than being rehabilitating, constructive and corrective to myself. Therefore I humbly request that the Court comes to my sentences to run concurrently. May the Court also consider the period I have already spent incarcerated. I have learnt a lesson and I promise the Court that I will not involve myself in criminal activities again..."

- [5] The Crown opposes this appeal and has filed comprehensive Heads of Arguments, together with a Bundle of Authorities. The Appellant himself made comprehensive submissions during his argument on the matter.

- [6] For ease of reference, It is important to outline the offences as well as the monetary value of the properties involved:-

- (i) **Count 1** is a House Breaking with Intent to Steal and Theft wherein property worth E33 000-00 was stolen on the 1st September 2015 at Mbangweni, Mbabane.

- (ii) **Count 2** is another House Breaking with Intent to Steal and Theft wherein property worth E14 530-00 was stolen on the 15th December 2014 at Qobonga area, Mbabane.
- (iii) **Count 3** is another House Breaking with Intent to Steal and Theft wherein property worth E5 300-00 was stolen on the 15th June 2015 at Sidvashini area, Mbabane.
- (iv) **Count 4** is another House Breaking with Intent to Steal and Theft wherein property valued at E19 600-00 was stolen on 1st January 2015 at Thembelihle area, Mbabane. The property includes a 9mm Taurus Pistol and nine (9) live rounds of ammunition.
- (v) **Count 5** is a Contempt of Court charge for failure to appear in Court on 13th December 2014.
- (vi) **Count 6** is another House Breaking with Intent to Steal and Theft of property valued at E3 080-00 at Mbangweni area Mbabane during August 2015.
- (vii) **Count 7** is another House Breaking with Intent to Steal and Theft of property valued at E3 650-00 at Sidvashini Mbabane on 30th August 2015.
- (viii) **Count 8** is Contravention of Section 12 (1) of the Theft of Motor Vehicles Act of 1991, whereby the Appellant wrongfully and unlawfully entered a motor vehicle with intent to steal and theft. This was on the 27th August 2015.
- (ix) **Count 9** is the offence of Theft for property valued at E600-00 at Sidvashini area, Mbabane on 27th August 2015.
- (x) **Count 10** is the offence of Theft of property valued at E850-00 at Sidvashini on the 30th August 2015.
- (xi) **Count 11** is the offence of Theft of property valued at E2 300-00 at Sidvashini area Mbabane on 30th August 2015.

(xii) **Count 12** is Contravention of Section 12 (1) of the Theft of Motor Vehicles Act of 1991 at Thembelihle area, Mbabane on 27th August 2015.

(xiii) **Count 13** is the offence of Theft of property valued at E8 000-00 at Thembelihle area on 27th August 2015.

[7] I have outlined the offences and the values involved as well as the dates and places where these offences occurred to demonstrate the terror which was launched by the Appellant on the complainants from December 2014 to September 2015. Even on new year's holiday 1st January 2015, he committed the offence of Housebreaking with Intent to Steal and Theft at Thembelihle, Mbabane and stole property valued at E19 600-00.

[8] The gist of the Appellant's appeal is that the learned Senior Magistrate ought to have ordered the sentences to run concurrently so as to make the imprisonment sentence less than he imposed. The Appellant submitted that the sentences as they stand are excessive, severe, harsh and induce a sense of shock and thus this Court would be justified to interfere with the sentence and order it to run concurrently.

ARE THE SENTENCES EXCESSIVE, HARSH AND SEVERE SUCH THAT THEY INDUCE A SENSE OF SHOCK?

[9] As I have stated above herein that the Appellant submit that the cumulative sentence is severe and induces a sense of shock. The only way to deal with the Appellant's submission is by considering the timeline for the commission of these offences and the gravity of the offences. I have done that in the preceding paragraphs and it is clear that the Appellant committed these crimes over a long period of time, and there is no way by which they can be taken as one transaction for purposes of sentence.

[10] I have perused the Court Record in search of any misdirection that may have been committed by the learned Senior Magistrate in imposing the sentences in respect of the various Counts for which the accused has been convicted. I am convinced that the learned Senior Magistrate did not commit any irregularity and/or misdirection in the manner in which the cumulative sentence was imposed on the accused. The learned Senior Magistrate was conscious of the long period it took the Appellant to commit these offences, and he correctly sentenced the Appellant in accordance with his criminal conduct.

THE TRIAD

[11] This principle is mandatory to be applied by all judicial officers when imposing a sentence or sentences on an accused or accused persons after conviction. The triad demands or obligates the Court to consider the following circumstances when imposing a sentence on the accused person who has been convicted of an offence(s) and these were stated by the Court in the landmark case of **S v Zinn 1969 (2) SA 537 A 540 G** as follows:-

“What has to be considered is the triad consisting of the crime, the offender and the interests of society.”

[12] The implication of this judgment is that a sentence should be individualized to fit the crime and the criminal, and also that the interests of society be considered as well when such sentence is imposed because it is the society that is heavily affected by crime. The sentences should not be harsh but must be commensurate with the gravity of the offence(s). The sentences to be imposed are all in the discretion of the Trial Court, and not the Appellate Court. However, the Appellate Court can only interfere with the sentence where there is a

material misdirection by the Trial Court in not considering the **triad** and or in imposing a sentence that is harsh and not proportionate to the crime committed by the accused person

- [13] In the case of **Elvis Mandlenkhosi Dlamini v Rex (30/2011) [2013] SZSC 06 (31 May 2013)** the Court stated as follows:-

"It is trite law that the imposition of sentence lies within the discretion of the Trial Court and that an Appellate court will only interfere with such sentence, if there has been a material misdirection or irregularity resulting in the miscarriage of justice."

- [14] In the case of **S v Rabie 1935 (4) SA 855 (AD) at pg. 6** Holmes JA 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, and the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand surrender to misplaced pity ---

It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

- [15] *In casu* the learned Senior Magistrate Phathaphatha Mdluli, as he then was, properly in my view fairly considered the *triad* and personal circumstances of the accused in this matter. At paragraphs 1-3 page 64 of his judgment, His Worship Mdluli stated the following:-

"In sentencing any accused, the Court is duty-bound to consider all mitigatory circumstances as has been listed. These are of particular interest in favour of such accused. However, the Court has to balance those individual interests against the greater community interests of society, in particular, private property rights of citizens and the society.


Accused has unleashed a "**reign of terror**" on the Mbabane suburbs spanning from the year 2014 to 2015 towards the end of year. He may be described as a carrier thief as he wanted to live by thieving right through.

The Court is the optimal protector of individual and society's property rights and such protection is manifested in the sentences that it has

to impose at each instance. That is not to say that the Court should **"chop off"** his head, but as the High Court orders lower courts to sentence such that the crime fits the sentence and vice versa."

- [16] There is no better way than how His Worship Mdluli addressed the personal circumstances of the Appellant together with the other components of the *triad* and how he dealt with the circumstances and factors he considered leading to the sentence he imposed on the Appellant.
- [17] His Worship Mdluli appreciated that the offences were committed within a period of a year from 2014 to towards the end of 2015, around the suburbs of Mbabane. This is clearly evident from the Charge Sheet, and therefore it cannot be argued by the Appellant that the sentences should all be made to run concurrently as if they arise from one transaction. *In casu* that is not the case, and His Worship Mdluli properly, fairly and justly imposed the sentences exercising his discretion judiciously, and this Court finds no material misdirection in His Worship's sentencing justifying this Court to interfere with the cumulative sentence he imposed on the Appellant.
- [18] In the circumstances the appeal against sentence is dismissed, and the cumulative sentence imposed on the Appellant on the 11th May 2018 backdated to the 15th September 2015 is hereby upheld by the Court.

I hand down this Judgment.


N.M. MASEKO
JUDGE