THE HIGH COURT OF SWAZILAND

SIPHAMANDLA SIMO DLAMINI

1st Appellant

NDUMISO KHUMALO

2nd Appellant

And

THE KING

Respondent

Criminal Appeal No. 282/2005

Coram: S. B. MAPHALALA-J

Q. MABUZA J

For the Appellant : **MR. R. MHLANGA**

For the Respondent: **MR. N. MASEKO**

JUDGMENT

(13th April 2006)

[1] On the 141 October 2005, the two Appellants who were conducting their own defence appeared before Magistrate Mr. Musa Nxumalo at the Nhlangano Magistrate Court wherein they were charged with the crime of housebreaking with intent to steal and theft, it being alleged that on or about the 16th September 2005, and at or near Sibovu area in the Shiselweni district, the accused (appellants) did wrongful andunlawfully and intentionally break and enter the house there situate of Thokozani Mabuza and did steal items specified in the charge sheet in the lawful

possession of Thokozani Mabuza total value at El, 220-00.

[2] When the charge was put in the court *a quo* the Appellants pleaded guilty to the charge and the Crown accepted the pleas. Consequently, the Magistrate *a quo* found them guilty on their own pleas and sentenced each of them to eight (8) months imprisonment without an option to pay a fine. Following this, the Appellants have noted this appeal to this court against the said sentence.

[3] The grounds advanced therein is crisply that the Appellant having pleaded guilty to the charge and such pleas having been accepted by the Crown (and there being no evidence led in support of the case for the Crown) the Honourable Court was in error in imposing a custodial sentence as it did as this is contrary to the proviso to Section 238 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) or alternatively the Appellant having pleaded guilty to the charge and the Crown having tendered no evidence to prove the commission of the offence and the Appellants having been convicted on their respective pleas, a custodial sentence without the option of a fine (as imposed by the Honourable Court) was incompetent in the circumstances.

[4] When the matter came before us for arguments the Crown conceded that the Magistrate *a quo* erred in giving the sentence he gave in the circumstances. The court however instead of pronouncing judgement there and then was of the view that this was a serious matter deserving a written judgment for guidance of the subordinate

courts.

[5] The crux of the appeal is that by imposing a custodial sentence, the magistrate a *quo* acted contrary to the proviso to Section 238 (1) (b) of the Criminal procedure and Evidence Act No. 67 of 1938 as amended. The said Section reads in *extenso* as follows:

> **"If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on indictment or summons) other than the offence with which he is charged, and the prosecutor has accepted such plea, the court may, if it is:**
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> **b) A Magistrate's court, other than the principal Magistrate court, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed: provided that if the offence to which he has pleaded guilty is such that the court is of opinion of a fine or of whipping of a fine exceeding two thousand Emalangeni, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission such offence, and thereupon impose any competent sentence other than imprisonment or any other form of determination without the option of a fine or whipping or a fine exceeding two thousand Emalangeni, or may deal with him otherwise in accordance with law".**

[6] Clearly the learned Magistrate a *quo* erred in sentencing the Appellants to eight (8) months imprisonment without giving the Appellants an

option to pay a fine. The court *a quo* failed to call upon the Crown to lead evidence (other than the unconfirmed evidence of the Appellants) to prove the commission of the offence, since in his opinion he felt that such an offence did merit or it warranted punishment of imprisonment without the option of a fine.

[7] In this regard we are in total agreement with the written submissions of Counsel for the Appellants that the court a *quo* ought to have called upon the Crown to tender evidence of the commission of the said offence as it is required by the proviso to Section 238 (1) (b) of the Act, as amended. Clearly on the facts of the present case the Magistrate *a quo* acted outside the clear provisions of the Act authorising a Presiding officer to convict an accused on his bare plea of guilty in circumstances where such presiding Officer is of the opinion that the offence in question does not merit certain kinds of punishment or a fine exceeding E2, 000-00. In forming his opinion the Presiding Officer is largely guided by the nature and serious ness of the offence. But the court may also take into account all other relevant and available information, for example further particulars which may have been furnished, (see also *Du Toil et al "Commentary on the Criminal Procedure Act, Juta* at *17 - 3* and the cases cited thereat).

[8] In the result, for the afore-going reasons we have come to the considered view that in the present case a sentence of eight months imprisonment or a fine of E800-00 would meet the justice of the present case, and it is so ordered.

S.B. MAPHALALA – J

Q.M. MABUZA - J