IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Criminal Case No: 251/15

In the matter between:

JABULANE MAGAGULA	**:**	**APPLICANT**
v		
MAGISTRATE SEBENZILE NDLELA-KUNENE	**:**	**1ST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**:**	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**:**	**3RD RESPONDENT**

Neutral Citation	:	Jabulane Magagula v Magistrate Sebenzile Ndlela-Kunene and 2 Others (251/2015) [2015] SZHC 01 (4TH FEBRUARY 2016)
Coram	:	Q.M. MABUZA
Heard	:	30/10/2015
Delivered	:	04/02/2016

JUDGMENT

MABUZA -J

[1] The Applicant was charged with the crime of assault with intent to cause grievous bodily harm in that upon or about 28th August 2015 at Mzaceni, he wrongfully, unlawfully and intentionally hacked Botsotso Dlamini once with an axe on the right hand.

[2] He was arraigned on the 6th October before the 1st Respondent, the Honourable Magistrate Sebenzile-Ndlela Kunene sitting at Luve in the Manzini District.

[3] When the charge was put to him, he pleaded guilty and the Crown accepted the plea. After accepting the plea the Crown called upon the complainant to give evidence with regard to the events that led to his being assaulted by the Applicant. The complainant testified that he was struck on his right hand by an axe wielded by the Applicant.

[4] The Crown further filed a medical report by consent (Exhibit A) whose contents corroborated the assault on the complainant.

[5] The medical report states that an examination was carried out on the Applicant at Dvokolwako Health Centre. It records that:

> "+- 2 cm long laceration on dorsal side of the right hand."
> "Fractured right 4th and 5th metacarpals"

[6] The Applicant was subsequently convicted upon his own plea of guilty to the charge and in compliance with section 238 (1) (b) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended which reads as follows:

> "238. (1) 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 the indictment or summons) other than he offence with which he is charged, and the prosecutor has accepted such plea, the court may, if it is –
>
> (b) a magistrate's court other than a principal magistrate's 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: (Amended A. 2/2004)

> Provided that if the offence to which he has pleaded guilty is such that the court if of opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or 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 of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding two thousand Emalangeni, or it may deal with him otherwise in accordance with law. (Amended A.2/1970; K.O-I-C. 23/1976; A.2/2004.)"

[7] The Honourable Magistrate thereafter sentenced him to 7 years imprisonment without an option of a fine.

[8] The conviction is good in law and I cannot interfere with it. Had he not pleaded guilty the Court would have been obliged to take a closer look at all the procedural aspects complained of during the course of the trial.

[9] However, the sentence on the other hand is harsh and induces a sense of shock. Miss Hlophe for the Respondents agrees. She submitted that the Appellant should receive a reduced custodial sentence.

[10] The charge sheet did not set out any aggravating circumstances but the Honourable Magistrate erroneously concluded that there were aggravating circumstances.

[11] The medical report did not state that the Complainant would suffer permanent disability. The Honourable Magistrate erroneously made a finding that the Complainant suffered permanent disability and that this was an aggravating factor.

[12] The Crown did not set out any aggravating factors and nor did it prove such factors nor permanent disability. The extent of fractures was not proved as the doctor was not called. Consequently the Court had no idea as to whether it was a hairline fracture or whether the two fingers were crushed. Evidence of the nature of the medical treatment was not lead to enable the court to form an opinion as to the severity of the fractures.

[13] The injury was not life threatening nor was the Complainant struck on a sensitive part of his body that would have been life threatening. The complainant's two fingers were merely fractured and not severed.

[14] I agree with the applicant's attorney that a sentence of 7 years imprisonment is usually meted out in the High Court for culpable homicide cases and not cases of the nature of the assault committed by the Applicant.

[15] The Applicant is a first offender and has no record of previous convictions in all his fifty five years. This factor should have been taken into account by the Honourable Magistrate.

[16] I hold that the Applicant has made out a strong case for my intervention and the application for review succeeds in respect of the sentence which is hereby set aside and replaced as replaced as The sentence of the Court *a quo* is hereby set aside and replaced as follows:

(a) The Applicant is sentenced to a fine of E1,000.00 (One thousand

Emalangeni) and failing payment thereof to 12 months' imprisonment.

Q.M. MABUZA -J
JUDGE OF THE HIGH COURT

For the Applicant	:	Mr. S.K. Dlamini
For the Respondent	:	Miss L. Hlophe