IN THE HIGH COURT OF THE KINGDOM OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 1545/17

In the matter between:-

LINDOKUHLE BRAAI DLAMINI Appellant

And

REX Respondent

Neutral Citation: *Lindokuhle Braai Dlamini v Rex (1545/17) [2018] SZHC 122 [12th June 2018]*

Coram: MAPHANGA J

Date Heard: 20/03/2018

Date Delivered: 15/06/2018

Summary: ***Criminal procedure - Sentencing - Appellant convicted of housebreaking and theft and sentenced to two years imprisonment without the option of a fine - appeal against sentence - Section 238 (1) (b) of Criminal Procedure and Evidence Act 67 of 1938 applicable; mandatory prison sentence not competent on account of Applicant's plea guilt; which plea was accepted by the Crown and upon which he was convicted by the magistrate without hearing of evidence on the commission of offence; sentence also excessive and inappropriate in light of mitigating and extenuating circumstances; appeal upheld and sentence set aside.***

Judgment

[1] Appellant was convicted on 11th November 2016 of charges of house breaking with intent to Steal and Theft of property valued at E8, 000.00 by the Siteki Magistrates Court and having pleaded guilty to the charges; which plea was accepted by the Crown, he was sentenced there and then to two years imprisonment without the option of fine.

[2] He has appealed against the sentence on the following grounds:

2.1. that the learned Magistrate had erred in law and in fact by handing down a custodial sentence without an option of a fine.

2.2. that the learned Magistrate in the court *a quo* erred in law and in fact by finding that the personal circumstances of the

Appellant were far outweighed by the interests of society thus warranting a custodial sentence being handed down against him;

2.3. that the court *a quo* misdirected itself by failing to sufficiently take into account and weigh the attendant extenuating and mitigating factors in favour of the Applicant; and;

2.4. that the court *a quo* misdirected itself in failing to consider and take cognizance of broader constitutional imperatives found in Section 27 (3) and (5) of the Constitution – 2005 when handing down sentence against the Appellant.

[3] The brief facts of the matter are that the Appellant who at the time of the commission of the offence was a minor was found to have stolen panoply of electronic computer lab of a school. At the time of the trial and conviction he was 21 years of age. The stolen equipment was eventually recovered and returned to the school.

[4] In sentencing the Appellant, it is clear from the record that the court *a quo* sought to take into account the pertinent interests to be balanced upon sentencing. In the circumstances the learned Magistrate took the view that regard being had to the gravity and prevalence of the offence, these factors far outweighed the personal circumstances of the Appellant; not least his penitence and plea of guilt, without much ado.

Sentencing Discretion

[5] It is now trite law that the sentencing considerations and what sentence is appropriate in any given circumstances in a matter before a trial court fall within the province of that courts discretion; which discretion may be interfered with by a higher court only in proscribed and exceptional circumstances.

[6] This principle has been often recited by our counts on numerous occasions. In ***Elvis Mandlenkhosi Dlamini v Rex (30/2011) [2013]SZSC 06 (31May 2013)*** the court stated the guiding position in these words:

> ***"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".***

[7] The cautionary approach to be adopted by an appellate court on sentence receives higher and crisper elucidation in a recent South African judgment in ***S v Malgas 2001 (SACR) 469 SCA*** in the words of learned ***Marais JA*** when he said at paragraph 478 d-h:

> ***"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material***

> ***misdirection*** *by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said the appellate court is at large. However, even in misdirection, an appellate court may not yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed is so marked that it can properly be described as "shocking" "startling" or "disturbingly inappropriate"*
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> *It must be emphasised that in the latter situation the appellate court is not at large in the sense that it is at large in the former. In the latter situation it may not substitute a sentence which it thinks appropriate merely because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."*
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> (added emphasis)

[8] The above outlined approach is both instructive and positively adaptable to the circumstances of this case.

[9] Two questions arise. Did the court *a quo* commit a material misdirection resulting in a miscarriage of justice as to warrant this court to be at large to undo its sentence? Is this a case of the sentence being merely 'disturbingly inappropriate', 'shocking' or startling' as to warrant interference to bring such sentence in line with the bounds of what is a fitting of appropriate sentence.

Whether there was a material misdirection

[10] Specifically the Appellant pleads the existence of misdirection on the grounds that the learned magistrate failed to take into account the Appellants extenuating and mitigating circumstances of the Appellant in handing down the sentence?

[11] He also asserts the court *a quo* misdirected itself in failing to take cognizance of Section 27 (3) and (5) of the Constitution of the Kingdom[1] in the sentencing. I propose to deal with the substance of merits of these grounds in turn.

[12] I hasten however to emphasise that it is not a misdirection that will warrant an interference with the sentencing discretion of a lower court but only the sort of misdirection or irregularity that so vitiates the courts exercise of its discretion as to result in a manifest miscarriage of justice. ***(see Elvis Mandlenkhosi Dlamini v Rex* case above)**. The alleged failure to take into account the Appellants mitigating circumstances can hardly be said to fit this bill.

[13] From the court is evident that the learned Magistrate acknowledged the personal circumstances of the Appellant in the sentence. This appears so in the record when he says in passing sentence:

[1] The Constitution of Swaziland, 2005.

"Investigating the interests of the accused against that of the complainant and seriousness of the offence, I found the accused's personal circumstances are far outweighed by those of the public and the gravity of the offence".

[14] In elaboration the court made comment in regard to the 'the triad of Zinn'[2] as follows:

"The offence you have been convicted of is a very serious offence; first you stole for the school thereby depriving other children the use of the equipment you took. House breaking is also a prevalent offence. It is in the interest of Society that whatever is hard earned and acquired is protected from other people taking it; these considerations are what in my opinion make the offence very serious and the appropriate sentence to impose being a custodial sentence.

Your personal circumstances are far outweighed by the above, you pleaded guilty you did not waste the court's time and you are also a first offender; if it was not House Breaking this court would be considering giving you the option of a fine unfortunately that cannot be so"

[2] As enunciated in S v Zinn 1969 (2) 537 (A).

[15] To me these reasons demonstrate that the court *a quo* applied its mind to the mitigating personal circumstances of the Appellant. It may well be that in so doing it came to a conclusion that another court might not have made but that does not mean it committed a material misdirection in the sense as articulated in the well known principle.

[16] To borrow the words of **Marais JA** quoted above this court in the absence of a material misdirection cannot approach the sentence 'as if it were a trial court and substitute the sentence 'imposed by the magistrate simply because 'it would have reached a different conclusion.'

[17] Secondly, I am not persuaded that there has been a material misdirection in the sense of disregard or violation of the quoted section of the Constitution; Section

27 (3) and (5);[3] in as much as the Appellant falls far short of setting out on what basis he alleges such violation. I therefore have no hesitation concluding that equally this ground has neither any merit in law nor does it disclose any material misdirection as alleged by the Appellant.

[18] Whilst on the subject of material misdirection I do think the learned Magistrate did overlook one highly pertinent consideration; the application and operation of the provisions of Section 238 (1) (b) of the CPEA.[4] The circumstances of this case are such that the Court a quo should have been mindful of the constraints placed upon the court by the proviso to the section as read with the general wording as a whole in so far as it provides that:

[3] Section 27 (3) and (5) of the Constitution Act of Swaziland of 2005.
[4] The Criminal Procedure and Evidence Act No. 67 of 1939.

"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 the offence with which he is charged, and the prosecutor has accepted such plea, the court may, if it is-

(a)……;

(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……

Provided that if the offence to which he has pleaded guilty is such that the court is of the 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 of 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 the law"

[19] Based on the available record it is clear that the matter came before another court other than a Principal Magistrate of the district and as such clearly Section 238 (a) does not apply, but subsection (b) does. The Accused having pleaded guilty it is also apparent *ex facie* the record that the Prosecution accepted the plea and the court proceeded to convict the accused on that basis without any evidence of commission of the offence having been led or at the very least a statement of agreed facts having been taken down *in lieu* of prosecution evidence. These circumstances brought the case within the fold of the proviso to the subsection 238 (1) (b) of the Act for sentencing purposes. In the event it was not permissible for the learned magistrate to impose the mandatory custodial sentence that he did. By operation of the section this was not a permissible option available to that court. In imposing a mandatory custodial sentence he misdirected himself on a fundamental matter of law.

[20] This is one reason this court may not allow the sentence to stand. I nonetheless consider the rest of the Appellant's submissions as regards the alleged inappropriateness of the sentence meted out.

[21] The remaining question is whether the sentence can be said to be shocking or markedly disproportionate in the circumstance or disturbingly inappropriate as to induce a sense of shock, to use the usual epithets as alleged by the appellant.

Severity Sentence

[22] At this time I think it appropriate to highlight the circumstances of the crime and the Appellant as a backdrop to the question.

[23] The Appellant who was a minor at 19 years old at the time of the theft, produced and handed over the stolen articles. He was a first offender and it appears from the record that he was driven by financial privation intending to sell the items and get cash for his needs. He owned up to the school for his transgressions and sought pardon; which it is noted, was extended to him. Apparently he had dropped out of school and was yet to complete his upper high school.

[24] In my judgment all these would seem to have been a plausible persuasive factor in favour of the Appellant being such a young impressionable person.

[25] There is no doubt that house breaking is quite a common or prevalent crime that warrants sufficiently serious deterrent sentences in the best interests of society. However the balanced principled approach that the courts have adopted emphasise the need to temper a robust sentencing stance with considerations of proportionality and the broader social interests as well as the condition of the criminal in such a way that;

a) the sentence for the crime;
b) should not be so harsh as to be manifestly unfair.

[26] This balance has been eloquently in the new famous dictum of ***Holmes JA*** in ***S v Rabie 1975 (4) SA 855 (AD)*** at page 6 when he said:

> ***"A judicial officer should not approach punishment in a spirit if 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"***

[27] With difficulty I have in this case been unable to discern that equanimity referred to in the **Holmes JA** dictum in the context and the sentencing carried out in the court *a quo* especially in regard to that consideration of mercy and recognition of the frailty and the human character. Even more so in regard to the mitigating and extenuating personal circumstances that the court *a quo* made a nodding reference to.

[28] In the realm and range of crimes committed across this land where abhorrent and violent crimes abound, I am unable to come to agree with the learned magistrate's conclusion that the offence to which the Appellant readily made an admission and plea of guilt is of such severity as would have warranted a mandatory custodial sentence unless the offender was shown to be a recidivist; this particularly in light of the Appellant's relative youth, contrition and that this being was his first offence.

[29] I would not yield to the clichéd phrase of regarding the sentence as 'inducing a sense of shock' but would be inclined to view it as being merely "disturbingly inappropriate" and disproportionate in the circumstances. To some it may be the same thing but I would say not.

[30] In my view the court a quo in considering the sentence took an extreme view by unduly inclining towards deterrence as opposed to also taking into account the interests of justice and considerations of mercy when it determined the sentence of two years imprisonment but excluded the fine option. In my view were the court have determined the prison sentence in conjunction with a fine and or a suspended portion of the sentence or any such permutation as would have enabled the Appellant to avoid serving a mandatory prison term, that would in my respectful view still have been a fair exercise of his discretion.

[31] I was presented with a number of judicial decisions both on the critical principles applicable and also on the ranges of sentences that have been passed by the courts in matters involving similar offences in relatively similar circumstances. I regard the latter as serving more as a guide and believe should not overshadow the cardinal rule that a trial court retains a sentencing discretion save that on appeal this shall be weighed against the yardstick of the litmus test postulated in the *S v Rabie* case.

[32] In the circumstances in my judgment the sentence imposed by the court a quo was so excessive and harsh as to be inappropriate in the circumstances.

[33] At the very least the learned Magistrate should have tempered the term of imprisonment by allowing an option to pay an appropriate fine to the Appellant.

[34] For the above reasons I am inclined as I hereby do, to set aside the sentence *a quo* substituting it with the following:

The Appellant is to serve a sentence of two (2) years imprisonment with the option of E2000.00 fine.

MAPHANGA J

Appearances:

For the Appellant : F. Tengbeh
For the Respondent: E. Matsebula