IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

High Court No: AR 707/05
Case No: N90/2005

In the matter between:

ALPHEUS BONGOKUHLE MAZIBUKO **APPLICANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

Delivered: 09/06/2011

MBATHA J

[1] This is appeal from the Magistrate Court, Louwsburg, held at Ngome.

[2] The Appellant was charged and convicted for theft of two (2) bundles of pine timber valued at R4 200,00. He was sentenced to undergo twelve (12) months imprisonment. The Appellant was arraigned with three others, of which two were three acquitted at the end of trial. The judgment and sentence were delivered on the 23rd of August 2005. On the 4th of October 2005 Appellant was granted leave to appeal and released on bail of R1 000,00.

[3] It was raised on behalf of the Appellant that it is not clear if leave to appeal was granted only against sentence or not. The submissions made by

the Appellant's counsel before this Court relate to both judgment and sentence. It is imperative that I address this issue first as it touches on the core of the matter.

[4] The learned Magistrate is clear and unambiguous, in that, the appeal is on sentence only. I quote:

> "I have considered that another Court would not have reached a different conclusion. The Appellant is guilty of theft and there was an eye witness. I do not doubt the correctness of the decision to find Appellant guilty of theft. However, the leave to appeal be granted for the Court to consider the issue of sentence, whether the sentence with an option of a fine is appropriate in the circumstances."

[5] I have therefore confirmed to submissions made on sentence only.

[6] It is common cause that Appellant was sentenced to twelve (12) months imprisonment, irrespective of being in possession of a constructed record. In evaluation whether the Appellant was given an appropriate sentence, I have taken into account the personal circumstances of the Appellant at the time of sentencing in the Magistrate's Court, as they appear ex facie from the record.

6.1 Appellant was thirty three years old, gainfully employed, married and has children.

6.2 He is a first offender and as a consequence of this case, it brought loss of employment for him.

6.3 The aggravating circumstances were that he was in a position of trust and stole from his employer.

6.4 The Appellant was caught on the scene of the crime, which led to the recovery of the timber by his employer.

[7] I find that there is just a paucity of information relating to the Appellant's personal circumstances. We only have his age. I have found the following discrepancies:

(a) It is stated that he is married, there is no mention whether the Appellant's spouse is gainfully employed or not.

(b) The number of children is not mentioned and if they are attending school or not.

(c) Appellant is described as a breadwinner no details are given regarding this aspect and how much he earns.

(d) The record further states that he has been employed for a number of years and gives no further details regarding that.

[8] The presiding officer ought to have exercised powers given to him in terms of section 274 of the Criminal Procedure Act, which reads as follows:-

> "A Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

This duty extends even to the represented accused in any trial, if such mitigation factors have not been adequately placed before him. In *S v Zuma* 2006 (2) SACR 257 (W) 261 (g) Van der Merwe J noted that:

> "The Court is at liberty itself to investigate the situation in order for it to impose a proper sentence."

[9] In canvassing the aforementioned factors, the Court would then come up with an appropriate sentence, which will take into account the crime, the offender and the interest of society as stated in S v Zinn 1969 (2) SA 537 (A).

[10] In this case a custodial sentence of twelve (12) months imprisonment has been imposed on the Appellant. Custodial sentences should be imposed as sparingly as possible. The interests of the individual and society should

weighed to come to an appropriate sentence. In cases where a person is a first offender, whenever possible a sentence of imprisonment must be avoided.

[11] The sentence must also deter the offender from committing further offences. I find that the learned Magistrate failed to consider a fine or suspended imprisonment in this case, though one of those punitive measures could have been put in place.

[12] The Appellant was convicted of theft with one Madide. Madide is a family man and has children too. He was also a first offender and more or less of the same age with the Appellant. The Court aquo imposed a fine in respect of Madide. This has led to a gross disparity in sentencing. It is trite law that a wider discretion is given to trial Magistrates with regard to the assessment of punishment except in the case of minimum sentences.

[13] This sentence imposed on the Appellant is disturbing inappropriate, when compared with a sentence imposed on his co-accused Madide. The Appellant and Madide played an equal part in the commission of the same crime and have comparable personal circumstances. Interference is only justified if the lighter sentence is a reasonable or commonly imposed sentence. Only then, by reason of the sentences being disproportionate, can the heavier sentence be ameliorated on the ground of its being disturbingly inappropriate. The aforementioned principles were stated in *S v Marx* 1989 (SA) 1 at 223.

[14] I will not canvass the issues raised regarding the reconstructed record. Had the appeal been on conviction, I should have applied my mind on that aspect in details, in particular if this resulted in any prejudice to the

Appellant before Court. I, and for purposes of sentence, the record is clear and unambiguous.

[15] I find that the sentence imposed by the learned Magistrate induces a sense of shock and that there was disparity in sentencing of the two accused.

[16] It is accordingly ordered as following:

a) A sentence of twelve (12) months imprisonment imposed upon the Appellant is hereby set-aside.

b) In place thereof it is substituted as follows:
Appellant/Accused is sentenced to twelve (12) months imprisonment, wholly suspended for a period of three years on condition that the Appellant/accused is not convicted of a crime of theft committed during the period of suspension.

c) The sentence is ante dated to 23rd August 2005.

It is so ordered.

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Mbatha J

I concur: _____
Hadebe AJ

Date of Hearing:	12 May 2011
Date of Judgment:	09 June 2011
For the Appellant:	Adv P.Marimuthu
Instructed by:	PMB Justice Centre 20 Otto Street Pietermaritzburg
For the Respondent:	Adv Z. Dyasi
Instructed by:	Legal Aid, Pietermaritzburg