

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.189/87

In the matter of:

THE KING

VS ENOCK MATSENJWA

CORAH: DUNN J.

FOR THE CROWN: MR. DLAMINI

FOR THE DEFENCE: IN PERSON

ADDENDUM TO JUDGMENT ON COMMITTAL FOR SENTENCE

(9.3.1988)

DUNN J.

The accused in this case was convicted by the Senior Magistrate, Siteki, on a charge of kidnapping a 13 year old boy. At the conclusion of the trial the Senior Magistrate committed the accused to this court for sentence. The reasons given by the Senior Magistrate for the committal are set out as follows:-

"An abhorrent crime. I consider that the accused should serve a term of imprisonment of 7 years and as I am unable to impose this I order that he be committed for sentence by the High Court."

The case was called before me on the 9th January 1988 and for reasons which were given and recorded in open court I sentenced the accused to 2 years imprisonment with effect from the 13th October 1987.

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The sentence was in the normal course communicated to the Senior Magistrate who has since written to the Registrar in the following terms:-

"Whilst I appreciate that the High Court has an absolute discretion in the matter, I would nevertheless deem it a favour if, in the event that the reviewing judge considers a lesser sentence is appropriate than the limit of my jurisdiction, the record be returned to this court for the purpose of sentence.

With great respect to the learned judge in the above case, I do feel that a sentence of 2 years imprisonment is rather on the lenient side."

The Registrar has placed the Senior Magistrate's memorandum before me and I have found it necessary to make certain comments on the memorandum, in the present form.

I understand from the Registrar that the Senior Magistrate has not made a request for a transcript of the proceedings of the 29th January. I have some difficulty, in the circumstances, in appreciating how the Senior Magistrate can respond in the manner he has without any reference to my judgment on sentence. I do not intend going into the reasons I gave when sentencing the accused and will only point out that the decision not to remit the case to the Senior Magistrate was reached after careful and proper consideration.

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The Senior Magistrate had reached a firm conclusion that this was an "abhorrent crime" which called for a sentence in excess of the 4 years which he is empowered to impose and i could see no real prospects of the Senior Magistrate bringing his mind to a consideration of an appropriate and fair sentence to impose, upon remittal. The decision whether or not to remit a case depends on the facts and circumstances of each particular case and not on the individual requests and or preferences of the Magistrates. I am at a total loss as to how and why the Senior Magistrate would deem remittals in the circumstances he has set out as a "favour".

In so far as the sentence is considered ail I can add at this stage is that 1 was not in the least guided by the Senior Magistrate's feeling as to what an appropriate sentence was. There will no doubt always be cases in which this court will arrive at a different sentence from what a subordinate court or for that matter the Court of Appeal may consider appropriate. It would in my view be quite improper, in such circumstances, for the type of exchange which the Senior Magistrate has embarked upon to follow. It is open to the Senior Magistrate in any subsequent case of kidnapping to fully set out his views on the question of sentence and as to possibly why the sentence I imposed in this particular case should not be followed.

In conclusion I should point out:-

1. That the present case should be distinguished from the recent review judgments in R v. PHILLIP DLAMINI Crim. Case No. 171/87 and R v. MAKHEHLA JOSEPH SHABANGU Crim. Case NO.19/88 (all unreported) in which the committal orders were quashed and the cases remitted to the subordinate courts either because the presiding officers had in committing the accused simply

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"passed thy buck" or had failed to comply with the requirements of Section 292 of the Criminal Procedure and Evidence Act No.67/1938.

2. That the kind of response from the Senior Magistrate is the first in my experience both as a Magistrate and a Judge and that I do not consider it a positive and healthy attitude in the relationship of the different levels of courts.

B. DUNN

JUDGE