

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 71/97

IN THE MATTER BETWEEN

REX

VS

SIBOSHWI NHLOKOZAMABELE MAMBA

CORAM

S.B. MAPHALALA - J

FOR CROWN

MR M. NSIBANDZE

FOR DEFENCE

IN PERSON

JUDGEMENT

(17/08/98)

The matter was committed to the High Court for sentence. The magistrate sitting at Piggs Peak after convicting the accused for contravening section 4 as read with section 18 (1) of The Stock Theft Act No. 5 of 1982 (as amended) was of the view that section 302 of The Criminal Procedure and Evidence Act should be invoked. The learned magistrate took the following factors in adopting this attitude.

- Accused has a record of previous convictions
- The majority of these previous convictions were in respect of stock theft cases.
- Accused was declared a habitual criminal.
- The fact that the accused was declared a habitual criminal justifies this court to commit him to the High Court for sentences.

The matter was then brought to me for this exercise. I have perused the evidence brought against the accused and I was satisfied that the conviction by the learned magistrate was supported by overwhelming evidence against the accused. The crown in the court a quo had proved its case beyond a reasonable doubt that the accused stole the cattle in question. As a matter of fact the accused was caught red handed.

The next step was to determine a proper sentence. The accused has a string of previous convictions stretching from 1974 up to 1992. Six of these convictions involve the crime of stock theft, three of which involves escaping from lawful custody and the last one involves the crime of possession of dagga in 1992.

It appears from the R. S. P. 107 to wit, record of previous convictions that under Case No. 815/84 before the High Court for the crime of stock theft the court declared the accused a habitual criminal on the 14th December 1984. I queried this as it did not make sense to me as accused was subsequently released from custody four years after the declaration. Mr. Nsibandze was equally baffled by this state of affairs. When accused was asked about this he told the court that he appealed this decision by the court to the Court of Appeal and was successful. The crown did not take issue on this explanation by the accused and

urged the court to accept accused explanation. However, Mr. Nsibandze applied that the accused be declared a habitual criminal and that the full rigour of the section take full effect. He based his assertion on accused statement he made in mitigation of sentence at page 14 of the court record where accused said:

"...I am not employed. I am ashamed of myself, I am even known as a thief in my home area. I just find myself having stolen other people's property. I just do not know what is wrong with me. I think it is because I am poor, if I had my own things I would not be stealing other people's property".

Mr. Nsibandze argued that the accused is a self-confessed stock thief and society is to be protected from his kind.

The accused although he could not tell us his exact age but we estimated his age to be about 70 years although he is still a robust man for a man of his age.

I have considered this matter very carefully and I have to decide whether to invoke section 304 of The Criminal Procedure and Evidence Act (as amended). Section 304 provides for the declaration of offenders as habitual criminals. The court is to satisfy itself on the following:

1. The person habitually commits offences, and that,
2. The community should be protected against him. (see State vs Makohla 1978 (4) SA. 763 (SWA).

Although not a statutory requirement, it is rule of practice not to declare an accused to be a habitual criminal unless he has previously been warned that such a sentence might be imposed on a further conviction (see State vs Mache 1980 (3) S.A. 224 (t). Despite this rule of practice, the courts may impose such a sentence even where no warning has been given. However, a court will be particularly careful before imposing it in such a case. (see State vs Shabalala 1984 (2) SA. 234 (n).

It is clear to me that accused was not warned that on further conviction he would be declared a habitual criminal if that was so it would have been reflected in R. S. P. 807. I am inclined to follow established practice in view of accused age and other factors in

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mitigation. I will thus sentence the accused to a period of five years without the option of a fine in terms of section 18 (1) (b) of the Stock Theft Act.

Further the accused is warned that on further convictions of a similar offence he will be declared a habitual criminal.

S.B. MAPHALALA

JUDGE