IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **REVIEW CASE NO. 84/04**

In the matter between:

THE KING

VS

NHLANHLA SONNYBOY DLAMINI

CORAM **MAMBA AJ**

JUDGEMENT

9/02/06

[1] The accused, a 29 year old male appeared before the Shiselweni Senior Magistrate on the 16th day of June, 2004. He was charged with the statutory offence of escaping from lawful custody in contravention of section 48 of the Prisons Act, 40 of 1964. Section 48 (1) (a) of the Act reads as follows: "48 (1) A prisoner shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding two years which shall commence after the expiry of any other sentence which he was serving at the time of his offence if he -(a) escapes or attempts to escape, from prison or other lawful custody;"

[2] The charge against the accused was framed as follows:

"The accused is charged with the office of contravening section 48 of the Prisons Act 40 of 1964 in that upon (or about) the 19th February, 2004 and at (or near

[3] Nhlangano Correctional Institutional quarters in the said district, the said accused did wrongfully and unlawfully escape from the lawful custody of His Majesty's Correctional Service while serving a sentence."

[4] The accused pleaded guilty to the charge. The Crown led the evidence PW1 a prison Warder, an Assistant Superintendent of Prisons. This witness testified that on the 19th day of February, 2004 the accused was detained at the Nhlangano prison serving a sentence of twelve months imprisonment on a conviction of robbery. He testified further that the accused had served four months of this sentence. The accused had been assigned to do some work within the prison's premises when he unlawfully escaped. He was rearrested on the next day.

[5] The accused did not contest this evidence and on the 21st day of June, 2004 he was convicted as charged and sentenced to "a term of eight (8) months of imprisonment."

[6] There are 3 disturbing or worrying features in this case that prevent me from certifying that the proceedings in the court a quo were "in accordance with real and substantial justice" and these features are:

a) the allegation in the charge sheet (or summons) that the accused was serving sentence.

b) the Crown led the evidence of the accused's previous conviction before conviction and

the failure by the trial Magistrate to order that the term of 8 months' imprisonment imposed on the accused must be served after the expiry or completion of the term he was serving when he unlawfully escaped from custody. I deal with these three points below.

[7] First, by alleging in the charge sheet that the accused escaped from prison whilst serving sentence, the crown alleged that he was a convict or had previously been convicted of some criminal offence. It is only persons convicted by a competent court that serve sentence in a prison. Thus, the charge sheet proclaimed that accused's incarceration was as a result of a conviction by a court. This should not have been done by the crown or permitted by the trial Magistrate.

[8] Section 282 of the Criminal Procedure and Evidence Act, 67 of 1938 forbids in mandatory terms the allegation of previous convictions in a charge sheet or indictment. The section reads as follows: "It shall not be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Swaziland or elsewhere"

[9] The charge sheet in the Magistrate's court is the equivalent of the indictment used in the High Court. It contains "the name of every accused person, with the name of the offence with which he is charged and the necessary particulars thereof concisely stated." See section 118 (1) and 114 (1) of the Criminal Procedure and Evidence Act 67 of 1938.

[10] The plain words of the section prohibits absolutely and without any exception, the allegation **in any charge sheet against any person for any offence that such person has been previously convicted of any offence,** (the emphasis is mine)

[11] There is no doubt in my mind that the charge sheet as framed against the accused sinned against the obligatory provisions of section 282 of the Criminal Procedure and Evidence Act and stands to be set aside.

[12] Section 48 (1) (a) of the Prisons Act prohibits all prisoners from escaping from lawful custody. The purpose or reason of their detention is not an element of the offence. It was therefore absolutely unnecessary and gravely prejudicial to the accused for the Crown to allege in the charge sheet that the accused had been detained as a convict when he escaped from prison.

Secondly, as a general rule, evidence of previous convictions may not be led at the criminal trial of an accused person. The reason for this is that it is highly prejudicial to the accused and irrelevant to determine whether he is innocent or not of the charge under consideration. **Ref : R V DOMINIC 1913 TPD 582, S.V. MTHEMBU AND OTHERS, 1988 (1) SA 145 (AD).**

[13] Section 283 of Act 67 of 1938 gives effect to this common law rule and provides that "except in circumstances specifically provided in this act, no person may prove at the trial of any accused for any offence that such accused has been previously convicted of any offence, whether within Swaziland or elsewhere, or ask any accused, charged and called as a witness, whether he has been so convicted."

[14] This section refers to the proof of previous convictions during the trial and before

conviction. There are, however, exceptions to this rule and for purposes of this judgment, I shall only confine myself to examining whether a charge as that faced by the accused herein falls under one of such exceptions. The exceptions provided by section 283 are those "in circumstances specifically provided in this Act." One such exception is contained in section 263 of the act. This relates only to a charge of receiving stolen property knowing it to have been stolen. The other exceptions are found in section 248 of the Criminal Procedure and Evidence Act and is dealt with in paragraph 19 below.

[15] In the Republic of South Africa, the position is governed by section 211 of the Criminal Procedure Act. This section provides that :

"Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence."

[16] It will be immediately noticed that our section 283 does not specifically provide for the exception where the fact of a previous conviction is an element of the offence with which the accused is charged. Commenting on the above exception, **Du Toit et al, COMMENTARY ON THE CRIMINAL PROCEDURE ACT AS AT 31/3/95** at page 24-21 states that such exception would apply in the Republic of South Africa "where, for instance, an accused is charged with escaping from custody it will be necessary to establish that he was in lawful custody following a conviction of a certain offence." I refrain from commenting on this opinion by the learned authors.

[17] Suffice to say that the elements of escaping from lawful custody in contravention of section 48 (1) (a) of our Prisons Act are as follows:

(a) An escape, (b) from lawful custody and (c) mens rea. It is immaterial or irrelevant whether the escapee or accused was at the time of his escape an awaiting trial prisoner or a convict. This would of course become relevant and important upon conviction and for purposes of sentence. The prosecution has to allege and prove that the incarceration of the accused was lawful and in doing so, it need not lead evidence to prove that the accused was

in custody following a conviction. The prosecution merely has to prove that the incarceration of the accused in prison was lawful by leading evidence to prove that the accused had been taken into custody on the orders of a court or other competent authority. It can not be said that by pleading guilty to the charge as framed the accused voluntarily told the court that he was a convict and thus the crown was at liberty to lead such evidence.

[18] **JRL MILTON** (assisted by **N.M. FULLER)** in his book **SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE Vol 3** at page 225 states that "it is essential that the custody be a lawful one and an escape from unlawful custody is not an offence. In this regard the matter is influenced by the circumstances of the arrest, as an unlawful arrest necessarily results in the consequent custody being unlawful. It must then always be shown that the arrest was lawful, and the onus

of proving this rests on the state which may not rely on the maxim **OMNIA PRAESUMUNTUR RITE ACTA** [all things are presumed to have been done regularly] to discharge this onus." (footnotes omitted by me)

[19] Section 248 of our Criminal Procedure and Evidence Act provides other exceptions to the rule. That section reads as follows:

"An accused person called as a witness upon his own application shall not be asked and if asked shall not be required to answer, any question tending to show that he has ... been convicted of or has been charged with, any offence other than that wherewith he is then charged ... unless ...

(d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged."

[20] I am unable to hold that in order for the prosecution to prove that the prisoner's incarceration was lawful, it has, as a matter of law, to prove that the accused had been taken into custody following a conviction, more so in a case like the present, where the accused has pleaded guilty to the charge and is unrepresented. For instance, where the accused escaped whilst still

awaiting trial the lawfulness of his incarceration would be based on the court order remanding him into custody and not on a conviction. The status of the accused when he escapes must be that of a prisoner. That is what the crown would need to allege and prove. That the prisoner was a convict or an awaiting trial prisoner, seems to me, with due deference, not to be an element necessary to prove the offence of escaping from lawful custody.

[21] It is noted that the escaping from custody cases have been included as an exception to the rule by **Du Toit et al** on the basis of the exception in the Republic of South Africa which permits the proving of previous convictions "where the fact of a previous conviction is an element of any offence with which an accused is charged." Our Criminal Procedure and Evidence Act does not have such an exception. Neither does our Criminal Procedure and Evidence Act specifically provide that cases of escaping from lawful custody in contravention of the common law or the Prisons Act shall be such an exception. Consequently, the leading of the evidence of the previous conviction of the accused was irregularly received by the court. This irregularity was, however, not of such a nature, on the particular facts of this case, as to vitiate the proceedings or constitute a failure of justice.

[22] **I** come to this conclusion mainly in view of the plea of guilty that was entered by the accused. There was nothing in issue between him and the crown. In **Mthembu's case (supra)** the court pointed out at page 151 that it is not every irregularity of this nature that would **per se** result in a failure of justice. Referring to the case of **S V MAVUSO 1987 (3) SA 499 (A),** the court stated that " Mavuso's case clearly did not intend to convey that in every case where a previous conviction was irregularly introduced into the evidence, or irregularly cross-examined on, a failure of justice **per se** results irrespective of the effect or the likely effect of the irregularity. Insofar as the decision in **S V DOZEREL, 1983 (3) SA 259 (C)** suggests this to be the case, it is incorrect. ...Each case must be considered in relation to its own special facts and circumstances in order to determine whether the irregularity and its consequences, or probable consequence, were so gross as to have resulted in a failure of justice **per se."**

[23] It is, however, one matter leading evidence of previous conviction during the trial, and

another, totally different and perhaps more serious, alleging in the indictment that an accused has previous convictions. As stated in paragraph 10 herein, the latter is prohibited by section 283. Its violation constitutes an irregularity. This irregularity leads, **per se,** to a failure of justice because it is such a gross departure from the normal procedural rules of trial.

[24] In sentencing the accused to a term of 8 months imprisonment, the learned magistrate did not order that the sentence must run or "commence after the expiryof any other sentence which he was serving at the time of his offence." He should have so ordered.

[25] At the time of his conviction for escaping from lawful custody, the accused had served about 8 months of his 12 months period of incarceration. Four (4) months of that period remained. I shall assume that he served that period concurrently with the eight (8) months' period imposed on him in the second trial. This would mean that he served about one half of that sentence of 8 months imprisonment after completion of his first sentence. This is, perhaps, the only mitigating or ameliorating factor in this review.

[26] The review record was received by the Registrar of this court on the 7th day of July, 2004. Because of **inter alia,** the shortage of Judges at this court then, the review could not be considered or done until in December, 2005; seventeen (17) months later and long after the accused had served and completed the term of imprisonment which is the subject of this review. What should have been a speedy process of review turned out to be an inordinate delay and denial of justice. It should never have occurred. It should never happen again. Hopefully, it shall never happen to anyone again, for it is these small things that taint our administration of justice.

[27] For the above reasons, the allegation in the charge sheet that the accused was a convict was an irregularity. This irregularity was so gross as to constitute a failure of justice.

[28] The conviction and sentence imposed on the accused are both set aside.

MAMBA AJ

I concur

EBBORSOHN J