

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 18/06

In the matter between :

REX

Versus

SANDILE ANSLEY MASEKO

CORAM

MAMBA AJ

JUDGEMENT

19th April, 2006

[1] The accused who was undefended, appeared before the Lubombo Acting Senior Magistrate on two counts. Count 1 alleged that he was found in possession of a firearm, a Luger pistol in contravention of section 11 (1) of Act 24 of 1964 as amended. Count 2 related to a contravention of section 11 (2) of the same Act in that he was found in possession of 1 live round of ammunition.

[2] The accused pleaded guilty on both counts and was, in my view correctly convicted as charged, after the evidence of the investigating officer was led by the Crown.

[3] There are several issues though that attracted or caught my attention whilst going through the record of the proceedings herein.

[4] First, the charge sheet on count 2 was framed as follows;

"...In that upon or about the 24th day of July 2005 and at or near Lukhula area in the Lubombo District, the said accused not being a holder of a valid permit or licence did wrongfully and unlawfully possess 1 live round of ammunition."

[5] Section 11 (2) of the said Act states that :

"(2) No person shall be in possession of ammunition unless he is the holder of a current permit or licence to possess the firearm for which such ammunition is intended, or is otherwise permitted to possess such ammunition under this Act."

[6] It seems clear to me that this section prohibits not the possession of ammunition without a licence to do so, but rather the possession of ammunition without a permit or licence to possess a firearm for which such ammunition could be used. Whilst it may be argued that a permit to possess a particular firearm is a permit to possess any ammunition that could be used on that firearm, one is not, strictly speaking required to possess a licence to lawfully possess ammunition. The ammunition is lawfully had or possessed when the holder thereof is licenced to possess a firearm to which that ammunition could be used or is intended.

[7] What was alleged in the charge sheet on this count was, however, very clear. The accused was found in possession of one live round of ammunition without the necessary legal instrument or right for him to do so. That is what in essence the subsection prohibits and that is what the charge sheet said. I would therefore hold that whilst the charge sheet on this count did not strictly follow the wording of the prohibition in the subsection, this was not an irregularity and the accused suffered no prejudice as a result thereof.

[8] My second concern is that in sentencing the accused, the learned trial Magistrate stated that "...I impose upon him a sentence of E5000-00 fine or five years' imprisonment, E3500-00 or three and a half years is suspended for three years on condition that the accused person is not found guilty of a similar offence within the period of three years."

[9] I assume, as I must in the circumstances, that the above sentence was in respect of both counts, that is to say, the court took both counts together for purposes of sentence. This is neither authorised nor prohibited by the Criminal Procedure and Evidence Act 67/1938. It is, however, not desirable to resort to such a form or method of sentencing. It should be resorted to in clear and exceptional cases. As a general rule, a court should impose a specific sentence on a specific and separate crime or count and then order that these sentences must run concurrently, if that be the desired and intended effect.

[10] A global sentence is undesirable since, *inter alia* one of two or more counts may be set aside on appeal or review and this may present a problem on what sentence was imposed on the remaining counts. Again, a statute may prescribe a minimum or specific sentence on the offences for which a global sentence is imposed, like in the present two counts. I refer in this regard to the following cases;

**S v LESHUBA, S v MAHLANGU, S v MAMELE, 1968 (4) SA 576 (T)
and S v YOUNG, 1977 (1) SA 602 (A).**

[11] The minimum statutory sentence on a contravention of section 11 (1) is

" (a) a term of imprisonment not less than five years or to a fine not less than E5000-00 in respect of a first offence" and on a contravention of section 11 (2) is "(ii) in respect of an offence under paragraph (c), to a fine not exceeding E2000-00 or to a term of imprisonment not exceeding two years or both", as per section 11 (8) (c) (ii) of the Act.

[12] A sentence of E5000-00 or five years imprisonment on a first offender for possession of a mere one live round of ammunition is in my view too harsh and totally disproportionate to the offence and the accused in all the circumstances. In any event, any fine in excess of E2000-00 or a term of imprisonment exceeding two years is incompetent for a contravention of section 11 (2) of the Act. This sentence illustrates in my view some of the difficulties that may be posed by the imposition of a single sentence for more than one count.

[13] What seems clear to me though is that the court was of the view that an effective sentence of E1500-00 or Eighteen months' of imprisonment should be imposed on the accused and that is the fine that the accused paid to escape the term of imprisonment.

[14] It would serve no useful purpose to remit the matter to the trial Magistrate for him to effect the corrections stated herein. This court shall make the corrections.

[15] The third factor in the record that merits comment by this court is the condition upon which the sentence was suspended as stated in paragraph 8 above.

[16] Where a sentence is conditionally suspended, the terms upon which it is suspended must be clear, certain, fair, just, relevant, competent, practical and legally sound. The condition of the suspension imposed by the court a quo seems to me to be neither of the above. For instance, the accused may be tried and found guilty of a contravention of either section 11 (1) or 11 (2) (which

would qualify as a "similar offence") within one year on this conviction. If this offence was committed before his conviction herein, this would trigger into operation or put into effect the suspended sentence. This would be so for the simple reason that the conviction was within a period of three years after this conviction. This would not be fair or just as the offence for which he would be convicted then would have been committed prior to his present conviction.

[17] The suspension should be that the second condition must be on an offence committed during the period of suspension. The suspended sentence would for instance, be activated even if the accused is convicted after the expiration of three years, as long as it was committed within the period of suspension.

[18] For the foregoing reasons, the following orders are made;

1. The proceedings herein were in accordance with real and substantial justice.
2. The conviction of the accused on both counts is confirmed.
3. On count one the accused is sentenced to a fine of E5000-00 or to serve a term of imprisonment for a period of five years. E3500-00 or three and a half years of this sentence is suspended for a period of three years on condition that the accused is not convicted of a similar offence committed during the period of suspension.
4. On count two the accused is sentenced to a fine of E2000-00 or a term of imprisonment for a period of two years. This sentence is wholly suspended for a period of three years on condition that the accused is not found guilty of a contravention of section 11 of the Act, committed during the period of suspension.

MAMBA AJ

I AGREE

EBERSOHN J