IN THE HIGH COURT OF SWAZILAND

REVIEW CASE NO. 128/06

In the matter between:

THE KING **APPLICANT**

VS

CORAM **MAMBA A J**

FOR THE APPLICANT

FOR THE ACCUSED

JUDGEMENT 23rd

January, 2007

---

[1] The accused appeared before the Lubombo Acting Senior Magistrate on the 6th day of July 2005 on a charge of contravening section 3 (a) as read with section 18 (1) of the Stock Theft Act No. 5 of 1982 (as amended) (hereinafter referred to as the Act). The charge against them was that, they had, the previous day, that is to say, on the 5th day of July 2005, stolen a pig valued at E200.00 belonging to or in the lawful possession of Johannes Shiba.

[2] After being duly appraised of their rights to be legally represented in their trial, each accused informed the court that he would conduct his own defence.

[3] On being arraigned on the same day, they all pleaded guilty to the change. The crown led only the evidence of the complaint which evidence established the commission of the offence and the value of the pig stolen. This evidence was not disputed or challenged by either of the accused and they were, in my judgement, properly convicted as charged.

[4] Immediately after judgement the accused were called upon to make submissions in mitigation of sentence which they did. Thereafter the case was postponed to the 20th day of July, 2005 for sentence.

[5] Sentencing the accused that day the learned Magistrate observed that;

> "the minimum sentence stipulated for first offenders under this Act is two (2) year's imprisonment without an option of a fine. The court will impose this sentence upon the accused persons without fail, but because of their personal circumstances the court will suspend 18 months of this sentence for three (3) years on condition that the accused persons are not found guilty of a similar offence or any other offence where theft is an element [committed] within the period of three (3) years."

Section 18(1) of the Act provides that :

"(1) A person convicted of an offence under section 3 or 4 in relation to any cattle, sheep, goat, pig or domesticated ostrich shall be liable to imprisonment for a period of not less than -

(1) two years without the option of a fine in respect of a first offence; or

(2) five years without the option of a fine in respect of a second or subsequent offence,

but in either case no such period of imprisonment shall exceed ten years; provided that if the court convicting such person is satisfied that there are extenuating circumstances in connection with the commission of such offence, he shall be liable to a fine not exceeding E2000-00 or a term of imprisonment not exceeding ten years or both".

The underlining is mine, to emphasis the right that accrues to the accused where extenuating circumstances are found to exist.

[6] A proper reading of section 18 (1) of the Act reveals that the above observations by the trial Magistrate are not entirely correct. The proviso to that section clearly enjoins the trial court to conduct an enquiry and make a finding on the existence or otherwise of extenuating circumstances before sentencing and for purposes of sentencing an accused. Where the court finds that extenuating circumstances do exist, the court is again enjoined to impose a sentence of "a fine not exceeding E2 000-00 or a term of imprisonment not exceeding tens years or both".

[7] A court must impose the sentence of two (2) years' imprisonment without the option of a fine on a first offender only if it determines or finds that there are no extenuating circumstances. If on the

other hand, extenuating circumstances are found to exist, the convict is entitled to be given the option of a fine as per the proviso to the section. This court had occasion to deal with the same subject in **R v SEBENELE SISHAYI BHEMBE AND NKOSINATHI MNISI REVIEW CASE 21/06** (which was incidentally a review of a decision by the same Magistrate.)

In the present case, the trial court failed to conduct an enquiry and to make a determination on whether or not extenuating circumstances were present in respect of either of the Accused. The court erred in this regard and this error or irregularity clearly prejudiced the accused inasmuch as it condemned them to terms of imprisonment without the option to pay a fine. It denied the accused the right to be given the opportunity to pay a fine and avoid a straight custodial sentence if of course extenuating circumstances were to be found to exist.

In **SEBENELE'S CASE (supra)** the court stated that:

> "As authoritatively held by the court of Appeal in the case of **Daniel Mbudlane Dlamini v R Appeal Case 11/98** the
> responsibility or duty to make this inquiry and finding resides with the presiding officer. The accused bears no duty or onus or responsibility to prove or establish the existence of extenuating circumstances. This is the case even where the accused elects to remain silent and not assist the court in this regard. No such determination was made by the court **a quo.** The sentence imposed by the court on the accused herein cannot stand and is set aside."

The failure to determine whether extenuating circumstances exist or not is undoubtedly a misdirection by the court **a quo.** This

irregularity is, however, not fatal; or put differently, it does not per se constitute a miscarriage of justice. There is sufficient evidence, free of the irregularity, which established the guilt of the accused beyond a reasonable doubt. In any event the irregularity only affects the sentence and not the conviction.

[11] For the aforegoing reasons, it is ordered as follows:

(3) The convictions of both Accused are confirmed.

(4) The sentence imposed on each of the accused is set aside.

(5) The case is remitted to the trial Magistrate to make an enquiry and or determination whether or not extenuating circumstances do exist in respect of each of the accused herein and thereafter to pass sentence **de novo**.

MAMBA AJ