IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO.87 OF 2009
District Record No. MP 31 of 2009

In the matter between:

THE KING

VERSUS

SIBUSISO MACOCOMA NGWENYA

Date of consideration: 24 March, 2009
Date of order: 25 March, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] The accused was arraigned before the Manzini Magistrates Court charged with two counts of assault with intent to cause grievous bodily harm and contempt of Court. He pleaded guilty to both counts and was upon his said guilty pleas convicted and sentenced to a fine of

E900.00 and in default to 9 months' imprisonment on the first count. On the second count, he was sentenced to a fine of E500.00 and in default, to imprisonment for a period of 5 months' imprisonment. Both sentences were ordered to run consecutively.

[2] No evidence was led by the prosecution in proof of the charges, including evidence, proving commission of the offences in question, an issue I have had occasion to comment adversely about previously. I maintain my views in that regard.

[3] What does, however raise spasms of disquiet for present purposes, is the conviction of the accused person on the second count on the basis of his own guilty plea. The charge sheet alleged that on 16 October, 2008, the accused, despite being duly served **or** ordered to do so, failed to appear before Court, thereby wrongfully, unlawfully and intentionally violating the dignity, repute or authority of the Court. (Emphasis added).

[4] I must, in the premises, state that the charge was embarrassing inasmuch as it alleged alternatives within the same charge. I say so because it was not clear whether it was alleged that the accused was served with

an order to appear or was ordered in *facie curiae* to attend but did not. In my view, the charge sheet should have been specific as to which of the two it was. It was not open to the Crown to put two possible scenarios to the accused person and ask of him to enter a plea thereto.

[5] In this regard, I am of the view that the charge sheet was defective and would clearly have embarrassed the accused person as it would not be clear to a reasonable person as to which of the two variables was being alleged against him. For that reason, I am of the view that the conviction ought to be set aside.

[6] Furthermore, it is clear from what the accused said to the Magistrate after conviction that his absence from Court was neither intentional nor unlawful. There is an explanation he gave, which if properly investigated may have cast a reasonable doubt in the mind of the Court. The accused stated that he came to Court on the date in question but went to the wrong courtroom. This was not investigated. He also stated that one "Shoes", probably an employee of the Court, released him to go home. These revelations should have put the Court on a *qui vive* regarding the propriety of a conviction, particularly in the absence of an investigation of the accused's allegations.

[7] On a further perusal of the record of proceedings, it is also clear that the accused person was not even afforded an opportunity to make submissions or to lead evidence in mitigation of sentence. The fact that an accused person pleads guilty does not deprive him or the Court of information from the prosecution as to whether or not he is a first offender, and secondly, an opportunity to

mitigate sentence. It would appear that in both respects the Court erred and the Court returned the verdicts it did devoid of the necessary facts and information to enable it to do so.

The anomaly, in particular, calls into serious question the propriety of ordering the sentences to run consecutively. Without being afforded an opportunity to mitigate the sentence, I am of the view that the Court would not have been properly placed to mete out a condign sentence and would, in the circumstance, be ill-placed to order the sentences to run consecutively as it did. In the premises, I am of the view that the conviction on the second count should fall away. Similarly, the sentence thereon is set aside. In relation to the first, the accused's sentence be and is hereby set aside and the Court *a quo* is ordered to conduct a proper enquiry into the stage of

mitigation before meting what will become an appropriate sentence in the circumstances.

DONE AND SIGNED IN CHAMBERS IN MBABANE ON 25 MARCH, 2009.

T.S. MASUKU

JUDGE