IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Review Case No. 81/2009
District Record No. MP 388/08

In the matter between:

THE KING

VERSUS

MPENDULO DLAMINI

Date of hearing: 21 April, 2009
Date of Order: 5 May, 2009

Mr. Attorney Thabiso Masina for the Crown
Mr. Attorney O. Nzima for the accused

JUDGMENT ON REVIEW

MASUKU J.

[1] This matter came before me on automatic review. It was, however, unusually accompanied by a notice of review issued under the hand of the Accused's attorney of

to have both the conviction and sentence set aside on review. The said notice did, however, have one major undoing - it was directed to the Magistrate's Court of the District of Manzini.

[2] In order not to put form ahead of substance, particularly in cases such as this where an individual's liberty is at stake, I decided to use my discretion as envisaged by section 81 (3) of the Magistrate's Court Act, of 1938 and invited both the Accused Counsel and Crown Counsel to address the Court on the issues raised in the said notice.

[3] When the matter was eventually called, Mr. Nzima, indicated that he was abandoning the attack advanced against conviction and in essence conceded that a guilty verdict was inexorable in the circumstances. I cannot agree more. It was certainly plain on the evidence that the trial Court was eminently correct in convicting the accused on the

evidence then before it. In view of that concession, the need to exhaustively consider the evidence led during the trial is thereby obviated. I shall, in the paragraphs that follow, consider the evidence led only to the extent that it is necessary and to which it sufficiently bears on the question of sentence which shall be the Court's only and ultimate enquiry.

[4] Before considering the propriety of the sentence, there is a major hurdle to the accused's case raised by Mr. Masina. He argued that since it is plain from Mr. Nzima's concession that the review was premised exclusively on the propriety of the sentence, the Court could not entertain the complaint under the auspices of a review. He contended that sentence can only be properly challenged via the medium of an appeal. Is this contention sound in law?

[5] I have recently had occasion to consider this very question. I particularly had to consider the line of

demarcation, which I must confess may, in cases, be blurred, between the procedures of appeal and review. This was in the case of *Mbongiseni Nhlabatsi v The National Court President and Another* Civil Case No. 1075/09. I found that there is nothing to stop an accused person from taking a sentence imposed upon him on review, particularly in circumstances such as are alleged in the instant matter, namely that the Court took into account irrelevant considerations on the one hand and failed to take into account relevant ones on the other. In particular, I relied on the work of the learned authors Lansdowne and Campbell, South African Criminal Law and Procedure, Vol.V., Juta **85** Co. 1982, generally at page 682 - 690. See also *R v Zeeman and Another* 1987 - 95 (2) SLR 34.

[6] It is also plain from reading section 79 (1) (b) of the Magistrate's Court Act *[supra)* as read with section 81 (2) (a) (1) of the same Act that the Court is eminently capable of dealing with the propriety of

the sentence on review. The said sections, cited *ad seriatim* read as follows:-

> "79. (1) without prejudice to the right of appeal against a judgment which right may be exercised before or after a review under this section and subject to the time prescribed or for appeals, every sentence shall be subject to review in the ordinary course by the High Court where the punishment awarded-
>
> (b) exceeds six months of a custodial sentence or fine of five hundred Emalangeni imposed by a magistrate other than a magistrate referred to in paragraph (a).
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> 81. (2) If, upon considering the proceedings aforesaid, it appears to the reviewing officer or the judge, as the case may be, that they are not in accordance with justice or that doubt exists whether or not they are in such accordance- (a) the reviewing officer may-(i) alter or reverse the conviction or reduce or vary the sentence of the court which imposed the punishment; or..."

[7] In view of that conclusion, I am of the considered opinion that there is nothing untoward with this Court exercising its review jurisdiction in the instant circumstances. I must state in addition that I must state this in addition that this is particularly so because there may be merit in the submissions by the accused's attorney on sentence.

If the Crown's arguments were to be adhered to in the instant case, an injustice may well have been done and which is incapable of being remedied by the time that the appeal proper comes for hearing. I say so taking full cognizance of the fact that appeals in this Court are not dispatched and brought to this Court with the requisite and deserving degree of promptitude. It is clear on this score that Mr. Nzima is on a *terra firma.*

[8] Turning to the grounds for review, Mr. Nzima, submitted that the trial Magistrate erred in the following respects in the imposition of sentence:-

(i) he considered that the accused had "robbed" the complainant of a pair of shoes. He held that the accused did this in the company of three friends;

(ii) he did not take into account that the accused was a first offender who as far as possible should have been spared the imposition of a custodial sentence

by imposing a fine and at the least, ordering a portion of the sentence imposed on him to be conditionally suspended; and

(iii) the trial Magistrate failed to sufficiently take into account the circumstances in which the offence occurred.

Do these grounds justify this Court's interference with the sentence?

[9] I now come to the facts which could assist this Court in finally determining whether the application for review is meritorious in the circumstances. Briefly outlined, the relevant facts follow hereafter: The accused, a 24 year Swazi male adult of Kwaluseni area, was arraigned before the Manzini Magistrate's Court on a single count of assault with intent to cause grievous bodily harm. It was alleged that on 16 December, 2007, he wrongfully, intentionally

and unlawfully assaulted Sibusiso Elvis Dlamini with a fist on his left eye. The accused pleaded not guilty.

[10] With his plea joining issue with the Crown, four witnesses were called by the latter in proof of its case. The evidence led proved indubitably that the complainant had bought some alcohol from the accused known as "Magregor" for E50.00, on credit. I interpolate to observe that the sale of the liquor on such terms is illegal in terms of the liquor laws of this Kingdom. The complainant failed to settle his bill on time, prompting the accused, self-help style, to seize four pairs of shoes from the complainant. The latter, for his own misdemeanors, was arrested and detained by police before he could settle the aforesaid dues.

[11] Upon his release, the complainant made further undertakings to make good the debt he owed to the accused but did not comply. He was on 16

December, 2007, found by the accused making telephone calls And he was assaulted by the accused on the left eye which got damaged as a result and the complainant lost use of the same. The complainant was, as a result of the injury suffered, admitted to Good Shepherd Hospital for a week. The accused did not deny the assault although he tried to suggest and concoct a story meant to exculpate him from the assault during his evidence in chief. This was correctly discarded by the trial Court as it was a clear afterthought.

[12] In his judgment on sentence, the learned Magistrate correctly recorded that the offence was serious and that it had resulted in the complainant losing the use of his eye. The Court *a quo* further found that the accused took the law into his own hands by taking the complainant's shoes and by also assaulting him for the admitted debt of E50.00. The Court further noted that the accused's behaviour could lead back

to the state of nature and that it was necessary that the accused's untoward behaviour be punished accordingly. The trial Court opined that the accused should "be sent away from society as he posed a threat. He should be kept at a reformatory where he would resocialise so that he is able to tolerate and accommodate those who might owe him in future." In a rather dismissive manner, the Court *a quo* finally stated that it considered that the accused was a first offender who was a breadwinner and was owed by the complainant.

[13] As his just desert in the circumstances, the Court found that a custodial sentence of three (3) years' imprisonment without the option of a fine was condign. The sentence was backdated accordingly. Is there a need to interfere with this sentence? The first point that needs to be made in this regard is that it is trite learning that the sentencing discretion rests primarily in the hands of the trial Court. For this

reason, the higher Court does not lightly interfere with that exercise, save in instances where it is improperly used.

[14] I am of the view that the circumstances which might call for this Court's interference with the sentence on review and appeal may actually coalesce. Mr. Masina submitted that for present purposes, the Court *a quo* correctly exercised its jurisdiction thereby rendering it unnecessary for this Court to intervene.

[15] I agree with Mr. Nzima that the Court *a quo* did take into account irrelevant factors and what also appears to have been unproved facts into account for purposes of sentence. There was no evidence that the accused "robbed" the complainant of his shoes. The word "rob" is a term of art and implies theft by the use of actual violence or threats of violence, elements which were never alleged or proved. It is clear that this aspect did have a bearing on the Court sentencing the accused in the manner it did although

the accused was never charged, let alone convicted of that offence.

[16] It is also clear that the Court put a lot of emphasis on the seriousness of the offence and how it was committed. The battle lines were drawn - the accused was to be taught a lesson and kept out of circulation because he "posed a threat" to society. In a bid to emphasize the seriousness of the offence, the Court *a quo* unfortunately did not properly exercise its discretion for the reason that the person of the accused and his personal circumstances did not receive due weight. In particular, the fact that he was first offender who previously had no brush with the law carried trifling weight nor the fact that in a sense the complainant provoked the accused by failing to pay the outstanding amount. This is evidence that the Court *a quo* did not properly apply its mind to the case before it.

[17] I am of the view that although the offence was undoubtedly serious, meriting a sentence that would have deterrent and retributive components to it, to however have little or no regard for the rehabilitative aspects of it was not a proper exercise of the sentencing discretion by the Court *a quo.* It is in that respect that some relevant considerations were not given due or sufficient weight e.g. the fact of the accused's status as a first offender and the circumstances in which the offence, serious as it was, was committed.

[18] As a result of putting emphasis on irrelevant factors and failing to lay proper emphasis on necessary factors, the Court *a quo* appears to have passed a sentence that was in my view harsh in the circumstances, without having regard to the salutary principle of sentencing that unless it is imperatively called for, first offenders should, as far as is possible not be sentenced to imprisonment. The option of a fine should, unless the legislation

concerned prohibits or the circumstances strongly militate against it, be the first port of call.

[19] It is also clear that the accused was shown no mercy by the Court. It is in this wise that the remarks that fell from the lips of Holmes J.A. in S *v Sparks* 1972 (3) SA 396 resonate. At page 410, the learned Judge of Appeal said:-

> "On the other hand, the offences were, without doubt, very grave, and, in addition to the matter of punishment the deterrent aspect calls for a measure of emphasis lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishments to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy."

[20] In the Botswana case of *Motsumi v The State* [1993] B.L.R. 131 at 137 B - C, after quoting the above remarks by Holmes J.A., Gyeke-Dako J. said the following about the necessary ingredient of mercy in sentencing:

> "Mercy, by its very nature, it has often been said eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger. It

> follows therefore, that the convicted person should not be visited with punishment to the point of breaking him. It is obvious that the learned senior magistrate, blinded by anger, failed in his assessment of sentence, to give consideration to the triad: consisting as it does of the crime, the offender and the interests of society. This is where he erred."

[21] In another Botswana case of *Mosiiwa v The State* [2006] 1 B.L.R. 214 at 219, Moore J.A. had this to say about sentencing, sentiments which were quoted with approval by our Supreme Court in *Celani Maponi Ngubane v Rex* Criminal Appeal No.6/06 at page 31:-

> "It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the Court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to produce in the minds of the public a feeling that he has been unfairly and harshly treated."

[22] Having regard to the entire conspectus of the attendant facts and circumstances of this case, I am of the opinion that the learned Magistrate did not exercise

his sentencing discretion properly. Interference with the sentence he imposed on review is therefor called for. Having regard to all the factors involved in the sentencing *triad,* I am of the view, that the following Order would meet the justice of the case:-

22.1 The conviction of the accused for the offence of assault with intent to cause grievous bodily harm is in accordance with real and substantial justice and is thereby confirmed.

22.2 The sentence of three years' imprisonment imposed by the trial Court be and is hereby set aside and is substituted therefor the following sentence:

22.2 (1) The accused person be and is hereby ordered to pay fine of E2.000.00 and in default of payment of which, he is hereby sentenced to fifteen (15) month's imprisonment.

22.2 (2) In addition to the sentence 22.2 (1) above, the accused be and is hereby sentenced to two (2) years' imprisonment which is hereby wholly suspended for a period of three (3) years on condition that the accused is not, during the period of suspension, found guilty of an offence in which violence to the person of another is an element.

22.3 In the event that the accused is unable to pay the fine imposed, the period he has already spent in custody shall be taken into account in computing the period of imprisonment he shall be required to serve under 22.2 (1),

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 5th DAY OF MAY 2009.

T.S.
MASUKU

JUDGE

Messrs Nzima and Associates for the Accused. Directorate of Public Prosecutions for the Crown.