IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE REVIEW CASE NO. 34/09

In the matter between:

REX

Vs

BHEKI KUNENE

CORAM MAMBAJ

JUDGEMENT
12th August, 2009

[1] The Accused, who was unrepresented during the trial, was arrested and incarcerated on the 28th April 2009 on a charge of robbery. He made his first appearance in court on the 04th May 2009 and was remanded into custody. He remained in custody as an awaiting trial prisoner until the 12th June, 2009 when he was convicted and sentenced to a term of two (2) years of imprisonment, without an option to pay a fine. The sentence was not back-dated, probably, one would suspect, because the accused had spent less than two months in custody whilst awaiting completion of his trial.

[2] The trial Magistrate did not state in his judgement on sentence why he found it inappropriate to back-date the sentence to the date on which the accused was taken into custody. Notwithstanding the comparatively short period spent by the accused in custody before he was sentenced, in passing sentence, the learned Magistrate was enjoined to take into account the period of incarceration already spent by the accused whilst awaiting trial. Our Constitution demands this, as a matter of law. Article 16 (9) (of the Constitution) states that:

> "(9) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period that person has spent in lawful custody in respect of that offence before the completion of the trial of that person shall be taken into account in imposing the term of imprisonment."

[3] Again, apart from the Constitutional imperative, as a rule of law and practice, the court a quo was obliged to back-date the sentence. This does no violence to the general rule that sentencing is preeminently and that the date on which a sentence should start to run, is a matter within the discretion of the trial court.

[4] In the case of **R v** BENSON **MASINA & ANOTHER, 1987-1995 (1) SLR 391, HANNAH CJ** (as he then was) stated as follows:

> "The fact of the matter is that they spent 64 days in custody prior to their conviction and that was a factor which they were entitled to have taken into consideration either by a reduction in their sentence or by back-dating their sentence. The loss of liberty be it for 4 days or 64 days is necessarily a punishment."

And in **R v BHEKI DLAMINI, Review Number 210/1986** (unreported)

the court stated the rule thus:

> "Although the question of when a sentence should commence is matter for the discretion of each court, in my judgement the courts of this country should, as a general rule, exercise that discretion in favour of backdating sentences of imprisonment in those cases where an accused has been in custody awaiting trial. Such a general practice

> will, in my opinion, more effectively ensure not only that justice is done but that it is seen to be done. That is not to say that there will be no cases in which a court can take account of time already spent in custody in a more general way but, in my view, good reason should exist for adopting such an approach.
>
> I may add that this practice of backdating sentences of imprisonment has in most cases been followed not only by the High Court but also by the Court of Appeal.
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> The judgements of this court are binding on Magistrates' courts and it not now open to the Magistrate who tried the case under consideration to say that the general rule is that sentences should not be backdated. While he has a discretion in the matter good reason must exist for a departure from the general practice."

[5] For the foregoing reasons the sentence imposed on the accused is hereby corrected and or amended and is ordered to commence on the 25th April 2009. This is to be communicated to the Accused and the prison authorities by the Registrar of this court as soon as .possible.

MAMBA J