IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 5/2009

In the matter between:

SANDILE MAJAHONKHE NKOMO

APPELLANT

VS

REX

RESPONDENT

CORAM

MABUZA J MAMBA J

FOR APPELLANT FOR RESPONDENT

MR M LOTS A
MR T. ViLAKATI

JUDGEMENT

20th August, 2009

[1] The Appellant, a twenty four year old male of Mliba area appeared before a Magistrate in Manzini on a charge of contravening section 3 (a) of the Stock Theft Act No 5 of 1982 as read with section 18 (1) (a) (as amended) (hereinafter referred to as the Act). The allegation against the appellant was that he had on or about the 10th January, 2009 at Mliba area, stolen a black goat belonging to one Fikelephi Dlamini.

[2] After his rights to legal representation were explained to him on his first court appearance, he indicated that he would conduct his own defence and he proceeded to do so. He was subsequently arraigned on his second appearance and he pleaded guilty to the charge.

[3] Following the plea of guilty, the crown led the evidence of the complainant who testified that she had last seen her goat on the 24th December, 2008. She also gave a detailed description of the goat. She further told the court that she had not given anyone the right to take away or appropriate her goat from her. It was her further evidence that on the 12th January, 2009 she had met the Appellant at the local Police station "because he had stolen my goat [and the carcass of] the goat was shown to me by the police [whilst] the hide (skin) (sikhumba) remained at the police station." The sum total of her evidence was that her black goat had been stolen by the appellant.

[4] Her testimony was not disputed by the Appellant who did not have even a single question for her in cross-examination. The crown thereafter closed its case (without leading any further evidence).

[5] The Appellant had his rights explained to him at the close of the case for the crown and also his rights on how he could present or closed his case. The court immediately returned a verdict of guilty as charged. After mitigating he was sentenced to a term of imprisonment for 2 years without an option to pay a fine and he has appealed against both his conviction and sentence.

[6] In his first ground of appeal against conviction, and this is the main ground that was strenuously argued by his counsel before us, the

Appellant states that:

> "the learned Magistrate erred in fact and in law in returning a guilty verdict yet the evidence led did not link the Appellant in anyway [with] the crime."

The other two grounds of appeal are in my view, different shades or versions of the first one and for that reason I need not burden this judgment by a further reference to them.

[7] The aforequoted ground of appeal shows, in my judgement, a very elementary misunderstanding of the provisions of section 238 (2) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). This section provides that:

> "(2) Any court which is trying any person on a charge of any offeno© may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:
> Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed."

[8] The plain meaning of the above section is that where an accused, as in the present case, has pleaded guilty to the charge he is facing, he may simply be found guilty of the charge if the prosecution, leads evidence *aliunde,* other than the accused's confession or plea of guilty, proving that the offence in question was actually committed.

This evidence need not link or implicate the accused with the offence. In casu, all that the crown needed to prove was that the complainant's goat had been stolen and this it did. The crown did not only prove that the goat was stolen but that it was the appellant who committed the offence. This was not challenged or disputed by the appellant.

[9] In the case of **R v NATHANSON, 1959 (3) SA 125 (AD) at 126,**
which was cited to us in argument by Counsel for the Appellant, Schreiner JA, referring to s258 (1) (b) of Act 56 of 1955 of South Africa, which although not worded word for word with our section 238 (2) but had similar meaning and import, stated as follows:

> "This provision has given rise to some difference of judicial opinion but in a series of cases decided last year the Provincial Divisions have substantially concurred in an interpretation which seems to me, with respect, to be the correct one. Once the plea of guilty has been entered, it is not further regarded in applying the provision. Before the inferior court has power to convict on the plea, the actual commission of the crime by some one, not necessarily the accused, must be proved by any admissible and sufficient evidence. The plea is not included in such evidence."

[10] For the foregoing reasons, there is no merit at all in the appeal against conviction and I would dismiss it. The Appellant was, in my
judgement, properly convicted.

[11] The issue of the sentence meted out on the Appellant, however, falls on a different plane.

[12] In terms of section 18 (1) of the Act,

> "(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-
>
> (a) two years without the option of a fine in respect of a first offence; or
>
> (b) 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 or a term of imprisonment not exceeding ten years or both."

The proviso makes it mandatory that where someone has been convicted of contravening either section 3 or 4 of the Act, the court must conduct an enquiry to determine whether or not extenuating circumstances exist in connection with the commission of the offence. The duty to conduct this enquiry lies with the presiding officer. (DANIEL MBUDLANE DLAMINI v REX (CR. **APPEAL** 11/98) (unreported). Recently this court considered a similar point in the case of **MPOSTOLI ZAZA SIMELANE v REX CR. APPEAL 25/2008,** judgement delivered on the 6th August 2009 and stated as follows:

> "[10] Whilst it is true that the trial Principal Magistrate did make a finding that there were no extenuating circumstances in this case, she did not conduct or embark on an enquiry on this. She was enjoined to conduct such enquiry as it was very crucial in the determination of the "appropriate sentence" she referred circumstances that condemned the Appellant to the sentences I have referred to above.
>
> [11] Where an accused is unrepresented, it is encumbent on the presiding officer to advise the accused about this enquiry and the importance of such enquiry in the sentencing equation. Whilst the duty to conduct the inquiry rests on the presiding officer, the sentencing provisions and their significance should, as a matter of law and practice, be brought to the knowledge and attention of the convicted person. This would enable such person to be an active participant in the inquiry should he decide to take advantage of these provisions in order or in an endeavour to receive a sentence that has an option of a fine. In fact an accused should be encouraged to lead evidence in extenuation, even if he is not obliged to do so (see **Daniel Mbudlane Dlamini v Rex Criminal Appeal 11/98)** (unreported). An accused person can only exercise his right to participate in the inquiry, if he has knowledge of such right, and obviously the attendant benefits to him flowing therefrom.

> [12] The normal or usual practice in this jurisdiction is to conduct the inquiry on the existence or otherwise of extenuating circumstances immediately after conviction but before mitigation."

These remarks are apposite in this case. In **Zaza's case (supra),** the sentences imposed on the appellant were set aside and the matter was remitted to the trial court to conclude the necessary enquiry and then pass sentence de novo. A similar order was made under similar circumstances in **R v MATSENJWA, BHEKANI, 1987-1995 (1) SLR 393 where ROONEY J** said :

> "Under the Stock Theft Act (as amended), it is clear that the consideration which must guide the court relate to the commission of the offence. As the learned Magistrate did not, in the present case, consider the facts of the case, he misdirected himself. As it is possible that on a proper direction he might find extenuating circumstances, I shall send the case back to the court below for that purpose."

[13] I would therefore allow the appeal on sentence and the sentence of two years imprisonment imposed by the trial magistrate is hereby set aside. The matter is remitted to the said magistrate to conduct an enquiry into the presence or absence of extenuating circumstances in connection with the commission of the offence and to pass sentence a fresh.

MAMBA J

I Agree

MABUZA J