THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Crim. Appeal No. 36/2008

In the matter between

MARK ALLESTER GILES
vs
REX

Coram M BANDA, CJ
MABUZA, J

For the Appellant Mr. Shilubane
For the Crown Mr. Nxumalo

JUDGMENT

BANDA, CJ

[1] The appellant was convicted on his own plea of guilty by the Magistrate's Court sitting at Nhlangano. He had been charged with the offence of contravening Section 14(2) of the Immigration Act 17/82 as amended.

[2] The Notice of Appeal which was filed with this court disclosed three grounds of appeal which contended as follows:-

1. The court *a quo* erred in law and in fact in convicting the appellant only on his plea of guilty contrary to the

provisions of Section 238 of the Criminal Procedure and Evidence Act, 1938.

2. The Court *a quo* erred in law and in fact in not giving the appellant a fair trial in as much as he was not afforded adequate facilities and time to prepare for his defence in as much and he (was) arrested, charged and tried on the same day contrary to the provisions of (section) 21 of the Constitution of Swaziland.

3. The court *a quo* erred in law and in fact in convicting appellant of contravening the Immigration Act 1964 which statute has been repealed given that it does not appear from the record that the original with which the appellant had been charged was amended.

When the appeal came to be argued Mr. Shilubane for the appellant took issue with two points namely -

(1) That the conviction of the appellant in terms of Section 238 of the Criminal Procedure and Evidence Act was not competent for the trial Magistrate to sentence the appellant to a fine of E400-00 which, in his view, exceeded the limit which the proviso to Section 238 had imposed.

(2) That the amendment of the charge sheet was irregular and constituted unfair hearing to the appellant.

After Mr. Nxumalo for the crown had submitted and had shown that the proviso impose a limit of two thousand Emalangeni and that it was, therefore, competent for the Magistrate to have sentenced the appellant to a fine of 400

Emalangeni, Mr. Shilubane withdrew his first point which he had taken on the appeal. He continued, however, to rely on the second point.

[3] It is clear on record that the original charge against the appellant was brought under the 1964 Immigration Act. Equally clear is that an amendment was made but what is not clear on record is to find out at what point was the amendment made. It is the submission of Mr. Shilubane that the amendment was made after the appellant had already taken his plea. This, Mr. Shilubane has contended, constituted an unfair hearing because the appellant should have been given the opportunity to know that he had now been charged under the 1982 Immigration Act and not under the 1964 Act. Mr. Nxumalo was taken by surprise by this development because, according to him, he had prepared his Heads of Argument for this court on the basis of the transcribed and typed record of the proceedings which did not show that there had been an amendment. He was not able to help the court as to the time when the amendment was made.

[4] It is significant to note that while the section that charged the appellant with the offence was amended to read "Section 14(2) of the Immigration Act 17 of 1982" the particulars of offence remained the same. The offence remained the same as originally charged. I am satisfied that, assuming that the amendment was made after the appellant had taken his plea, there was no prejudice occasioned to him nor would the failure to put the amended section to the appellant, constitute

unfair hearing to contravene the provisions of Section 21 of the Constitution. There was no serious prejudice occasioned to the appellant as the verdict would not have been different as the appellant had pleaded guilty to the same charge.

[5] I also find that the appellant was competently convicted by the trial Magistrate as required under the provisions of Section 238 of the Criminal Procedure and Evidence Act. The provisions of this section were fully explained in the case of Thulani Sipho Motsa and others v the King, Criminal Appeal No. 30/2006 where it was stated at page 4 and paragraph (12) as follows :-

> " *The presiding officer, other than a Judge or Principal Magistrate is empowered to convict and sentence an accused simply on his own plea of guilty only if the court is of the view that the offence with which the accused is charged would not attract a sentence in excess of that stated in the section or a sentence of imprisonment without the option of a fine. The section is really meant to deal with minor offences that can be speedily concluded without the need to lead evidence. The responsibility to make the assessment or determination lies with the presiding officer. He has to look at the offence and decide on its gravity and the nature of the sentence that is merited...*".

The judgment also cited the case of **S v Aniseb,** 1991(2) SALR(NM) where Hannah AJ stated the position as follows :-

> "*The policy behind (Section 238(1)(b)) is clear. The legislature has provided machinery for the swift and expeditious disposal of minor criminal cases wherein accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts its plea at face value. The accused thus loses the protection afforded by the procedure and envisaged ... but he is not exposed to any really serious form of punishment. The court may not pass a sentence of imprisonment or any other form of detention without the option of a fine or whipping and any fine imposed must not exceed (E2000.00).*"

[6] I am satisfied and find that there is no merit in this appeal which must be dismissed.

Pronounced on open court on this 21 August 2009.

Banda, CJ

MABUZA, J