

# **IN THE HIGH COURT OF SWAZILAND**

**REVIEW CASE NO. 43/09**

**In the matter between**

**REX**

**VS**

**NHLANHLA MASUKU**

**ACCUSED**

**CORAM**

**MAMBA J**

**JUDGEMENT 27<sup>th</sup>**

**October, 2009**

[1] The Accused, Nhlanhla Masuku, an 18 year old male was tried and convicted by the late Magistrate Nkambule esq. on a charge of housebreaking with intent to steal and theft. The crown alleged and was eventually able to prove or establish that the accused had, with the requisite intent, on the 8<sup>th</sup> March 2008 at Ararat Primary School broken into the house of Nompurnelelo Gama and stolen property valued at E5450.00.

[2] He conducted his own defence and pleaded not guilty to the charge.

[3] There are three points or issues that deserve or bear mention in this case and these I discuss in turn herein below.

[4] First, the complainant testified that the Accused had broken and stormed into her bedroom armed with a gun and demanded money from her before making off with her property. She had submitted to the threats. She gave the accused about E200.00 in cash and under pain of being shot by him, she had allowed him to remove from her house the various items enumerated in the charge sheet. That, in my book, is the crime of Robbery and not just the lesser offence of Housebreaking with intent to steal and theft. That the accused was charged with the latter offence is, of course, not a matter for the court a quo, but for the crown. Assuming that the complainant's statement to the police was substantially as her evidence in court and that she had been interviewed, as one would expect, by the crown before she was put onto the witness' stand, the crown was in error in formulating the charge sheet in the manner it did.

[5] It is unfortunate or regretted that the trial court did not discuss the above issue in its main judgement and that in its judgement on sentence, it only referred to the use of the firearm by the accused as an aggravating factor. The main judgement or verdict was written by the late Magistrate referred to above whilst the judgment on sentence was by another Magistrate, he acting in terms of section 291 bis of the Criminal Procedure and Evidence Act 67 of 1938.

[6] The second issue that deserves mention is this: In his testimony, the accused told the court that he had heard of the charge against him for the first time when he was interrogated by a policeman whilst he was in custody at the Big Bend Prison. For no conceivable reason, the presiding officer failed to intervene and allowed the Crown Prosecutor to engage in the following exchanges with the Accused:

"PP - Can you tell the court what you were doing at Big Bend Prison? ACCD - I had been arrested. PP - What were you arrested for? ACCD - For assault.  
PP - Was that case completed or is it still pending?"

ACCD - It was completed.

PP - What was the outcome of the case?

ACCD - I was convicted.

PP - What was the sentence?

ACCD - I was sentenced to 10 months.

PP - Were you given an option of a fine?

ACCD-No.

PP - Had you finished serving the sentence on the 8<sup>th</sup> March 2008? ACCD - I had not finished it."

[7] With due respect to the trial Magistrate, the crown should not have been permitted to cross examine the accused on the outcome or verdict of the case for which he had been incarcerated at Big Bend Prison. This offends or sins against the provisions of Section 283 of the Criminal Procedure and Evidence Act 67 of 1938 which provides that...

"Except in circumstances specifically described in this Act, no person may prove at the trial of any accused for any offence that such accused has been previously convicted of an offence ... or ask any accused, charged and called as a witness, whether he has been so convicted."

See also the case of **The King vs Nhlanhla Sonnyboy Dlamini, Review Case 84 of 2004** (unreported judgement delivered on 9<sup>th</sup> February 2006) and the authorities cited therein. In casu, the accused was not represented by an attorney and ought to have been protected by the court from such questioning by the crown. This was an irregularity. Ones previous convictions are generally speaking, irrelevant and therefore inadmissible on the merits of a case. They are, of course, relevant and admissible at the sentencing stage.

[8] Whilst the above irregularity is a serious one, it did not, in the particular circumstances of this case result in a failure of justice. There was overwhelming independent and untainted evidence, not affected by the irregularity, that the Accused was guilty of the offence.

[9] The third and last matter concerns the effective date of the sentence imposed on the accused. The accused made his first court appearance on the 20<sup>th</sup> May, 2008 and although he was thereafter granted bail, he was unable to pay the bail

deposit. He thus remained in custody until he was sentenced on the 18<sup>th</sup> December, 2008.

[10] He was sentenced to pay a fine of *E2000.00* or in default of such payment to a term of imprisonment for two years. This sentence was not back-dated in spite of the fact that the Accused had spent about seven (7) months in custody in connection with this case. I am not unmindful of the fact that when the accused was interrogated and charged with this offence he was serving a 10 month's sentence at Big Bend Prison. The sentencing Magistrate did not address this issue of the time already spent by the accused in custody pending finalization of his trial. He should have done so and apart from the plethora of judicial decisions within this jurisdiction, he was constitutionally enjoined to do so. See Article 16 (9) of the Constitution which provides:-

"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."

[11] For the foregoing reasons, the following order is made:-

- (a) I certify that the proceedings herein were in accordance with real and substantial justice.
- (b) Both the conviction and the sentence imposed on the Accused are hereby upheld. However, the sentence is back-dated to the 20<sup>th</sup> May 2008, that being the date on which the Accused made his first court appearance.

**MAMBA J**