IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 12 OF 2009
District Record No. 1408 of 2008

In the matter between:

THE KING

VERSUS

VUSIE MAHLOBO

Date of consideration: 19 February, 2009
Date of judgment: 20 February, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] The accused was arraigned before the Manzini Magistrate's Court on a single count of indecent assault. He pleaded guilty to the said offence and was convicted thereon and sentenced to a fine of E2, 000.00 and in default of payment thereof, to two years' imprisonment.

[2] Because the allegations in the charge sheet and the procedure adopted by the Court cause spasms of disquiet, I find it

appropriate to reproduce the charge sheet in its entirely. It reads as follows:

> "Upon or about 30 November, 2008 at or near Mkhulamini area, the said accused person did wrongfully and unlawfully and intentionally commit an assault of an indecent character by showing her his penis intending to have sexual intercourse, while in her home, thus did commit the crime cited above."

[3] As indicated in paragraph 1, above, the accused person pleaded guilty and the Crown as it is wont, correctly or incorrectly, in most of these cases, preferred not to lead any evidence. The accused was thus convicted, it would appear, on no other basis but his aforesaid plea of guilty.

[4] I have serious reservations regarding the propriety of the conviction and also the appropriateness of the sentence imposed. Regarding the certitude of guilt returned by the trial Court, it is clear from the reproduced charge sheet that there is a material omission, namely, the name of the complainant. In the absence of the name of the complainant thereof, and of which I am presently unaware even now as I sit on automatic review, it is abundantly clear that the charge sheet was defective. In the circumstances, it is not clear and would not have been certain to the accused when called upon to plead, to whom he allegedly brandished his *virilia.* On this ground alone, I am of the view that the conviction and sentence ought to be set aside.

[5] There are other difficulties as well. It is apparent that the Crown did not lead any evidence to prove commission of the offence, supposing of course that a proper and valid charge sheet had been read to the accused and to which he was asked to plead. There does not appear to have been any facts admitted by the accused person save his aforesaid plea and upon which the certitude of guilt was returned.

[6] In the absence of either evidence to prove commission of the offence on the one hand, or the failure to submit facts admitted by the accused, the conviction, it appears to me was highly suspect. I say so in the first place because it does not appear as to what the "assault" perpetrated by the accused was. It would appear that the assault alleged was exposing his *virilia* to the undisclosed complainant and that does not amount to an assault at law. Joubert Laws of South Africa, Vol.6, Butterworths, 1961 says at page 256 paragraph 268 that all the requirements of the crime of common assault apply to the offence of indecent assault.

[7] Had the evidence been led or had the accused admitted any facts, it would also have been apparent therefrom what it is that the accused actually did to show his intent to have sexual intercourse with "her". It is also not clear what is meant by the complainant being at her home. Was she within the yard in her house? If so, where was the accused? These are all germane questions on which

the Court was bound to make factual findings before returning the verdict that it did.

[8] On the allegations appearing in the charge sheet and without more, it is quite conceivable that the accused could have been properly found guilty of the offence of public indecency and only the full rendition of the facts predicating the conviction could have properly placed the Court in an informed position to decide whether this was a proper case of indecent assault or public indecency.

[9] Regarding the offence of public indecency and it being unclear, as earlier stated where exactly the complainant and the accused were in relation to the complainant's home and to each other, it must be recalled, what was stated by P.M.A. Hunt, South African Criminal Law and Procedure, Volume II, 2nd Ed. 1982, at page 285 in relation to the offence of public indecency:-

> "The *actus* must occur publicly, but this does not mean the same thing as in a public place; at least if the latter phrase is interpreted literally for:
>
> (i) X acts 'publicly; if, though he is on private premises to which the public has neither access nor right of access, what he does can reasonably be expected to be audible or visible to members of the public whether they are in a public or even, it would seem, a private place."

[10] It is clear that the disclosure of facts which underpinned the conviction was momentous and that the Court relied only on

the plea of guilty, predicated on insufficient and unproved allegations. That is not enough and cannot satisfy me without more, than the accused's plea, unrepresented as he was, was unequivocal. I say so for the reason that the critical facts were not disclosed to him and are also not available to this Court.

[11] Turning to sentence, it would appear to me, assuming of course that the crime charged was proved, that the sentence, particularly in the case where the accused pleaded guilty and actually showing remorse, was shockingly onerous and heavy. Furthermore, his aroused state of insobriety at the time appears not to have been considered at all by the trial Court. The situation becomes worse

and the sentence less condign if it was proved on proper evidence or admissions that the offence was actually public indecency and not indecent assault.

[12] In view of all the aforegoing, I issue the following Order:-

12.1 the accused's conviction of the offence of indecent assault is hereby quashed.

12.2 the sentence imposed upon the accused be and is hereby set aside.

DATED IN MBABANE ON THIS THE 20™ DAY OF FEBRUARY, 2009.

T.S. MASUKU

JUDGE