IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Review Case No. 85/2009 District Record No. 323/08

In the matter between:

THE KING

VERSUS

GCINA MNISI

SIFISO NKAMBULE

Date of consideration; 9 March, 2009 Date of judgment: 11 March, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] The above-named accused persons were each convicted of two counts of stealing stock and being found in possession of goat meat which was likely or suspected to be stolen in contravention of the Stock Theft Act, 1987, (as Amended).

[2] They had initially been charged with numerous counts of contravening the Stock Theft Act (supra) and of which they were acquitted. I have no concern regarding the acquittals and the convictions referred to in 1 above. It is with the procedure adopted before sentencing on which I have to comment.

[3] Before I do so, however, there is a further matter, which concerns the conviction but which does not affect the result in relation to the counts in respect of which the accused persons were found guilty.

[4] The *modus operandi* of the police in relation to most of the counts was to take the accused persons after arrest to the homes of the various complainants, allegedly after being told by the accused persons where those homes are situated. On arrival, they would find an "independent" witness to oversee the pointing out aforesaid. In addition, these witnesses i.e. the complainant and the independent witness would testify about what the accused told them regarding how he committed the offence and this was done in the presence of the police.

[5] The Investigating Officer, when he subsequently took oath was astute. He correctly did not volunteer to the Court what incriminating information the accused imparted to him and the aforesaid witness. All he would say was that after a caution, the accused said "something" or pointed out a certain scene. As a result, the witnesses, other than the policeman told the Court what was clearly incriminating and certainly inadmissible evidence against the accused person. The police, did not, however bring to Court any confession statement correctly recorded in terms of the provisions of section 226 (1) of the Criminal Procedure and Evidence Act, 1938, particularly the second *proviso* thereto. This was moreso because the accused persons alleged that they had been assaulted by the police before the pointing out and before they made the oral statements about which the aforesaid witnesses testified.

[6] In fairness to her, the learned Magistrate did not rely on any of such dubious pieces of evidence and correctly so in my view. What I do have is some difficulty with though, was for her to allow to be adduced what was clearly inadmissible prejudicial evidence by the Crown.

[7] Speaking in respect of almost identical circumstances in the Botswana case of *Patrick Sondano Mwanza vs The State* CLCLB-000009-07, McNally J.A. posed the following rhetorical questions at page 6 of the cyclostyled judgment:confessions? What happened to warning and cautioning? What happened to section 228 of Criminal Procedure and Evidence Act? Why did the Magistrate not stop these witnesses from giving what was clearly inadmissible evidence of a most prejudicial nature?"

[8] In the *State v Dineo Mathepe* Criminal Trial F15 of 2005 (delivered in the Republic of Botswana), I commented on the undesirability of police officers using witnesses before whom an unwary accused is caused by them to confess. I said the following at page 20 of the cyclostyled judgment:-

> "In my view, the evidence of what the accused said when asked about the scene must be declared inadmissible because it is clear that PW1 was being used disingenuously by the police as a witness, to hear and to later testify to what the police themselves would not have been entitled to say, short of following the provisions of section 228 of the Act ... Investigating officers are encouraged to follow the provisions of the Act in bringing evidence before Court that is admissible. They should avoid using persons in PWl's position as a decoy for obtaining inadmissible evidence and attempting to use them as a cloak to cover and to tender

> what is otherwise inadmissible evidence before Court through the back door."

I reiterate these views as a guide in dealing with confessions generally.

[9] I now turn to the central issue I referred to in paragraph 2 above. This relates to the question of sentence. Section 18 of the Stock Theft Act, as amended, provides the following: -

> "(2) 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 for 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 on (sic) 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."

[10] It is common cause that the accused persons were charged under section 18 of the Act. For that reason, the sentencing regime quoted above, applies to the accused persons, possibly including the *proviso* thereto. The learned Magistrate, in the instant case, after returning a certitude of guilty, proceeded to take submissions in mitigation of sentence. Thereafter, the Court, upon taking into account that the accused persons were first offenders, sentenced each of them in terms of the *proviso,* to a fine of E2000 or a term of imprisonment for two years. This is because the trial Court found that there were extenuating

circumstances in terms of the *proviso to* section 18 as quoted above.

[11] Ordinarily, criminal trials in which accused persons are convicted become a bifurcated affair. That consists of the conviction, followed by the enquiry into what is in the particular circumstances, a condign sentence. Where however, the issue of extenuating circumstances is introduced by statute, as in most cases, like in murder trials and in the instant case, the trial then becomes trifurcated. The enquiry into extenuating circumstances constitutes a separate enquiry and usually follows conviction in order to place the Court in a position, depending on whether or not extenuating circumstances are extant, to decide on the condign sentence, whether mandatory, in the absence of them, or some other prescribed or discretionary penalty.

[12] A reading of the record shows indubitably that the enquiry into extenuating circumstances was not conducted separately by the trial Court. Furthermore, it is clear that there was no explanation to the accused persons as to what extenuating circumstances are. In my view, the question of extenuating circumstances in cases such as the present, must be dealt with in similar manner as in murder cases. Because the accused persons herein were unrepresented, it was incumbent upon the trial Court to explain what these circumstances are and either take oral submissions or evidence there upon before making a ruling thereon. To the extent that

this did not happen, I am of the view that the learned Magistrate erred.

[13] What appears at page 67 of the judgment on sentence, is the following at line 14 to 18:

> "The Court noticed that in mitigating both accused persons have raised extenuating circumstances as mitigating facts. This will mitigate their sentences. Both accused are sentenced in terms of Section 18 (1) (a) with the proviso in that the court considers that there were extenuating circumstances."

I have already stated that the extenuating circumstances were not explained and it would appear that it was merely fortuitous, if it at all was that the accused persons happened to stumble so to speak, on extenuating circumstances as stated by the learned Magistrate.

[14] In such instances, the accused bears no onus to establish the existence of extenuating circumstances. The Court must, as in murder cases, with the assistance of Counsel, make a specific finding on the existence or otherwise of extenuating circumstances. See *Daniel Dlamini v Rex* Criminal Appeal No. 11/98 (C.A.). This will usually be after evidence on extenuation is led or oral submissions thereon are tendered. There may yet be cases where such circumstances are littered throughout the evidence tendered during the trial. In the instant case, the Court *a quo* did not make a specific finding as to what the said extenuating circumstances were. I say so because the accused persons were never, at any stage

required to address the Court in extenuation. It is abundantly clear from the record that the accused addressed the Court only in mitigation of sentence.

[15] In the case of S *v Letsolo* 1970 (3) SA 476 (A), Holmes J.A. gave the following definition to the concept of extenuating circumstances and which has been followed by our Courts consistently:-

> "Extenuating circumstances have more than once been defined by the Court as any facts which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard, a trial Court has to consider.

(a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);

(b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;

(c) whether such bearing was sufficiently appreciable to be able to abate the moral blameworthiness of the accused in doing what he did.

> In deciding (c) the trial Court exercises a moral judgment...And it should be weighed with the most anxious consideration for it is literally a matter of life and death. Every relevant consideration should receive the most anxious scrupulous care and reasoned attention; and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion, that is to say unless the sentence, is vitiated by irregularity or misdirection or is disturbingly inappropriate."

From a reading of the submissions tendered by the accused persons in mitigation of sentence, I am not certain if what they did say, considering that extenuating circumstances had not been explained to them and that they were not directly asked by the Court to address same, amounted to extenuating circumstances.

[16] In the circumstances, it is my considered view that a necessary step was not followed by the trial Court and which step is critical in order for the Court to come to a conclusion on the condign sentences and it is only fair that the *proviso* to section 18 of the Act must be applied in deserving cases. In undeserving cases, the sentence prescribed in section 18(1) (a) or (b) must be meted out.

[17] Having come to the conclusion I did, it is my considered view that the following Order would meet the justice of this case:-

17.1 the conviction of both accused person is hereby certified to be in accordance with real and substantive justice and is thereby confirmed.

17.2 the respective sentences meted out by the accused persons be and are hereby set aside.

17.3 the matter be and is hereby remitted to the learned trial Magistrate in order for her to specifically enquire into the existence or otherwise of extenuating circumstances whereafter, she can properly mete out the condign sentence in line with section 18 aforesaid.

DONE IN CHAMBERS IN MBABANE ON THIS THE 11th DAY OF MARCH, 2009.

T.S. MASUKU

JUDGE