



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Crim. Review Case No. 84/14

In the matter between

**SIPHO VUSI MASEKO  
BONGANI ELLIOT MASEKO**

**1<sup>st</sup> Applicant  
2<sup>nd</sup> Applicant**

**and**

**REX**

**Respondent**

**Neutral citation:** *Sipho Vusi Maseko & Another v Rex* (84/2014 [2014]  
SZHC 156 (14 July 2014)

**Coram:** Mamba J

**Considered:** **14 July 2014**

**Delivered:** **14 July 2014**

- [1] Criminal law and Procedure – on a conviction on a charge of stock theft in contravention of section 3 (a) of The Stock Theft Act 5 of 1982 as amended - before mitigation and sentence, the Court is enjoined in terms of section 18 (1) to determine or enquire into the existence or otherwise of extenuating circumstances in connection with the commission of the offence. Where extenuating circumstances exist, the accused shall be entitled to a fine, but where no such circumstances exist a custodial sentence is mandatory.

- [2] Criminal law and Procedure – accused convicted of stock theft and the presiding officer failing to enquire into the existence or otherwise of extenuating circumstances. Sentence passed under these circumstances irregular and set aside or quashed.
- [3] Criminal law – operation of sentence – where court does not specifically state when sentence shall start to run, such sentence deemed to be with effect from the day it is passed.
- [4] Practice and procedure – accused arrested and detained on 17 March 2014 and sentenced on 10 April 2014. Court failing to back-date sentence. This is irregular and in fact contrary to section 16 (9) of the Constitution.
- [5] Criminal law – accused damaging leg irons in order to facilitate his escape from lawful captivity. A charge of malicious damage to property coupled with one for escaping from lawful custody is a duplication or splitting of the latter charge. Conviction and sentence for malicious damage to property quashed.
- [1] This is a review application following the conviction and sentencing of the applicants herein by a Magistrate’s Court at Simunye on 10 April 2014.
- [2] The first Applicant, Sipho Vusi Maseko, was the first accused in the Court a quo whilst his co-applicant was the second accused. I shall refer to them as they appeared in the Court below.
- [3] The accused made their first appearance in Court on 20 March 2014 and they were immediately arraigned after the Court had advised them of the right to be legally represented. They informed the Court that they were ready to proceed with the trial and they were to conduct their own defence.

- [4] The charge sheet against the accused contained four counts. On the first two counts, the crown alleged that the accused were guilty of the crime of Theft of Stock in Contravention of section 3 (a) of the Stock Theft Act 5 of 1982 (as amended). The crown alleged that the accused had on 17 March 2014 stolen a goat on each of those counts.
- [5] The third count alleged that the first accused had contravened section 43 (1) of the Criminal Procedure and Evidence Act 67 of 1938 in that on or about 17 March, 2014 he had unlawfully and intentionally escaped from lawful custody whilst held, at the Lomahasha Police Station. The fourth count also involved the first accused alone and it alleged that on 17 March 2014 he had unlawfully and intentionally maliciously damaged a set of leg irons belonging to the Swaziland Government. Again this is said to have occurred at the Lomahasha Police Station.
- [6] On arraignment, both accused pleaded guilty to all the respective counts they faced. The crown led a total of four witnesses in its quest to prove its case. The accused did not question or cross-examine any of these witnesses. The Court record of the proceedings do show that the accused were given the

opportunity to cross-examine each of these witnesses. I shall return to this aspect of the case presently in this judgment.

[7] The accused did not lead any evidence in their defence. They chose to remain silent. After conviction both accused were allowed or given the opportunity to lead evidence or address the court in mitigation of sentence. They both addressed the court on the issue and were immediately sentenced as follows:

7.1 On the first and second counts they were each sentenced to a term of two (2) years of imprisonment without the option of a fine.

7.2 The first accused was sentenced to pay a fine of E2000.00 failing which to undergo a term of imprisonment for 2 years in respect of the third and fourth counts. He was further ordered to pay a sum of E375.00 to the Swaziland Government as the replacement value of the leg irons that had been damaged or destroyed. If the accused failed to pay this amount by 18 April 2014, he had to serve 12 months in prison. The sentences were ordered to run consecutively.

[8] It is noted that although there was evidence led by the crown on the value of the leg irons in question, there was no application made by the crown for the

compensation thereof, after the conviction of the first accused. In *Sikelela Matsenjwa v Rex, Crim. Case No. 20/08*, judgment delivered on 19 February 2009, a similar situation arose and this Court quashed or set aside that Order.

It held that:

‘[25] This was a gross violation of the rules of procedure by the learned magistrate. First, there was no application by the crown on behalf of the Government for the compensation ordered by the Court. Secondly, there was no basis for ordering double compensation for the damaged handcuffs. Only one pair had been damaged. Thirdly, the Magistrate had no power to withdraw the bail granted to the Appellant in the manner he did. The Appellant ought to have been heard before such a decision, adverse to him could be taken. Fourthly, assuming that the conviction for escaping was on an offence that had resulted in the damage or destruction of the handcuffs, at the conclusion of the trial, the learned trial Magistrate had no power to mero motu order the Appellant to pay the compensation. Fifthly, the value of the handcuffs had not been established by evidence and the E1000.00 was a figure arbitrarily determined by the trial Magistrate.

[26] Section 321(1) of the Criminal Procedure and Evidence Act 67 of 1938 states that :

“If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss.” (The underlining and emphasis is mine).’

[9] The order for compensation for the leg irons cannot stand in this case and is hereby set aside for the reasons stated in *Sikelela* supra.

[10] But more importantly, I think, count 4, constitutes the means employed by the accused to escape from his arrest. It was therefore not a separate and distinct crime from the actual escape from lawful custody. In my judgment, the crown should not have treated the two offences as different and separate crimes. This constituted an unfair and oppressive duplication or splitting of the charge of escaping from lawful custody. The conviction and sentence of the accused on count four is hereby set aside.

[11] The court a quo did not state when the sentences imposed on the accused were to start running. That being the case, they are deemed to be with effect from the date on which they were passed, that being 10 April 2014. However, it is common ground that the accused were arrested and detained on 17 March 2014 and remained in custody throughout the trial. Both Counsel have, properly in my view, agreed that the sentences imposed on the applicant should have been back-dated to that date. In *Jango Lontos Mkhavela v R Crim. Appeal 3/2009*, (judgment delivered on 20 August 2009, this Court stated as follows:

‘[10] It is common cause that when the Appellant made his first appearance in court on the 21<sup>st</sup> November, 2007 he had already spent two days in police custody. His sentence should therefore have been back-dated to the date of his arrest and incarceration, that being the 19<sup>th</sup> November, 2007 in accordance with the long and salutary rule of practice within this jurisdiction. In the case of **R v BENSON MASINA AND ANOTHER, 1987-1995 (1) SLR 391, HANNAH CJ** (as he then was) stated as follows:

“the fact of the matter is that they spent 64 days in custody prior to their conviction and that was a factor which they were entitled to have taken into consideration either by reduction in their sentence or by back-dating their sentence. The loss of liberty be it for 4 days or 64 days is necessarily a punishment.”

See also the cases referred to in **THULANI SIPHO MOTSA & 2 Others, Criminal Appeal 30 of 2006** (judgement delivered on the 4<sup>th</sup> August, 2006) (unreported). This rule of practice is also captured and

its enforcement echoed in article 16 (9) of the Constitution which provides that:

“(9) 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.”

(See also *R v Bheki Kunene, Review case 34/2009*, judgment delivered on 12 August 2009)

[12] The applicants have also submitted that the court a quo erred in law in passing sentence on the stock theft counts without enquiring whether or not there were extenuating circumstances in connection with the commission of these offences. Again, Counsel for the crown has conceded that this was an irregularity committed by the Court a quo. There is a long line of cases on this point; holding that the court must, before sentence, make an inquiry or determination as to the existence or otherwise of extenuating circumstances in such cases. In *Sandile Majahonkhe Nkomo v R, Crim. Appeal 5/2009*, I had occasion to say the following:

‘[12] In terms of section 18 (1) of the [The Stock Theft] 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 ;

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 6<sup>th</sup> 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 to in her judgment on sentence. In casu, it was the absence of extenuating circumstances that condemned the Appellant to the sentences I have referred to above.

[11] Where an accused is unrepresented, it is incumbent 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 conduct 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] From the cases quoted above, it is clear that the sentences imposed on both accused in respect of counts 1 and 2 cannot stand and they are hereby set-aside; for lack of an inquiry on the presence or absence of extenuating circumstances in connection with the commission of these offences.

[14] As the applicants were in court, both counsel were in agreement that justice demanded that this Court must conduct this inquiry rather than remit the case to the trial court for that very purpose. A remittal to the Court a quo would take sometime before the matter is heard and finalized. I agreed and enquired into the presence or otherwise of extenuating circumstances.

**MAMBA J**

**For the Applicants : Mr. N.K. Vilakati**

**For the Respondent : Mr. M. Nxumalo**