



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Review Case No. 38/14

In the matter between

REX

and

**SENZO MALAMBE
SIYABONGA DLAMINI
NKHULULEKO SIBANYONI**

**1st Accused
2nd Accused
3rd Accused**

Neutral citation: *Rex v Senzo Malambe and 2 Others* (38/14) [2014]
SZHC 347 (25 September 2014)

Coram: Mamba J

Considered: 25 September 2014

Delivered: 25 September 2014

Criminal law – sentence – where sentence is conditionally suspended, such condition of suspension must be definite and not vague, too wide, oppressive, impossible to meet or comply with and must be related to the offence for which the accused has been convicted.

- [1] Each of the accused herein was charged and convicted by the Pigg's Peak Magistrate on at least one count of Housebreaking with intent to steal and theft. There were four counts in all.
- [2] Notwithstanding their pleas of innocence, they were found guilty in respect of one or more of the charges leveled against them. I have carefully gone through the record of the proceedings herein and I am of the view that the various convictions of the respective accused herein were all merited; and so were the various sentences imposed on each count. However, one issue needs to be said regarding the sentences.
- [3] In passing sentence; the Learned Magistrate also ordered that: 'one half of each Accused's sentence is suspended for a period of 2 years on condition accused is not found to have committed any offence.' (The emphasis is mine). This condition upon which the sentences are suspended is plainly too wide and oppressive.
- [4] In *R v Sandile Ansley Maseko, review case 18/2006* this court pointed out that :

‘[16] Where a sentence is conditionally suspended, the terms upon which it is suspended must be clear, certain, fair, just, relevant, competent, practical and legally sound. The condition of the suspension imposed by the court a quo seems to me to be neither of the above. For instance, the accused may be tried and found guilty of a contravention of either section 11 (1) or 11 (2) (which would qualify as a “similar offence”) within one year of this conviction. If this offence was committed before his conviction herein, this would trigger into operation or put into effect the suspended sentence. This would not be fair or just as the offence for which he would be convicted then would have been committed prior to his present conviction.

[17] The conviction should be that the second conviction must be on an offence committed during the period of suspension. The suspended sentence would for instance, be activated even if the accused is convicted after the expiration of three years, as long as it was committed within the period of suspension.’

These remarks are applicable in the instant case. Again in *R v John Thabede, 1970-1976 SLR 174* where the portion of the sentence had been

suspended on condition that the accused is not convicted of a “similar offence”. On view the court held that:

‘[the] he words “similar offence” are too vague and offend against the rule that there must be certainty in regard to the circumstances which will involve a breach of the condition of suspension. See *Rex v Gordon 1949 (2) SA 172 (C)*; *S v Mothobi 1972 (3) SA 841 (O)*, and the authorities referred to in the last mentioned decision’. Similar words were also held to be inappropriate in *R v Simon Shongwe 1970-1976 SLR 175*. In *R v Magwagaza Mathenjwa, 1970-1976 SLR 176*, a suspension on the condition that the accused is not again convicted of ‘a crime involving dishonesty’ was held to be too wide. The use of the words ‘same offence’ were also held to be objectionable in *R v Zembote Motsa, 1970-1976 SLR 179*. Lastly, in *R v Nyawo and others 1970-1996 SLR 334* the court held that ‘only offences which are clearly related to the nature and the circumstances of the offence of which the accused is convicted should be referred to’. Vide also *R v Gumede, 1970-1976 SLR* where the court stated that ‘...the ambit of the condition should be precisely defined without enumerating too large a number of offences’. “Any office” as stated in this case is clearly too wide or large a set.

[5] For the foregoing, the condition of suspension imposed herein is set aside and substituted with the following:

One half of the sentence imposed on each of the accused is suspended for a period of three years on condition that the accused is not convicted of the crime of Housebreaking with intent to steal and theft committed during the period of suspension.

[6] The Registrar of this Court is ordered to convey this order to the Prison Authorities and the office of the Director of Public Prosecutions so that the necessary amendments or corrections must be effected on the accused committal warrants and records of the accused persons.

[7] The meaning and effect of this order is to be explained to the accused persons by the trial Magistrate who is also expected to note on the court record that she has done so.

MAMBA J