



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Crim. App. No. 59/2016

In the matter between:

**PHILANI MAPHOSA
SIKHUMBUZO MPILA
NORMAN MKHONTA
SIBONISO MOTSA**

VS

REX

Neutral citation: *Philani Maphosa and Others v Rex* (59/2016) [2016]
SZHC 57 (14 March 2016)

CORAM

MAMBA J

CONSIDERED:

14 March, 2016

DELIVERED:

14 March, 2016

[1] Criminal Law – Sentence – Accused convicted of a contravention of section 52 of Crimes Act 6 of 1889, for being found in unlawful possession of or using police uniform. Court enjoined to impose a fine and only in default of payment of such fine should a prison term be an option.

- [2] Criminal Law and Procedure – Sentence – any period of incarceration of and by an accused must as a matter of Law & Practice be taken into account in the imposition of sentence. This is mandatory as per article 16(9) of the Constitution.
- [1] This is a review application at the instance of the applicants herein.
- [2] The applicants made their first appearance before the Pigg's Peak Magistrate on 18 December 2015. It is common cause that they were arrested and taken into custody on 15 December 2015. They all faced a charge of contravening section 52 of the Crimes Act 6 of 1889. It was alleged by the crown that on the 15th day of December, 2015 at Nyakatfo area in the Hhohho region they were all found in unlawful possession of police uniform whilst they were not members of the Royal Swaziland Police services. It was alleged by the crown further that they were at the time acting in furtherance of a shared or joint enterprise or common purpose, as it is usually called or termed in this jurisdiction.
- [3] The 5th Applicant, Siboniso Motsa, was also charged with a contravention of section 23 (1) of the Road Traffic Act 6 of 2007 in that at the relevant time he unlawfully drove a motor vehicle on a public road whilst he did not have the requisite licence to do so.
- [4] None of the applicants was represented when they made their first appearance in court. When they were advised of their rights to be legally

represented by counsel of their choice if they so wished and were able to pay for such services, they all advised the court that they will conduct their own defence and they proceeded to do so, save that when the trial started on 27 February, 2016 the 1st applicant was represented by counsel.

[5] On being arraigned, they pleaded guilty to their respective charges. The crown accepted the pleas on the second count and offered no evidence but tendered the evidence of 5810 Detective Constable Zizwe Mazibuko in respect of the first count aforesaid.

[6] At the conclusion of the trial, the applicants were all found guilty on the charges they faced. They have not complained about these verdicts and having gone through the evidence that was led in respect of the first count faced by all five applicants, I am satisfied that they were properly convicted on that count. The 5th applicant was in my judgment also correctly convicted on the second count to which he pleaded guilty.

[7] After being found guilty as aforesaid, all applicants duly made submissions in mitigation of sentence. On the first count, they were all sentenced to a custodial sentence of six months whilst the 5th applicant was also sentenced to pay a fine of E800.00 or in default thereof, to

undergo imprisonment for a further period of six months on the second count.

[8] In sentencing the applicants on the first count the trial Magistrate, correctly in my view, emphasised the seriousness of the first count and the attendant dangers of civilians or non-police officers being found in unlawful possession of police uniform and the prevalence of such an offence in the region. The Learned Magistrate, for some inexplicable reason repeatedly referred or stated that the accused had been charged and convicted of a ‘contravention of section 23 (1) (i) of the Police Act’. For instance, in her penultimate paragraph on sentence she states as follows:

‘The court feels even the sentence stipulated in s23(1) of the police Act does not even begin to mitigate the serious implications both financially and otherwise related to the commission of such an offence.’

She was obviously in error in this assertion. The accused were charged and found guilty of contravening section 52 of the Crimes Act 6 of 1889.

[9] The committal warrants that were all signed by the Clerk of Court and the trial Magistrate also state that the applicants were convicted and

sentenced for a contravention of 's23(1) of the Police Act'. This is plainly incorrect as I have already stated above.

[10] Section 23 (i) of the Police Act 29 of 1957 provides as follows:

'23. Any person not being a member of the force shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred Emalangeni or imprisonment not exceeding six months or both, if he –

...

(i) knowingly obtains, buys, exchanges or receives from any member of the force or deserter or from any person acting on behalf of such member or deserter or who solicits or entices any member of the force or deserter, knowing him to be such, to sell, make away with or dispose of arms, ammunition, clothing, accoutrements, medals or other appointments furnished for the use of the force, or who has in his possession any such arms, ammunition, clothing, accoutrements, medals, appointments, food or rations and fails to give a satisfactory account of how he came by them.'

And section 52 of the Crimes Act 6 of 1889 stipulates that:

'52. Any person who without due authority wears or uses any uniform, decoration, medal, badge or ribbon supplied to or

authorised for use by any of His Majesty's forces or the Royal Swaziland Police, or any uniform, decoration, medal, badge or ribbon so nearly resembling them as to be calculated to deceive, shall be guilty of an offence and liable to the penalties prescribed.'

The prescribed penalty as per section 57 of that Act is '...a fine not exceeding one hundred and fifty emalangeni or in default of payment thereof imprisonment not exceeding six months.'

- [11] From the above provisions of the legislation under which the accused were charged and convicted, it is plain to me that an accused person so convicted is entitled to a fine not exceeding E150.00 and only in default of such payment should he or she be condemned to a term of imprisonment. The trial court did not afford the applicants the option to pay a fine. In fact the legislature decreed that an accused shall be liable to pay a fine and it is only in the event of non-payment or failure to pay the said fine, that he or she must be sent to prison. The custodial sentence is only in lieu of non-payment.

[12] Although the Crimes Act is more than a century old, it was according to my brief research, last amended in 1993 by the King's Order In-Council 19 of that year and Part VI thereof, under which section 52 falls, came into effect on 29 September 1922. Parliament, being the lawgiver, has in its wisdom not found it fit or proper to amend the relevant penalties. It is not the business or duty of the Court to do so even if it felt such amendment was now due. To do so would be usurpation of the powers of Parliament.

[13] For the above reasons, the trial court erred in imposing a straight custodial sentence on the applicants for the said contravention. Crown counsel has properly conceded this. Consequently, the sentence imposed by the court a quo on each of the applicants in respect of count one is hereby reviewed, set aside and corrected and in its stead substituted with the following:

Each accused is sentenced to pay a fine of E150.00 and in default thereof to undergo imprisonment for a period of six months. This sentence is, in compliance with article 16 (9) of the Constitution, backdated to the 15th day of December 2015, that being the date on which the accused were taken into detention or custody.

[14] The sentence imposed on the 5th applicant in respect of count 2 is confirmed.

MAMBA J

For the Applicants : Mr. C. S. Dlamini

For the Respondent : Ms. N. Masuku