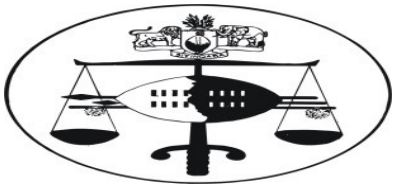


IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CRIMINAL REVIEW CASE NO. 02/2017(NHO504/17)

In the matter between:

THE KING

AND

MBUKWA FOREMAN DLAMINI

Neutral Citation: *The King vs. Mbukwa Foreman Dlamini Case No. [02/2017]* [2017] *SZHC 134 28 June 2017*

Coram: MLANGENI J.

Heard: 16th June 2017

Order made: 16th June 2017

Reasons Delivered: 28th June 2017

Summary: *Criminal procedure – automatic review of proceedings wherein the theft of clothing items valued at E10, 343.00 was penalised with a sentence of twenty (20) years imprisonment or a fine of E34, 000.00.*

The rule against splitting (duplication) of charges considered and court concluding that in this particular case the rule was completely overlooked, this resulting in gross miscarriage of justice.

Duty of presiding officer in cases where accused person unpresented discussed, as well as the purpose of sentencing.

All the sentences imposed by the Principal Magistrate set aside and substituted.

JUDGMENT ON REVIEW

[1] This matter is before me on automatic review of the sentences imposed by the Principal Magistrate for Shiselweni Region, sitting at Nhlangano on the 8th June 2017. The accused was a nineteen year old boy of Zombodze area in the Shiselweni Region. At the time of committing the offence he was school-going and enrolled in a South African equivalent of Form II in Swaziland.

[2] He was charged with fourteen counts of theft of clothing items whose total value was stated as E10, 343.00. At the time of committing the offence he was in the company of one other person who, however, was not part of the criminal proceedings. All the items were stolen in broad daylight from washing lines at

Evelyn Baring High School hostel, having gained access by jumping over the fence. The theft occurred in one transaction wherein numerous items were stolen. The fifteenth charge was in respect of illegal possession of dagga weighing 0.030kilogrammes. The possession of dagga occurred on a date and place that is different from the theft incident that occurred at Evelyn Baring.

[3] It is probable that the prosecutor who drafted the charges is unaware of an important common law rule of criminal procedure which prohibits the splitting of charges, otherwise referred to as "**duplication".** Assuming that the prosecutor is not aware of this rule of procedure, I have considerable difficulty in embracing the same assumption in respect of the Honourable Principal Magistrate who allowed the fourteen counts to stand.

[4] The accused conducted his own defence, he pleaded guilty to all the charges and was sentenced to a total of twenty (20) years in prison or E34, 000.00 fine in respect of the fourteen counts of theft and to two (2) years in prison or E2, 000.00 in respect of illegal possession of dagga. This is a total of twenty-two (22) years in jail or E36, 000.00 fine. The stark disproportion between the fine and the jail term is unmistakable and disconcertingly suggests that the Honourable presiding officer hardly reflected on the important responsibility of sentencing a convicted person.

[5] I need to say more about the common law rule against splitting of charges. It often happens that one act constitutes two or more criminal offences, in some

cases a common law offence may have a statutory equivalent. For example a person who steals a prohibited substance could in theory be charged with theft as well as possession of the substance; one who has forcible sexual intercourse with a minor could in theory be charged with common law rape or under the **Girls and Women's Protection Act 1920**, commonly referred to as statutory rape[1] In practice this is legally unacceptable. At best the two can be invoked as alternative charges, the result of which being that the accused can be convicted of one or the other, not both. The argument is that to convict him of both has the effect of punishing him twice for what is in reality one and the same act. It has been held on numerous occasions that "charges are not to be multiplied out of what is in reality one and the same offence."[2] The act of illegal entry into this country is a statutory offence in terms of the Immigration Act 1982 but it would be unlawful duplication to also charge the culprit with remaining in the country without lawful authority, for this would occasion double punishment for essentially one transgression.

[6] Several tests are used to determine whether or not there is splitting of charges. I will only refer to two.

6.1 <u>The single intent test</u>: Where one act constitutes two or more offences, there could well be one legal intent. In most cases that is, in fact, the case.

[1] In terms of the Act sexual intercourse with a girl under the age of sixteen (16) is a criminal offence, notwithstanding that she may have actually consented. The rationale is that at the tender age the girl is vulnerable, hence her consent, if given, is inconsequential. The provision is an anti-abuse measure intended to safeguard the virtue and innocence of young girls.

[2] South African Criminal Law and Procedure Vol.5 by Lansdown and Campell, p226. See also the cases of S v Grobbler,1966 (1) SA 507 and S v Mutawariar, 1973 (3) SA 901.

6.2 The same evidence test: In a case of multiple offences arising out of the same transaction it is usually the case that the same evidence is required to prove each one of the offences.

[7] Applying the two tests referred to above leads to one conclusion, that ordinarily it occasions undue hardship upon an accused person to prefer several charges arising out of essentially one intended act. It may be prudent to charge in the alternative, so that if the requirements of one are not met the accused is not allowed to get away with impugnity. For instance, the line between theft by false pretences and fraud is quite thin. It has been stated that theft by false pretences is always fraud, but fraud is not always theft by false pretences as the latter crime has several ingredients which are not required for fraud.[3]

[8] It does not take much to see that in the case under review everything went terribly wrong. Out of one act committed in respect of the theft the prosecutor contrived fourteen (14) counts of theft. Consequently, clothing items alleged to be valued at E10, 343.00 attracted a jail sentence of twenty years or a fine of E34, 000.00. Never mind the startling disproportion between twenty years jail term and E34, 000.00 fine. Never mind, also, that the actual value of the clothing items is probably much less due to natural wear and tear, given the sentimental inclination of complainants to quote the purchase price of new goods as opposed to current value that takes into account regular use since the date of the purchase. It is unfortunate that the Honourable Court played along with the Crown, and in the process abandoned its responsibility to protect the

[3] PMA Hunt, South African Criminal Law and Procedure, Vol II, 2nd Ed,p754

undefended accused person. It is an established principle of our law of criminal procedure that where an accused person has no legal representation and conducts his or her own defence, the role of the presiding officer is more than that of a referee in a sporting contest. In the case of **GIDISANI GILBERT RAMALTE v THE STATE** the court remarked, per Schoeman AJA, that a judge or magistrate "**is not merely an observer but has a duty to prevent unfair questioning of an accused**."[4] In *casu,* the issue of unfair questioning is not relevant, but the principle is relevant, that a presiding officer has a duty to safeguard the interests of an undefended person.

[9] In the case of **THE STATE v RICARDO FISHER**[5] the court remarked as follows: -

> **"What is clear is that the court has a duty to satisfy itself of the guilt of the accused, and that the court cannot abdicate this duty, when it may well be that an unrepresented and unsophisticated accused has admitted having committed a crime the seriousness of which fell outside of his or her capacity to comprehend."**

[10] Closely related to the above analysis is the hardship occasioned by the order for the sentences to run consecutively. As stated above, the numerous items of clothing were stolen in one transaction or act arising out of one motive. To sentence the transaction fourteen times amounts to multiplying *mens rea* as many times.

[4] Supreme Court of Appeal of South Africa case No. 958/2013, para 22
[5] High Court of South Africa (Cape Division) Ref. No. 0503232, para 10 per Ntsebeza A.J.

[11] The result can be astounding and has the potential to bring the administration of justice to disrepute. In our jurisdiction it is settled that where two or more offences arise from the same transaction and can properly be treated as stand-alone offences, the court should ordinarily order that the sentences run concurrently. This gives meaning to the need to avoid multiple penalties for what essentially arises from one transaction and it seeks to obviate a situation where the accused carries a burden that is in excess of his or he blameworthiness.

[12] I consider that it is not necessary for me to venture into a discussion of the theories of punishment in criminal proceedings, because in my view that is not where things went wrong in this matter. Suffice to mention, in passing, that sentencing is not about vengeance[6], it is about correcting the accused so that, hopefully, he or she can be a better person in future. Quoting Corbett JA. With approval in the case of **S v RABIE[7],** the learned M.C.B MAPHALALA J. had this to say:-

> **"A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve the delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him"**[8]

[13] A nineteen year old who is sent in for twenty-two years for theft is effectively denied a chance to become a better person because the time that he may spend

[6] R v Goodman Mngometulu (Judgement on Sentence), Cr. Trial No.60/06 at para 4
[7] 1975(4) SA 855 at p862G
[8] In R v Goodman Mngometulu, supra, para 5.

in there has an enormous potential to groom a monster that is far worse than a petty thief who was merely hoping to be more presentable among his peers at school[9] and elsewhere.

[14] On a different note, illegal possession of dagga in this country has reached rampant levels, to the extent of breeding dagga wars and intoxicating school children. These concerns were recently highlighted by the full bench of the High Court in the consolidated case of **MDUDUZI MOHALE AND OTHERS v THE KING[10].** In the spirit of that judgement there is objectively nothing wrong with the sentence of two years or E2, 000.00 fine that was imposed by the court. The judgement just referred to above reiterates the importance of discretion, and it is only in this respect that the sentence could, in view of the very small quantity, be seen as being possibly on the high side.

[15] The offence relating to dagga was committed on a date and place that is different from the theft at Evelyn Baring. For that reason there is ample justification for the sentence in respect thereof to run consecutively with that of theft.

[16] The record shows that there was no record of previous convictions in respect of the accused person. It is apparent that no thought was spared for this important consideration. Account must also be taken of the fact that the stolen clothing items were recovered.

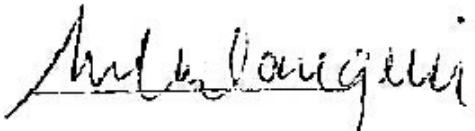
[9] The record shows that the accused's words were that he "needed what to wear at school".
[10] Consolidated case NOs 138/16, 146/16 and 147/16.

[17] The unavoidable conclusion that I come to is that the criminal proceedings against this relatively young offender amounted to a gross miscarriage of justice. I therefore set aside all the sentences meted out by the Honourable Principal Magistrate on the 8th June 2017 and substitute same with the following:-

17.1 In respect of counts 1-14 (inclusive) the accused is sentenced to a period of three (3) years imprisonment or a fine of E3, 000.00.

17.2 In respect of count 15 the accused is sentenced to a period of one (1) year imprisonment or a fine of E1, 000.00

17.3 The sentences are to run consecutively.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Crown: Mr. Matsenjwa

Accused in person