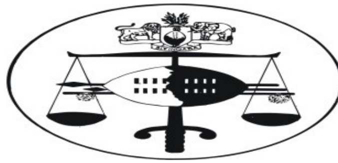

IN THE HIGH COURT OF ESWATINI

JUDGMENT

CRIMINAL CASE NO: 927/2020

In the matter between:

FANNIE SIMELANE **APPLICANT**

AND

THE COMMISSIONER GENERAL OF
THE CORRECTIONS SERVICES **1ST RESPONDENT**
THE ATTORNEY-GENERAL **2ND RESPONDENT**

Neutral Citation: *Fannie Simelane v The Commissioner General of The Corrections Services and Another (927/2020) [2020] SZHC (188) 28th September 2020*

Coram: MLANGENI J.

Heard: 12th June 2020

Delivered: 28th September 2020

Summary: *Criminal procedure – Sentencing – backdating of sentence. The applicant was convicted and sentenced to a total of six (6) years in prison, which was to end on 20/12/2020. He subsequently sentenced to an effective period of five (5) years for different offences. The later sentence was backdated on the assumption that the applicant was in custody awaiting trial. Applicant argues that the effect of the backdating is that he should have been released from custody on 20th December 2020, which the respondents deny.*

Held: *The backdating of the later sentence was erroneous, the court having not been made aware that the applicant was already serving jail time when he was convicted on the second set of charges.*

Held, further: *The effect of Regulation 76(3) of the Prison Regulations 1965 is that in the event of successive convictions, one occurring while the convict is already serving jail time, the later sentence starts to run upon completion of the earlier sentence.*

Application dismissed with costs.

JUDGMENT

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[1] The applicant is a convict who is presently under the care of His Majesty's Correctional Services at Sidwashini Centre. He was convicted and sentenced on two separate trials, under two different case numbers, for two different sets of offences and by two different presiding officers.

[2] The first conviction, under case number 940/16, was on the 22/12/16 in respect of three counts, each of which carried a custodial sentence of two (2) years. The sentences were ordered to run consecutively. This gives an effective period of six (6) years, calculated from the 22/12/16. In the absence of remission and/or pardon, this prison term would end on 21/12/2022. It is common cause that with remission of four (4) months per year, the custodial sentence is reduced by twenty-four (24) months, ending on 21/12/2020.

[3] The second conviction, under case number 946/16 was on the 5th July 2018. He was again convicted of three counts as follows:-

Count one	=	5 years (2 years suspended)
Count two	=	2 years
Count three	=	2 years

The sentences on count 2 and 3 were ordered to run concurrently, this resulting in an effective prison term of five (5) years. Further, the Honourable court directed that the sentences were to be backdated to the 4th July 2017. On the papers before me the significance of the 4th July 2017 is not apparent, but he certainly was not arrested on that date because he was already serving jail time in respect of the earlier conviction.

[4] The effect of backdating the later sentence was to create an overlap in the prison terms of the two sentences, in that while the applicant was lawfully in custody up to the 21/12/2020, the backdating then gave

him an effective reduction of the period 4th July 2017 to 21st December 2020, which is a total of two years and five months.

[5] There is no doubt in my mind that when the presiding officer backdated the later sentence to 4th July 2017 he was under the erroneous impression that the applicant had been awaiting trial in detention, yet the applicant was already serving jail time in respect of the earlier conviction. In this position I am further fortified by the whole suspension of a conviction in respect of one of the counts, something the court would certainly not have done had His Lordship been aware of the previous convictions and the facts relating thereto. The backdating having clearly been ordered erroneously, I have the option to refer this matter back to the trial court to attend to and rectify the position. It appears, however, that there is adequate information upon which to resolve the matter without that circuitous route.

[6] I make reference to Regulation 76(3) of the Prison Regulations 1965 which stipulates that:-

> **"Except where otherwise provided by law or the court, if a person is convicted of an offence and either before or after sentence for such offence but before the expiry of such sentence, <u>he is convicted of another offence, the sentence for his second offence shall be served after the completion of the sentence for the first offence</u>."** (my emphasis).

[7] The effect of the above regulation is clearly that the second sentence can only start to run on the 21st December 2020, for a period of five (5) years, less remission of twenty months.

[8] According to the applicant, he ought to have been released from prison on the 20th December 2019. This after taking into account Royal Pardon of twelve months from which he claims to benefit, which is said to have been made in 2017 and 2018. Bar Regulation 76(3) of the Prison Regulations, this submission would hold water. It clearly does not, because the later sentence starts to run only on the 21st December 2020, but then taking into account the Royal Pardon, it then starts on the 21st December 2019.

[9] Because the applicant believes he ought to have been released from prison on the 20th December 2019, and the correctional authorities are of a different view, he has moved this application in which he seeks orders in the following terms:-

> **"3. Reviewing and/or setting aside and correcting the decision of the first respondent from continued detention of the applicant……till unknown date on 2023.**
>
> **4. Compelling and directing the first respondent to compute and calculate each of the sentences to run in terms of Section 16(9) of the Constitution Act 2005 backdated to the date of arrest of the applicant on 21st December 2016, and, releasing the applicant forthwith from detention because his jail term was completed on the 20th December 2019."**

[10] Above I have demonstrated that the applicant's calculation is erroneous in that it overlooks the effect of the backdating on the later sentence and the application of Regulation 76(3) of the Prison Regulations 1965 thereon.

[11] It remains for me to address one other argument advanced by the applicant. He submits that all the sentences relating to the six convictions ought to have been backdated to the 21st December 2016. That is the date on which the first conviction occurred. For this submission the applicant relies on section 16 (9) of the Constitution. All that this provision requires is that where an accused has spent time in custody while awaiting completion of the trial, the period spent in custody shall be taken into account when pronouncing sentence. It does not require that where an accused is convicted of various offences committed at different times and for which he is tried at different times, the sentences should all be backdated to the date of the earliest conviction. It was therefore not necessary for the court to backdate the later sentences to the 21st December 2016 as submitted by the applicant.

[12] At paragraph 2 of his founding affidavit the applicant alleges that his detention is illegal in that there is no **"committal warrant allowing the first respondent to keep me detained….."** This averment passes for a fishing expedition in that there are committal warrants in respect of convictions, being annexures ECS1 and ECS2 to the answering affidavit.

[13] The applicant has therefore failed to make out a case for the relief that he seeks, and the application is accordingly dismissed with costs.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: **Attorney L.N. Dlamini**

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