IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE   CASE NO. 20/2014

In the matter between:

DUMISANI TREVOR DLAMINI   Applicant

And

**THE COMMISSIONER GENERAL – HIS MAJESTY'S
CORRECTIONAL SERVICES**   1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTION   2nd Respondent

THE ATTORNEY GENERAL   3rd Respondent

In re:

DUMISANI TREVOR DLAMINI   Appellant

And

THE KING   Respondent

 Neutral Citation : Dumisani Trevor Dlamini vs Rex (20/2014) [2020]

SZHC 68 (29 April 2020)

Coram : MABUZA – PJ

Heard   : 17/02/2020, 25/02/2020

Delivered   : 29/04/2020

SUMMARY

Criminal law: The Applicant was sentenced to 20 years imprisonment for murder while serving sentences meted out by the Magistrate's Court. In this application the Applicant challenges the computation of his sentences effected by the Correctional services as being erroneous.

Held: That the sentences were properly calculated and are hereby confirmed. Application dismissed. Each party to pay its own costs.

JUDGMENT

MABUZA –PJ

[1] The Applicant, Dumisani Trevor Dlamini, was convicted on the 19/10/2011 by me in the High Court for the murder of Madonano Dlamini. On the 08/03/2012 I sentenced him to twenty (20) years' imprisonment without an option of a fine. The sentence was backdated to the 26th December 2007 being the date that he was arrested and taken into lawful custody for that offence. The backdating was in terms of Section 16 (9) of the Constitution which provides that:-

> *" 16 (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 "

It was not for any other reason as the Applicant seems to believe.

[2] In the application before me, dated 24/10/2018, the Applicant seeks an order in

the following terms:

(a) Compelling the first Respondent to backdate the Applicant's 20 years sentence

to the 26th December 2007 as ordered by the High Court and

confirmed by this Honourable Court.

(b) Alternatively, that the first Respondent be directed to file in Court a record of

computation of the Applicant's backdated sentences.

(c) Ordering the Respondent to pay costs of this application.

(d) Granting Applicant further and/or alternative.

An affidavit deposed to by the Applicant is attached to the application. I granted

prayer (b) and the 3rd Respondent filed Exhibit A which sets out the computation of

sentence in respect of the Applicant. I set out the aforesaid computation:-

"RE: DUMISANI TREVOR DLAMINI VS THE COMMISSIONER GENERAL OF HIS MAJESTY'S CORRECTIONAL SERVICES AND 2 OTHERS SUPREME COURT CASE NO. 20/2014.

1. We refer to the above captioned subject matter.

2. At the onset, let us confirm that Dumisani Trevor Dlamini is indeed still serving his sentence at our Matsapha Correctional Centre. A brief overview of his sentence is as follows:

2.1 Dumisani Trevor Dlamini was sentenced by the Pigg's Peak Magistrates Court, on 2 charges of Robbery and Assault GBH under Case No. 14/18.

2.1.1 Count 1 (Robbery) – 2 years without an option of a fine;

2.1.2 Count 2 (Robbery) – 2 years without an option of a fine;

2.1.3 Count 3 (Robbery) – 18 months without an option of a fine.

The sentences in these charges were backdated to the 26th December, 2007 and were ordered to run consecutively. With the date of conviction being, 30th September 2009, at Pigg's Peak Magistrate Court.

2.2 Dumisani Trevor Dlamini was further sentenced at the Pigg's Peak Magistrates Court, on 2 counts of Robbery under Case No. 567/07. He was sentenced as follows:

2.2.1 Count 1 (Robbery) – 2 years without an option of a fine;

2.2.2 Count 1 (Robbery) – 2 years without an option of a fine.

Both these sentences were ordered to run consecutively after the completion of the sentence in Criminal Case No. 14/18. His date of conviction being 13th October, 2009, at Pigg's Peak Magistrates Court.

3. *Dumisani Trevor Dlamini was later convicted for the offence of Murder and sentenced to Twenty years (20) years imprisonment by the High Court on the 08th March, 2012. The High Court further ordered that the sentence be backdated to the 26th December, 2007.*

4. *In response to paragraph 1 (notice of motion) we do agree that we have backdated the applicant's sentence to 26th December, 2007.*

5. *Hence, the applicant's record computation of his sentence is computed hereunder as follows: (Note: for clarity sake, you can either count the sentences one by one or combine them, either way the date of release will be the same, hence, both computation formulas given for easy digestion.)*

5.1 One by one counting formula: Using Section 76 of the Prison

Act, 1964.

26-12-2007 Date of Conviction
+   6   9   Sentence
25- 06 – 2017 Longest Possible Date of Release (L.P.D)
-   02 – 03 Less Remission

25 – 04 – 2014 Earliest Possible Date (E.P.D)

+   20 yrs Murder Sentence

25 – 04 – 2034 L.P.D

*   08 – 06 Less Remission*

25 – 08 – 2027

-   2 King's Amnesty (2015, 2016, 2017, 2018__

25 – 08 – 2025 New E.P.D

5.2 Combined counting formula: Using Section 78 (1) of the Prison

Act, 1964

26 – 12 – 2007 Date of Conviction
*   06   29 Sentence*
25 – 18 – 2036 Improper Date
25 – 06 – 2037 L.P.D
*   10   9 Remission*
25 – 08 – 2027 E.P.D
*   2   King's Amnesty (2015, 2016, 2017, 2018)*
25 – 08 – 2025 New E.P.D

6. *From the above computation of the instances, it is apparent that*

whichever formula you may intend to use to count the sentence, it

all comes down to the same date of release which is the 25th August

2025. It is important to state that when computing the sentences to

be served by Dumisani Trevor Dlamini, we took into cognizance,
the orders of the various courts, that the sentences be backdated to
the 26ᵗʰ December, 2007, and all the sentences were accordingly
backdated so. Probably it also suffice to add that when we compute
such sentences, we are guided by the provisions of Regulation 78
(1) of the Prisons Regulations, 1965, in that, for purposes of
remission, the consecutive terms of imprisonment, the aggregate of
all the terms are treated as one term. Furthermore, it a person is
convicted of an offence but before expiry of such sentence, he is
convicted of another offence, the sentence of the second offence
shall be served after the completion of the first offence, unless the
court states otherwise, (Regulation 76 (3)).   Which in this
particular case it did not state so hence we follow the laid down
procedures from the enabling legislation of computation of
sentence.

7. *In a nutshell, the inmate's sentence was well computed by the*
department immediately after he was sentenced to the 20 years of
imprisonment and that his term of imprisonment lapses on the, 25ᵗʰ
August 2025.

8. In light of the foregoing, the office of the Commissioner General kindly requests your esteemed office to defend the matter on his behalf. For any additional information, we are willing to assist and shed more light.

T. C. MHLANGA

FOR: COMMISSIONER GENERAL OF CORRECTIONAL SERVICES"

[3] The Applicant is currently incarcerated at the premises of the first Respondent. In the affidavit the Applicant says that apart from the charge of murder he was also charged with four counts of robbery and assault for which he was convicted by the learned Magistrate sitting at Pigg's Peak. He was convicted during 2009.

[4] The Applicant seems to think that his term of imprisonment shall lapse during 2021 but the officers of the first Respondent have disabused him of that thought by advising him that his term of imprisonment ends of the 25th August 2025. This is apparent from a letter dated 27/07/18 (Annexed

"DTD1") written to the Applicant's attorney by the first Respondent. The contents whereof are the same as these of Exhibit A reproduced in paragraph 2 *supra*.

[5] Despite that information, the Applicant believes that his term of imprisonment lapses in 2019 after commutation of his sentence on the bases of the Royal prerogative for mercy and that the first Respondent did not backdate the murder sentence.

[6] The Applicant further states the following:

6.1 I have been advised and reasonably believe that the First Respondent ought to have deducted 4 years, 2 months and 10 days from my murder sentence of 20 years in effecting the backdate to the 26th December 2007.

6.2 I further submit that, Regulation 76 of the Prison Regulations, 1965, should not be constructed to exclude a backdated sentence, but the sentence should first be backdated and the remaining sentence shall then be served after the completion of the earlier sentence(s).

6.3 I further believe that, I am entitled to know how my sentence was computed that is, if the fires Respondent insists that he backdated my sentence.

6.4 I further submit that, I have made a case for grant of orders as prayed for in the notice of motion.

[7] When this application came before me on the 17/02/2020 I called for an officer of the first Respondent to give oral evidence with regard to Exhibit **"DTD1"**. On the 25/02.2020 I heard oral evidence from 2719 Welile Mabuza an employee of the first Respondent. He testified that he was the desk officer and does computation of sentences. He was shown exhibit **"DTD1"**. He recognized it and told the Court that he did not sign it nor compute it but as he carries out computation he could unravel it for the Court.

[8] It was the evidence of Mr. Mabuza that the Applicant was convicted in the Magistrate's Court for robbery in five Counts. The sum total of the years he was sentenced added up to nine (9) years six (6) months. All these counts were backdated to 26th December 2007 and they were all ordered to run

consecutively. The date of conviction being the 30th September 2009 for the first three Counts and the 13th October 2009 for the remaining two counts.

[9] Mr. Mabuza testified that the Applicant was then convicted for Murder and sentenced to 20 years imprisonment by the High Court on the 8th March 2012. The sentence was to be backdated to 26th December 2007.

[10] This meant that the Applicant had to serve a maximum of 29 years 6 months beginning from the 26th December 2007. Section 76 (3) of the Prison Act 1964 then brings in a method of calculating the numbers of years less remissions and King's Amnesty. And that after subtracting remissions and the King's Amnesty, the Applicant is expected to finish serving his sentences on the 24th August 2025 and be released on the 25th August 2025.

[11] Mr. Mabuza stressed the point that if a person is sentenced to 9 years and 6 months on 5 separate counts and all counts are to run consecutively, he must finish each count and then begin the next. If it occurs that 20 years' sentence is then imposed on top of the 9 years six months, it does not then

mean that the 9 years 6 months will be included in the 20 years which will mean that the person will serve the 20 years alone. He was to first serve the 9 years 6 months and finish it then the 20 years. Backdating of a sentence does not mean that the 9 years 6 months is then to run concurrently with the 20 years sentence. Each count must be served entirely separate from the other.

[12] It was his evidence that a Court passing its sentence cannot make concurrent sentence passed by another Court. As it was in this case, the Applicant was convicted by two different Magistrates. The other Magistrate could not be in a position to order that his sentence must run concurrently with the sentence issued by the other magistrate. Likewise, the High Court cannot Order that its 20 year sentence run concurrently with the 9 years 6 months issued at the Magistrate's Court as perceived by the Applicant.

[13] The Applicants arguments are as follows:

(a) It is common cause that when the Applicant was sentenced to serve a terms of 20 years imprisonment on the 8th March 2012, his earlier sentence from the Magistrate's Court was to come to an end on the

25th April 2014 as more fully appears on calculations by the first respondent. This means that he was only left with 2 years, 1 month, and 17 days calculated as follows:-

25 – 04 – 2014
- <u>08 – 03 – 2012</u>
17 – 01   2yrs

(b) That the provisions of Section 300 (2) is an exception to the provisions of Regulation 76 (2) of the Prison Regulations, 1965. Section 300 (2) of the Criminal Procedures and Evidence Act, 67/1938 (as amended) provides that if the earlier sentence consists of imprisonment the Court shall direct whether each sentence shall be served consecutively with the remaining sentence.

(c) In this present case the Court did not direct that the latter sentence of 20 years shall be served consecutively with the remaining sentence of 2 years, 1 month and 17 days and as such it should by implication run concurrently with the remaining sentence.

The latter sentence ought to have absorbed the remaining balance of the earlier sentence and Applicant be released on the 26th April 2019.

(d) In the event the Court does not agree with the above interpretation of

Section 300 (2) of the CP&E, a fair computation would be to add the

remaining sentence to the latter sentence as follows:-

26-04-2019

17-01-   2 remaining sentence
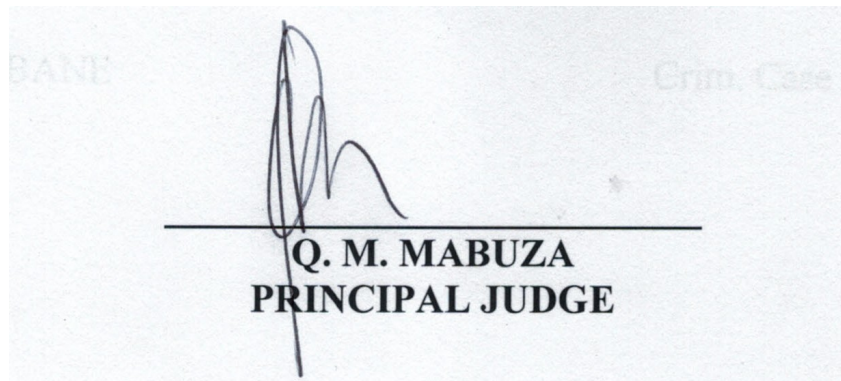
43-05-2021

13-06-2021

[14] On the other hand the Respondent argue that:-

(a) There was no Order to the effect that the 9 years 6 months sentence run

concurrently with the High Court 20 years' sentence. As such the

Applicant must serve all his sentences consecutively. The

calculations of his relies date was calculated accurately according to

section (3) of the Prison's Act. 1964 wherefore the Applicant is to be

released out of prison on the 25th August 2025.

(b) It is our submission therefore that the sentence of the Applicant was backdated

to the 26th December 2007 as ordered by the Courts and that the

record of computation of the Applicant's backdated sentences was

filed in Court.

[15] Mr. Mabuza made a compelling and credible witness. I must therefore agree with him and learned Counsel for the Respondents.

[16] In the event, the Applicant's application is dismissed. Each party is ordered to pay its own costs.

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Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant   : Mr. S.B. Motsa
For the 1st – 3rd Respondents : Mr. Magongo