

**CRIM.APPEAL CASE NO.11/2000**

**In the matter between:**

**SIGULUMBA CASSABLE**

**APPELLANT**

**AND**

**REX**

**RESPONDENT**

**CORAM:**

**MAPHALALA, MASUKU J.J.**

**For the Appellant:**

**In person**

**For the Respondent:**

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**JUDGEMENT**

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**Masuku J.**

The Appellant, to whom I shall continue to refer to as “the accused”, appeared before the Senior Magistrate at Nhlngano charged with the crime of rape. It was alleged that he did wrongfully and unlawfully and intentionally have sexual intercourse with one A, a Swazi female juvenile, aged fifteen years, without her consent at Billy Farm on the 30<sup>th</sup> January 1997.

The learned Senior Magistrate found him guilty as charged and meted a sentence of ten years imprisonment without the option of a fine. For some inexplicable reason, the Magistrate ordered the production of the accused before him and unilaterally changed the sentence to one of seven years without the option of a fine and also backdated this sentence to the 17<sup>th</sup> February, 1997, presumably the date of the accused’s arrest.

The accused lodged an appeal against both conviction and sentence. However when appearing before us, he indicated that he was abandoning the appeal against conviction but would confine himself to that against sentence.

The Crown's evidence clearly established that the accused did in fact rape the complainant and the decision to abandon the appeal was a wise one, as the prospects of success were non-existent.

As against sentence, the accused raised the following grounds of appeal:-

1. The evidence that was presented against me was too shallow to justify such a big sentence as ten (10) years. The entire evidence furnished to the court could not prove I was the culprit. It is on these grounds that I wish to ask the High Court to quash the conviction and set aside the sentence of ten (10) years
2. I would also like to ask the High Court to consider setting aside the sentence of ten (10) years for the sake of my wife who is not in good health.

my wife sustained injuries and underwent an operation to deliver a baby after she had been beaten by police who accused her of refusing to co-operate.

3. Besides the baby, I have four children two are wholly dependent on me as my wife is unemployed.
4. To arrive at the sentence of seven (7) years, the magistrate erroneously revived a suspension of three (3) years which long expired in 1994.

It is apparent, from the accused's notice of appeal that there is confusion regarding which sentence is sought to be set aside – the one for ten years or the lesser one of seven years. Responsibility for this confusion must be placed squarely at the door of the presiding Magistrate, who unilaterally altered the sentence that he had initially imposed.

The learned authors *Du Toit et al*, in their work entitled "Commentary on the Criminal Procedure Act", Juta, 1995, state as follows at page 28 – 52:-

*"where a sentence has been imposed, the court is **functus officio** and normally that sentence cannot be changed.... The amendment must take place in the presence of the parties. The accused will be afforded full opportunity to address the Court and to take part in the proceedings during which the sentence is amended."*

The latter portion applies in South Africa, where Section 298 of their Criminal Procedure Act allows the Court to amend a wrong sentence passed by mistake before or immediately after it is recorded. There is no equivalent Section in our statutes. The import of this is that once the Court has passed the sentence, it is *functus officio* and cannot thereafter amend it. Even if one may say that the South African statute was followed, which would be wrong, it is worthy of

note from the Court record that the accused was sentenced to the ten year term on the 11<sup>th</sup> July, 1997 and the sentence was amended on the 22<sup>nd</sup> November, 1999, more than two years later. In South Africa, the amendment must be effected as soon as possible, within a reasonable, time given the circumstances. Two years is clearly an unreasonably long time.

We note that there is no indication as to whether or not the amendment was in open Court as there is no record of proceedings for that day. It is not even clear as to whether the prosecutor was in attendance and was given a right to address the Court. This appears to have been Magistrate's baby so to speak. Requests by this Court for him to explain what happened activated no response from the Magistrate concerned. What is however of grave concern in this matter is that, not only was the sentence altered, but a fresh warrant of committal was also produced and the date stamp altered to reflect that it was dated on the 11<sup>th</sup> July, 1997 when in fact, the sentence of seven years was imposed in November, 1999. In our view, this a serious matter which borders on the fraudulent.

Where a presiding officer realises that he committed an error in the sentence, as in this case (his penal jurisdiction being limited to 7 years), he would have been expected to make an entry acknowledging his error stating what sentence he ought to have imposed and thereafter leaving the correction of the sentence to the higher Court to which an appeal has been lodged or before which the matter is there for automatic review.

In the circumstances, the purported amendment of the sentence was irregular and ought to be set aside. This Court is at liberty to consider the Appellant's appeal based on the ten year sentence.

As hitherto mentioned, a Senior Magistrate's penal jurisdiction is seven years. See **SIZA GANGADVU TFWALA v REX CRIM APP. CASE NO 41/99** (un reported). It is clear therefor that the learned Magistrate, although enjoying the jurisdiction to hear the matter, did not however have the penal jurisdiction to impose a sentence of ten years imprisonment. There was misdirection on the part of the Magistrate which entitles this Court to interfere with the sentence, See **PAT BHIBHI MNGOMEZULU v REX CR.APP. NO 12/98** (per Tebbutt J.A.) and **S v SHIKUNGA 2000 (1) SA. 601 @ 616 (Nm S.C.)** per Mohamed C.J.).

The sentence of 10 years is set aside and the Court substitutes the said sentence with one of seven (7) years without the option of a fine. This sentence will be backdated accordingly, as the Magistrate had ordered.

**T.S. MASUKU**

**JUDGE**

I agree

**S.B. MAPHALALA**  
**JUDGE**