IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL CASE NO. 38/2002

In the matter between

Alex Sigwili Dlamini Appellant

vs

THE KING Respondent

Coram BROWDE, JA
BECK, JA
ZIETSMAN, JA

For Appellant
For Respondent

JUDGMENT

BROWDE, JA

This matter came before us as a result of the notice of an appeal by the appellant against his conviction and sentence in the High Court in which he was indicted on charges of rape and incest. Matsebula J, heard the case against the appellant, convicted him and imposed a sentence of 14 years imprisonment.

In his notice of appeal which he addressed to the Registrar of the High

Court the appellant alleged that he had been previously tried for the same offences before a Senior Magistrate, found guilty and sentenced to 12 years imprisonment. He appealed to the High Court against the conviction and sentence and came before Sapire, CJ and Maphalala, J. Mr. Ngarua, who appeared before us on behalf of the Crown, informed us that the learned judges observed that the Magistrate had exceeded his jurisdiction in imposing a sentence of 12 years imprisonment in that the maximum sentence he was empowered to impose was one of 7 years imprisonment. What the learned judges then proceeded to do was to declare the trial before the Magistrate to be annulled and to order that the appellant be retried for the same offences before a judge of the High Court. That is how the appellant came to be tried again and once more found guilty and sentenced, this time to 14 years imprisonment, by Matsebula J.

Mr. Ngarua attempted to persuade us that there was nothing improper in the above procedure. He could not, however, overcome the difficulties caused by what occurred in the High Court. The learned judges clearly had no right in the circumstances to declare the Magistrates court proceedings a nullity. All they were entitled to do, and in this case should have done, was to substitute a sentence of 7 years imprisonment if they were satisfied that the appellant had been correctly convicted. To have him retried by another court offends against the established principle that once an accused person has been tried by a court of competent jurisdiction on a charge and has been convicted or acquitted on the merits of the matter, he cannot again be prosecuted for the same offence. Mr. Ngarua submitted, somewhat faintly, that the appellant should have pleaded “autrefois convict” before Matsebula, J and that his failure to do so precludes him from now arguing the point. This is obviously an untenable submission. The appellant was unrepresented and could hardly be expected to have the knowledge necessary to tender the plea. In any event the problem arose when

the appeal tribunal ordered the retrial and Matsebula J knew that he had been tried and convicted – the point should, therefore, have been raised by the learned judge *mero motu.*

We have not been furnished with a copy of the proceedings in the Magistrate's Court which for some reason unknown to us was not made an exhibit in his second trial although some efforts were made by the appellant to refer to the earlier evidence.

For the above reasons it is necessary for this court, in order to rectify the position, to declare the trial before Matsebula J, a nullity and to set aside the order made by the judges of the High Court. The Magistrate's verdict is restored but the sentence imposed by him is deleted and substituted by a sentence of 7 years imprisonment. I make no comment on the conviction of the appellant by the Magistrate and if the appellant wishes to appeal against that conviction and/or the sentence, he is hereby given leave to do so by lodging a notice of appeal within 21 days of the date of this judgment. If he fails to do that the conviction and sentence will automatically become confirmed.

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BROWDE, JA

I agree

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BECK, JA

I agree

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ZIETSMAN, JA

GIVEN AT MBABANE this……..day of November, 2002