



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Criminal Case No: 10/2012

In the matter between:

MFANUKHONA VELABO DLAMINI

APPELLANT

v

REX

RESPONDENT

Neutral citation: Mfanukhona Velabo Dlamini v Rex (10/12) [2012] SZSC 46 (30
NOVEMBER 2012)

Coram: MOORE J.A., OTA J.A., and LEVINSOHN J.A.

Heard: 5TH NOVEMBER 2012

Delivered: 30TH NOVEMBER 2012

Summary: Rape – Appellant sentenced to nine years imprisonment with effect from 16th June 2011 being the date of sentence – Appeal against sentence – Appellant admitted into Mbabane Correctional Institution on the 13 July 2007 – He was released on bail on the 20 July 2007 – Appellant submitted that his sentence should be backdated to the 5th November 2005 when he alleged that he was arrested – That claim was not supported by the Correctional Institution’s records - Ordered that the period of seven days that the appellant spent in lawful custody in respect of the offence before the completion of his trial shall be taken into account and deducted from the term of nine years imprisonment awarded by the trial court – Period of time Appellant at liberty on bail pending trial not deductible.

MOORE J.A.

- [1] Upon his plea of guilty to the charge of rape during the month of August 2006 accompanied by aggravating factors, the appellant was duly convicted by the trial judge of the High Court and sentenced to a term of nine years imprisonment with effect from the date of sentence which was pronounced on the 16th June 2011.
- [2] The appellant noted an appeal against sentence in which he prayed that his sentence be backdated to the date of his arrest which he alleged to have taken place on the 5th day of November 2005. He complained that he had suffered a period of pre-trial incarceration which commenced from the date of his arrest and ended some 10 months later when he was released on bail sometime in August of that year. The date of his indictment in the instant case – the 2nd July 2007 - clearly negatives that patent falsehood.
- [3] Counsel for the respondent drew attention to section 16 (9) of the Constitution of the Kingdom of Swaziland which reads:

“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 is clear that the above segment of the Constitution does not support a claim that a sentence imposed for the commission of an offence should in every case be backdated to the date of the arrest of the convicted person for the offence in question.

[4] A proper reading of subsection (9) of section 16 would have the effect of backdating the commencement of the sentence if an appellant remained in custody for the entire pre-trial period commencing with his arrest, and ending with the imposition of sentence at the conclusion of the trial. But that does not always happen.

[5] Frequently, as in the instant appeal, the person awaiting trial is admitted to bail for the whole, or for some portion of the interval between his initial arrest and detention, and the date of sentence. The commendable aim of section 16 (9) of the Constitution is to relieve a convicted person sentenced to imprisonment of the hardship which he would suffer if a period of pre-trial incarceration were to be heaped on top of the sentence of imprisonment imposed by the trial court.

- [6] The subsection cannot be properly interpreted to mean that it affords a bonanza which allows for the deduction from the sentence imposed by the trial court of pre-trial periods of time when the convicted person was at liberty on bail or when, as sometimes happens, he had improperly seized his own liberty by escaping from lawful custody.
- [7] The instant appeal illustrates the injustice which the crown and the citizens of this Kingdom would suffer if the appellant's contention that his sentence should be backdated to the date of his arrest, without more, were to prevail. The relevant records reveal that the appellant was admitted to the Manzini Correctional Institute on the 13th July 2007 and that he was released on bail on the 20th July 2007. It is common cause that he was sentenced on the 16th June 2011.
- [8] By the above reckoning, the appellant was at liberty between 20th July 2007 and the 16th June 2011 when he was sentenced by the trial judge. This period, when he was at liberty pending the conclusion of his trial, amounted to some 3 years 10 months and 29 days. The framers of the Constitution could hardly have envisioned such a glaring anomaly as to allow that period

to be deductible from the appellant's prison sentence. Such an interpretation would operate as a *defacto* convicts' charter and make a mockery of the hallowed and timeless principle that upon proper conviction, a person must receive a just and appropriate sentence of imprisonment where a custodial sentence is warranted.

CONCLUSION

In the light of the well established principles articulated above, it follows that the appeal must be allowed so as to enable the appellant the benefit of the reduction of his sentence by the period during which he was detained in lawful custody pending the conclusion of his trial and sentence to imprisonment by the trial court.

ORDER

- i. The appeal is allowed.
- ii. The sentence imposed by the trial court is set aside.
- iii. The appellant is sentenced to a term of nine year imprisonment minus the period of seven days spent in lawful custody pending the conclusion of his trial and sentence.

S.A. MOORE
JUSTICE OF APPEAL

I agree

E.A. OTA
JUSTICE OF APPEAL

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

For the Appellant : In person
For the Crown : Miss Qondile Zwane