IN THE HIGH COURT OF SWAZILAND

In the matter between:

REX

VS.

1. JOSEPH METHULA

2. DOCTOR HLATSHWAYO

REVIEW ORDER NO.25/79 DISTRICT OF HHOHHO

MBABANE ON THE 3rd DECEMBER, 1979 REVIEW CASE NO.168/79

JUDGMENT ON REVIEW

NATHAN, C.J. :

The two Accused in this case are peregrini in Swaziland. They were each convicted on five counts of car theft and were sentenced to nine months imprisonment on each count. They "ere first offenders.

The Magistrate in submitting the case for review has stated that he had it in mind to impose heavier sentences . than he has done, but that he did not do so because of my decision in R. v. Nxumalo and Another, Review No.22 of 1977, by which he (correctly) considered himself bound.

In that case I said, in relation to the same Magistrate, "He said that this offence (a planned housebreaking and. theft) is very common in Mbabane and requires deterrent sentences to stamp it out. This was a legitimate consideration to take into account; but it loses some of its force in the light of the fact that No.2 Accused in the present case was not a member of the Swaziland community but was a refugee from South Africa who was visiting Swaziland en route for Nigeria where he was due to take up a scholarship".

The Magistrate has invited me to reconsider my decision in Nxumalo's case, supra, in the light of the decisions in

S. V. Hanyesa, 1975(4) S.A. 846(RAD); S,v. Cassim, 1976(4) S.A. 29(R A D); and S. v. Mothibe 1977(3) S.A. 825 (A. D,) The question in a nutshell is whether the Accused as peregrini, should be treated on exactly the same basis as incolae would be treated. It may be premised that car theft is rife in Swaziland and is very frequently committed or at least facilitated by peregrini from the Republic of South Africa.

I do not derive much assistance from the case of S. v. Manyesa, 1975 (4) S.A. 846 R. A. D.). This was a case of smuggling goods in contravention of the Rhodesian Customs and Excise Act. The Court gave public warning that, as had in the past been threatened by the Magistrates, such contra ventions might attract a prison sentence even in the case of first offenders. The Court in that case reduced the Magistrate's sentence of six months imprisonment to a fine of 8400 or in default of payment to a fine 6 months imprisonment, and in addition six months imprionment which was suspended on certain conditions. The Court's reason for doing this was that it was not satisfied that the appellant had received the magistrates' warning. The appellant in that case was a driver of heavy transport vehicles; but the report does not indicate whether or not he was a peregrinus in Rhodesia. I may point out that if the reason why the Court was not satisfied that the appellant had received the Magistrates' warning was that it considered that he was or might be a peregrinus, this tends to militate against the contention that peregrini and incolae should be treated on an equal footing.

The matter was far more pertinently raised in S. v. Passim 1976 (4) S.A. 29 (R. A. D.), also a case of smuggling. There Beadle A. C. J., after referring to and endorsing Manyesa's case, supra, said at p. 30 H, "So there is not the slightest doubt that, had the appellant been an incola, the reasoning in Manyesa's case would have applied and the Court could not have done otherwise in the circumstances than to have imposed a sentence of imprisonment. Mr. Wilmot has argued, rather ingeniously, that because the appellant is a peregrinus he is unlikely to have heard of this warning issued in Manyesa's case, supra,

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and therefore he should be treated as if he were an ncola ho committed the offence before the warning had been given. There are tiro answers to this arguement. In the first place, if the appellant had never heard of the warning, it is equally probable that he had never heard of the custom which had apparently developed in Rhodesia of not imposing prison sentences on first offenders, so the reasoning in Manyesa's case would not apply to him. But there is a further reason Why he should not be treated differently from an incola. If a peregrinus comes into a foreign country he must be expected to obey the laws of that country, and, if he breaks those laws he must be expected to be treated like any other incola. He must not expect that because of his position as a Peregrinus he is in a privileged position and (that) he could be much more leniently dealt with than an incola would be in similar circumstances. I think, therefore, that this case should be approached in exactly the same fashion as if the appellant were an incola. That being so, I think the sentence of imprisonment was an appropriate punishment for this offence.

I come now, however, to deal with the quantum of sentence, The amount involved was not very great and the appellant has already suffered quite a substantial penalty by the forfeiture of the watches. It seems to me in these circumstances the sentence of five months' imprisonment is severe enough to justify interference by this Court."

In the result the sentence was reduced from five months imprisonment to five months of which four months were suspended.

I would remark, with respect, that I do not find the learned judge's one reason for reducing the sentence - namely the "substantial penalty" (why, incidentally, substantial if the amount involved was "not very great"?) incurred, by the forfeiture of the watches - very cogent, because it loses sight of the fact that the appellant was bound to suffer this forfeiture, whatever the sentence imposed.

In regard to the learned judge's first reason for rejecting counsel's submission, I find this, again with respect, to be somewhat specious and unconvincing. It is

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not, so it appears to me, a question of claiming to be treated as a first offender and therefore not to "be sent to prison; it is rather a question of being given a lesser sentence than would be imposed on an incola.

There is more substance in the learned Judge's second reason for rejecting counsel's argument. But there is authority pointing the other way, to which the learned judge did not refer. In the case of S. v. Naicker, 1967 (4) S.A. 214- (N), Milne J.P. said, at p. 225-6, "Even if the appellant had proved that he did not know of the relative statutory provisions -—-— this would not, in my view, have absolved him from responsibility for complying with them. That would be a case of mere ignorance of the lav, which might justify mitigation of punishment but not an acquittal,,"

See to the like like effect 10 Halsbury, 3rd edition page 284, paragraph 525: "Ignorance of law cannot be set up as a defence even by a foreigner, although it may be a ground for the mitigation of sentence".

In S. V. Mothibe, 1977 (3) S.A. 823 (A.D.) at page 828 F - G Galgut A. J. A. said, "There is much to be said for the view that the fact that appellant is a non-citizen does not mitigate the crime. Whether that fact in the circumstances of this case is an aggravating factor is doubtful, particularly as appellant was due to

leave the Republic on 31st August 1976 ------It may well be that the imposition of a severe sentence on a non-citizen, may have a greater deterrent effect on other foreigners than a sentence which would normally be imposed on a citizen,. Even assuming that to be so one must not overstress this aspect."

It is to be noted that the Court reduced the sentence imposed on the appellant from 4 years to 18 months' imprisonment.

I would make two observations in regard to the judgment of Galgut A. J. A. Firstly, he expressed himself in very guarded language, and did not decide that the fact that the appellant was a peregrinus does not operate to mitigate the

crime. Secondly, we are in the present case not concerned with the question whether a heavier sentence should be passed on a peregrinus than upon a incola. We are concerned with whether the same or a lesser sentence should be passed upon him.

Giving the natter my best consideration I find myself unable to say that my judgment in R. v. Nxumalo and Another, supra, requires revision. The fact that an accused is a peregrinus may entitle him to some consideration in regard to sentence on that ground. It is one of the factors to be taken into account when passing sentence, along with other factorso But I do not think it would be correct to say that no regard at all should be had to it.

I should mention, in conclusion, that in my opinion the sentence of nine months imprisonment on each of the five counts was perfectly adequate and that it would not call for an increase.

The convictions and sentences are confirmed.

C. J. M. NATHAN.

CHIEF JUSTICE