

IN THE HIGH COURT OF SWAZILAND

In the matter of

Case No. B59/81

REX

vs

Daniel Maseko

Review Order No. 1/82

District of Manzini

Mbabane 12/1/82

Review Case No. 2/82

JUDGMENT ON REVIEW

NATHAN C.J.

The Accused in this case was convicted of the theft of a raincoat, pair of trousers, two pints of milk, a screw driver and a travel document, all valued at E35.50. These articles were removed from the complainant's unlocked car by the Accused who had asked for a lift. The complainant was in the near vicinity and apparently saw the Accused removing the milk. It is indeed strange that the complainant did not give chase immediately.

The Magistrate sentenced the Accused to imprisonment for two years and warned him that on a future conviction for theft he is liable to be declared an habitual criminal.

The Accused has a long record of previous convictions but these are considerably less formidable than at first sight appears to be the case. There are convictions for theft in 1960, 1961 and 1962, for each of which the Accused received strokes. He also received strokes in respect of a conviction for contravening the Motor Vehicle Proclamation in 1962, and a conviction for assault and another for assault with intent to commit grievous bodily harm, both in 1962. There was a conviction in 1963 for contravening the Gambling regulations and in 1964 and 1968 there were two convictions, for theft by false pretences and theft of money and clothing.

2

For these he was sentenced, respectively, to a fine of R54 or 9 months imprisonment and a fine of R60 or 6 months imprisonment. In the meantime, in 1967 he had received a suspended sentence of 1 year's imprisonment for indecent assault.

He was released under amnesty in September, 1968 but very soon thereafter was sentenced to a fine of E5 or 2 weeks imprisonment for contravening the African Tax Regulations. On 20th November 1968 he was sentenced, apparently in two successive trials, to 4 years imprisonment, in each instance for robbery. The record does not indicate whether these sentences were ordered to run concurrently or not.

The Accused apparently had a clean record from 1968 to March 1977 when he was sentenced to a fine of E30 or 3 months imprisonment for assault, and in February, 1978 there was a similar sentence of E20 or 2 months imprisonment, also for assault.

There have been no convictions since February 1978.

As I have said, this list of previous convictions is, on careful consideration, considerably less formidable than at first sight appears to be the case. The only heavy sentences that have been imposed are those for the robberies in November 1968 and these appear to have had a salutary effect as since then there have only been the minor convictions for assault in March 1977 and February 1978.

The Magistrate appears to have had no regard to this aspect of the case. On the contrary he says, "The Accused person has an alarming propensity to commit criminal offences as shown by the list of previous convictions. Further, thefts from motor vehicles are on the increase." He also refers to the personal circumstances of the Accused, although it does not appear that he was to any degree influenced thereby. The Accused had said in mitigation that he is 45 years old; his wife works in Johannesburg. He has five children in Swaziland and three in South Africa, and also supports

3

one nephew and two nieces. The youngest of his children is six months old.

It appears to me that the Magistrate misdirected himself on a number of aspects of the matter when passing sentence. In regard to the "alarming propensity" to commit crime, I have already pointed out that the Accused had a clean record from November 1968 to March 1977. The convictions in March 1977 and February 1978 were not for theft, but were for assault. Judging from the sentences imposed they appear to have been of a minor nature. Had it not been for these two convictions all the earlier convictions would, following current practice in Swaziland, have fallen to be disregarded on the basis that they are more than 10 years old and the Accused has had a clean record since the date thereof. I may point out that this practice is apparently in general modelled on the South African practice as set out in the Fifth Schedule to the South African Criminal Procedure Act No. 56/1955, which, however, is more stringent in only reckoning the 10 year period from the date when a non-suspended prison sentence would have expired, without reference to any remission thereof. I have discussed this aspect of the matter with the Director of Public Prosecutions, Mr. Hassanali, and am grateful to him for his assistance.

In regard to thefts from motor vehicles being on the increase, the present case is not a typical case of theft from a motor vehicle.

The Magistrate said he considered that a lengthy sentence was called for; but following the precedent in *R v S.M. Hlatshwayo*, Review Order No. 29 of 1980 he imposed a sentence of two years imprisonment but coupled with it a warning of the indeterminate sentence, Hlatshwayo's case is immediately distinguishable. The amount stolen in that case was E494, as compared with E35.50 in the present case; and Hlatshwayo's record during the immediately preceding four years was considerably more serious than in the present case.

4

In my opinion the sentence of two years imprisonment was far too severe, and the warning of declaration as a habitual criminal was not called for at all, regard being had to the greatly improved record of the Accused since November, 1968. I stress that a previous bad record cannot justify the imposition of a heavy sentence out of all proportion to the sentence which the case itself merits. Although previous convictions are a factor to be taken into account, the Court must guard against punishing an Accused twice for the same offence.

The conviction will be upheld; but the sentence is altered to one of six months imprisonment, with effect from 17th December, 1981, the date of the original sentence. The warning of declaration as an habitual criminal is deleted.

C. J. M. NATHAN

CHIEF JUSTICE.