

IN THE HIGH COURT OF SWAZILAND

In the matter of:

Criminal Case No. 76/82

RIGINA

VS

MAHABOVU

MAJAZIFO GAMA

Review Order No.3/83

District of Lubombo

Mbabane 30th March, 1983

Review Case No.292/82

JUDGMENT ON REVIEW

HATHAN C.J.

The Accused in this case was charged with Stock Theft as defined in Section 2 of the Stock Theft Act No. 6/1904 in that on or about 1st July, 1982 he unlawfully stole 4 head of cattle, the property of Girlie Phikile Madlopha, valued at E658.00.

The Accused was convicted and was sentenced in the following terms :

"Accused is sentenced to E600 or 600 days imprisonment and further ordered to compensate the complainant in the amount of E440 being the value of the 3 still missing beasts of the complainant. Accused to effect this within three months failing which to undergo a further 4 months imprisonment."

The case came on automatic review before my brother Hassanali J who queried whether an order for imprisonment in default of payment of compensation was competent in terms of the

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Stock Theft Act or Section 321 of the Criminal Procedure Act No. 67 of 1958.

As it was felt that the matter might involve a reconsideration of the decisions in R v M. Mathenjwa 1970-76. SLR 176 and R v S.M. Sikhondze, Review Case No.125/1982, and possibly also of R v Mhlanga, 1970-76 SLR 358, it was ordered that it should be argued before a full Court and that pro deo counsel should be appointed to represent the Accused. Mr. Shilubane has argued the matter on behalf of the Accused and Mr. Donkoh has appeared on behalf of the Crown.

I should at the outset point out that in terms of Section 20 of the new Stock Theft Act No.5 of 1982 which came into operation on 2 July, 1982, compensation in cases of statutory Stock Theft is now governed by the provisions of Part XVIII of the Criminal Procedure and Evidence Act, 1938. The present case, however, has to be decided on the law as it was on 1st July, 1982, the date of the offence charged.

I held in Mathenjwa's case, supra, that neither Section 6 of the Stock Theft Act 26 of 1904 nor Section 321 of the Criminal Procedure Act authorised the imposition of a sentence of imprisonment failing payment of the compensation awarded, and that consequently a sentence of imprisonment for 9 months in default of payment of compensation in the sum of E140 could not stand. This sentence of 9 months imprisonment had been imposed by the Magistrate in addition to a sentence of 4 years imprisonment, of which 1 year was suspended, that was imposed for the main offence. The provision in regard to the 9 months

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imprisonment was accordingly deleted.

On the other hand in Sikhondze's case, supra I sentenced the Accused to a fine of E150 or in default of payment to imprisonment for 150 days and in addition it was ordered that he should pay the complainant compensation in the sum of E400 and that he should be sentenced to a further 60 days imprisonment which would be suspended on condition that he paid the said sum of E400 within 3 months.

On reconsideration it appears to me that although there is no specific provision empowering a Court to order a further term of imprisonment in default of payment of the compensation awarded, there is in principle no reason why a portion of the main sentence imposed should not be suspended on condition that the compensation is paid. The object of such an order is to bring pressure to bear on the Accused to pay compensation.

Although there is authority to the effect that a substantive order for imprisonment in default of the payment of compensation cannot be made (see *E v Vabaza*, 1948 (2) 452 (ED); *S v N. & Others* 1980 (3) SA 529 (Transkei); and compare *S v Gombarume* 1975 (3) SA 439 (R) it appears to me that suspension of portion of the sentence on condition that the compensation is paid can only have a beneficial result. The objection voiced in some of the cases such as, *Vabaza* and *Gombarume*, supra, that civil and criminal remedies should not be conjoined, largely loses any cogency it might otherwise have had, by reason of Section 16 (2) of Act 6/1904 which preserves to the complainant the right to sue

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civilly for the recovery of any amount in excess of the E200 awarded by the Magistrate.

I think it is implicit in the decision in *S v Lepale*, 1979 (1) SA 117 (B S C) that such an order can validly be made. Compare also *R v Mhlanga*, 1970-76 SLR 358 at p.361 A.

It will be appreciated that I prefer the approach in *Sikhonde's* case, supra, to that in *Mathenjwa*; and I think I was wrong in the latter case in setting aside the period of imprisonment in default of payment of the compensation. The only gloss that I have in regard to *Sikhondze's* case is that it may be preferable to attach the condition in regard to suspension to the main sentence instead of imposing an additional sentence subject to suspension. I think it is almost unnecessary to stress that if the Accused serves the full sentence this will not relieve him of the liability to pay the compensation. See *Mathenjwa's* case, supra, at p. 187 E; *Sikhondze's* case.

It remains to deal with two subsidiary matters: (a) The Magistrate sentenced the Accused to a fine of E600 or 600 days imprisonment apart from the extra imprisonment imposed in default of payment of the compensation. The Accused was a first offender; and in terms of Section 4 (1) of Act 6/1904 the maximum sentence that could properly be imposed on him was a fine not exceeding E400 or in default of payment imprisonment not exceeding two years, or imprisonment not exceeding two years, or both. A fine of E600 was clearly excessive.

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(b) The Magistrate awarded compensation in the sum of E440. The Magistrate's jurisdiction in this regard in a case falling under the Stock Theft Act 6/1904. is limited to E200. See Section 6 (3) of the Act; *Mhlapga's* case, supra.

In my opinion the following should be substituted for the sentence and compensation order that the Magistrate made:-

The Accused is sentenced to a fine of E400 in default of payment to imprisonment for 2 years, of which E100 or 6 months imprisonment is suspended on condition that the Accused pays to the complainant within three months the compensation hereafter referred to. The Accused is ordered to pay to the complainant the sum of E200 as compensation. By reason of the provision for compensation and the suspension of sentence attached thereto the said compensation is to be paid within 3 months of the

Magistrate acquainting the Accused with the provisions of this Judgment, which the Magistrate is hereby ordered to do.

In the event of the said compensation not being paid within that time the full sentence will come into operation.

Save as aforesaid the sentence will operate as from the original date of sentence, 19th October, 1982.

C. J. M. NATHAN

CHIEF JUSTICE

I agree

HASSANALI J.

I agree

DUNN A.J.