



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Review Case No. 02/14

In the matter between

REX

and

NKULULEKO MASUKU

Accused

Neutral citation: *Rex v Nkululeko Masuku* (02/14) [2014] SZHC 346 (25 September 2014)

Coram: Mamba J

Considered: 25 September 2014

Delivered: 25 September 2014

[1]Criminal Law and Procedure – Accused charged and convicted of Theft of Stock in contravention of section 3(a) of the Stock Theft Act 5 of 1982 as amended.

[2]Criminal law and Procedure – sentence – on a conviction of a contravention of section 3 (a) of the Stock Theft Act 5 of 1982 as amended, it is mandatory for the court to make an enquiry on the existence or otherwise of extenuating circumstances before passing sentence, per section 18 (1) failure to conduct such enquiry renders sentence irregular and incompetent.

- [1] The accused, a 21 year old male appeared before the Nhlanguano Senior Magistrate's Court on a charge of contravening section 3 (a) of the Stock Theft Act 5 of 1982 (as amended). It was alleged that he had stolen 22 goats valued at E8650.00.
- [2] The accused made his first Court appearance on 23 August 2013 and was immediately apprised of his rights to legal representation. He opted to conduct his own defence.
- [3] On arraignment on 04 September 2013, he pleaded guilty to the charge. The crown led two witnesses in evidence in support of its case. In turn the accused testified on his own behalf and essentially admitted that he, together with one Celimpilo Mamba had indeed committed the offence with which he had been charged.
- [4] At the end of the trial, he was found guilty as charged. I entertain no doubts that his conviction was justified herein. However, before passing sentence, the learned trial magistrate failed to conduct an enquiry on the presence or absence of extenuating circumstances in connection with the commission of

the offence. That the accused was given the opportunity to mitigate could never be used as a substitute for the said enquiry. The law is settled in this jurisdiction that it is mandatory for the court to embark on this exercise and actually make a finding whether or not extenuating circumstances exist in such a case before passing sentence.

[5] In *SANDILE MAJAHONKHE NKOMO v R*, *Crim. Appeal 5/2008*, judgment delivered on 20 August 2009, this case stated as follows:

‘[12] In terms of section 18 (1) of the Act,

“(1) A person convicted of an offence under section 3 or 4 in relation to any cattle, sheep, goat, pig or domesticated ostrich shall be liable to imprisonment for a period of not less than-

(a) two years without the option of a fine in respect of a first offence;

or

(b) five years without the option of a fine in respect of a second or subsequent offence,

but in either case [no] such period of imprisonment shall exceed ten years;

Provided that if the court convicting such person is satisfied that there are extenuating circumstances in connection with the commission of

such offence, he shall be liable to a fine not exceeding E2000 or a term of imprisonment not exceeding ten years or both.”

The proviso makes it mandatory that where someone has been convicted of contravening either section 3 or 4 of the Act, the court must conduct an enquiry to determine whether or not extenuating circumstances exist in connection with the commission of the offence. The duty to conduct this enquiry lies with the presiding officer. (**DANIEL MBUDLANE DLAMINI v REX (CR. APPEAL 11/98)** (unreported). Recently this court considered a similar point in the case of **MPOSTOLI ZAZA SIMELANE v REX CR. APPEAL 25/2008**, judgement delivered on the 6th August 2009 and stated as follows:

“[10] Whilst it is true that the trial Principal Magistrate did make a finding that there were no extenuating circumstances in this case, she did not conduct or embark on an enquiry on this. She was enjoined to conduct such enquiry as it was very crucial in the determination of the “appropriate sentence” she referred to in her judgment on sentence. In casu, it was the absence of extenuating circumstances that condemned the Appellant to the sentences I have referred to above.

[11] Where an accused is unrepresented, it is incumbent on the presiding officer to advise the accused about this enquiry and the importance of such enquiry in the sentencing equation. Whilst the duty to conduct the inquiry rests on the presiding officer, the sentencing provisions and their significance should, as a matter of law and practice, be brought to the knowledge and attention of the convicted person. This would enable such person to be an active participant in the inquiry should he decide to take advantage of these provisions in order or in an endeavour to receive a sentence that has an option of a fine. In fact an accused should be encouraged to lead evidence in extenuation, even if he is not obliged to do so (see **Daniel Mbudlane Dlamini v Rex Criminal Appeal 11/98**) (unreported). An accused person can only exercise his right to participate in the inquiry, if he has knowledge of such right, and obviously the attendant benefits to him flowing therefrom.

[12] The normal or usual practice in this jurisdiction is to conduct the inquiry on the existence or otherwise of extenuating circumstances immediately after conviction but before mitigation.”

These remarks are apposite in this case. In **Zaza’s case (supra)**, the sentences imposed on the appellant were set aside and the matter was

remitted to the trial court to conduct the necessary enquiry and then pass sentence de novo. A similar order was made under similar circumstances in **R v MATSENJWA, BHEKANI, 1987-1995 (1) SLR 393** where **ROONEY J** said :

“Under the Stock Theft Act (as amended), it is clear that the consideration which must guide the court relate to the commission of the offence. As the learned Magistrate did not, in the present case, consider the facts of the case, he misdirected himself. As it is possible that on a proper direction he might find extenuating circumstances, I shall send the case back to the court below for that purpose.”

These remarks are apposite in this case and are hereby repeated.

[6] For the above reasons, the following order is made:

(a) The conviction of the accused is hereby confirmed.

(b) The sentence of two years of imprisonment meted out to the accused is hereby set aside.

(c) The matter is remitted to the learned trial Senior Magistrate to conduct an inquiry whether or not extenuating circumstances exist in connection with the commission of this offence and then pass sentence anew.

MAMBA J