THE HIGH COURT OF SWAZILAND

Crira. Appeal Case No.30/06

In the matter between:

THULANI SIPHO MOTSA	**1st APPELLANT**
NHLANHLA LUCKY MDLALOSE	**2nd APPELLANT**
THABO SAMUEL SILINDZA	**3rd APPELLANT**
VS	
THE KING	**RESPONDENT**

CORAM: MATSEBULA J.
MAMBA AJ.

For the Appellants: In person

For the Respondent: Mr Makhanya

JUDGEMENT
4th August, 2006

MAMBA A.J.

[1] The appellants were all arrested and detained by the Manzini Police on the 29lh day of April, 2005. They were charged with diverse offences and they remained in custody as awaiting trial prisoners until they were convicted and sentenced to various terms of imprisonment on the 8lh day of December, 2005 and all their respective sentences were ordered to run consecutively with effect from that date.

[2] The appellants were unrepresented in the trial Court and before this Court. On count one, all 3 appellants were convicted of Robbery wherein a gun had been used and property valued at about E7,000.00 had been taken from the complainant. All 3 appellants were, correctly in my judgment, convicted and sentenced to a term of four years of imprisonment.

[3] Counts two and three were also Counts of Robbery which involved the 1st Appellant only. He was sentenced to a term of 3 years and 4years of imprisonment on count two and count 3 respectively.

[4] In total, the 1st Appellant was ordered to serve an effective custodial sentence of 11 years; for 3 counts of aggravated robbery, perhaps aptly called armed robbery in this jurisdiction. As with the other two appellants he has appealed to this court on sentence only and not on his convictions.

[5] The 2nd and 3rd appellants pleaded guilty to counts four, five and six and were sentenced to a term of two years of imprisonment on each count. The cumulative effect of their sentences is a term of 10 years' imprisonment.

[6] The charge on count four relates to the unlawful possession of a firearm in Contravention of Section 11(1) as read with Section 11(8) of the Arms and Ammunitions Act 24 of 1964 as amended (hereinafter referred to as the Act). The crown accepted the plea of guilty on this count as in the next two counts and did not lead any evidence thereon. The learned trial Magistrate permitted this decision or stand by the Crown Prosecutor and acting in terms of section 238 (l)(b) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) (herein after referred to as the CP & E) sentenced the appellants to the maximum sentence stipulated therein, namely, a fine of E2000.00 or a term of 2 years' imprisonment.

[7] When the record of the proceedings in the Court *a quo* came before us on appeal, we instructed the Registrar of this court to inform both the affected appellants and the Crown that we would require them to address us during the appeal on whether or not the procedure adopted by both the Crown and the trial Magistrate in dealing with Count 4 was legally competent in view of the minimum sentence stipulated for such offence in the Act.

[8] Section 11 (1) & 11 (2) of the Act provides that the minimum sentence is:

> "(a) a term of imprisonment not less than five years or to a fine not less than E5000-00 in respect of a first offence" and on a contravention of section 11 (2) is "(ii) in respect of an offence under paragraph (c), to a fine not exceeding E2000.00 or to a term of imprisonment not exceeding two years or both", as per section 11 (8) (c) (ii) of the Act.

[9] Reference is made in this regard to the judgment of this Court in **R V SANDILE ANSLEY MASEKO REVIEW CASE NO.18/2006** (unreported) and **R V MAZIBUKO SIBONGISENI, 1987 - 1995 SLR (2) 315.**

[10] It is clear from the above that the sentence of two years of imprisonment imposed by the Magistrate on this count was not in accordance with the above provisions. But because the learned Magistrate permitted himself to deal with this charge under Section 238 of the CP & E, he precluded himself from imposing a sentence of more than that which he imposed. With due respect to the learned Senior Magistrate, he, together with the learned Prosecutor erred in this regard.

[11] Section 238 of the CP & E provides that:-

> "(1) If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is charged, and the prosecutor has accepted such plea, the court may, if it is -
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> (a) the High Court or Principal Magistrates Court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence; or
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> (b) a Magistrate's Court other than the Principal Magistrates Court, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed:
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> Provided that if the offence to which he has pleaded guilty is such that the court is of opinion that

> such offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding E2000.00, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding E2000.00, or it may deal with him otherwise in accordance with law."

[12] The presiding officer, other than a Judge or Principal Magistrate is empowered to convict and sentence an accused simply on his plea of guilty, only if the court is of the view that the offence with which the accused is charged would not attract a sentence in excess of that stated in the section or a sentence of imprisonment without the option of a fine. The section is really meant to deal with minor offences that can be speedily concluded without the need to lead evidence. The responsibility to make the assessment or determination lies with the presiding officer. He has to look at the offence and decide on its gravity and the nature of the sentence that is merited. In **S V Cook 1977(1) SA 653 (A)** the Court held that the trial court has a duty to decide whether the offence is of such a nature. This is the case notwithstanding the fact that the public prosecutor is the *dominus litis.* This is perhaps understandable and logical regard being had that the main focus is on the nature, severity or otherwise of the sentence that would be imposed on the offender in the circumstances. Sentence, though not exclusively, is predominantly a matter for the trial court. In *casu*, the legislature, in its wisdom decided to have a say and set or prescribe the minimum sentence that must be imposed for Contravention of Section 11(1) of the Act. The Court is enjoined by law to take into account the minimum sentence set by parliament.

[13] The case of **S V ANISEB, 1991 (2) SACR 413** (Nm) is authority for this proposition. There Hannah AJ stated that;

> "The policy behind s [238 (1) (b)] is clear. The Legislature has provided machinery for the swift and expeditious disposal of minor criminal cases where an accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts its plea at face value. The accused thus loses the protection afforded by the procedure and envisaged... but he is not exposed to any really serious form of punishment. The Court may not pass a sentence of imprisonment or any other form of detention without the option of a fine or whipping and any fine imposed must not exceed [E2000.00]. Referring to S V Mia 1962 (2) SA 718 at 719C-E the court said;

> "in enacting [the proviso to Section 238 (1) (b)] the legislature clearly had in mind trivial and petty offences and was concerned to enable such offences, whatever they might be, to be dealt with swiftly and expeditiously."

[14] See also S **V** MKHAFU, **1978(1)** SA **665**(0).

[15] In stipulating the minimum sentence to be what it is for a contravention of Section 11 (1) of the Act, the legislature has said such a contravention is not one of those minor offences to be dealt with under section 238 (1) (b). It was therefore not open to the Court *a quo* to deviate from that legislative determination.

[16] For the aforegoing reasons, the learned trial Magistrate committed an error in dealing with the charge for the possession of a firearm in terms of Section 238, as if it were a minor offence. This error resulted in a failure of justice inasmuch as a sentence less than the minimum prescribed sentence had in the end to be and was of course imposed.

[17] Notwithstanding the pleas of guilty entered by the 2nd and 3rd appellants on this count, their convictions and sentences on this count are set aside.

[1.8] The 2nd and 3rd appellants were rightly convicted and sentenced in respect of Count 5 and they have not challenged their convictions or sentence on this charge.

[19] The appellants have, however, challenged the sentence of 2years' imprisonment imposed upon them for the Contravention of Section 14 (2) (C) of the Immigration Act

> " any person who -
> (e) unlawfully enters or is unlawfully present in Swaziland in contravention of this Act,... shall be guilty of an offence and liable to a fine not exceeding five hundred Emalangeni or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment."

[20] Mr Makhanya for the Crown has, properly in my view, conceded that the trial magistrate erred in sentencing the appellants to a fine and term of imprisonment in excess of that.laid down in the relevant Act. Mr Makhanya has submitted that this court is at liberty to correct this error rather than remit the matter to the

trial Court to pass a proper sentence in conformity with the Immigration Act. I agree.

[21] I have carefully and closely considered the appellants submissions that their sentences on the various counts for which they were each convicted must be ordered to run concurrently.

[22] Looked at individually, the 1st appellant was convicted and sentenced on 3 separate counts of robbery. In each case a firearm was used to carry out the robbery. The offences were committed on 3 separate dates and places. In all, property valued just over E30 000.00 was taken. The cumulative effect of the 1st appellant's sentence is that he is to serve a term of 11 years' imprisonment for his troubles. I can find nothing wrong with this.

[23] With regard to the other appellants, again, they were also found guilty of the robbery count, for which they were sentenced to a term of four years of imprisonment. This count is separate and different from the other charges for which they were convicted, namely the Immigration charge and that of being found in possession of ammunition without the requisite documentation. The trial magistrate, in my judgment, properly exercised his discretion in ordering that the sentences must run consecutively.

[24] There is, however, merit in the appellants' submissions that the magistrate ought to have backdated their sentences to the date on which they were taken into custody. This has been conceded by the crown.

[25] In the case of **MOSES MPHIKELELI DLAMINI VS REX** (appeal 20/2006) (unreported) judgment delivered on the 22nd June, 2006 this court referred to what was said in **R V BENSON MASINA AND ANOTHER, 1987-1985 (1) SLR 391** where there the court noted that;

> "the fact of the matter is that they spent 64 days in custody prior to their conviction and that was a factor which they were entitled to have taken into consideration either by a reduction in their sentence or by back-dating their sentence. The loss of liberty be it for 4 days or 64 days is necessarily a punishment.

[26] In **R V BHEKI DLAMINI,** Review case No.210 of 1986 (unreported) this court said;

> "Although the question of when a sentence should commence is matter for the discretion of each court, in my judgement the courts of this country should, as a general rule, exercise that discretion in

> favour of backdating sentences of imprisonment in those case where an accused has been in custody awaiting trial. Such a general practice will, in my opinion, more effectively ensure not only that justice is done but that it is seen to be done. That is not to say that there will be no cases in which a court can take account of time already spent in custody in a more general way but, in my view, good reason should exist for adopting such an approach
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> I may add that this practice of backdating sentences of imprisonment has in most cases been followed not only by the High Court but also by the Court of Appeal.
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> The judgements of this court are binding on Magistrates' courts and it not now open to the Magistrate who tried the case under consideration to say that the general rule is that sentences should not be backdated. While he has a discretion in the matter good reason must exist for a departure from the general practice."

[27] This salutary rule of practice has been captured in Section 16(9) of our constitution. The appellants were, of course, sentenced before the Constitution came into effect.

In summary:

(a) The appeal by the 1st appellant, which was on the sentence only is dismissed on all 3 counts;

He shall serve a term of 11 years imprisonment and his sentence is backdated to the 29th day of April, 2005, that being the date on which he was arrested and detained.

(b) The Convictions and Sentences of the 2nd and 3rd appellants on Count 4 are set aside.

(c) The appeal by the 2nd and 3rd appellants on Count 5 is dismissed.

(d) The Conviction of the 2nd and 3rd appellants on Count 6 is confirmed. However, the sentence is set aside and substituted with a sentence of a fine of five hundred Emalangeni (E500.00) or a term of six months imprisonment.

(e) The 2nd and 3rd appellants are each to serve a sentence of 4 years imprisonment in respect of count 1; pay a fine of E2000.00 or serve a term of 2 years imprisonment in respect of Count 5 and pay a fine of E500.00 or undergo a custodial sentence of 6 months in respect of Count 6.

(f) These sentences are ordered to run consecutively with effect from the 29th day of April, 2005.

MAMBA AJ

I agree

MATSEBULA J