IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 124 OF 2009
District Record No. MLT 7 of 2009

In the matter between:

THE KING

VERSUS

MOSES VUSANI MVUBU

Date of hearing: 22 April, 2009
Date of judgment: 30 April, 2009

Mr. Attorney Tholi Vilakazi for the State

JUDGMENT ON REVIEW

MASUKU J.

[1] The above matter came to me on automatic review. Upon perusal of the record of proceedings, certain issues raised my eye-brows thereby necessitating that I invite Counsel

for the Crown to make submissions thereon. I shall advert to those issues very shortly.

[2] The accused person was arraigned before the Manzini Magistrate's Court on three counts, alleging contravention of various sections of the Road Traffic Act No.6 of 2007, hereinafter referred to as "the R.T.A.". I shall enumerate the charges in full presently for the reason that some of the issues that raised spasms of disquiet emanate from the charge sheet.

[3] The Counts were recorded as follows:-

Count 1

> The accused is charged with the offence of contravening Section 89 of the Road Traffic Act 6 of 2007 as read with Section 122(6) of the same Act.
>
> In that upon the 26th February, 2009 at about 1715 hours at or near Mliba area along Luve/Dvokolwako MR5 public road in the Manzini District, the said accused person being a driver of an unregistered Toyota L.D.V, did wrongfully and unlawfully drive the aforesaid motor vehicle in a negligent manner and caused

it to collide with another motor vehicle registered SD 736 KN Toyota Sedan driven by Thulsile Gama of Tshaneni Area, and as a result both motor vehicles were damaged.

Particulars of Negligent Driving

1. Failed to take a proper lookout before entering the main road.

2. Caused an accident which a reasonable driver would have avoided from occurring.

Count 2

The accused is charged with the offence of contravening Section 13 (2) of the Road Traffic Act 6 of 2007 as read with Section 122 (6) (b) of the same Act.

In that upon the 26th February 2009 at about 1715hours at or near Mliba area along Luve/Dvokolwako MR5 public road in the Manzini District, the said accused person being a driver a unregistered Toyota L.D.V, did wrongfully and unlawfully drive and said motor vehicle while it was not registered in accordance with this Act.

Count 3

The accused is charged with the offence of contravening Section 16 (2) of the Road Traffic Act 6 of 2007 as read with Section 122 (6) (b) of the same Act.

In that upon the 26th February 2009 at about at or near Mliba area along Luve/Dvokolwako MR5 public road in the Manzini District, the said accused person being a driver of an unregistered Toyota L.D.V, did wrongfully and unlawfully operate the aforesaid motor vehicle on the same public road while it was unlicensed in accordance with this Act.

[4] The accused, who was unrepresented during the trial, pleaded guilty to the various counts. He was consequently convicted upon his aforesaid pleas without the Crown having led any evidence against him. Having made oral submissions in mitigation of sentence, the accused was sentenced as follows:-

Count 1 - El, 000 fine or ten months' imprisonment, which is wholly suspended for two years on condition that the accused does not contravene any provision of the R.T.A. during that period of suspension. He was further ordered to compensate the owner of the motor vehicle registered as SD 736 KN for the repair on the

said motor vehicle on or before 30 April, 2009 and to report to Court what he has done thereon.

Count 2 - A fine of E500.00 or five months' imprisonment in default of payment.

Count 3 - A fine of E300.00 or three months' imprisonment in default of payment.

The sentences in Count 2 and 3 were ordered to run consecutively.

[5] The are basically three issues that arise and require this Court's determination. These were brought to Crown Counsel's attention before the hearing. I hereby record the Court's indebtedness to Mr. Vilakati's erudite and well researched heads of argument and his commendable grasp of the issues arising. The first issue was whether the charges, as stated above were proper; if not, the appropriate relief; second the propriety of the suspension of the sentence and the conditions attaching thereto and lastly, the sustainability of the compensation Order granted by the Court under Count 1. I may also have to

comment on the need to clarify sentences, particularly where these are ordered to run consecutively. I shall presently deal with the above issues *ad seriatim.*

Propriety of Charges.

[6] It will be noted from reading all the counts that the accused was charged with the contravention in Count 1 of section 89 of the R.T.A. as read with section 122(6) (b) of the Act; section 13 (2) as read with section 122 (6) (b) of the Act on the second and section 16 (2) of the Act as read with section 122 (6) (b) on the last Count. It should be noted at this early stage that section 122 (6) is a penalty provision, whereas the first sections quoted in each of the counts are the offence - creating sections.

[7] The instructive section and which can lead to a resolution of the issue under consideration is section 122 (6) (b) itself and which has the following rendering:-

> "A person convicted of an offence in terms of subsection (1) read with section 90 (1) shall be liable -
>
> (b) in the case where the court finds that the offence was committed by driving negligently, to a fine not exceeding EI 600 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

Section 122 (1) which is referred to above, reads as

follows:-

> "A person who contravenes or fails to comply with any provision of this Act or with any direction, term, condition, demand, determination, requirement, or request hereunder, shall be guilty of an offence."

[8] What becomes immediately clear is that the provisions of section 122 (6) (b) apply, according to the text, to persons who contravene section 122 (1) as read with section 90 (1) of the Act. Surprisingly, there is no section 90 (1) of the Act. This is an aspect that the drafters of this legislation must attend to and without undue delay for the present state of the legislation deals more towards confusion than clarity, a situation that should not be. A reading of the majority of the sub-sections of the section 122, particularly from sub-section (2) to (6) indicates the sections in respect of which the penalties stipulated therein apply.

[9] This fact therefore leaves the following conclusion: in order for a person who has allegedly contravened a section of the R.T.A. to know the possible range of penalties, and consequently the penal provision with

which the offence - creating provision must be read, one must read the provisions of sub-section (2) to (6) of section 122. Section 122 (7), which is rather omnibus in its wording and proper application, reads as follows:-

> "A person convicted of an offence in terms of any other provision of this Act shall be liable to a fine not exceeding E800.00 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

[10] Having established this position, one has to consider each of the penal provisions in section 122 and to consider whether any of them has to be read with or applies to the offence-creating provisions of which the accused was charged and convicted. From my reading of the Act, I have been unable to find a specific penal provision that applies to 89 (Count 1); section 13 (2) (Count 2) and section 16 (2) (Count 3). None of the provisions of section 122 makes specific or any provision for that matter in respect of the penalty to be imposed on an accused convicted as the accused was, of any of the above.

[11] In the premises, I am of the view that once there is no specific penal provision applicable to any offence-creating provision stated, then the provisions of section 122 (7), which I described as omnibus in application, must be invoked. This analysis leads me to the inexorable conclusion that in respect of all the counts of which the accused was convicted, section 122 (6) (b) was of no application at all. It is also clear as I have sought to demonstrate, that no other sub-section created a specific penalty for the sections he was found guilty of having contravened. For that reason, the accused person should have been charged with contravention of section 89 (Count 1); 13 (2) (Count 2) and 16 (2) (Count 3) as read with section 122 (7) in each case. This, Mr. Vilakati, fairly conceded.

[12] This conclusion necessarily, leads me to state without equivocation that the accused was not properly charged in the circumstances. This conclusion then leads to a further question as to what should now happen? Should the Court set aside the conviction and sentence or can the Court, even at this stage, amend the charge sheet? If it does so, will that not

prejudice the accused person? All these are questions that arise and require the Court's determination.

[13] The key to the questions above, is provided by section 154 of the Criminal Procedure and Evidence Act 67 of 1938, hereafter called "the C, P 85 E". That section reads as follows:-

"(1) If, on the trial of any indictment or summons, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars which ought to have been inserted in the indictment or summons have been omitted, or that any words or particulars which ought to have been omitted have been inserted, or that there is any other error in such indictment or summons, the court may at any time before judgment, if it considers that the making of the necessary amendment in such indictment or summons will not prejudice the accused in his defence, order such indictment or summons to be amended, so far as it is necessary, by some officer of the court or other person, both in that part thereof where the variance, omission, insertion, or error occurs, and in every other part thereof which it may become necessary to amend.

(2) Such amendment may be made on any terms as to postponing the trial which the Court thinks reasonable.

(3) The indictment or summons shall thereupon be amended in accordance with the order of the court and, after any such amendment, the trial shall proceed at the appointed time upon the amended indictment or summons, in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(4) The fact that an indictment or summons has not been amended as provided in this section shall not, unless

the court has refused to allow the amendment, affect the validity of the proceedings thereunder."

[14] Regarding the proper application of a similar provision i.e. section 149 of similar legislation in the Republic of Botswana, Lord Sutherland J.A. said the following in *Leonard Mabutho v The State* Criminal Appeal No.20 of 2001 at page 5 - 6 of the judgment:-

> "The power contained in section 149 is a power to bring the wording of a charge into line with the evidence that has been led, provided there is no prejudice to the accused. While it is clearly intended that the power could normally be exercised during the course of the trial, it is nevertheless a power which if necessary, can be exercised in this Court. It is however, a power which should be exercised sparingly in this Court because at the stage of an appeal there would be no longer any opportunity for the accused to lead evidence about the amended charge, or to consider recalling witnesses for further cross-examination. In certain cases, the whole strategy of the defence might be affected by the amendment. This Court therefore has to be entirely satisfied that there can be no possible prejudice to the defence before allowing such an amendment. On the other hand if there is no such prejudice, the public interest requires that an otherwise good conviction on clear evidence should not fail because of an error in the wording of the charge."

[15] In the above case, the question of the amendment or correction of the charge sheet was moved at the stage of appeal. I am of the view that there is nothing to preclude the amendment and correction of the

charge sheet on review, so long as the issue of prejudice to the accused person is adequately catered for. This proposition would appear to find support in the case of *R v Macebo Lion Thabede and Others* 1970 - 1976 S.L.R. 2 at page

[16] In that matter, the accused person, Lion, and his co-accused, had been charged with contravening section 14 as read with section 26 (1) of the Game Act, 1953 to which they pleaded guilty. They were fined. The charge sheet alleged that the, accused persons had unlawfully set snares for the purposes of capturing game though not being holders of valid licences. The latter element, i.e. of not being holders of valid licences was found to be superfluous by the Court on review as it was not required by the Game Act. The Court duly amended the charge sheet and convicted them of the appropriate charge.

[17] At page 3 A, Nathan C.J. had this to say:-

> "It is in my view competent for this court under section 154 (1) and (4) of the Criminal Procedure and Evidence Act 67 of 1938 to amend the charge and convict the accused accordingly; and this I propose

> to do. No prejudice to the accused can result from this, and the evidence led would have been exactly been the same if the amendment had been effected by the trial court. This is the test. See such cases as S *u Kearney* 1964 (2) SA 495 (A) at page 503; *S v F* 1975 (3) SA 167 (T)." See also *R v Bernnet* 1979 - 81 S.L.R. 127.

[18] It having been established that the charge sheet can be amended on review, the question to decide is whether there is likely to be any prejudice to the accused person if this Court on review amends and corrects the charge. In the instant case, it would appear to me that there can be no prejudice to the accused for the reason that it was clear to him what case he had to meet and he understood the charge preferred against him at the plea - taking stage. The substantive offence-creating section remains the same. The amendment is only geared towards quoting the correct penal section and which in the instant case, in so far as count 1 is concerned, results, to the accused's benefit, to a lesser sentence being imposed. This can hardly be described as prejudicial to the accused.

[19] In the premises, I hereby amend the charge sheet in respect of each of the counts, deleting any reference to section 122 (6) and replacing the same with "as read, with section 122 (7) of the same Act." It will be seen that in

respect of the sentences, it will be necessary, if the sentences are upheld, to bring the sentence in Count 1 in line with the sentence contained in section 122 (7), the maximum of which is E800 or imprisonment for a period not exceeding six months.

Conditions attached to suspension of sentence.

[20] In count 1, as indicated earlier, the Court imposed a fine of E1000.00 or 10 months' imprisonment on default, expressly on the condition that "accused does not contravene any provision of (sic) Road Traffic Act during period of suspension." I have enormous difficulty with the conditions attached. I presently deal with the difficulties.

[21] In their work entitled, Criminal Procedure Handbook, Bekker *et al,* 6th Ed, Juta, say the following regarding the conditions to be attached to a suspended sentence at page 285: the condition(s) must -

(a) relate to the offence committed

(b) be clear and unambiguous; and

(c) reasonable

Do the conditions stipulated by the Court *a quo* meet muster, regard had to the above requisites, which I hold apply with equal force in this jurisdiction? I think not.

[22] In the first place, it is clear that the conditions do not relate to the offence committed or a sufficiently related one. In this regard, it is stipulated that the accused is not to contravene "any" provision of the Act, related or not to the section he was found guilty of having contravened. Two particular difficulties arise. The word "any" is in my view too wide and does nothing to help the accused order his behaviour accordingly and so as not to cause an activation of the suspended sentence.

[23] An example may illustrate the point well. If for an example a person is found guilty of reckless or negligent driving contrary to section 89 (1) of the R.T.A. and is convicted and sentenced thereon, subject to a suspension on the conditions set out above, it is clear that if that accused person

subsequently contravenes the Act even a minor sense, totally unrelated to section 89 (1) then the suspended sentence shall have to be activated. This is not just or fair.

[24] Secondly, I also have criticism for the use of the words
"does not contravene any provision of the Act." I say so
because what should ordinarily serve to activate the sentence is not a mere allegation of a contravention of the
Act but rather a conviction by the Court for the contravention of specific related sections and not just "any" section of the Act. The proper manner to phrase
the condition is "that the accused is not, during the period of suspension, found guilty of contravening section........"

[25] In that manner, the conditions will meet the test of being clear and unambiguous and at the same time reasonable. As indicated, the contravention of specific sections must be mentioned in the condition

for suspension and not the landmines planted by the Court in the entire terra of the R.T.A. It will be clear that presently stated, the conditions attached to the sentence imposed do not meet the three-pronged criteria mentioned above, necessitating that they be set aside.

[26] I must also record my doubts about the correctness of suspending the sentences in their entirety in such matters. I say so for the reason that there does not appear to be any guidelines followed by the Court. A sampling of the R.T.A. cases shows that the Court, in some cases, imposes a sentence, without suspending any portion thereof. In others, part of the sentence is suspended and yet in others, the entire sentence is suspended. No enquiry is undertaken by the Court to inform itself which is proper in each case, save the run of the mill process of mitigation or reasons for that matter in the sentence to show why the one method rather than other has been adopted in one matter but a different one in another. There needs to be accountable so that the public and indeed this Court gets to know why the one type of sentence is found to be condign.

[27] It must not be forgotten as stated by *Bekker et al, {supra)* at page 285, that the object of suspending the sentence or a portion thereof is to achieve two principal purposes, namely (i) to serve as an alternative to imprisonment, where the offender cannot afford a fine and where other forms of punishment are improper mainly because the sentence was not particularly serious; and (ii) to serve as individual deterrence to the offender, hanging as it does, like the sword of Damocles over his head. It is highly debatable whether the suspension of the entire sentence, particularly when subject to the wide and imprecise terms as evident above, serves the purpose. The interests of the *fiscus* in such cases is not, in my view, an idle factor.

Compensation

[28] I now turn to the issue of compensation. It is clear that on Count 1, the learned trial Magistrate ordered the accused, in addition to the wholly suspended sentence, to compensate the owner for the repairs necessary to restore his vehicle to its pristine condition. There was, in this

regard, a return date imposed on which the accused was to report as to what he had done regarding the compensation order.

[29] The relevant provision to issues of compensation is section 321 of the C,P 85 E, which provides:-

> "(1) If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss:
> Provided that the amount so awarded shall not exceed the civil jurisdiction of such court.
>
> (2) For the purposes of determining the amount o compensation or the liability of the accused therefore, the court may refer to the proceedings and evidence at the trial or hear further evidence either upon affidavit or verbal, or the amount of compensation may be awarded by court in accordance with an agreement reached between the person convicted and the person to be compensated.
>
> (3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to any sum awarded under subsection (1): Provided that if such private prosecution was instituted after a certificate by the Attorney-General that he declined to prosecute, the court may order the costs thereof to be paid by the Government.

(4) If a court has made any award of compensation, costs or expenses under this section and such award has been accepted by the person in whose

favour it has been made, such award shall have the effect of a civil judgment of such court.

(5) Any costs so awarded shall be taxed according to the scale, in civil cases, of the court which made the award.

(6) If any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from such moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted such award, to any other civil proceedings in respect of the injury for which compensation has been awarded."

What is clear from the nomenclature employed is that the compensation order will be issued upon the application made by of the injured party or on his behalf, if the compensation claimed does not exceed the civil jurisdiction of such court.

[30] Three important issues emerge which the learned trial Magistrate does not appear to have heeded, in issuing the compensation Order. In the first place, the victim must apply for the order. The Court cannot *mero motu* issue such order. I am of the view that the prosecution, being the *dominis litis* may also move for compensation on behalf of the complainant. It would appear, to me that the prosecutor must,

however act on the complainant's in moving for compensation. There is no evidence that the complainant was present in Court and there is no record of his having made the necessary application nor of the prosecution having done so. See *R v Mhlanga* 1976 - 79 S.L.R. 358 at 360 E-F.

[31] It is also implicit, and this is the second observation, that the complainant must at the least place some evidence before Court of the extent of the loss or damage sustained as a result of the accused's criminal conduct. The Court, it would seem to me, is not at large to issue a compensation Order in the abstract and for an unspecified amount in the absence of evidence of the amount of the loss. It is for that reason that sub-section (2) section 321 gives guidance as to how that evidence can be gathered if not evident from the record of proceedings.

I say so for the following reason, which is the third observation. The extent of the compensation order is dependant upon the civil jurisdiction of such Magistrate. It is implicit therefore that the question of monetary

jurisdiction comes into the picture with the result that the Court must be aware of the amount of the loss or damage, which in turn will enable the Court to determine whether it has the monetary jurisdiction to issue the compensation Order. See *R v Mhlanga (supra).*

[33] It would appear to me the only inexorable conclusion and which is wholesome in the premises that the Magistrate did not, in the circumstances, have the power to issue the compensation Order. It would appear to me that on all the three points discussed above, the trial Court was in grave error. This leads to the only inescapable conclusion that the compensation Order must be set aside, it having been incompetent in the circumstances.

[34] Having regard to what I have said above, I am of the view that the conviction of the accused person should be ordered to stand, save the amendments I referred to earlier. In the premises, I order the matter to be returned to the learned Magistrate for him to impose condign sentences, taking into account all the comments I have made above.

[35] In view of the various issues which I consider to be of some importance in dealing with criminal procedure and the ubiquity of erroneous practice in relation to some of these issues, I order that the Registrar of this Court to distribute this judgment to the Magisterial Bench of this Kingdom.

DELIVERED IN OPEN COURT IN MBABANE ON THIS 30th DAY OF APRIL, 2009.

T.S. MASUKU

JUDGE