IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIM. APPEAL NO. 25/08

In the matter between:

MPOSTOLI ZAZA SIMELANE APPELLANT

VS

REX RESPONDENT

CORAM BANDA CJ

MAMBA J

FOR APPELLANT FOR RESPONDENT IN PERSON
MR. P. DLAMINI

JUDGEMENT
6th August, 2009

Mamba J

[1] The Appellant, Zaza Mpostoli Simelane appeared before a Principal Magistrate in Nhlangano on four counts of Stock Theft in contravention of section 3 (a) as read with section 18 (1) of the Stock Act 5 of 1982 (as amended) (hereinafter referred to as the Act). On two of these charges, he was co-charged with one Vusi Sonkomo Mabuza.

[2] Their first court appearance was on the 04 March, 2008 and they had their right to legal representation explained to them by the presiding officer. Both indicated that they will not be legally represented.

[3] On being arraigned, the Appellant and his co-accused pleaded guilty to all their respective counts. All pleas were accepted by the crown and consequently no evidence was led and without any further ado, the Presiding officer returned a verdict of guilty against them on all their respective counts.

[4] Probably because the crown was aware that the accused were not first offenders, it applied for a postponement in order to enable it to prepare itself to make submissions on sentence. This application (for postponement) was opposed by the Appellant's co-accused who stated *inter alia* that he had

> "pleaded guilty because I have hoped that the prosecutor was ready with all the evidence and that we would finalise the case today because I did not want to stay/go into prision because I am a sickly person ... suffering from TB and Asthma."

[5] The court allowed the application for postponement on the ground

"that since this is the case's first appearance before court, the crown may not have necessarily anticipated that it would go to full trial. And as such cannot fairly be expected to have been ready with all its evidence in the matter."

When the Appellant's co-accused insisted that he had pleaded guilty for the reasons stated above, the presiding officer, rather inexplicably noted that

> "the court rescinds its finding of guilty and resultant convicting of Accused No. 2 on counts one and two and as such now enters pleas of not guilty to both counts",

and a separation of trials was ordered. The learned Principal Magistrate was in error in this respect. Once she had returned a verdict, she had no power or jurisdiction to rescind it. If she came to the conclusion that the conviction was bad in law and therefore could not stand, the proper course for her to take was to state that fact and the grounds thereof and forward the case to this court for its consideration and correction.

[6] As a general rule, once a court judgement has been delivered the Judicial officer is functus officio and he can not alter or revoke that judgement. Vide **Firestone SA (Pty) Ltd vs Gentiruco AG, 1977 (4) SA 298 (A).** However, section 177 (2) of the Criminal Procedure and Evidence Act 67 of 1938 provides that;

> "If by mistake a wrong judgement or sentence is delivered, the court may before or immediately after it is recorded, amend it, and it shall stand as ultimately amended."

In the case of **S vs Wandrag, 1970 (2) SA 520 (O),** it was held, in relation to a similarly worded section in South Africa, that this section can only be invoked where there is a mistake inherent in the judgement which does not relate to the merits of the case.

> "The mistake must either consist of the Judicial Officer saying something different to what he intended or where he passed an incompetent sentence (R v Armoed, 1936 EDL214). Where the accused has given false information to the court and he is sentenced on the basis of the information such a sentence is not imposed by mistake and cannot be altered by the judicial officer (R v Mhlongo 1946 NPD
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> 406)." (Commentary on the Criminal Procedure Act, by Du Toit

et al (Juta) at 22-33). In entering his plea of guilty to the two charges, the Appellant's co-accused did not make a mistake. It was a deliberate act on his part based on his hope or strategy to gain an advantage over the crown; were the case to be concluded there and then. His plan failed. In any event where a judgement is rescinded or set aside, it is not amended but withdrawn in its entirety.

[7] The above misdirection in respect of the rescission of the judgement only pertains to the Appellant's co-accused and has no relevance in this appeal. I have, however, deemed it necessary to comment on it for future guidance.

[8] In convicting the Appellant under the circumstances described above the court was acting in terms of the provisions of section 238 (1) (a) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Following the separation of trials I have referred to above, the trial against the Appellant on sentence resumed or continued on the 26th March 2008

wherein the crown made submissions and brought in proof of the Appellant's previous convictions which included two contraventions of the Act. The Appellant also made submissions in mitigation of sentence and just before passing sentence the court observed that:

> "the law is very clear on the sentence to mete out to second or subsequent offenders in this relation. And this court must mete out an appropriate sentence. Further, in casu, the court makes a finding that there are no extenuating circumstances in connection with the accused's commission of the offence,"

and went on to impose a sentence of five years of imprisonment without the option of a fine on each count.

[9] The statement I have quoted in the preceding paragraph demonstrates that the presiding officer was alive to the fact that she was enjoined by law, upon convicting the Appellant, to make a finding on the presence or absence of extenuating circumstances. Section

18(1) of the Act, which is the relevant section herein states as follows:

> "(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-
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> (a) two years without the option of a fine in respect of a first offence; or
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> (b) five years without the option of a fine in respect of a second or subsequent offence,
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> 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."

This proviso clearly applies to all persons in categories (a) and (b) of the subsection quoted above; that is to say, whether the convicted person is a first offender or a second or subsequent offender. The submission by the crown that subsection "18 (1) (b) provides that a second or subsequent offender should be sentenced to not less than five (5) years imprisonment without an option of a fine" is, in my judgement, plainly incorrect. Such a sentence may only be imposed where a finding has been made that there are no extenuating circumstances present in relation to the commission of the offence. The reference to "such person" in the proviso refers to both a first offender and a second or subsequent offender.

[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 encumbent 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 absence of extenuating circumstances immediately after conviction but before mitigation. In *Jamludi Mkhwanazi v Rex Criminal Appeal 4/97* the Court of Appeal referred to **Mbudlane's case** (supra) and reiterated that:

> "...the accepted general definition of extenuating circumstances as being one which morally, although not legally, reduces an accused person's blameworthiness or his degree of guilt. The court...adopted the finding of that court and its reasons for coming to them and stated that-"In reaching a conclusion as to whether or not extenuating circumstances are present the Court makes a value or moral judgement after considering all the relevant facts and circumstances both mitigating and aggravating in order to make

such a judgement. In these circumstances it seems to us to be quite inappropriate to determine the issue of raising the question of onus. The duty falls upon the court."

In regard to the duty of the Court, this Court in the Dlamini case cited with approval the following statement by the Botswana Court of Appeal:-"We note in particular the significance which Schreiner JA ascribes to the "subjective side" and that no factor not too remote or too faintly or indirectly related to the commission of the crime and which bears on the accused's moral guilt can be ingnored. **(R VS FUNDAKUBI (supra)).**

It seems to us that there is therefore an over-riding responsibility on the Court and its officers - Counsel - to ensure that the second phase of the process - the enquiry as to the presence or absence of extenuating circumstances - is conducted with diligence and with an anxiously enquiring mind. The purpose of the inquiry is **inter alia** to probe into whether or not any factor is present that can be considered to extenuate an accused's guilt within the context and meaning described above... When all the evidence is in, the Court is obliged to evaluate the testimony and submissions before it, consider and weigh all the features of the case, both extenuating and aggravating... This would include evidence tendered during the second phase enquiry. It will then make its "value or moral judgement."

In casu, no enquiry at all was conducted despite the fact that the presiding judicial officer stated in her judgment that there were no extenuating circumstances. The crown accepted this but submitted that there was no such enquiry needed as the appellant was not a first offender and the proviso to s 18(1) (b) of the Act did not govern his situation. This submission has been shown to be incorrect.

[13] Due to the failure by the trial court to conduct an inquiry into the presence or absence of extenuating circumstances in this case, the sentences imposed on the Appellant were incompetent and can not be allowed to stand. The sentences are vitiated by this misdirection or irregularity. They are set aside. The convictions are, however, confirmed and the case is remitted to the learned Principal Magistrate to conduct an inquiry on the existence or otherwise of extenuating circumstances and to pass sentences anew.

MAMBA J

I agree.

BANDA CJ