

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO. 21 OF 2009

District Record No. NHO 299 OF 2009

In the matter between:

REX

VERSUS

HENRY MANKUNTU SIBANDZE

MAZWI SIMON SIKHONDZE

Date of consideration: 07 December, 2009

Date of judgment: 08 December, 2009

J U D G M E N T

MASUKU J.

[1] This matter serves before me on automatic review.

[2] The above-named accused persons were arraigned before the Nhlangano Magistrate's Court on a single count of stock theft.

Because of the centrality of the charge sheet to the

decision that I will make, I shall quote the charge sheet in its entirety immediately below.

[3] It states that the accused persons are, "Charged with the offence of C/S 3 (a) ARW Section 18 (1) of the Stock Theft Act 5/1982 as Amended by Act 11/1987 in that upon (or about) 2nd June, 2009 and at or near Makhonza area in the said District, the said accused person, acting in furtherance of a common purpose did wrong fully and unlawfully and intentionally steal stock to wit three (3) goats valued at E1,300.00, the property of or in the lawful possession of Magwagwa Mdluli".

[4] When called upon to plead, accused 1 pleaded guilty and accused 2 pleaded not guilty. Notwithstanding the former's plea of guilty, the Court, upon the application of the prosecution, decided to proceed with both accused persons as if they had both pleaded not guilty. I have had occasion to comment adversely about this procedure in recent times. I did so in the judgment of *The King v Siboniso Dlamini and Another* Review Case No. 390/2008.

[5] In that judgment I made the following remarks at page 2-3 [para 3]:

"I interpolate to observe that the procedure that normally follows when more than one accused person is arraigned and the accused persons proffer different pleas, is to apply for a separation of trials, as envisaged by section 170 of the Criminal Procedure and Evidence Act No. 67 of 1938. In that circumstance, the one who pleads guilty is dealt with separately from his counterpart. It shocks my sense of justice to compel an accused person who has timeously indicated that he intends to plead guilty to the offence charged, to run the entire gauntlet of a fully blown trial. He should be dealt with in terms of his plea and punished accordingly."

[6] I reiterate these views, save to add that in dealing with the plea of guilty, it is desirable that the Court, in addition to any measures it takes to ensuring that the plea is unequivocal, also puts the elements of the offence charged to the accused person and thereby becomes satisfied that he or she accepts them as well. Presiding Officers in the Magisterial Bench should avoid following the erratic course described above, notwithstanding the convenience it may offer to both the Court and the prosecution.

[7] I now come to the question of the charge sheet which is reproduced in full above. What is particular note is that the full description of the goats allegedly stolen is not disclosed in the charge sheet. The only allegation made is that the said accused persons stole three goats, together with the alleged value thereof. Is such a bare charge sheet sufficient for purposes of finding a person guilty of the serious charge of stock theft?

[8] The starting point in this regard is the Constitution of Swaziland, 2005. Section 21 (2) (b) thereof reads as follows:

"A person who is charged with a criminal offence shall be-

(b) informed as soon as reasonably practicable, in a language which that person understands and in sufficient detail, of the nature of the offence or charge;

[9] Another relevant provision in this regard is to be found in section 122 (1) of the Criminal procedure and Evidence Act, 67/1938, which has the following rendering:

"Subject to the provisions hereinafter contained and subject also to any special provision contained in any law relating to any particular offence, each count of the indictment or summons shall set forth the offence with which the accused is charged, in a manner, and with sufficient particulars as to the alleged time and place of committing such offence and the person (if any) against whom and the property (if any) in respect of which such offence is alleged to have been committed, as are reasonably sufficient to inform such accused of the nature of the charge."

[10] It is clear, regard being had to the provisions quoted immediately above, that there must be sufficient particularity in the charge sheet and where allegations are that an offence was committed in relation to property, sufficient particulars of that

property must be disclosed. This, it must be done, to reasonably inform the accused as to the nature of the offence he has to meet.

[11] Commenting on similar provisions of the then South African Criminal Procedure Act, the learned authors Lansdowne 85 Campbell, The South African Law and Procedure, vol V, 1982, describe particularity for purposes of this section in the following terms at page 195:

"What is adequate particularity for this purpose is a question which must largely depend upon the circumstances of each case. The charge is not required to be 'absolutely sufficient', but merely reasonably sufficient, to inform the accused of its nature. The word 'reasonably' is not defined. It may be that a discretion is vested in the judge or magistrate: or it may be that the word suggests the objective test of what is necessary to inform the ordinary man."

[12] I have no doubt, in the circumstances that the contents of the charge sheet as stated above do not meet the threshold. They were certainly deficient. The detail disclosed in the charge sheet certainly was not reasonably sufficient to enable the accused persons not only to know in full the case they had to meet but they were thereby denied the cognate right of preparing their defence adequately and which right is fully

conducted and made effectual by provision on the part of the prosecution of reasonably sufficient details in the charge

sheet. It would appear to me that their constitutional right to a fair hearing was thereby impaired.

[13] In the Botswana case of *Lesetedi And Another v The State* [2001] B.L.R. 393, Dibotelo J. had the following to say about the necessity, in cases involving allegations of stock theft, of providing a full description of the beast allegedly stolen in a charge sheet at p396G to 397A:

"When an accused person is charged with stealing stock, the particulars of the offence must state whether the animals allegedly stolen are cattle, goats, sheep, donkeys and so forth and such animals must be described by their colours, earmarks and brand marks if they have been branded, or both because that information would be available to the prosecution at the time they decided to charge the accused. The disclosure of these details as well as the owner of the animals where he is known to the prosecution in the particulars of offence in the charge sheet are of paramount importance because they enable the person charged to know in advance what he is alleged to have stolen in order to prepare his defence and in my view, failure to disclose these particulars of the animals which it is alleged the accused has stolen cannot be cured by evidence led in the trial. It is not enough to state in the charge sheet that the accused stole a certain number of beasts belonging to the complainant. A Court has to ensure that the accused receives a fair trial and that includes ensuring that the accused is arraigned on a properly prepared charge." See also my remarks in *Mmadikgonyana Paki v The State* Crim. App. No. F236/03.

[14] I fully associate myself with the remarks and conclusions of the learned Judge in the above case and I find them to be fully applicable in this jurisdiction as well. See also my remarks in *The King v Meshack Mhlongo and Another* Review Case No. 29/2009 at page 2 [para 3].

[15] In view of the foregoing, it is my considered opinion that the details disclosed in the charge sheet were not sufficient to enable the accused persons to know full well what case they had to meet and consequently affected proper preparation for their defence. It would seem a wholesome conclusion to me that the charge sheet, by what it did not disclose, breached and offended the provisions of both the Constitution and section 122 (1) above. For that reason, the conviction and sentence, particularly which offends the fairness of the trial guaranteed by the Constitution, cannot be allowed stand.

[15] Another issue that I need to point out which is not of any importance for purposes of the present matter but which has to be mentioned for future guidance relates to the question of the sentence imposed by the trial Court. Accused 1 was sentenced to a fine of E3 000.00 or imprisonment for a period of one year. The sentence was conditionally suspended.

Accused 2 was sentenced to two years' imprisonment without the option of a fine. Half of the sentence was suspended conditionally.

[16] It is the sentence imposed on the second accused that I have to comment on. The proviso to section 18 of the Stock Theft Act creates the route of extenuating circumstances in relation to sentence. In other words, once a Court has convicted a person of the offences therein listed, it must perforce enquire into the existence or otherwise of extenuating circumstances. Should it find that the same are extant, it may pass sentences of less severity than those prescribed.

[17] In the instant case, it is clear that the Court did not advert its mind to the question of extenuating circumstances in the instant case, yet that is an issue that has the potential, depending on the circumstances, to affect the nature and duration of the sentence imposed. With regard to accused 2, he could, for instance, if extenuating circumstances were found, be sentenced to a fine, as it appears he was a first offender. I had occasion to comment on this very issue in the case of *The King v Gcina Mnisi and Another* Review Case No. 85/2009.

[18] In the premises, I order the following:

[18.1] The conviction and sentences imposed on the accused persons, being Henry Mankuntu Sibandze and Mazwi Simon Sikhondze be and are hereby set aside.

[18.2] The fine, if any, paid by Accused 1, is hereby ordered to be refunded to him.

[18.3] The Crown may, if it is so inclined, institute fresh proceedings against the accused persons and which proceedings are to be prosecuted before a different presiding Magistrate.

DONE IN CHAMBERS ON THIS THE 8TH DAY OF DECEMBER, 2009.

T.S. MASUKU

JUDGE