

# **IN THE HIGH COURT OF SWAZILAND**

**REV.CASE NOS. 55 & 57/09**

**In the matter between**

**REX**

**VS**

**SANELE VILANE**

**ACCUSED**

**PHUMLANI GIDEON DLAMINI**

**ACCUSED**

**CORAM**

**MAMBA J**

## **JUDGEMENT**

**8<sup>th</sup> December, 2009**

[1] These two cases both emanate from Pigg's Peak Magistrates' Court. Although tried separately, they were dealt with by the same Judicial Officer, the learned Senior Magistrate H.J. Khumalo.

[2] Both Accused persons were charged and convicted of the crime of rape. The crown alleged that each of these crimes was accompanied by aggravating factors as defined in terms of section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). The alleged aggravating factors are stated under or in each case.

[3] Both accused persons were found guilty as charged and both convictions, in my view, find ample justification in the evidence that was presented in each case. This, however, can not be said about the sentences of (9) nine years of imprisonment meted out on each of the Accused. Mr Dlamini was sentenced on 16<sup>th</sup> June, 2009 whilst Mr Vilane was sentenced on the 13<sup>th</sup> August 2009.

[4] The jurisdiction of a Senior Magistrate regarding sentence is, unless specifically granted by the Act that is the subject matter of the act for which the accused has been convicted, limited to seven (7) years of imprisonment.

The relevant law in this regard is the Magistrates Courts (Increase of Jurisdiction) Legal Notice No. 57 of 1988, which I reproduce hereunder in full:

"(2) Every Senior Magistrate shall, in respect of any criminal matter instituted on or after the coming into force of this Notice, have jurisdiction to impose a sentence of imprisonment not exceeding seven years or such fine as may, in accordance with law, be imposed."

[5] Section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 provides that

"185 bis. (1) A person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended."

It has been said over and over again, and it is worth reiterating once more that a Magistrate's Court and indeed the Magistrate himself is a creature of statute and therefore may only do that which is stated in the empowering or enabling legislation. S185 bis as quoted above does not increase the jurisdiction of a Magistrate in respect of those cases covered by it. It merely lays down the minimum sentence to be imposed on someone convicted on a charge of rape wherein aggravating factors are found to exist. Where a Magistrate, who does not have jurisdiction to impose the stipulated minimum sentence, finds himself enjoined by the law to pass that sentence or a more severe sentence, he has to state

that fact in his judgement and commit the accused to this court for sentence.

[6] If Parliament wanted to empower a Magistrate with jurisdiction to impose the stated minimum sentence or a more severe sentence it would have specifically said so. Words such as "notwithstanding any other law regarding the criminal jurisdiction of the court," or words to that effect, are often used to express such legislative intent. No such words appear in section 185 bis quoted above.

[7] For the foregoing reasons, the learned Senior Magistrate had no jurisdiction to pass the sentences he passed in these two cases. These sentences are set aside and the cases are remitted to the court a quo to pass sentence anew or, if he is of the view that the minimum sentence laid down or any term exceeding his 7 year jurisdiction is to be imposed, he must state and motivate that view and commit the accused to this court for sentencing.

**MAMBA J**