



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 65/2011

In the matter between:-

**JOHN SHILOMBO**

**Appellant**

and

**REX**

**Respondent**

**Neutral citation:** *John Shilombo v Rex* (65/11) [2012] SZHC 60(...  
March 2012)

**Coram:** HLOPHE J

**Heard:** 15<sup>th</sup> March 2012

**Delivered:** 29<sup>th</sup> March 2012

**For the Appellant:** In person

**For the Respondent:** Mr. B. Magagula

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## JUDGMENT

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- [1] The Appellant was convicted by the Magistrate sitting in Piggs Peak on three counts comprising the contravention of section 11 (1) read together with section 11 (8) of the Arms and Ammunition Act 24 of 1964, contravention of section 11 (2) of the Arms and Ammunition Act of 1964 as well as the contravention of section 14 (2) of the Immigration Act 17 of 1982.
- [2] The substance of the charges leveled against the Appellant were what is loosely termed the unlawful possession of a firearm without a license, the unlawful possession of two live rounds of ammunition and entering and remaining in Swaziland without a valid resident permit.
- [3] All these offences were said to have been committed at a place called Magudu in the Hhohho region on the 27<sup>th</sup> August 2009. Following his finding the Appellant guilty of the said offences the presiding Magistrate sentenced the Appellant to nine thousand Emalangeni fine or nine (9) years imprisonment for contravening section 11 (1) read together with section 11 (8) of the Arms and Ammunition Act of 1964; two thousand Emalangeni fine or two (2) years imprisonment for contravening section 11 (2) of the Arms and Ammunition Act 1964 and to 5 months imprisonment or five hundred Emalangeni fine for contravening section 14 (2) of the Immigration Act of 1982.
- [4] The three sentences were ordered to run concurrently. The Appellant was sentenced on the 14<sup>th</sup> January 2010, two years of the nine year

sentence was suspended for three years on condition the accused was not convicted of the same offence.

- [5] By letter dated the 19<sup>th</sup> May 2010, the Appellant noted an appeal to this court against the sentence imposed by the court *a quo*. The relevant portion of the letter forming the Notice of Appeal states as follows:-

“Your Worship (sic as it should read Your Lordship)  
I consider my sentence as very harsh...”.

- [6] Although he started off by suggesting that he had an issue even with the conviction, during the hearing of the matter; the Appellant was quick to clarify that his appeal was against sentence when clarity was sought on his appearing to be challenging the conviction when his Notice of Appeal challenged only the sentence.

- [7] The Appellant contended during his argument that the sentence imposed by the court *a quo* was too harsh and that it did not take into account his being a first offender and his being a sickly elderly person.

- [8] The position of the law on sentencing has crystalized by now it being that sentencing is a preserve of the trial court which has to exercise a discretion judicially on what an appropriate sentence is. A court sitting in the position of this one, can only interfere with such a discretion in those cases where the court *a quo* appears or can be inferred not, to have exercised its discretion judicially which has been interpreted to mean where the sentence is vitiated by an irregularity or a misdirection or where the sentence is so severe that it induces a sense of shock

[9] In *Rex v Ndusha Themba Zwane 1970-76 SLR 106*, a judgment prepared by Nathan J (as he then was) to which Hill CJ concurred, the foregoing position was put as set out herein below in two sections of the judgment at page 108 B-C and 108 D to E. At 108 B-C the learned Judge quoted a passage from *S v Bolus and Another 1964 (4) SA 575-(A)* and stated:-

“...we think the general principle to be applied is better expressed earlier in the judgment, at page 581 E, where it is said, “ It is well settled that punishment is a matter for the discretion of the trial court, and that a Court of Appeal cannot interfere unless such discretion was not exercised judicially”.

At page 108 D- E, the learned Judge put the position as follows:-

“We think assistance is also to be derived from the case of *S v De Jager and Another 1956 (20 SA 616 (A))* in which Holmes JA said at page 629, “It is the trial court which has the discretion, and a Court of Appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of Appeal would have imposed”.

[10] Of the three indicators of failure by a court to exercise its discretion judicially mentioned above, the Appellant does not contend that his sentence be interfered with because of an irregularity or misdirection but contends that same is too severe or too harsh which I interpret to mean that it induces a sense of shock. I therefore have to determine whether the sentence does induce a sense of shock in reality. As indicated above, a sentence induces a sense of shock if there is a striking disparity between the one passed and the one which the Court of Appeal would have imposed.

[11] The applicable sections of the Arms and Ammunition Act of 1964 as amended provide for a minimum sentence. As regards the unlawful possession of a firearm the minimum sentence is five years whilst for the unlawful possession of live rounds of ammunition is two years.

[12] Considering the sentencing trend of this court in similar matters, I do not think there is any room for contending that the discretion of the court *a quo* was not exercised judicially, on sentence relating to the unlawful possession of the live rounds of ammunition as well as on the Appellant's entering and remaining in Swaziland without a valid permit. I also did not understand the Appellant to contend otherwise concerning these.

[13] The question therefore centres around the sentence with regards the contravention of section 11 (1) read together with section 11 (8) of the Arms and Ammunition Act of 1964, which is otherwise known as the

unlawful possession of a firearm without a license or permit. I further agree that in so far as the appropriate section allows a sentence above five years there was no misdirection or irregularity by the court *a quo*. However I cannot agree that the sentence concerned does not induce a sense of shock when applying the test referred to above. In other words, when I consider all the circumstances of the matter the sentence this court would have imposed is strikingly different from that the court *a quo* imposed. I say this being fully alive to the fact that the court *a quo* was influenced more by considerations of deterrence, and had taken into account the fact that the Appellant was a potential threat to the security of Swaziland and its citizens and the fact that normally such people enter the country to commit stock theft or dagga smuggling. He however had not given due weight to the fact that on the day in question there was no offence, distinct from those with which the accused had been charged and convicted of, committed by the accused. The same thing goes for the weight attached to his being a first offender as well as his elderly age, which was put above 60 years without it being disputed.

[14] Being that as it may it is my considered view that a sentence of five years imprisonment without the option of a fine and without a portion of the sentence being suspended, would be an appropriate one on what was count 1 or the unlawful possession of a firearm without a license, otherwise referred to as the contravention of section 11 (1) read together with section 11 (8) of the Arms and Ammunitions Act of 1964. I have come to this conclusion after considering the seriousness of this offence, its prevalence in society and the fact that Applicant comes to the country to commit such offences as stock theft and that by arming himself he places the safety of Swazis at stake. I have further

considered the fact that the other sentences would have to run concurrently with this one.

[15] I can only record that Mr. Magagula for the crown, whilst acting in a very professional manner, submitted on similar lines and noted that the sentence on count 1 did look excessive and that it begged to be interfered with and replaced with an appropriate sentence on the same lines as those I have arrived at above. I also agree with his submission that the sentence on the unlawful possession of live rounds of ammunition is proper or put differently, is not strikingly different from the one this court would have imposed, which consideration also goes for the sentence on the entering and remaining in Swaziland without a valid permit.

[16] I agree as well that the sentences do deserve to run concurrently owing to the manner of their occurrence. The backdating of the sentence to take effect from the date of the Appellant's arrest is also not to be interfered with.

[17] Consequently I make the following order, which is the one the order of the court *a quo* should read.

1. For the contravention of section 11 (1) read together with section 11 (8) of the Arms and Ammunition Act 24 of 1964 (count one) the sentence imposed by the learned Magistrate is set aside and is substituted with the following:-

- 1.1 The accused is sentenced to 5years imprisonment.
2. As regards the contravention of section 11 (2) of the Arms and Ammunition Act 24 of 1964, (count two) the appeal by the Appellant be and is hereby dismissed.
  3. As concerns the contravention of section 14 (2) of the Immigration Act 17 of 1982 the appeal by the Appellant be and is hereby dismissed.
  4. The sentences aforesaid are to run concurrently and shall take effect from the 27<sup>th</sup> August 2009.

**Delivered in open Court on this the .....day of March2012.**

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**N. J. HLOPHE**  
**JUDGE**