



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Review Case No. 25/14

In the matter between

REX

and

**SIBUSISO KUNENE
DENNIS KUNENE**

**1st Accused
2nd Accused**

Neutral citation: *Rex v Sibusiso Kunene and Another* (25/14) [2014]
SZHC 348 (19 September 2014)

Coram: Mamba J

Considered: 19 September 2014

Delivered: 19 September 2014

[1]Criminal Law and Procedure – On a conviction of stock theft in contravention of section 3 (a) of the Stock Theft Act 5 of 1982 (as amended). Court enjoined to enquire into the presence or otherwise of Extenuating circumstances in connection with the commission of the offence before passing sentence. Failure to do so irregular and sentence imposed set aside.

[2]Criminal law and Procedure – review court not in a position to determine whether or not extenuating circumstances present. Case remitted to trial court to conduct such inquiry.

- [1] This matter comes before me on automatic review. The two accused herein made their first appearance before the Pigg's Peak Magistrate's Court on 20 December 2012. They were charged with stock theft in contravention of section 3 (a) of the Stock Theft Act 5 of 1982 (as amended).

- [2] Both accused were not represented during the trial which was heard by the late Learned Senior Magistrate H.J. Khumalo. The trial dragged on for some time and was finally concluded on 12 April 2013. Both accused were found guilty as charged and each was sentenced to a term of two years of imprisonment without the option of a fine.

- [3] After conviction but before sentence, both accused voluntarily offered to compensate the complainant for the heifer that they had stolen from him which was valued at E4000.00. The case had to be postponed for two weeks to allow the accused to raise the sum of E4000.00 but at the end the accused managed to raise and compensate the complainant in the sum of E3000.00.

- [4] The actual proceedings leading to the conviction of the accused herein appears to have been in accordance with justice save that the learned trial magistrate failed to conduct an inquiry to determine the existence or

otherwise of extenuating circumstances in connection with the commission of the offence, as required by section 18 (1) of the Stock Theft Act. This the court had to do before passing sentence on the accused. The relevant provisions of the Act provides as follows:

‘18. (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 –

(a) two years without the option of a fine in respect of a first offender; or

(b) five years without the option of a fine in respect of a second or subsequent offence,

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.’

[5] The above provisions of the Act have been the subject of countless decisions of this Court such as the following:

R v Matsenjwa Bhekani, 1987-1985 (1) SLR 393, Mpostoli Zaza Simelane v R, Crim. Appeal 25/2008 and Sandile Majahonkhe v R. Cim. Appeal 5/2009.

In *Sandile* 's case (*supra*) this Court stated that:

‘[12] In terms of section 18 (1) of the Act,

“(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-

(a) two years without the option of a fine in respect of a first offence; or

(b) five years without the option of a fine in respect of a second or subsequent offence,

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.”

The proviso makes it mandatory that where someone has been convicted of contravening either section 3 or 4 of the Act, the court must conduct an

enquiry to determine whether or not extenuating circumstances exist in connection with the commission of the offence. The duty to conduct this enquiry lies with the presiding officer. (**DANIEL MBUDLANE DLAMINI v REX (CR. APPEAL 11/98)** (unreported). Recently this court considered a similar point in the case of **MPOSTOLI ZAZA SIMELANE v REX CR. APPEAL 25/2008**, judgement delivered on the 6th August 2009 and stated as follows:

“[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 incumbent 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 otherwise of extenuating circumstances immediately after conviction but before mitigation.”

These remarks are apposite in this case. In **Zaza’s case (supra)**, the sentences imposed on the appellant were set aside and the matter was remitted to the trial court to conduct the necessary enquiry and then pass sentence de novo. A similar order was made under similar circumstances in **R v MATSENJWA, BHEKANI, 1987-1995 (1) SLR 393** where **ROONEY J** said :

“Under the Stock Theft Act (as amended), it is clear that the consideration which must guide the court relate to the commission of the offence. As the learned Magistrate did not, in the present case, consider the facts of the case, he misdirected himself. As it is possible that on a proper direction he might find extenuating circumstances, I shall send the case back to the court below for that purpose.’

[6] In the result, the following order in made:

- (a) The conviction of both accused is hereby confirmed.
- (b) The sentences imposed on each of the accused herein is hereby set-aside.
- (c) The matter is remitted to the incumbent Senior Magistrate (Pigg’s Peak) to deal with the matter in terms of section 191 bis of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) and pass sentence anew on the accused. This has to be done as soon as possible in view of the 2 year sentence that was imposed on the accused in 2013.

MAMBA J