IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 197/2013

In the matter between:

REX

And

THOKOZANI DLAMINI

WONDERBOY KUNENE

Neutral citation: *Rex vs Thokozani Dlamini & Wonderboy Kunene (197/13) 2015 SZHC 91(06 June 2016)*

Coram: Hlophe J

For the Crown: Miss. E. Matsebula

For the 1st Accused: In Person

For the 2nd Accused: In Person

Date Heard: 28 April 2016

Date Handed Down: 06 June 2016

Summary

Criminal Law – After convicting both accused persons for an alleged violation or contravention of Sections 3 (1) (c) and 3 (1) (a) of the Counterfeit Currency Order No. 31/1974, as expressed respectively in counts 1 and 2, the Magistrate referred the matter to this court for sentencing in accord once with Section 292 as read with Section 293 of the Criminal Procedure And Evidence Act 67 of 1938.

The evidence led ex-facie the record confirms that the 1st accused was correctly convicted on the basis of his plea of guilty with regards Count 1 – The conviction of accused 2 in count 2 was not supported by the evidence when such is viewed against the charge sheet even though there was established a different offence committed in violation of the same statute.

Whether open to this court to substitute a correct conviction of the accused by pronouncing the one proved and thereafter to pass the appropriate sentence. Court of the view, taking the provisions of Sections 194 of the Criminal Procedure and Evidence Act of 1938 as read with Section 293 (3) of the same Act, that it is entitled to correct the obvious mistake by passing the appropriate sentence.

What is an appropriate sentence in circumstances like the present – Accused persons having been convicted of having committed similar offences sentenced to a fine of E3000.00 each or three years imprisonment, half of which is suspended for a period of three years.

JUDGMENT

[1] The two accused persons herein were charged with two different offences allegedly arising from two different contraventions of The Counterfeit Currency order No. 31 of 1974. In count 1 both accused persons were charged with having contravened Section 3 (1) (c) of the said Act, it being alleged that they had each, and whilst acting in furtherance of a common purpose, unlawfully and intentionally uttered counterfeit currency in the sum of R1200.00 by presenting same to a petrol attendant at the Tiger City Filling Station in Manzini whilst knowing very well that the money in question was made of forged notes.

[2] In count 2 the accused persons were charged with an alleged contravention of Section 3 (1) (a) of the Counterfeit Currency Order in that they had each or jointly, whilst acting in furtherance of a common purpose wrongly, unlawfully and intentionally uttered forged notes amounting to R1200.00 at the Central Filling Station in Manzini.

[3] It is not in dispute that when trial commenced in the matter, the accused persons pleaded differently to the different charges. The first accused pleaded guilty to count 1 and not guilty to count 2. The second accused

on the other hand, pleaded not guilty to count 1 whilst pleading guilty to count 2.

[4] It merits mention, that although there were similarities on what the particulars of the offences entailed (that is, that the accused persons uttered counterfeit currency notes in the sum of R1200.00), the subsections allegedly contravened were not the same. Whereas in count 1 the Subsection allegedly contravened was Section 3 (1) (c), in count 2, the Subsection allegedly contravened was Section 3 (1) (a). While Subsection 3 (1) (c) referred to the uttering or holding or tendering a counterfeit coin or a forged or altered note, Subsection 3 (1) (a) referred to the actual act of counterfeiting a coin or taking part in the process of counterfeiting a coin or forging a note.

[5] It therefore immediately becomes clear that there is something wrong with either the reference to the section said to have been contravened by the accused persons in counter 2 or with the particulars of the charge as set out in that count as regards how the section was contravened. It is for instance clear that on the face of it, the charge sheet suggests that the accused persons "performed a part in the counterfeiting process" of a coin or forging of a note by uttering or tendering forged notes in the sum of R1200.00 which is untenable when considering the simple reality that one

cannot "perform a part in counterfeiting a coin" by uttering or altering the alleged forged notes in the sum of R1200.00.

[6] This state of affairs is further complicated by the fact that the statute is very clear on what counterfeiting a coin refers to when juxta posed against forging a note. Counterfeiting relates to the production of a fake coin while forging relates to the production of a fake note. It was to later become clear as the evidence was led, that the R1200.00 allegedly uttered by the accused person in both counts was in notes form. This makes the reference to "counterfeiting" notes a in that sense a misnomer therefore. This latter point may be more an issue of language inexactitude rather than one of prejudice occasioned the accused persons. What remains clear though from the evidence is that the performing of a part in the counterfeiting process by the accused persons in count 2 actually refers to uttering or tendering forged notes for payment of the petrol supposedly purchased. I shall revert later to this aspect of the matter.

[7] After the pleas had been tendered in the manner set out above; the crown as it is entitled to do in criminal matters, accepted the pleas of guilty as tendered by the accused persons while choosing not to lead evidence on the charges pleaded not guilty to. The effect of the failure to lead evidence to the charges pleaded not guilty to, was to render the accused

persons acquitted in such charges. In reality this meant that 1st accused was acquitted in count 2 whilst accused 2 was acquitted in count 1.

[8[With regards the pleas of guilty as tendered and accepted, the crown chose to lead evidence in order to prove the commission of the offences concerned. This was obviously in line with Section 238 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938, which provides as follows:-

> **"238 (1), If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons other than the offence with which he is charged), and the prosecutor has accepted such plea, the court may if it is –**
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> **(a) The High Court or a Principle Magistrate Court, and the accused has pleaded guilty to an offence other than murder, sentence him for such offence without hearing any evidence:**

(b) A magistrate's court other than a principal magistrate's court, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed:

Provided that if the offence to which he has pleaded guilty to is such that the court is of the opinion that such an offence does not merit punishment of imprisonment without the option of a fine or of whipping or a fine exceeding two thousand Emalangeni, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding two thousand Emalangeni, or it may deal with him, otherwise in accordance with law".

[9] The net effect of the entire process with regards the pleas of guilty was that the first accused was, after the leading of the evidence in proof of the commission of the offence alleged in count 1, convicted while the second accused was convicted only in count 2. From what has been said above, with regards count 2, it was in my view irregular to find the second accused guilty of "performing a part in the process of counterfeiting a coin" by "uttering" notes amounting to R1200.00. Before dealing at length with the propriety or otherwise of the conviction of the second accused in count 2, one needs to turn to what the evidence before court proved.

[10] With regards count 1, the evidence led in court proved that the first accused, who is said to have been in the company of others, drove to the Filling Station known as the Tiger City Total Filling Station in Manzini and thereat purported to be purchasing petrol for the sum of R1200.00. After such petrol had been poured into the containers he had brought, the first accused who was identified, purported to pay for the said petrol using fake R100.00 notes amounting to R1200.00. When the attendant noted that the money paid to him was fake, the car drove off despite it being flagged to stop to clarify the issue of the suspected fake notes. Because of the accused person's conduct, the attendant's salary was

allegedly withheld for that month as it was used to pay for the fuel acquired by the accused by means of the fake notes in question. This version was not disputed ex facie the record.

[11] As regards count 2, the evidence led revealed that on the 13th February 2013, four people drove into the Filling Station known as the Central Filling Station, in a greyish Toyota Corolla. One of them asked the petrol attendant to fill certain containers with petrol worth R1200.00. Having done that, the attendant was paid with fake notes worth R1200.00, which upon noticing he tried to engage the occupants of the car but the car drove off without him getting any answers with regards the notes paid to him. This incident was later reported to the police. The Filling Station in question suffered a loss of the money equivalent to the petrol supposedly purchased.

[12] There was further led the evidence of an obvious accomplice witness in Gcina Nyembe, who informed the court how the 2nd accused, whom he had known for a considerable period had on the day of the commission of the offence asked for the use of his car to enable him perform a certain task. It turned out that the task in question was to purport to buy petrol

through the use of some fake or forged notes, which the said accused allegedly disclosed he had. This witness further revealed how they had, on the 12th February 2013, gone to the Tiger City Filling Station in Manzini and thereat purchased petrol worth R1200.00, only to pay for same using forged notes amounting to R1200.00. The full description on what happened during this incident is corroborated by what was said to have happened in count 1.

[13] This witness further revealed how on 13th February 2013, he in the company of the second accused, at the latter's instance, had used his car to fetch certain containers at Fairview and later proceeded to the Central Filling Station in Manzini. Upon arrival there he said the second accused had alighted from the car and facilitated the filling of petrol into their containers under the guise they were purchasing same. After the containers had been filled up, the second accused went back into the car, counted the forged notes to R1200.00, the purported purchase price, and used same to pay for the petrol. When the attendant realized that the notes used to purportedly pay him were fake, he tried to reason with them only for the second accused to order them to drive away. A reaction by some members of the public at a certain resort attempting to stop them,

could not yield fruits as the second accused is said to have ordered them to drive through, which they did.

[14] It was only after a few days that the police commenced their investigations which led to him having to disclose his companions in the commission of the offence in question. They had been identified through the registration numbers borne by his motor vehicle as used in the crime commission.

[15] It was on the basis of the foregoing that the court, after submissions, pronounced a guilty verdict against the two accused persons; each on the count to which he had pleaded guilty to. The accused persons were allowed to mitigate after which, instead of passing what she considered an appropriate sentence, the learned Magistrate hearing the matter decided that in view of her sentencing powers as afforded her by the relevant statutes, the matter had to be referred to the High Court for sentencing purposes. This she justified by comparing the maximum sentence to be imposed in a matter where the accused person would be convicted for having contravened Section 3 (1) (a) and 3 (1) (c) of the Counterfeit Currency Act of 1974. She reasoned that whereas her

sentencing jurisdiction in terms of the amended Magistrates Court Act No. 2 of 2011 was seven years or E10 000.00 fine, the maximum sentence in terms of Section 3 (2) (a) of the Counterfeit Currency Act, which is the relevant one for purposes hereof was, 15 years imprisonment or E15 000.00 or both.

[16] Section 3 (2) (a) of the Counterfeit Currency Order No. 31 of 1974 is couched as follows verbatim:-

> **"3 (2) A person convicted of an offence under subsection 1 shall be liable to the following penalties namely, in the case of an offence referred to in:-**
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> **(a) Paragraph (a), (b), (c), (e), (f), (g) or (i) thereof, to a fine of E15000.00 or imprisonment for fifteen years or both".**

[17] It is clear that in her understanding, the learned magistrate who heard the matter, she had no discretion in the case of a conviction but to impose the sentence as stated whatever the circumstances. It has already been observed that a statute that interferes with the sentencing powers of a court so as to remove from it the discretion enjoyed by the court in that

regard only does more harm than good. In the present matter the question whether this was as a matter of fact a case in which the Magistrate could not herself impose a sentence as she deemed appropriate, was neither raised nor argued before me. Consequently the matter was, for purposes hereof, dealt with as one in which it was proper for the Magistrate to have referred it to this court for sentencing, which means the question whether it was in law such a matter has not been decided. I must however state that having considered the matter closely, I have no doubt that the sentence expressed in Section 3 (2) (a) of the Counterfeit Currency Order is merely a maximum sentence. To this extent, I do not agree the court could not deal with it but I will none the less go ahead and deal with same as there is no prejudice suffered by any of the parties in my doing so.

[18] Having said that, there is no hurdle to imposing a sentence against the first accused for his having violated Section 3 (1) (c) of the Act as that seems to have been confirmed by the evidence. A hurdle that needs to be dealt with prior to imposing what this court considers an appropriate sentence is as concerns count 2, which allegedly refers to violating Section 3 (1) (a) of the Act, (which as stated above referred to the accused as having performed a part in the process of counterfeiting a coin" by uttering a forged note well knowing it to be forged. I have

already indicated that as it stood, this was a misnomer. Secondly there is no evidence of any roll played by either of the accused in the production of the forged notes.

[19] The question in my view is what should happen to the relevant count therefore? In other words should the conviction be set aside with regards the relevant count? It seems to me that the short comings referred to above were erroneous without causing the accused any prejudice. I say this because when looking at the framing of the charge itself as set out above and in the foregoing paragraph, it becomes clear that it is not real in the manner it is couched. In fact one can only "perform a part in the processing of counterfeiting coin or forging a note," where he is shown to have played a part in its production. In the same view one can "utter" a note if he is shown as having tendered it in payment of a particular transaction such as using it to pay for something purchased or for services rendered.

[20] In the present matter the evidence on count 2 does not indicate the accused performing any part in the process of counterfeiting a coin or forging a note. Instead it shows him tendering or uttering forged notes

amounting to R1200.00 at the Filling Station referred to as the Central Filling Station. The accused himself could not dispute the said evidence when it was led which means that he would suffer no prejudice if convicted for uttering or tendering forged notes as contemplated in Section 3 (1) (c) of the Act as opposed to Section 3 (1) (a). Although on the face of the charge sheet the accused person is charged with Contravening Section 3 (1) (a) which presupposes that he played a part in the processing of a counterfeit coin or forging of a fake note by uttering a note"; it is clear that in fact all he did was really to "utter" or tender fake notes to pay for petrol he purported to be purchasing at the Central Filling Station. In my view the evidence has therefore established a violation of Section 3 (1) (c) on count 2 than a violation of Section 3 (1) (a), which the evidence led did not prove. Since a complete offence of a similar nature as that initially referred to has been proved as partly referred to in the charge sheet, it seems to me that there is nothing wrong with the accused having been convicted and committed to this court for sentencing. I believe I am supported in this view by what is stated in Section 194 read together with Section 293 (3) of the Criminal Procedure and Evidence Act of 1938.

[21] Section 194 of the Criminal Procedure And Evidence Act provides as follows verbatim:-

> **"Conviction for part of a crime charged.**
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> **194. In other cases not herein before specified, if the commission of the offence with which the accused is charged as defined in the statutory enactment or statutory regulation creating the offence, or as set forth in the indictment or summons, includes the commission of any other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence charged is not proved".**

[22] In my understanding this means that although charged with a different offence, if the evidence proves another offence, then the accused could be convicted of the offence so proved, which is consistent with what happened in the present matter.

[23] In the context of this matter, what this court should do is put beyond doubt by Section 293 (3) of the Criminal Procedure And Evidence Act of 1938 which puts the position as follows:-

"293 (3) If any person is brought before the High Court in accordance with Subsection (2) such court shall enquire into the circumstances of the case and, if, after consideration of the record, it is satisfied of the accused's guilt, it shall thereafter proceed as if such person had pleaded guilty before it in respect of the offence for which he has been so committed".

[24] For the foregoing considerations I can now go ahead to pass what I consider to be appropriate sentences in this matter. Before doing so, I must reiterate what I said above namely that, that although on the face of it the sentences suggested by the Section are obviously serious I cannot say that it has taken away the discretion of this court in imposing what it considerers an appropriate sentence, which could be expressed in the form of either a suspended sentence, a fine or imprisonment. Given that there is no evidence of either of the accused persons playing part in the production of the forged notes, including the value of the Counterfeit Currency they each tendered, the sentence to be imposed should be reflective and should not be oppressive.

[25] Having considered all the circumstances of the matter I am of the considered view that an appropriate sentence herein will be the following:

Count 1

[26] The first accused be and is hereby sentenced to the following:-

26.1 A fine of E3000.00 or three years imprisonment.

26.2 Half of the said sentence is suspended for a period of three years on condition that the accused is not convicted of a similar offence during the period of suspension.

Count 2

[27] The second accused is sentenced to the following:-

27.1 A fine of E3000.00 or three years imprisonment.

27.2 Half of the said sentence is suspended for a period of three years on condition that the accused is not convicted of a similar offence during the period of suspension.

N. J. HLOPHE
JUDGE - HIGH COURT