



**IN THE HIGH COURT
OF SWAZILAND**

JUDGMENT

Cri/Rev Case No. 17/2018

In the matter between

REX

And

SAMKELO ERNEST KHUMALO & ANOTHER

Neutral citation: *Rex vs Samkelo Ernest Khumalo & Another* (75/2016)
[2018] SZHC 85 (05 April 2018)

Coram: **MAMBA J**

Heard: **05 April 2018**

Delivered: **05 April 2018**

[1] *Criminal Law & Procedure – Conviction on a charge of Robbery – Court suspending a part of sentence imposed. No part of the sentence may be suspended as per Section 313 (2) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Sentence set aside and new one imposed by Review Court.*

[1] This matter first appeared before me on automatic review three weeks ago.

I immediately requested the Registrar of this Court to invite the Crown and

the Accused persons herein to appear in Court on 23rd March 2018. Both the Crown and the second accused honoured that invitation. The first accused was not present. He had not been served or summoned to appear in court. The matter had to be postponed to allow the Registrar, with the help of the Police to locate and notify the said accused that the matter had been postponed to today and he was required to be present in court.

[2] When the matter was called in court today, the court was advised that the first accused was reported to have left the country to find work in the Republic of South Africa and his whereabouts in that country were unknown to anyone. The court determined that the matter should proceed in the absence of the first accused. The court decided on this move because the issues involved in the case were such that the presence of the accused persons, or indeed the Crown, was not absolutely required or necessary.

[3] The Accused persons were charged and convicted of the crime of Robbery on 08 July 2016. They were tried by the Manzini Magistrate's court. The Robbery was said to have been committed on 15 January 2016 and the Accused made their first appearance in court two days later and they were remanded into custody. They were unrepresented during the trial.

[4] Upon conviction, they were each sentenced or ordered to pay a fine of E4000-00, failing payment thereof, to undergo imprisonment for a period of four years. One half of the sentence was, however, conditionally suspended for a period of three years.

[5] The court queried the above sentence especially the suspension of a portion as manifestly irregular and invited the accused and the Crown to address the court thereon. Counsel for the Crown readily accepted or conceded that the court was in error in ordering a suspension of a portion of the sentence as such suspension is contrary to Section 313 (2) of the Criminal Procedure & Evidence Act 67 of 1938 (as amended). That section provides as follows:

‘(2) If a person is convicted before the High Court or any Magistrate’s Court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with sub sections (4) and (5) respectively’.

The offence or crime of Robbery is one of the offences listed in the Third Schedule. So plainly, the court was in error in ordering a suspension of a

part of the sentence it imposed on the accused persons. The whole sentence thus cannot stand and is hereby set aside.

[6] In *Rex v Zweli Nganka Magagula (22/11) [2012] SZHC (13 April 2012)* this court stated:

‘[3] In terms of section 313 of our Criminal Procedure and Evidence Act 67 of 1938 read with the third schedule thereto, it is impermissible for a court to suspend a sentence or portion thereof on a conviction on a charge of MURDER, ROBBERY, RAPE or any conspiracy, incitement or attempt to commit any of the said crimes. In *Rex v Mancoba Mkhontfo (review case number 26/2010)* this court stated that:

‘[4] Rape, the offence for which the accused was convicted and sentenced is, together with MURDER AND ROBBERY and the attempt conspiracy and incitement to commit such offences, is listed in the third schedule in the Criminal Procedure and Evidence Act 67 of 1938 (as amended). S313 of the Act stipulates that no part or

portion of a sentence in respect of such offences may be suspended. Plainly therefore the trial court was in error in suspending a portion of the sentence that was imposed on the accused. *Vide Sandile Shabangu v R Criminal Appeal 15/07 delivered in 2007 (unreported), R v Gumede 1970-1976 SLR 424.* The case of *Stanley Makhakha Dlamini v R 1977-1978 SLR 66* was in my respectful judgment rightfully overruled in the case of *Mngomezulu Sibusiso and Others v R 1987-1995 (3) SLR 179 at 183F-G.* See also *Mbhambali Siphon and Another v R 1987-1995 (4) SLR 116 at 118, Lucky Nhlanhla Khumalo v R High Court Criminal Appeal 19/2008 (unreported) and Jango Lontos Mkhavela v R High Court Criminal Appeal 3/2009 also unreported judgment delivered on the 20th August 2009.* These cases were all reviewed and referred to by this court in

R v Sabelo Dlamini Review Case No. 66/2009 judgment delivered on the 25th January 2010.'

These remarks are apposite in this case. Also appropriate herein are the remarks stated immediately after this excerpt; namely:

'[5] It remains for me to consider whether in all the circumstances of this case and in particular the period already spent by the accused in custody, a sentence of seven years of imprisonment was fair and merited. Whilst, it may be argued that the trial court clearly meant or wanted the accused to undergo an immediate and effective custodial sentence of four years, it cannot in my judgment be seriously argued that a conditionally suspended sentence is not a real and substantive sentence.'

- [7] The court has been advised that both accused, at various and different times were able to pay the unsuspended part of the fine and were released from custody.
- [8] This court is mindful of the fact that a suspended sentence is in itself a real sentence - notwithstanding it being suspended. This court further notes that the Learned Magistrate in the court below; no doubt after considering all the relevant facts of the case, was of the considered view that the accused persons must in real terms, pay a fine of two thousand Emalangi each, or undergo imprisonment for a period of two years; thus the unsuspended part of the sentence. The complainant was robbed of property valued at E1576.00
- [9] As already stated above, the accused paid the fine in question and were released from custody in 2016. The exact dated for their release could not be ascertained. The reality of the matter though is that the accused have been out of custody for close to two years now. That the review was only heard or called now is a matter for which

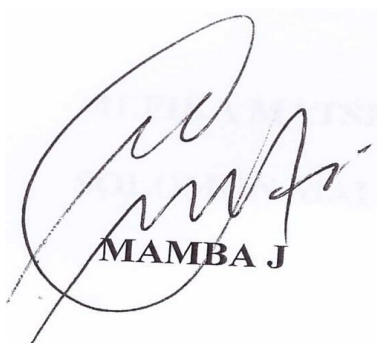
they are not to be blamed. The delay has not been explained to the court. In the circumstances, it would be grossly unfair and an injustice for this court to reinstate the whole sentence imposed by the court below - including the suspended portion thereof. That would mean that the accused would have to pay an additional two thousand Emalangi fine or go to jail for a period of two years. I do not think that would be just or that justice would be served by such an order. I say so fully cognizant of the fact that the fine or term of imprisonment that was ordered by the court appears to be rather lenient for such a crime - where violence to the person of another is an element.

[10] Taking into account all the factors and circumstances of this case, I make the following order:

(a) The conviction of the accused is hereby confirmed.

(b) The sentence imposed by the court below is hereby set aside and substituted with the following:

- (c) Each of the accused is ordered to pay a fine of two thousand Emalangeneni, or failing payment thereof, to serve a period of two years (24 months) imprisonment. The sentence is backdated to take effect from the 17th day of January 2016.



MAMBA J