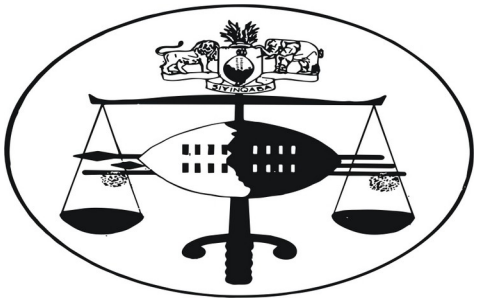

IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Case No. 37/2010

In the matter between:

BHEKIZWE MOTSA **Appellant**

versus

Rex **Respondent**

Neutral citation: *Bhekizwe Motsa v Rex 37/2010 [2012] SZSC 6 (31 May 2012)*

Coram**:** **M.M. RAMODIBEDI CJ, S.A. MOORE JA, E.A. AGIM JA**

Heard: **3 and 8 May 2012**

Delivered: **31 May 2012**

Summary: ***Appeal against sentence effectively 7 years for two counts of attempted murder − source and nature of discretionary power of trial Court to sentence − scope and nature of power of Supreme Court under S. 5 (3) Court of Appeal Act to deal with appeals against sentence − when appellate Court can interfere with sentence by Court a quo − sentence too severe to induce sense of shock − attempted***

murder − power to punish therefor and appropriate punishment − observence of S. 16 (9) 2005 Constitution − appeal fails on the sole ground− custodial sentence to include pre-sentence detention.

AGIM JA

[1] On the 4th November 2010, the High Court per M.C.B Maphalala J in case No. 246/2008 convicted the appellant herein on two counts of attempted murder. Following this conviction, the court sentenced the appellant to 7 years imprisonment in the first count and another seven years imprisonment in the second count and ordered that both sentences run concurrently.

[2] Being dissatisfied with this sentence, the appellant filed a notice of appeal commencing this Appeal No. 37/2010 containing one ground of appeal as follows: −

> " The sentence is so severe that it induces a sense of shock on the appellant".

[3] Both sides have filed their respective heads of argument.

[4] Appeals against sentence, however phrased, touch on how the trial court exercised its discretionary power of sentencing. A

complaint that the sentence is the result of misdirection or error of law or fact and a complaint that the sentence is too harsh or severe or disproportionate question how the discretion was exercised by the trial court. Therefore, in my view, considering the ground of appeal and the heads of argument of both sides the issues that arise for determination here are −

(i) Whether this court should interfer with the trial court's exercise of sentencing discretion in the circumstances of this case.

(ii) Whether a reasonable court or tribunal could have imposed an effective sentence of seven years on the appellant in the circumstances of this case.

[5] S. 301 (1) of the Criminal Procedure and Evidence Act 1938 gives the trial Court the discretionary jurisdiction to determine the nature or term of custodial sentence that is appropriate in a case. The same Act in S. 294 (2) provides that " a court may, before passing sentence, recieve such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed." It is clear, therefore, that a trial court in determining the custodial or monetary sentence that is appropriate in the circumstances of

a case is exercising a discretionary jurisdiction. The sentence, be it custodial or monetary is the result of the exercise of such discretion.

[6] By this appeal, the appellant invites this court to interfere with the exercise of the sentencing discretion of the trial court. The power of this court to do so is provided for by S. 5 (3) of the Court of Appeal Act No. 74 of 1954 which states that " On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

In the exercise of this power, this court is bound to have regard to certain universally accepted guidelines that have been adopted in a long line of cases in this jurisdiction on the scope of the power of the appellate court on appeals against sentence. The above provision does not give this court an unfettered or unimpeded power to substitute the discretion of the trial court with its own. The power of this court to interfere with the exercise of discretion of a trial court in sentencing is limited to

only instances that the trial court did not exercise its discretion judicially and judiciously or that the trial court's discretion was wrongly or improperly exercised. An exercise of discretion is judicial if it is a in accordance with the law and it is judicious if it is based on the facts before the Court and the result is borne out by those facts. An exercise of discretion that is not judicial and judicious cannot be a proper or correct exercise of discretion.

[7] In considering the scope of the power under the said S. 5 (3) of the Court of Appeal Act, the Court of Appeal of Swaziland in Masuku v R (1977- 1978) SLR 86 at 89 held that **"** the sentence which S. 5 (3) of the Court of Appeal Act enjoins this court to pass in substitution for that of the trial Court is such other sentence (as it thinks ought to have been passed). Now in the very nature of things it is imposible to lay down the mathematical precise periods or formular in what is pre-eminently a discretionary matter. Consequently general guidelines are necessary to be employed by a court of appeal as criteria when determining what sentenced "ought to have been passed". Those criteria are indicated in Thwala v R, supra. It is almost axiomatic that the mere fact that an appeal court would not itself have passed the same sentence as that appealed against is not a relevant criterion. In enacting S. 5 (3) of the

Court of Appeal Act it can not, in my opinion, have been the intention of the legislature − contrary to all generally acepted principles of criminal appeal jurisdiction − to vest the Court of Appeal with unfettered arbitrary power to, as it were, sentence anew without invoking the criteria usually employed in such matters as indicated in Thwala v R, supra or, in certain special types of case, the criterion of reasonableness. Thwala's case was concerned with a period of imprisonment. As was pointed out in S v M 1976 (3) SA 644 (A) − wherein the trial court passed a sentence of death for rape and the ambit of the Appellate Division's interference with sentence was again passed in review − the "disparity" or (strikingly inappropriate) criteria are difficult of application in relation to a sentence of death. In such a case it is more appropriate to apply the criterion of reasonableness. That is to say, before the appeal court will interfere, it must be satisfied that no reasonable trial court would have imposed the death sentence − of more particularly pp 650F-H and 651B of S v M. In my opinion, the aforegoing principles and guidelines are not impaired by the provisions of s 5 (3) of the Court of Appeal Act."

[8] The general law on appeal against sentence was correctly stated by this court per Banda JA (as he then was) in Siboniso Sandile

Mabuza v The King (Crim. App. No. 1/2007 decided on 9 May 2007) thus- **“A sentence is always a matter which is in the discretion of the trial court. It is for the trial court, after considering all the surrounding circumstances to find what is the appropriate sentence to impose. This court, as an appellate court, can only interfere with the sentence if there is a misdirection or irregularity or as it is sometimes stated when this court finds that there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would have passed.”**

In R v Percy Stanley Pyan Dlamini (1977 – 1978) SLR 28 at 26 the High Court per Nathan CJ relied on the statement of the Court of Appeal in Thwala v R (1970 – 1976) SLR 363 at 364A that “it is important that an appeal court should not erode the discretion of the trial judge, despite the fact that an appeal is a re-hearing”. The same principles apply to a court of review, and to the question whether a sentence should be reduced. As I have said, I do not consider that I would be justified in interfering with the magistrate’s exercise of discretion.”

In Masuku v R (supra) the Court of Appeal went further to state that **“Although an appeal is a rehearing, in the absence of a misdirection or failure to have regard to some relevant factor, a court of appeal does not lightly interfere with a competent sentence passed by a trial court. The criteria ordinarily employed by an appeal court in deciding whether or not to alter a sentence of imprisonment have often been stated − inter alia, by this court in Thwala v R 1970 – 1976 SLR 363.”**

In Eric Makwakwa v Rex (Crim. App. No. 2/2006, the Swaziland Court of Appeal per Ramodibedi JA (as he then was) held “Similarly, the Appellant’s complaint against sentence is without any merit. This is so because sentence is pre-eminently a matter within the discretionof a trial court. A Court of Appeal will not generally interfere unless there is a material misdirection resulting in a miscarriage of justice. No such misdirection has been shown to exist in this case. On the contrary, it is clear from the record that the trial court properly took into account all that needed to be considered in the interests of justice including the personal circumstances of the Appellant. It is right that courts should mark their abhorrence of the prevalent sexual attacks on young children as a deterrent.”

The Lesotho Court of Appeal in Matsotso v R (1962-1969) SLR 36 7 per Elyan JA delivering its unanimous judgment at P. 366 – 367 held that **"whilst no general rule can be laid down as to the circumstances in which the discretion to reduce sentence should be exercised, the nearest approach to the formulation of such a rule may be said to be that, the test is, whether there was an improper exercise of discretion by the trial judge.**

In cases for example where a court in passing sentence has exceeded its jurisdiction or imposed a sentence which was not legally permissible for a crime, or been influenced by facts which were not appropriate for consideration in relation to the sentence, a Court of Appeal would have power to interfere. But where, as here, no such consideration enters into the matter it is not for a Court of Appeal to interfere with a sentence.
Before so doing a Court of Appeal would have to be satisfied that a proper judicial discretion was not exercised by the Court passing sentence. In our opinion this is not so here. The sentence passed cannot be

described as unreasonable or out of proportion to the gravity of the offence."

[9] Having stated how an appellate court should deal with an appeal against sentence, let me now proceed to answer the questions that have arisen for determination herein.

[10] The complaint of the appellant in this appeal is that the sentence of 7 years is so severe that it induces a sense of shock in him. The Court of Appeal in Thwala v R (supra) stated that "sense of shock" in an appeal against sentence is an old expression that is now displaced by the more modern expression of "startlingly `inappropriate" and " disturbingly in appropriate". Implicit in the contention that a sentence generates a sense of shock is that it is inappropriate or disproportional or unreasonable to an independent right thinking person. In other words it offends an ordinary person's sense of reasonableness and proportionality in the light of the perculia circumstances of the case. A sentence that is strikingly inappropriate or disproportionate is beyond dispute unreasonable. I think that this is the kind of sentence Moore JA in Thapelo Motoutou Mosiiwa V Rex (Criminal Appeal No. 0124/05) referred to when he said "a sentence should not be of such severity as to be out

of all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated." The rule against disproportionate sentence is constitutionally entrenched by S. 21 (6) of the 2005 Constitution as part of the fundamental right to fair hearing.

[11] Therefore it becomes necessary at this juncture to determine if the effectively 7 years sentence is so severe as to be considered disproportionate or unreasonable or unfair by independent right thinking persons.

[12] The facts that led to the conviction of the appellant are at pages 11-35 of the record of this appeal. The gist of the facts are as follows. The appellant had gone to see the girlfriend, one Phumlile Ginindza. The girl refused to talk to the accused but informed him that she had a new boyfriend. The appellant went back to his workplace where he was employed as a security guard. At the said workplace, he stole a rifle gun belonging to one Albert Mvubelo from the latter's Motor Vehicle and decided to go and kill the girlfriend with the gun. With the gun he proceeded to the girlfriend's house. The girlfriend was with another girl Vusi Tsabedze in her bedroom at that time. The

accused with intention to kill the girlfriend shot her in the forearm. In the process he also shot the other girl on the back. Both girls sustained injuries and were treated in hospitals and discharged. The trial court before imposing the said sentence considered the facts herein, the impact of the shooting on the two ladies, mitigating factors in favour of the Appellant including his personal circumstances and certain aggravating circumstances. The court said –

> " The accused is a first offender, married with three minor children and unemployed ; he apologized to the complainant for the injuries sustained, and asked for forgiveness. He pleaded guilty to the second count and co-operated with the police well as the prosecution by making a Statement to the Magistrate; he further conceded to the formal admissions in terms of Section 272 (1) of the Criminal Procedure and Evidense Act as a sign of remorse. However, the offence of attempted murder is very serious particularly that the accused has been convicted on two counts. The bullet is still lodged in the body of Vusi Tsabedze. The court has a duty to protect society from trigger happy people such as the accused. The complainants were not armed, and the accused did not

shoot in self-defence; he shot them as a form of vengeance. However, I will also take into account the personal circumstances of the accused when passing sentence.

In the circumstances the accused is sentenced to seven years imprisonment in the first count and another seven years in the second count. The sentences will run concurrently."

[13] This consideration of the court accords with the guide on what is an appropriate punishment laid down by the South African Court of Appeal per Holmes JA in S v Rabie (1975) 4 SA 855 (A) at 862 (9) that **"punishment should fit the Criminal as well as the Crime, be fair to Society and be blended with a measure of mercy according to the circumstances."** This statement was quoted with approval by the court of Appeal of Swaziland in Musa Kenneth Nzima v Rex unreported decision in Crim. Appeal No. 21/2007 delivered on the 14th November 2007). It is clear from the judgment of the trial Court that it considered the personal circumstances of the appellant and other mitigating factors, the circumstances and nature of the crime and the interest of Society in arriving at the sentence in question. The

Swaziland Court of Appeal per Ramodibedi JA (as he then was) in Sam Dupont v The King (Crim. App. No. 4/2008) held that **" In sentencing the Appellant to 13 years imprisonment, the Learned Judge a quo took into account the triad consisting of the crime, the offender and the interests of society as laid down in S v Zinn 1969 (2) SA 537 (A). Furthermore, the court properly took into account the prevalence of crimes of sexual offences against young children in this jurisdiction. These are relevant considerations. There can, therefore, be no valid criticism to be made of the trial court's approach in the matter. No misdirection has been shown to exist".**

[14] The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principle and sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and

circumstances of the crime, the interest of society and the personal circumstances of the accused other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment.

[15] The approach of the trial court in sentencing the appellant is correct, save that in dealing with the nature of the offence, it did not consider the punishment prescribed by law for the crime. It is not enough for the trial court to say that the ofence of attempted murder is very serious. The trial court must go further to state the punishment prescribed by law for the offence. This will serve as a useful guide in assessing the proportionality of the sentence especially in view of S. 21 (6) of the 2005 Constitution.

[16] There is no doubt that attempted murder is a very serious crime because the intended consequence is the killing of a human being. The appellant is complaining in this appeal that, serious as the crime may be, a sentence that is effectively 7 years is so severe that it induces a sense of shock in him. The starting point for considering the merit of his complaint is to find out the punishment prescribed by law for the offence of attempted murder.

[17] The offence of attempted murder, like murder, is a common law offence in Swaziland. It is not created by statute. Only an attempt to commit any offence against a statute or statutory regulation is made an offence by S. 181 (4) of the Criminal Procedure and Evidence Act. The substantive criminal law of Swaziland is found in several penal statutes and the common law. There is no single compendium or code of this substantive law. The main crimes and the general principles of criminal liability are to be found in common law and are therefore not contained in any Swaziland legislation. The applicable common law is the common law of Swaziland which by S.252(1) of the 2005 Constitution consists of the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd february 1907. The content of the common law of Swaziland is heavily influenced by English law. There is also no single compendium of the the principles and rules of the Roman Dutch Common law applicable in Swaziland as at the above date. The challenge has always been where to find the common law.

[18] The common law is to be found in Swaziland case law, the case law of sister jurisdictions like Botswana, Lesotho and South Africa, as well as the consensus of opinions of legal scholars

contained in authoritive texts (particularly those of South Africa). These case law and textbooks lay down the requirements for every common law crime as well as the general principles of criminal law. One has to rummage through the large number of cases and authoritive texts to find out the content of the applicable common law on crime. This absence of condification of Swaziland substantive criminal law or of the Common law applicable in Swaziland makes it difficult to access and ascertain the common law applicable in Swaziland. This situation poses a challenge to the effective application of the principle of legality as enshrined in S. 21 (5) and (6) of our 2005 Constitution. It is therefore of utmost importance that the competent authorities take steps to codify our substantive criminal law or the common law applicable here. The lack a of compendium of applicable common law is not perculiar to Swaziland. The challenge exists in most African countries with common law tradition. Many of them have been able to solve this problem in the area of criminal law by codifiying their sustantive criminal law. Example, is Botswana with a penal Code that in S. 217 prescribes the offence of attempted murder and made it punishable with life imprisonment.

[19] The common law that created the offence of attempted murder does not prescribe any punishment or penalty for the offence. The question that follows is whether a court can impose a punishment which is not prescribed either by statute or common law. This question cannot be ignored in a criminal trial where every matter is in issue, particularly one that raises any doubt in favour of an accused or a convict and the court has a mandatory duty to ensure a strict adherence to the due process of law. This is moreso where the sentence imposed by the court is being challenged for being too severe. It does happen that sometimes statute or common law can create an offence without prescribing punishment therefor. To avoid frustrating legitimate public expectation of law enforcement and to protect the interest of society, the trend is to presume that the law intends as punishable any act or omission it makes a crime and move away from the general principle of legality in punishment often expressed in the latin maxim, nulla poena sine lege (no penalty without a statutory provision or legal rule) which prohibits a court from imposing a punishment unless the punishment, in respect of both its nature and extent, is prescribed by statutory or common law. The preponderance of legal opinion is that while it is desirable and will provide for a better administration of criminal justice that the penalty for an offence should be

prescribed by law, where the law omits to do so, then the punishment is at the discretion of the court. This issue has come for determination in several South African cases. I will refer to a few examples here. In R v Furlee (1917) 17 TPD 52. The accused was charged with and convicted of a contravention of Ss. 3 and 4 of Act of 1909 (Transvaal). The statute in question prohibited the sale or supply of opium but did not provide a penalty for a contravention of these provisions. The court at 53 held that " It is clear that no law of this kind can be effective without a penalty, and the argument that the courts must therefore be held to have the power to impose a penalty wherever the legislature has intended to create an offence, is of considerable weight". The court further adopted a passage from Leysers Meditationes ad Pandectas (book 10 page 280) thus-" **Where the act is definitely prohibited in a manner which renders it clear that the legislature was not exhorting or advising, then it is punishable at the discretion of the Judge where the law has not itself attached any penalty.**

And this principle is followed in England, namely that the doing of an act which is expressly forbidden by the legislature upon grounds of public policy constitutes an indictable offence, even though no penalty be attached,

unless such a method of procedure manifestly appears to be excluded by other provisions of the statute…

We have come to the conclusion that the same principle applies in Roman – Dutch Law, and that as the act in question was expressly prohibited in the public interest and with the evident intention of constituting an offence, it is punishable under our law". In R v Zinn (1946) AD 346, the appellant was convicted of a contravention of the Volksraad Besluit 104 of 1871 (Transvaal) in that he had allowed Coloured people to occupy an erf belonging to him. On appeal, the appellate division had to decide whether the legal provision in question created a crime because it only contained a prohibition and did not provide for a penalty. The Court held that the omission of any penalty will not prevent the offence from being punishable so long as the language of the legislature is not merely directory.

[20] In Swaziland, the Courts have exercised the discretion to punish for attempted murder even though no punishment is prescribed for it in common law or statute. See for example the cases of General M. Msibi v The King (Crim. App. No. 26/2000 Fs delivered) on 13-12-2000), Delisa Tsela v Rex (Crim. App. No. 11/2010 delivered on 27-10-2010), Rex v Bonginkosi Mhlolo Gina

(Crim. Case No. 272/2009 delivered on 9-8-2010) and The King v Fana Sicelo Dlamini (Crim. Case No. 48/2011 delivered 6-10-2011).

[21] Since neither statute nor common law has prescribed the punishment for attempted murder and left the punishment in the discretion of the court, the question is how do courts arrive at specific punishment for the offence. By what yardstick do courts impose terms of imprisonment for such offences. There do not seem to be any established guidelines on this, except the popular triad of punishment and other legally recognised principles of sentencing universally applied through the cases. It is on the basis of these established guides that I will determine if the 7 years imprisonment imposed by the trial court is appropriate in this case. As earlier decided herein the trial court correctly aproached the sentencing with adequate consideration of the relevant factors following the triad of punishment and the objectives of punishment. What I should look at now is whether the custodial sentence it imposed is within the range of the custodial sentences imposed by courts for the same offence. In doing this I am following the established judicial practice or tradition in Swaziland highlighted by Moore JA in Mgubane Magagula V The King (Crim. App No 32/2010 delivered on 3-11-

2010). In my humble view this is a sound judicial policy because it provides for uniformity, parity, consistency and certainty in the criminal law on punishment for crimes and thereby checks and limits the incidence of unusual, cruel and arbitrary punishments. This is an indication of an efficient, effective and reputable administration of criminal justice.

I will now straight away consider if the 7 years sentence imposed on the appellant by the court a quo falls within or is disturbingly outside the range of custodial sentences other courts have imposed for a similar offence bearing in mind the peculiar circumstances of this case. In the case of General M. Msibi (supra) the Court of appeal confirmed a sentence of 7 years imprisonment (of which 2 years were suspended) for attempted murder. In Delisa Tsela v Rex (supra) the Court of appeal also confirmed a sentence of 7 years imprisonment (with 2 years suspended) for attempted murder. In Rex v Bonginkosi Mhlolo Gina (supra) the High Court imposed a sentence of 7 years with 2 years suspension for attempted murder and arson. In the case of the King v Fana Sicelo Dlamini (supra) the High Court imposed imprisonment of 7 years (with 2 years suspended) for attempted murder. In the Case of Samson Magagula and another v Rex (Crim. App. No. 24/2002 cited by Learned counsel for the appellant, the Court of Appeal confirmed a five years sentence

(with two years suspended)for attempted murder. In Rex v Thandekile Malinga (Crim. App. No. 130/2007) also cited by Learned counsel for the Appellant, the High Court per Banda CJ imposed Five years sentence for attempted murder. In Siboniso Sandile Mabuza v The King (supra) this court confirmed an effective sentence of Six years and stated that such sentence "does not show any striking disparity nor does it induce any sense of shock."

The minimum custodial sentence imposed by the courts in the above cases is on the average 7 years. I think that any custodial sentence between five to fifteen years for attempted murder, a very serious crime, is within the range of the sentences imposed in those cases. The pendulum can swing between five years and fifteen years depending on the circumstances of the commission of the crime. I must, however, caution that the practice of being guided by the range of sentences previously imposed by courts for the same offence does not impair in any way the discretionary power of sentencing vested on a Court by statute. So that a court can in justifiably compelling circumstances impose sentence outside the existing range of custodial sentences for that offence.

[22] In the circumstances of this case, I do not think that an effective sentence of 7 years sentence is so severe as to induce a sense of shock or produce in the minds of the independent and right thinking members of the public the feeling that the appellant has been unreasonably or unfairly punished. I hold that any reasonable court or tribunal could have imposed this sentence on the appellant in the circumstances of this case. As it is, this court has no reason to interfer with the trial court's exercise of sentencing discretion here. I therefore refuse to disturb the terms of imprisonment imposed by the trial court which effectively amount to 7 years. The appeal on the sole ground therefore fails.

[23] The record of this appeal at pages 23 -24 shows that the appellant testified before the Judicial officer he made his confessional statement that he was arrested on 27th March 2008 and kept in police custody for one day prior to being brought before the Judicial officer. The record of this appeal does not show if he remained in such custody or remand custody or was released on bail pending trial. The appellant who was unrepresented by a legal practitioner at the court a quo appears to be illiterate because before this court, proceedings in this appeal had to be interpreted to him from English to Siswati. In

view of this state of affairs and in the light of S. 16 (9) of the 2005 Constitution, this court decided suo moto to find out if the appellant was in custody or on bail pending trial and conviction. So when this matter came up for hearing on 8th May 2012, questions were put directly to the appellant concerning this matter. He informed this court that from the 28th March 2008 he remained in prison custody for a while, before he was released on bail pending trial subsequently in the same year, 2008. He could not say for how long he remained in prison custody before his release on bail pending trial. Learned Crown Counsel was asked by this Court if he had such information. He said no and promised to find out, undertaking to ensure that such period of detention, if any, is deducted from the 7 years imprisonment. It is the duty of all agencies of administration of Criminal Justice involved in the due criminal process, to wit, the investigator, prosecutor, the defence and the court, to ensure the strict observance and enforcement of the fundamental rights of an accused in a criminal trial including any appeal therefrom. Courts have a pivotal role in this regard and cannot rely on the failure of the prosecutor or defence to perform this role at any time as an excuse for not ensuring that the rights of the accused during criminal trials before them are not undermined. In a situation where an accused is not represented by Counsel, the

prosecutor was duty bound, upon conviction, to bring to the attention of the court the fact that the convict was in prison custody or on bail pending trial. This will enable the trial court consider any period of pre-sentence detention in imposing custodial sentence. If the prosecutor failed in this regard, as happened in this case, it behoved the court to seek information from the appellant and the prosecutor concerning any period of pre-sentence detention of the appellant. It can receive evidence of such fact by virtue of S. 294 (2) of the Criminal Procedure and Evidence Act. The trial court did not do so, may be, due to inadvertence. The situation that has emerged in this appeal is that the appellant appears to have suffered some period of detention pending trial before he was released on bail pending trial. The exact period which is unknown was not taken into account by the trial court in imposing the term of imprisonment on the appellant. This is contrary to S. 16 (9) of the 2005 Constitution of the Kingdom of Swaziland which provides that **"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period that person has spent in lawful custody in respect of that offence before the completion of the trial of that person shall be taken in to account in imposing the term of imprisonment."** Even though the appellant has omitted to raise it in this appeal and it

cannot validly be treated under the rubric of the sole ground of appeal, it is being raised here and dealt with Suo moto in the interest of substantial justice by virture of and in pursuance of the duty imposed on the judiciary, and other arms of government as well as persons to uphold and observe the fundamental rights and freedoms in chapter 111 of the Constitution as provided therein. This court can do so by virture of Rule 7 of the Court of Appeal Rules which enables this court to go outside the grounds of an appeal in deciding the appeal. Criminal courts, during sentencing, have a mandatory duty to be vigilant, diligent and strict in the observance of this provision of the Constitution to avoid foisting on a convict a situation of unlawful prison custody that may have no legal remedy .

[24] In a situation, such as in this case, where the trial Court did not take into account the pre-sentence period of incarceration of a convict in imposing a custodial sentence, this court can invoke the power vested on it by S. 5 (3) of the Court of Appeal Act to order that the sentence so imposed by the trial court shall be calculated to include the period of incarceration of the convict between 27 March 2008 and the date he was released on bail in 2008. I will hold Learned Crown Counsel, Mr S. Fakudze to his undertaking before this court on the 8th may 2012 to find out the

exact period of appellant's pre- sentence detention and bring it to the attention of The Registrar of this court and The Commissioner, Department of Correctional Services to reduce it from the seven year prison term. The Registrar of this court is hereby ordered to cause another warrant for the prison custody of the appellant for the effective 7 years period to issue with an endorsement therein that the term now excludes the ascertained period of pre-sentence detention.

_____

E.A. AGIM
JUSTICE OF APPEAL

I agree

_____

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

_____

S.A. MOORE
JUSTICE OF APPEAL

For Appellant : Leo Gama Esq.

For Respondent: S. Fakudze Esq.