

COURT C

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CR. APPEAL NO. 7/94

In the matter between

SIMON MAKHANYA

AND

THE KING

CORAM: DUNN J.

FOR THE APPELLANT: MR MAZIBUKO

FOR THE RESPONDENT: MR MACHIRA

JUDGMENT

29 APRIL 1994

The appellant in this case was charged with and convicted of hunting game (a grey duiker) in contravention of Section 12(1) of the Game Act 1953. He was sentenced to a fine of E300.00 in default of which 12 months imprisonment. The appellant was unrepresented at the trial.

The evidence led at the trial sufficiently established the commission of the offence. The point taken on appeal is that the trial Magistrate did not, at the commencement of the trial, explain the accused's right to legal representation. It was argued in the appeal that the failure on the part of the Magistrate amounted to a grave irregularity sufficient to have the proceedings set aside.

The point raised, has been the subject of two definitive judgments of the Court of Appeal with which all judicial officers should be au fait.

There was a failure, in both cases, by the preciding officer to inform the accused of their right to legal representation. The first of these cases is that of CAIPHAS DLAMINI v.R 1982-6 SLR 309- in which Welsh J.A. stated at 313 B-F.

" Another fundamental right of an accused is the right to be legally represented at his trial. That right is recognised not only by the common law (see S v Wessels and another 1966 (4) SA.(89) (C), at 91-2) but also by s 171 of the Criminal Law and Procedure Act 67 of 1938, which provides that: 'Every person charged with an offence is is entitled to make his defence at this trial and to have the witnesses examined or cross-examined by his counsel, or other legal representative' The corresponding South African provision was referred to in S v Nqula 1974 (1) SA 801 (E) where Eksteen J. said this, at 804E-F: ' It is to my mind a matter of considerable importance in the interests of justice and the administration of justice that every accused person should be accorded every opportunity of putting his or her case clearly or succinctly to the court and this can only be properly done when it is put by a person who is trained in the law. Such a person must obviously be in a much better position to put the case of an accused person much better and much more clearly than that person could fairly do himself'. More recently, in S v Baloyi 1978(3) SA 290 (T) Margo J. referred to a number of cases dealing with

' the right of an accused to legal representation where he wishes it' and holding that 'the mere fact of being denied legal representation can by itself be fatal to the validity of the trial ', and said this, at 293F-G: 'However, where he (the accused) does not seek it, and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice of which I am aware which vitiates the proceedings'. Compare the case where a legal representative is not available because of the accused's own fault. R v Zackey 1945 AD 505. Naturally, where an accused is not legally represented- and this is especially so in the case of an illiterate or foreign accused who is not familiar with the judicial process, the Court will be careful to draw attention to the advisability of being legally represented, and in the absence of legal representation; will take all reasonable steps to protect the interests of the accused".

Later, in restating the rules which must be observed by all criminal courts the learned judge stated at 315 -

It is, indeed, imperative that the accused should be asked, at the very outset of the trial, whether he wishes to be legally represented.

The second decision is that of NKOSINATHI VILAKATI & ANOTHER v. R Court of Appeal Case No.12/1993 (unreported). In that case Melamet J.P. stated—

"Section 171 of the Criminal Law & Procedure Act 67 of 1938 provides that every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his Counsel or other legal representative. There is no statutory provision enjoining a Magistrate or other judicial officer to ensure that unrepresented accused fully understand their rights but there is a general duty on the part of judicial officers so to do. In this connection I refer to the following dicta of Goldstone J in S v Mbonani 1988 (1) SA 191 (T) at 196 F-J:

'If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a

complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.'

The learned Judge President continued to cite with approval the following passage from the judgment of Nicholas AJA in *S v RUDMAN & ANOTHER* 1992 (1) SA 343 (A) at 391 F-H

"Did the Magistrate's failure to inform the accused in terms of S v Radebe constitute an irregularity? In S v Mabaso at 204G, Hoexter J A said that it seemed to him that

'in the instant case the magistrate's failure to inform the appellants of their right to representation before they pleaded would amount to an irregularity only if the appellants were shown to have been ignorant of that right'..

I concurred in the judgment of Hoexter JA, but on reflection I am not sure that this dictum is entirely correct. I am inclined to think that the better view is that a failure to inform an accused of his right to representation is an irregularity unless it is apparent to the Magistrate, for good reason, that the accused is aware of his rights (eg. from his own statement or from the circumstances-for instance, that the accused is an attorney). Certainly it is the safer course always to inform the accused of his rights. But the difference between the two views does not appear to be one of substance: Whichever view be adopted, the result would be the same".

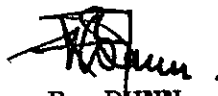
The trial magistrate responded to the appellant's grounds of appeal and had the following to say with regard to the point under consideration

It is humbly conceded that this Court made a grave error, in not explaining the appellant's legal rights to legal representation at the trial.

The appellant and his co-accused had been arrested on a farm shortly after midnight. They were kept in police custody until about 9.30 a.m. when they were brought to Court and tried. It was necessary for the magistrate to ascertain from the accused whether or not they had had sufficient time to prepare for their defence and as to whether or not they required legal representation. The failure by the magistrate to deal with these matters at the commencement of the trial is such that the conviction cannot be allowed to stand.

The appeal is upheld. The conviction and sentence are set aside.

It is imperative that a roneoed form be prepared for use by all magistrates, setting out the rights of which an undefended accused should be advised at the commencement of a trial. The form should be signed by the accused and kept as part of the record of the trial.


B. DUNN
JUDGE