



THE HIGH COURT OF SWAZILAND

MAX KEVIN CLAYTON

Applicant

Vs

THE SENIOR MAGISTRATE – HHOHHO DISTRICT (SIC)

1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

Civil Case No. 2969/2002

Coram
For the Applicant
For the Respondent

J. P. ANNANDALE – J
MR. P. SHILUBANE
NO APPEARANCE

**EX TEMPORE JUDGEMENT ON REVIEW
(25/10/2002)**

Under a Notice of Motion in terms of Rule 53, applicants filed papers of record in compliance with the provisions of the Rules pertaining to an order sought on review requiring of the respondents to show cause why a conviction and sentence should not be set aside, which was imposed by the 1st respondent in a certain matter, and secondly calling upon the 1st respondent (the Magistrate) to file the record of the criminal proceedings herein.

When this matter was brought before me last week Friday on the uncontested roll, I expressed certain reservations, the main one being that the court record which is referred to in Rule 53 (1) (b) was not dispatched and not filed as is required, in the Act and Rules as well as in the Notice. I therefore ordered that the Clerk of Court of the Magistrate court, Mbabane be

directed to file the original court record, which has since been done. The Deputy Director's office was served on the 3rd October, and the Magistrate was served on the 7th October, the matter was set down for hearing on 18th October, and today being the 25th October it is well past the 14 days period referred to in the Rule. No opposing papers or notices were filed by either of the two respondents, which both have fourteen days to do so. I may add that the requirement to file the court record is not a discretionary one – the Magistrate is required by the mandatory provisions of the Rules to do so.

Initially, the papers contained a photocopy of the court record of Case No L244/02 wherein Max Kevin Clayton was featured as the 1st accused. The reservations that I expressed considered a number of aspects. Firstly, the record appeared incomplete *ex facie* the photocopied document. A number of aspects appeared to me to be suspect, firstly, that on the back of the SC 10 coversheet no photocopy of the backside of it was made and from experience I take cognisance that the backside or rear side of the SC10 coversheet is frequently used for keeping of manuscript records, and it became evident to me that it must have been used for that purpose since none of the preliminaries running up to the hearing of evidence was recorded on the photocopied papers. The photocopied record did not set out who was the presiding officer. Who presided? Who was prosecuting? Who was defending? If it was applicable, who was the interpreter? In other words, the constitution of the court was not recorded. I said I know from experience that frequently such details and initial proceedings are recorded on the rear side of the SC 10 coversheet. Further omissions on the photocopied record attached to the notice of motion was that there was no recording of any explanation pertaining to the procedure to be followed, legal representation, etcetera. There was also no recording of who put the charge to the accused person, and what his plea was. There is also on the photocopied record no indication of whether the prosecuting counsel accepted the plea or not. The first entry on the photo copied court record was recorded on the subordinate court evidence pad and I quote *verbatim*: “PW1 2142 Detective Sergeant T. Tsabedze DSS” and thereafter evidence is recorded as: “I am a police officer...” etcetera. That is all that was recorded on the photocopied papers and which caused me to call for the original. Further, on the photo copied papers, it also was clear to me that the record could not be complete because it referred to, at the end of evidence being recorded, concerning cross-examination rights, and I quote: “see annexure “A”. No such annexure was found on the record. Further, at the end of the crown's case for the prosecution, the learned Magistrate

recorded on the photocopied papers “see annexure “B”, wherein those rights would have been explained, which was also not attached to the papers.

The documents that I refer to, the two annexures which would purportedly have contained what was said in court regarding the aim and purpose of cross-examination as well as the rights of the (undefended) accused person after the crown’s case was closed, if Section 174 of the Act did not apply, were not attached to the copied record of proceedings filed with the application for review.

Further also, conspicuous for its absence, was that after judgement was given, no rights whatsoever were explained, according to the record, concerning the rights of the accused person following conviction. It would have had to pertain to evidence, calling of witnesses, addressing the court sworn or unsworn etcetera. None of that was done. Incidentally, it was also not recorded that the prosecutor had any opportunity to address the court on sentence. Thereafter, sentence was imposed, following a conviction under Section 7 read with Section 8 (1) of the Opium and Habit- forming Drugs Act, 1922 (Act 37 of 1922), - possession of a habit-forming drug. The charge itself referred to a “herbal” (sic) forming drug, not a “habit”-forming forming drug. That serious flaw in the formulation of the charge is not the subject of this review.

On eventually receiving the original court record filed by the Clerk of Court, which incidentally had to be effected by this Court Interpreter, Mr. Magagula who had to go down to the Magistrate court and physically collect it.

The photocopy initially used in the application is an exact replica of the original complete court record, save for the fact that the back or reverse side of the SC 10 coversheet was not also copied. None of the annexures mentioned were included and none of the other serious omissions are anywhere to be seen on the original record. None of the shortcomings that I mentioned concerning the copied record were rectified when the original record was at hand. Thus, there was no explanation of the rights to legal representation to the accused persons, there was no explanation as to the rights of cross-examination after crown’s case, or of the rights in mitigation, etcetera. That is apart from the defect in the formulation of the charge itself.

The applicant in his founding affidavit states a number of reasons why he was dissatisfied with the court proceedings. I noticed that on six occasions, he states on oath that he wanted to be represented by an attorney. He mentioned the name of the attorney to the police and in court, but on six occasions, even though it was never explained to him that he has such a right, he was denied the right of legal representation, and that is one aspect this court certainly will not condone. Apart from that, he mentions a number of disturbing difficulties encountered during this trial. Some of it I have already alluded to, concerning the defective record. There is also on the court record no indication whatsoever as to which of the two accused persons were convicted or sentenced, whether it was the first or the second accused, the second accused being Londiwe Marie Clayton, a young girl of thirteen years. Apparently, from the applicant's own affidavit she is his daughter, but on record there is no indication whatsoever whether charges against her were proceeded with or not or which of the two accused were convicted. A disturbingly large number of defects and inadequacies abound in the court record. If each of the mentioned aspects in itself is not sufficient to overturn the proceedings, their combined presence certainly does justify it. The proceedings as they stand cannot be said to be in compliance with substantial justice.

The Magistrate's Court being a creature of statute and a court of record, I can make no other finding whatsoever on special review under Rule 53, than to hereby order that the proceedings under review, the judgement and sentence imposed by the Magistrate of Mbabane, region of Hhohho in Criminal Case L244/02 *in re: Rex vs Max Kevin Clayton* be hereby ordered to be set aside. No costs order is made, as per prayer (c) of the application, as neither of the respondents opposed the application.

J. P. ANNANDALE

JUDGE