

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

In the matter between

REX

Vs

VALENTINE OPARAOCHA

Review Case No. 193/2007

Coram

S.B. MAPHALALA - J

For the Applicant

MR. M. MABILA

For the Respondent

MR. B. MAGAGULA

JUDGMENT

14th February 2008

[1] Serving before court is an application on Notice of Motion in the long form for an order reviewing and/or setting aside the 1st Respondent's judgment issued on the 31st March 2006, and costs in the event application is opposed.

[2] Applicant has filed his Founding affidavit accompanied by a number of pertinent annexures. The Respondents have not filed any opposing

affidavit although Counsel for the Respondent appeared when the matter was argued and offered arguments against the application.

[3] Sometime in March 2006, Applicant was arrested by members of the Royal Swaziland Police and subsequently charged for contravening the Immigration Act wherein it was alleged that he was a prohibited immigrant. He was then taken to Matsapha Police Station wherein he was detained for one night. During the night he fell sick and one of the inmates advised him to plead guilty to the charge in court so that he is released because he might die in jail. He testified that the reason he was arrested is because his passport was not with him at the time. In fact his passport was with his uncle who was out of the country at the time. When he tried to explain to the officers they did not listen to him but told him to produce same if he had one.

[4] On his first appearance before the 1st Respondent at Manzini Magistrate Court he was still sick and being scared of dying in jail he pleaded guilty to the charge not only because he was guilty but was forced by circumstances, in particular because he did not know exactly the date of his uncle's return to the country and the fact that he was advised that they did not have good medication in jail. When he tried to apply for bail he was advised by the court that same could not be granted as it would amount to continuation and/or extension of the crime he was facing hence he was left with no alternative regarding his liberty.

[5] After being sentenced to ten (10) months in prison with an option of

E1, 000-00 fine he paid the fine and got released on the same day. When his uncle returned the following week, he took his passport and permit to the Matsapha Police Station to have his conviction reversed but he was told to approach the Manzini Magistrates Court where the matter had been dealt with. At the Manzini Magistrates Court he was told that his matter had been put to finality, hence the decision could not be reversed.

[6] In arguments before me Counsel for the Applicant advanced three reasons for review of the proceedings of the court *a quo*. The first point raised is that the Applicant was never told that he could apply for bail. Secondly, during the course of trial the Applicant was never afforded an opportunity to mitigate sentence. Lastly, he was never asked to open his case after the Crown had closed its case. The essence of the arguments on behalf of the Applicant is that all the above points do not appear in the transcript of the proceedings before the Magistrate Court on the 31st March 2006.

[7] The Crown on the other hand has submitted that Applicant should have proceeded by way of appeal and not review as there are no grounds alleged by the Applicant for review.

[8] According to the learned authors *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 929 the grounds upon which proceedings can be brought under review before a provisional division or before a local division having review jurisdiction are as follows:

- a) Absence of jurisdiction on the part of the court;
- b) Interest in the cause, bias, malice or corruption on the part of

the presiding judicial officer;

- c) Gross irregularity in the proceedings; and
- d) The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

[9] Indeed, in this court the above-cited grounds are also recognized in review proceedings. In the instant case it appears to me that ground (c) *supra* applies being gross irregularity in the proceedings. See in general *Johannesburg Consolidated Investment Co. vs Johannesburg Town Council 1903 T.S. 111 -114*. On the facts of the present case I have come to the considered view that the grounds submitted for the Applicant are sufficient to unseat the conviction by the court *a quo*. It is of paramount importance for an accused before being sentenced to advance factors in mitigation of sentence. In the instant case there is no evidence at all that Applicant was afforded this opportunity in aid of a fair trial.

[10] On the first point I do not think it constitutes an irregularity not to tell an accused about bail but what is clear is that when Applicant applied for bail he was advised by the court *a quo* that same could not be granted as it would amount to continuation and/or extension of crime, whatever that means. On the last point I agree with *Mr. Mabila* for the Applicant that the Applicant did not receive a fair trial when one looks at the transcript filed of record.

[11] In the result, for the afore-going reasons the application is granted in terms of prayer 1 and 2 of the Notice of Motion.

S.B. MAPHALALA
JUDGE