IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Review Case No. 86/2009
District Record No. 352/08

In the matter between:

THE KING

VERSUS

SANDILE FAKUDZE

BHEKI GAMEDZE

Date of consideration: 10 March, 2009
Date of judgment: 11 March, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] I have perused the record of proceedings in the instant matter and wish to make a few comments on certain procedural issues. I may conclude the judgment by requesting the learned Magistrate to clarify a certain aspect of her findings.

[2] The above-named accused persons were arraigned before the Manzini Magistrate's Court charged with the following:- a single count of robbery (in respect of Accused 1 only); house-breaking with intent to steal and theft and a single count of assault with intent to do grievous harm. They pleaded not guilty to all these charges, thus joining issue with the prosecution.

[3] At the end of the trial, the accused persons were acquitted of the first count but were both found guilty of the assault with intent to do grievous bodily harm. I wish to state that I have no qualms at all regarding the acquittals, which I found the learned Magistrate was eminently correct in returning.

[4] In relation to the house-breaking with intent to steal and theft the Crown alleged that a salon owned by Philisiwe Dlamini was broken into and various items, including clothes, towels and other salon paraphernalia was purloined. The break-in occurred at night on 5 March, 2008 at Sidzakeni and the culprits were not seen. In pressing for conviction, the Crown relied on a pointing out of some items allegedly recovered from the accused persons' house on 10 March, 2008.

[5] What concerns me is that the complainant Philisiwe Dlamini, in her evidence, merely mentioned that the following items were purloined from her shop, namely a pair of trousers, two towels, a box of gloves, two wigs and exercise books. Immediately after enumerating these items, she, was without further ado, called upon to identify the items before Court.

[6] What is astounding is that she was never at any stage, before being called upon to identify the said items in Court asked by the

prosecution nor the Court to give a full description of the items allegedly purloined. For instance, regarding the pair of trousers, she never testified whether it was for females or males, the texture, size, label e.t.c. The towels were not described by size, make or colour, nor were the wigs.

[7] Such a scenario should not be allowed. The Court must ensure that items allegedly stolen are properly and fully described before the said witness can be called to identity them. At the stage when the identification of the items recovered is being conducted, there must, of necessity be a connection between the description given and the items exhibited. If there are special distinguishing features mentioned, these must be subsequently pointed out to the Court during the identification. It is in following this *modus operandi* that the integrity of the identification can be regarded unimpeachable.

[8] In a recent review case of The King v Mduduzi Richard "Slovo" Zwane case no.84/2009 I commented on this very issue as follows at page 2-4 paragraphs 4-8 of the cyclostyled judgment: -

> "[4] What is disturbing is that the complainants normally give very vague descriptions of the items. If for argument's sake, the item in question is a mobile telephone, the witness will just mention the name and calibre thereof. Shortly thereafter, the witness is called upon to identify the mobile telephone in question amongst the exhibits displayed in Court.

> [5] There are primarily two issues of concern that arise with regard to this procedure. Firstly, it is desirable that as full a description of the item in question as possible is given to the Court e.g. the colour; size; serial and other numbers of the cell phone and where possible the receipt issued on purchase thereof. Any distinguishing features by which the item can be described and identified amongst others of the same class should be furnished to the Court. This is to ensure that the Court is satisfied that the item testified about and subsequently identified indeed belongs to or was in the possession of the witness concerned.
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> [6] Secondly, it would appear, from a reading of the record that exhibits seized during investigations are placed in the open during Court proceedings and where the witnesses can readily see them and proceed to give the vaguest of descriptions which the Court thereupon accepts as positive identification of the item testified about.
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> [7] It is my considered view that the safest and fairest way is first for a full description as stated in paragraph 5 above to be given. The exhibit should, at this time be concealed and it should be for the witness to go through whatever exhibits are present in Court and identify the correct one by reference to the identifying marks he or she would have mentioned earlier in the evidence.
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> [8] In this way, both the Court and the accused will be satisfied that the item indeed belongs to or was in the accused's possession and that the vague description given in evidence was not influenced by the item being readily placed on display in front of the witness concerned. The procedure I have outlined, if followed, would in my view conduce to the integrity of the identification process and would eliminate any bad after taste particularly with the accused that the witness' recollection was assisted and jogged by the prosecution placing the exhibits in a vantage position for the accused person to see and testify about."

Happily, the accused persons were not in any way prejudiced by procedure adopted by the Court as they were acquitted of the offence in question. Magistrates should henceforth ensure that the procedure outlined above is followed.

[9] Another queer aspect relates to the order followed after the close of the case for the prosecution. Firstly, after Accused 1 testified, Accused 2 was not given an opportunity to cross-examine him as ought to be the case. In point of fact, Accused 1 was not even cross-examined by the prosecution. The Crown suggested that Accused 2, who also, like Accused 1, chose to adduce sworn evidence, should proceed to adduce evidence and this suggestion was accepted without further ado by the Court.

[10] Thereafter, Accused 2 was also not afforded an opportunity to cross-examine his co-accused. After the accused persons completed adducing their evidence in chief, the Crown proceeded to cross-examine each one in turn. This procedure is clearly irregular and as far as I am aware, unprecedented. The learned Magistrate did not, in her judgment state why the conventional practice was jettisoned.

[11] The only question to determine at this stage, and this affects the count in respect of which the accused persons were convicted, is whether there was a failure of justice occasioned by the irregular procedure followed by the Court in respect of the defence case. The question of prejudice, if any, to the accused persons, it would seem to me, takes centre stage in this enquiry.

[12] In the Botswana case of *Motswedi v The State* [1984] B.L.R.223 O'Brien Quinn C.J. held as follows in circumstances such as the present:-

> "It is a fundamental rule that any witness who has been sworn is liable to be cross-examined, whether or not he has given any examination-in-chief... A witness includes an accused person who gives evidence on oath or affirmation and, as such witness, he is liable to be cross-examined not only by the prosecution but by his co-accused.... This right of an accused to cross-examine his co-accused is fundamental and could lead to the setting aside of the conviction."

It will be seen from the foregoing, that the learned Chief Justice did not state that this irregularity would inevitably lead to the setting aside of the conviction in every case. He carefully used the word "could".

[13] In an unreported judgment of *Merafe Kelebile v The State* CLHFT-00010006, unreported, where the accused persons were also not advised of the right to cross-examine each other and therefore did not exercise it, I came to the conclusion that in view of the accused persons' respective versions in which they incriminated each other, it was imperative for them to be afforded the opportunity to cross-examine each other. I therefore held that in those particular circumstances a failure of justice had occurred and I set aside the

conviction on that basis. This was in addition to other irregularities as well.

[14] At page 12 paragraph 20,1 stated as follows:-

> "It is worth noting that in the instant case, it was imperative for the accused persons to be advised of their right to cross-examine each other and actually be afforded an opportunity to do so if they wished. This was imperatively called for in the circumstances, particularly because the accused person's versions were mutually exclusive and incriminatory. One's version inculpated the other."

[15] In the instant case, the test to be followed, as indicated earlier, is whether the irregularity in procedure in the instant case resulted in a failure of justice. Whether or not the conviction should be set aside, recourse must be had to all the facts established by the matrix of the evidence. If the Court can be satisfied that the accused persons' guilt was established beyond reasonable doubt, and there was nothing that each accused persons could say that could possibly affect the verdict in any way, then the conviction should, in those circumstances be allowed to stand, the irregularity notwithstanding. See *Moroka v The State* [2001] 1 B.L.R. 135 (C.A.) on the failure to advise an accused person on the right to legal representation.

[16] Save what I say below regarding whether the Court *a quo* was correct in finding that there was common purpose in the assault of Bhembe, the complainant, I am of the view that the evidence was

overwhelming against the accused persons, particularly Accused 1. There does not appear to have been anything of substance raised by the accused persons as a defence in cross-examination or in their evidence-in-chief on this issue. This finding impels me to come to the conclusion that notwithstanding the irregularity pointed out above, there is nothing that the accused persons, particularly the 1st Accused could have said to better his circumstances. Even if he had cross-examined his co-accused, nothing of any consequence is likely to have emerged therefrom.

[17] Whilst the irregularities mentioned above cannot be condoned and encouraged, I find that on an entire conspectus of the case, it cannot be said that a failure of justice was occasioned thereby. Trial Magistrates should, however, ensure that all the procedures of a criminal trial are followed to the letter, admitting of no exceptions in that regard.

[18] I now come to the last and decisive issue on the conviction, particularly of Accused 2. This is the issue of whether the evidence proved that there was common purpose by both accused persons in the assault of the complainant Vusi Bhembe. The charge sheet alleged that Bhembe was assaulted by both accused persons acting jointly and in furthermore of a

common purpose by assaulting him with a stone as a result of which he lost his tooth.

[19] It is in evidence that Bhembe fell down upon being struck, bled, lost a tooth and required to be stitched in his mouth. In this regard there is no doubt that the offence charged was proved. What is also clear in evidence is that it is Accused 1 who hurled the stone that injured Bhembe. The only question to ask in the circumstances is whether the Court was correct in finding that the assault on Bhembe was in furtherance of a common purpose.

[20] According to the complainant, he was at his home and he heard some noise. On investigation he found the accused persons demanding his niece Xolile to come out of the house. He ordered the accused persons to leave his homestead. He went to bed and so did Xolile. Later, he heard Xolile screaming, with Accused 2 holding her by the arm, with Accused 1 walking in front. Bhembe managed to pull Xolile from Accused 2 and called the police. The accused persons threw stones at the roof to Bhembe's house.

[21] After the police arrived, they invited the accused persons to come to them for discussions but the latter refused. Accused 2 later attempted to go to the police but Accused 1 stopped him. As

Bhembe tried to pull Accused 1 to the police, Accused 2 said "Here is the man". Accused 1 then threw the stone and it hit Bhembe on his mouth.

[22] According to Xolile's evidence, in relation to the relevant aspects of this offence, Vusi Bhembe came out of his house and asked where the accused person were taking Xolile to and that he was annoyed at their behaviour. He ordered them to leave his homestead. The police then arrived. When Bhembe tried to catch Accused 1, Accused 2 alerted him and Accused 1 hit Bhembe with a stone and the latter fell down. Xolile accompanied Bhembe to hospital.

[23] In cross-examination, Accused 1 totally failed to dislodge Xolile's evidence regarding him assaulting Bhembe with a stone. When Accused 2's turn to cross-examine Xolile came, Accused 2 denied having assaulted Bhembe with a stone and Xolile testified that both accused persons were acting in concert and that had Accused 2 not alerted Accused 1 that Bhembe was close, the latter would not have assaulted Bhembe. He put to Xolile that he did not act in furtherance of a common purpose

with Accused 1 in assaulting Bhembe but Xolile was constant in her evidence as the Northern star.

[24] The question, as earlier indicated, is whether the Court was correct in finding that common purpose was indeed proved. Joubert, Laws of South Africa, 6th Ed at paragraph 117, page 125 deals with the doctrine of common purpose as follows:-

> "It is a mechanism which the courts, apply to offences requiring intention, where, upon proof of the required intention, all the participants in the common purpose are found guilty, without it being necessary to prove that each participant committed the act which constitutes the offence, or even that he was present at the scene of the crime."

[25] At page 126, paragraph 118, the learned author proceeds to state as follows:-

> "The words 'common purpose' denote that there is a purpose shared by two or more persons who act in concert in accomplishing some common object. The common purpose may be proved by words or conduct or by express or implied agreement between these persons to achieve this object, although it cannot be inferred from mere joint action on part of the accused. The common object or purpose must relate to the commission of an unlawful act..."

[26] According to the evidence, when Bhembe tried to apprehend Accused 1, Accused 2 alerted him of Bhembe's presence and

Accused 1 then assaulted Bhembe with the stone. Unfortunately, the Court *a quo* did not analyze the evidence and give reasons why it found that common purpose was established by the Crown in the instant matter. There is a doubt that precariously hangs over my mind regarding the correctness of the conviction of Accused 2 on the basis of the doctrine of common purpose.

[27] It would appear, from the evidence that the only piece of evidence by which Accused 2 was convicted was his alerting Accused 1 of Bhembe's presence. There is no indication that there was a plan, need or design by the accused persons to assault Bhembe. The only evidence led was to the effect that they had thrown stones at Bhembe's roof but this did not extend to the assault of Bhembe. It cannot be proved that the assault of Bhembe was ever within the contemplation of Accused 2 nor is there any evidence that he in any way, whether by words or conduct, associate or identify himself therewith.

[28] I therefore come to the conclusion that on the evidence, the Court *a quo* erred in finding Accused 2 guilty of the offence of assault with intent to do grievous bodily harm on Vusi Bhembe.

[29] In the premises, I make the following Order:-

29.1 The proceedings in sofar as they relate to Accused 1, Sandile Fakudze, be and are hereby certified to be in consonance with real and substantial justice.

29.2 The conviction of Accused 2 Bheki Gamedze of the offence of assault with intent to cause grievous bodily harm be and is hereby set aside and he is to be released forthwith. If he has paid a fine in respect of thereof, it shall be refunded to him with immediate effect.

DONE IN CHAMBERS IN MBABANE ON THIS THE 12™ DAY OF MARCH, 2009.

T.S. MASUKU
JUDGE