



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 13/12

In the matter between

MDUDUZI ARCHIBALD DLAMINI

Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTION

1st Respondent

**THE CLERK (CRIMINAL) OF HHOHHO
MAGISTRATE COURT**

2nd Respondent

**THE REGISTRAR OF HIGH COURT
Respondent**

3rd

Neutral citation: *Mduduzi Archibald Dlamini v The Director of Public Prosecution (13/12) [2012] SZHC140 (25 JUNE 2012)*

Coram: Mamba J

Heard: **19 June 2012**

Delivered: **25 June 2012**

[1] Criminal Procedure - accused noting an appeal - record of proceedings lost before reaching appeal court - what steps to follow before quashing such proceedings.

[2] Criminal procedure - court record lost - application to quash proceedings on appeal cannot succeed before every effort is made to reconstruct the record of proceedings. Parties given chance to do so.

[1] The applicant, who was the accused in criminal trial number 489/05 at the Mbabane Magistrate's Court, has applied to this court for the following orders:

- '1. That the 2nd Respondent be ordered to transmit the record under Hhohho Magistrate court case 489/05 to the Registrar of the High Court within the next 10 days.
2. That the 3rd respondent be ordered to enrol the appeal filed against Magistrate Court case 489/05 lodged by the Applicant within the next 10 days failing which;
3. That the appeal lodged by Applicant on the 3rd of December 2008 be heard without the aid of the record or judgment of the Court a quo on the issue of sentence.
4. Condoning the late noting of the APPEAL and hearing the appeal as prayed for in prayer 3 herein.
5. The 4th Respondent be ordered to redeliver his judgment if the original cannot be found within the next 5 days.
6. That the sentence imposed by Senior Magistrate HENRY KHUMALO in Magistrate Court case 489/05 on the 30th May

2008 of two years per each count of fraud be converted to run concurrently instead of consecutively.

7. Costs of suit.'

[2] On 17th February, 2012, this court per Sey J, granted prayers 1 & 2 above and the matter was then removed from the roll.

[3] When the matter returned to court on 30th April 2012, I was informed from the bar that the relevant clerk of court had informed the parties herein that he was unable to locate the court record. As I considered this a rather casual way of dealing with the issue at hand, I ordered that the said clerk must file an affidavit with the Registrar of this court setting out in detail all the relevant facts herein and what efforts had been made to locate the court record. This, the clerk had to do by 3rd May, 2012.

[4] The required affidavit was filed with the registrar on 4th May, 2012. The substance of that affidavit is that "despite a thorough search [the clerk has] been unable to locate the court record [and he is] unable to comply with the court order of 17th of February 2012."

[5] The matter was then postponed on various occasions in an effort to find a solution to the problem and on 14th June, 2012 I postponed the matter to today and ordered that the trial learned Magistrate should also be present.

[6] After hearing all the parties, including the learned trial magistrate (who attended a meeting in my chambers), I made the following order:

- '(a) The presiding magistrate and the parties hereto are ordered and directed to try and reconstruct the court record of the proceedings in the court a quo and such exercise is to commence on 24th July, 2012 and;
- (b) In the event a reconstruction cannot be done, affidavits to this effect are to be filed with the Registrar of this court stating that every effort has been made in this regard.
- (c) The reconstructed record or affidavits referred to hereinabove are to be filed with the Registrar of this court by 9th August, 2012.
- (d) The matter is postponed till 10th August 2012.'

The learned Senior Magistrate was also empowered to determine the venue and times for the necessary sittings. The proceedings were to commence on 24th July, 2012 to make allowance or

accommodate Crown Counsel that was involved in the trial, who was due to be out of the country until 23rd July, 2012.

[7] It is common cause that the appellant in this case was found guilty on six counts of fraud and was sentenced accordingly and thereafter the court record was submitted to the Registrar of this court on automatic review. It is common cause further that after review, the record of the proceedings was returned to the relevant clerk of court. It would seem, from this information, that the record disappeared or got lost whilst in the custody of the said clerk.

[8] The order I made, I believe is in line with judicial authority in this jurisdiction. In *R v Daniel Jege Dlamini and others, 1970-1976 SLR 426 at 428 B-E* Cohen ACJ stated as follows:

‘Before, however, taking such a serious step as setting aside the convictions and sentences in this case I think more adequate proof should be provided that every effort had been made to try to reconstruct the evidence. In this connection the police files and dockets should be looked into. The police officers in charge of the case should be consulted, the prosecutor if he is still available should be brought into the picture and any possible notes he possesses should be considered. Although the case

cannot be re-opened, the clerk, the magistrate, the prosecutor or the police can approach any of the witnesses and others who were present at the trial to obtain from them affidavit proof of their evidence. The accused should of course be given an equal opportunity with the Crown to peruse this proof and their comments, if any, should be transmitted; See Wolmarans, supra, p 283. See also the order made in the case of Rex v Nortje 1950(4) SA 725(E).

I have discussed the matter with the Director of Public Prosecutions who is in agreement with me that before a final decision can be arrived at the matter should be referred back to the magistrate to institute or cause to be instituted investigations of the kind suggested by me in the last paragraph. When this has been done it can be submitted for review, together with such proof as indicated in Nortje's case.

It is ordered accordingly.'

MAMBA J

For Appellant:

Mr. M.E. Simelane

For Crown:

Ms. Q. Zwane