



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 403/2011

In the matter between:

THE KING

and

POLYCARP DLAMINI

Neutral citation: *The King v Polycarp Dlamini (403/11) [2012] SZHC....(12th March 2012)*

Coram: HLOPHE J

Heard:

Delivered: 12th March 2012

For the Crown: Mr. N. Maseko

For the Defendant: Mr. M. Mabila

Summary:

JUDGEMENT

1. The accused person and three others were charged with nine counts which comprised eight of fraud and one of contravening section 13 (1) read with section 2 of The Commission of Enquires Act of 1963. It was contended by the crown that when allegedly committing the said offences, all the accused persons were acting in furtherance of a common purpose.
2. The accused persons were subsequently allocated a trial date which I was informed was the 1st February 2012. It was whilst the matter was awaiting commencement on the set date when I was allocated the matter of the current accused to deal with on the grounds that there was an application to separate the trial of the current accused from that of the others. The reasons for the then intended separation was the fact that the current accused intended to plead guilty to all the charges preferred against them and that he needed to do that right away. I was further informed that the parties represented by Crown Counsel Mr. Maseko and Defence Council Mr. Mabila, had already reached some agreement on how the matter was to be proceeded with. The accused had tendered, which had been accepted by the crown, a plea of guilty to all the charges faced by him.

3. When the matter was mentioned in court, counsel confirmed the foregoing position and an application for the separation of the current accused's trial from that of the others was made. A statement of agreed facts was then read into the record in keeping with the practice and procedure of this court in matters of this nature. The crown did not lead evidence. This practice is provided for in terms of section 238 (1) of the Criminal Procedure and Evidence Act of 1938.

4. The thrust of the agreed facts is that the accused, whilst having a common purpose with his co-accused mentioned above intentionally defrauded the Government of the Kingdom of Swaziland amounts adding up to E 12 million in total. He was thus pleading guilty to the commission of all the offences with which he was charged.

5. On the basis of the accused's plea and what was stated in the statement of agreed facts read into the record, I was convinced that the accused was guilty of the offences with which he had been charged and I accordingly returned a guilty verdict against him. I was then asked to postpone the matter so as to afford Defence Counsel an opportunity to prepare for the mitigation of sentence, it being argued that in view of the seriousness of

the charges and the potentiality of a lengthy custodial sentence, it was imperative for him to have sufficient time to do so. He therefore asked that I postpone the passing of sentence until the end of March 2012. The application was not opposed by the crown, as it concurred with the Defence. I must add that at that stage there apparently was hope that the matter of the accused person's co-accused meant to commence on the 1st February 2012 would have been concluded by then.

6. Other than that Mr. Mabila was not ready then to do what was understandably a serious task owing to the effect the guilty plea had in as far as a possible lengthy sentence was concerned, particularly because the accused was effectively saying, whilst acting with the other former co-accused of his, he had caused the Government of the Kingdom of Swaziland a Financial loss in the sum of E 12 million which should invariably call for a heavy sentence, no other reasons were given why the matter should be postponed to the end of March 2012. Of course there was a general mention of the case of his former co-accused having to commence on or around the 1st February 2012 but nothing much was being disclosed for the record.

7. It was because of these considerations that I would, whilst agreeing to postpone the sentence on that date to some future date, not agree to have the matter postponed until the end of March 2012 without sound and compelling reasons having been disclosed so that they could be assessed. Given that the court was at the time closing down to open on or around the 2nd February 2012, I was convinced that the parties needed to return to court before commencement of the legal year, particularly before the trial of the accused person's former co-accused. The idea in my doing so was to ensure that I hear the reasons for the postponement of sentence prior to the other matter so that the current one does not end up having a negative bearing on the other matter. I was very much alive to the fact that because of the amounts involved in the charges, for which the accused was convicted, the matter was one of public interest, which required that everything in the matter be done above board. I should say however, that the decision I took had to be balanced up against the fact that the accused had of his own free will come forward and confessed committing the offences. I therefore had to tread a delicate balance between discouraging accused persons who come forward of their own and confess to crime commission against the public losing confidence in the justice system because according to their interpretation of events accused persons are unnecessarily being leniently treated. When the matter resumed on the 28th

January 2012, it was postponed for some four or so days by consent of the parties involved on account of the fact that both counsel were involved the matter of the *State vs Charles Myeza and three others*.

8. When the matter eventually resumed on the said date, Mr. Mabila addressed me at length on the mitigation of sentence. Whilst doing so he disclosed that as part of his agreement with the crown, after the accused's conviction, his sentencing was to be postponed until such time that trial in the matter of his co-accused was finalized. I was informed, the rationale was to have the accused herein become an accomplice witness. For this reason Mr. Mabila stressed that besides his submission in mitigation as indicated herein above, they were actually asking for the postponement of sentence in line with section 313 of the Criminal Procedure and Evidence Act of 1938. In line with this section, Mr. Mabila argued that the accused person's sentencing he postponed for a period of three years.

9. Section 313 of the Criminal Procedure and Evidence Act of 1938, provides as follows:-

“ If a person is convicted before the High Court or any Magistrate Court of any offence other than one specified in the Third Schedule, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to

compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognisances to appear at the expiry of such period, and if at the end of such period, the offender has observed all the conditions of such recognisances, it may discharge him without passing sentence”.

10. The law on postponement of sentence is that same can be done with or without conditions. In this matter I was asked to postpone it without conditions for the reasons set out above. In considering whether or not to accede to the request to postpone sentence, the court exercises a discretion. According to The Commentary on the Criminal Procedure Act by Du Toit and others, among the considerations the court takes into account on whether to postpone the sentencing of an accused, is whether “*the immediate execution of the sentence will achieve the three main aims of Punishment*”. Where it will not sentencing may have to be postponed. I am convinced that in this matter, the immediate execution would not achieve this aim for the reasons set out in this judgment. The question that remains is for how long should be the postponement be.

11. I promptly indicated my disapproval of the postponement of the matter for the suggested period of three years because I have no doubt that would not send the correct message to the public owing to the seriousness of the

matter whatever the merits were in the postponement. Mr. Maseko on behalf of the crown, supported the application for the postponement of sentence at least pending the finalization of the criminal matter where the accused was expected to testify contending that treating the matter differently could jeopardize his case against the accused persons in the other matter. I am now required to determine whether or not I do postpone the passing of sentence at least pending the finalization of the other matter, where the accused expected to be a witness or I go ahead and sentence him now.

12. Having considered the gravity of the matter, the accused's role in the matter of his co-accused which I am told is about to commence if it has not commenced already, the argument made before me by the parties counsel including the genuineness of the reasons put forth, I have come to the conclusion that I cannot postpone the sentence in this matter for three years as requested by Mr. Mabila. I however have to agree to postpone it for a reasonable period within which the accused person would have completed giving his evidence in the other matter and the case of the other accused therein would have been finalized, whichever shall occur first. This is for me to have access to the evidence given in the other matter including what role the accused herein is proved by the evidence therein to have

realistically played, and what it is he is shown to have benefited by the evidence from the transaction so that I can pass a befitting sentence.

13. I have come to this decision I have considering that I do not want to be seen to be interfering with the matter of the accused person's former co-accused by passing a sentence that could send a message of either harshness or leniency which would end up being construed either as preventing the current accused from complying with his undertaking to give evidence in the other matter in case I give him a heavy sentence or I am soon as encouraging him to give evidence against his co-accused in case the sentence I pass is considered as being too lenient.

14. Furthermore, and most importantly, if I sentence the accused after he shall have given his evidence and been cross examined, or even after his co-accused shall have been sentenced, including what shall have transpired under their cross examination as regards their roll and that of the accused person, it shall make my work much easier on what an appropriate sentence to give shall be in the totality of the circumstances as well as its extent which I shall have to determine in context.

15. Further still, since the crown has indicated its intention to use the current accused as an accomplice I do not want to give him a sentence that might, given the gravity of the matter, discourage him from further assisting the crown. I am therefore prompted to withhold my sentencing until such time that the other matter shall have been finalized and I hope that shall be soon as I am informed dates in the other matter have already been set. I can only say I am very much alive to the seriousness of the matter at hand and shall be so when I eventually pass sentence.

16. I was informed by both counsel that the accused in this matter is honouring his bail conditions and I have no reasons therefore not to extend it until the call date I intend putting in place to review the situation on how far the other matter shall have gone.

17. Consequently this is the order I make in the circumstances of the matter.

1. The application to have the accused person's sentence postponed for three years be and is hereby refused.

2. The sentencing of the accused is postponed to a date to be arranged after the matter of his co-accused shall have been finalized or after it would have become possible to sentence the accused appropriately with all the necessary information at the court's avail.
3. The matter shall be mentioned in court for a call to review the situation on the 30th April 2012.
4. The accused person's prevailing bail conditions are extended to the said date.
5. Should the need arise at any time to review the accused person's bail conditions, the crown is given leave to approach this court as a matter of urgency to do so and as dictated to by the prevailing circumstances then.

Delivered in open court on this the _____ day of March 2012.

N. J. HLOPHE

JUDGE