



IN THE HIGH COURT OF SWAZILAND

Case No. 403/2011

In the matter between:-

THE KING

Crown

and

POLYCARP DUMISA DLAMINI

Respondent

Neutral citation: *The King v Polycarp Dumisa Dlamini* (403/11)
[2013] SZHC60 (14th March 2013)

Coram: HLOPHE J

For the Crown: Mr. N. M. Maseko

For the Respondent: Mr. M. T. Mabila

Heard: 11th March 2013

Delivered: 14th March 2013

Summary:

Criminal Law – Sentencing of accused –Principles of law entailed –Triad considered –Accused convicted of fraud committed in furtherance of a common purpose –Separation of trials as a result of the accused choosing to plead guilty and coming clean in evidence against his co-perpetrators –Huge sum of money (12 million Emalangeni) lost as a result of the fraud in question –Sentence subsequently imposed influenced more by considerations of the accused person’s remorse and having therefore assisted complainant in identifying the loopholes exposed by the accused’s evidence in the related matter so that the Government can manage to close such loopholes –Crime committed still calls for an appropriately stiff penalty being imposed –Custodial sentence unavoidable owing to nature of the matter –Compensation of complainant with “stolen” amount –Section 5(1) of Theft and Kindrent Offences against Public Officers Order 1975.

JUDGMENT

- [1] On the 28th November 2011 I granted an application for the separation of trials in a matter hitherto involving the current accused Polycarp Dumisa Dlamini, Mpumelelo Mamba, Sandile Dlamini, Sifiso Nsibande and a company by the name of Protronics Networking Corporation (PTY) Limited, who were all charged with eight counts of fraud with some of them also being charged with violation or contravention of section 13 (1) as read with section 2 of The Commission of Enquiries Act of 1963.
- [2] Moving the application was the Director of Public Prosecutions Mr. Maseko, who was then the Deputy Director of Public Prosecutions who was with counsel for the Defence, Mr. Mabila who also supported the application.

- [3] The reasons put forth for the move taken was that the accused herein had decided to come clean and own up on his role in the commission of the crimes concerned whilst his co-perpetrators wanted to defend the charges against them. It was stated further that the accused was tendering a plea of guilty to all the charges preferred against him and was prepared to become a witness for the crown. The crown saw no prejudice to its case if the trials are separated and the accused also saw none.
- [4] Mr. Maseko for the crown submitted that the crown could not let such an opportunity pass without making use of it because the reality was that the crown in the matter involving all the accused (the earlier matter) was dealing with organized crime. It was difficult to deal with organized crime without inside information Mr. Maseko submitted. To this extent he prayed that this court grants the application for the separation of trials. I must be clear from the onset that no mention of any favour being extended to the accused herein was revealed to me.
- [5] Whereas the general rule is that it is desirable for persons jointly charged with the same offence to be tried together, deviation from the general rule is allowed in certain circumstances. The cases of *S v Levy 1967 (1) SA 347 (W)* and *R v Bagas 1952 (1) SA 437 (A) at 441* are instructive in this regard.
- [6] The legal position is settled that the court has a discretion on whether or not to grant an application for separation of trials. The case of *R v Shumba and another 1933 AD 347* is authority for this point.

- [7] The main grounds for considering whether or not to grant the separation of trials sought is whether there is any prejudice to be suffered by the appellant. See in this regard ***R v Mc Millan and another 1958 (3) SA 800 (E)***.
- [8] The other consideration is where the accused persons intend entering different pleas. It has been said that this ground for separating trials is not a requirement of statute but a rule of practice. This principle was enunciated in ***R v Zonele & others 1959 (3) SA 319 (A)***. Having addressed me on the grounds why the accused felt that the separation of trials would favour him, particularly after he indicated that he was there and then tendering his plea of guilt, I allowed the application which is to say I directed that the trials in the said matters, be separated.
- [9] Soon after having granted the separation of trial, the accused was read the charges or put differently, had the charges put to him. The accused pleaded guilty to all the charges. I have to say that my task as the court was simplified because the accused was represented and I had no doubt he understood the full impact and effect of the decision he had taken.
- [10] After the pleas to all the counts were entered, Mr. Mabila applied for the postponement of sentence pending the finalization of the main matter. Whilst finalization was awaited, I was asked to extend the accused person's bail. I must say that the accused had been out on bail for a considerable period then. During all that time the accused had religiously observed all the bail conditions he had been released under. As there was no sound reason why bail could not be extended I duly extended same. The matter was postponed to a date for argument on

whether sentence in the matter could be postponed on such conditions I could find applicable or I should simply impose what I considered an appropriate sentence, at that stage and without further delay.

[11] The effect of both counsel's submission was that it would defeat the whole purpose of the arrangement between the crown and defence if I were to sentence the accused then. Having considered all the circumstances of the matter, I came to the conclusion that the sentence be postponed to a date after which the matter of his co-perpetrators would have been finalized or at least to a date after he would have given his evidence in the main matter.

[12] I was prompted to deal with the matter in this manner by the fact that the matter being what it is, I was not sure I had all the facts before me particularly as concerned the accused and also his degree of participation in the commission of the offences concerned as well as what it is he had really benefitted from the enterprise concerned. Whereas he had already declared to have benefitted only the sum of E126 000.00 when the Government had been defrauded of a sum in excess of 12 million Emalangeni, it had occurred to me that he could have been minimizing his benefit and participation. I was convinced it would come out during the trial of the main matter, how much he had exactly benefitted as I was convinced contrary evidence would be brought challenging or disputing his claim and proving otherwise.

[13] In this regard I tried to play a neutral role and not to be seen to be either discouraging the accused from giving evidence against his co-perpetrators by sentencing him before he had given evidence against

them or to be giving him what might be seen to be a very light sentence imposed without the court having full facts at its avail, as it would have had to be based on what he would have told the court without anyone particularly among his co-perpetrators having been afforded an opportunity to allege and possibly produce contrary evidence against his claim. Bearing all these considerations in mind, I postponed his sentence to the day after he would at least have played his part in the other matter.

[14] It was for this reason that the matter became virtually dependent upon what was happening in the main matter, hence its being repeatedly postponed up until now that the accused herein finalized his role in that matter.

[15] Having said all I have above I must now revert to the central issue before me today which is to impose what I consider an appropriate sentence against the accused.

[16] It has often been expressed by courts faced with the task of passing a sentence after the conviction of an accused person that same is not an easy task as it called for the court carrying out the exercise to maintain a delicate balance between various competing interests so that the court can be seen to have avoided passing either too severe or too lenient a sentence.

[17] The position is now settled therefore that the court carrying out the task I am now called upon to perform should not strive for severity but should have its sentence blended with mercy. The foregoing position

has been expressed in numerous decisions of this court, the Supreme Court and those of other jurisdictions. The case of *S v Zinn 1969 (2) SA 525* and that of *S v Rabie 1975 (4) SA 870* are instructive in this regard.

[18] I am therefore required to observe what has come to be known as the triad which consists of the three competing interests in sentencing which are the interests of the accused, those of society and the offence itself.

[19] As concerns the interest of the accused it was submitted that I should consider that the accused is an elderly man of sixty two years of age and that he is a first offender at this advanced age. This means that he has kept a clean record in life as his counsel put it, until now when he got himself into this situation.

[20] I have to consider in his favour that he is married with six children including a mother of his who I was told is 106 years old, being all dependent on him as he currently takes care of them from his income as a pensioner. While I am required by law to take into account such considerations, I cannot however lose sight of the fact these factors were there when he committed the offence he did, which was voluntary on his part. He therefore willfully assumed this risk well knowing what its possible outcome would be and cannot be heard to complain like he has just seen them.

[21] I have to take in his favour again what I was informed about his health having deteriorated mentally and through depression as he has had to be attended to at the Psychiatric Centre Hospital in Manzini.

[22] It was submitted that the accused person is remorseful for his conduct and the role he played in the commission of the crimes with which he was charged. This I think is obvious for all to see as it is borne out by the cooperation he not only exhibited towards the crown but the police and the court itself. It is common knowledge that he was letting out so much in the main matter when he gave his evidence about his degree of participation that Justice Levinsohn had to warn him about a possibility of implicating himself in other possible charges.

[23] Perhaps by far the most crucial factor for me to take into account in his favour is his coming forward upon realizing that he had not done what was expected of him and owning up thereto as well as by not only asking for forgiveness but by telling it all. I agree that this is a sign of total remorse and possible repentance by the accused. This I believe has not only helped the court deal with the matter of his co-accused at an informed level but I believe it has also assisted the complainant understand how easy it is to siphon money out of its coffers so that it can perhaps attend to all the weaknesses exposed which were exploited by the accused and his co-perpetrators. I otherwise agree with what was once submitted by Mr. Maseko as quoted earlier on above, namely that the accused made it possible for the crown to deal with what he referred to as a case of organized crime at its avail as such cases are often successfully prosecuted with the help of an insider.

[24] I agree that the sentence I pass against the accused person should indicate that although a total sum of over 12 million Emalangeni was lost to Government as a result of the fraud with which the accused is

charged, his assertion that he only received a sum of E126 000.00. has not been disputed. I am however mindful that he had benefited an undisclosed amount for the sums defrauded the complainant in counts 1, 2, 3, 4 and 5, which in all amounted to a sum of E1 272, 600.00. He has not said he did not benefit anything therefrom just as he has not disclosed how much he had benefited. Owing to the fact that these offences were committed early in the scheme of things here or when considering all the offences and when they occurred in relation to each other, and possibly as the first incidents of the fund involving the accused, he surely would not have gone on to commit the subsequent ones if he had not benefited from the earlier criminal transactions.

[25] Mr. Mabila further submitted that in passing an appropriate sentence against the accused, this court should approach the matter as though section 234 (1) of the Criminal Procedure And Evidence Act of 1938 was applicable. The section concerned provides as follows:-

“Freedom from liability to prosecution of accomplices giving evidence.

234 (1) If any person to the knowledge of the Public Prosecutor has been an accomplice, either as principal or accessory in the commission of any offence alleged in any indictment or summons, or the subject of a preparatory examination is produced as a witness by and on behalf of such public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all lawful questions put to him while under examination, he shall thereby be absolutely freed and discharged from all liability to prosecution for such offence, either at the public instance or at the instance of any private party; or, when he has been produced as a witness by and on behalf of any private

prosecutor who is aware of such persons complicity from all prosecution for such offence at the instance of any such private prosecutor.

(2) The said court or magistrate shall thereupon cause such discharge to be duly entered on the record of the proceedings.”

[26] Mr. Mabila made himself clear though that he was merely submitting that the section needed to be taken into account as a guide or by means of analogy, submitting that although the accused was not introduced as an accomplice witness it was clear that he was in effect one when considering his participation in the commission of the crime. He was therefore saying that had he been introduced as an accomplice, the accused would not have needed to answer the charges now leveled against him because having testified in the manner he did in the main matter, he would not have been tried for of these offences in line with the said section because he would have had to be discharged.

[27] The position is settled that often accomplice witnesses would be entitled to immunity from prosecution if they gave evidence to the satisfaction of the court. I am not sure whether the court dealing with the main trial was satisfied with the accused person's evidence and his manner of giving it. The crown was however visibly satisfied as expressed in court by Mr. Maseko.

[28] In reference to this section, Mr. Mabila did indicate that he was urging for a wholly suspended sentence against the accused whom he

submitted was no longer of any use to anyone having even retired from work.

[29] I must state from the onset that a wholly suspended sentence is unthinkable in this matter just as a custodial sentence is in my view not avoidable if a proper message that crimes of this nature cannot be tolerated is to be sent. Since the matter of the accused was proceeded with in the manner it was, it would be difficult for him to escape being dealt with like in all similar matters where a separation of trials had been ordered. It is true of course that the manner he conducted himself should influence the sentences the court eventually imposes as he cannot be viewed in the same light as one who insisted that a case be proved against him without assisting the crown as a witness.

[30] I need to point out that this matter has several factors which militate against the accused which include the seriousness of the crimes committed by the accused which all, the eight of them resulted in the loss of a sum of no less than E12, 272, 600.00. The role admittedly played by the accused was not a peripheral one but was a pivotal one. Whilst the points raised herein above in favour of the accused may be valid, it has to be remembered that the accused had voluntarily taken part in the commission of the crimes concerned, which should be taken together with the fact that huge sums of money were lost to the complainant. In a way therefore, the accused assumed the risk of being caught and dealt with in terms of the law from the moment he committed the crimes concerned. It is common knowledge that the complainant has been struggling lately with meeting its financial obligations and when one considers the ease with which such sums

- were siphoned out of the complaints coffers, it may well be that this situation is a result of similar losses of money which can only be reversed through appropriately harsh sentences being passed.
- [31] Otherwise I note that the offence committed by the accused is not only prevalent today but is on the rise as well. This necessarily calls for appropriate sentences being passed to meet both the retributive and the deterrent requirements of sentencing to result in a proper message being sent to other would be offenders.
- [32] Furthermore I need only emphasise that offences like these have a detrimental effect on the financial standing of the complainant as everybody can confirm today. Certainly the interests of society requires that appropriately severe sentences should be passed in such circumstances so that would be offenders are discouraged.
- [33] In the final analysis, I am of the view that although the general rule of sentencing requires that an accused convicted of several counts should be sentenced separately on each such count, this general rule may be departed from in appropriate circumstances as was observed by the Supreme Court in the case of ***Thembela Andrew Simelane vs The King Criminal Appeal case no. 01/2010*** where Justice I. G. Farlam JA (as he then was) cited with approval an excerpt from the case of ***R v Beyers 1956 (2) SA 91 (SR)***.
- [34] I am of the view that in this matter all the charges except for count No. 9 are closely related as they are about fraud allegedly committed by the same parties against the same complainant, although on different dates,

These dates are however relatively close to each other as they were all committed within a period not exceeding some two years or so. Chances are such charges would have had to run concurrently although I am making no finding in this regard as I do not have to decide this aspect of the matter herein. Furthermore although different in so far as it is not about fraud, the charge at count 9 was that of lying under oath which was itself committed in an attempt to cover up the fraud referred to in counts 1 to 8. I am therefore of the view that all the 9 counts qualify to be treated as one for purposes of sentence, and they shall be so treated.

[35] In view of the fact that the accused admittedly received a sum of E126 000.00 I cannot see why he would be allowed to enjoy the proceeds of crime. Consequently I will have to order that he compensates the complainant in this matter, the state, by paying to it the sum of E126 000.00 benefitted by him from the E11 000.00 fraud. This I am doing in light of the unlimited jurisdiction of this court taken together with the provisions of section 5 (1) of the Theft and Kindrent Offences by Public Officers Order No. 22/1975.

[36] In the circumstances of this matter, and particularly being influenced by the manner in which this particular accused conducted himself, which has made me not pass the severe sentence I would have otherwise passed including how it would have been effected, I make the following order.

1. Counts 1 to 9 are to be treated as one for purposes of sentence.

2. The accused person be and is hereby sentenced to 9 years imprisonment, three of which shall be suspended for a period of three years on condition that the accused does not commit a similar offence within the period of suspension.
3. The accused be and is hereby ordered to compensate the complainant in counts 1 to 8 with the sum of E126 000.00 being the equivalent of the sum benefitted by him from the fraud he was involved in.
4. This amount should be paid back to the complainant within 30 court days from today's date.
5. Should the said amount not be paid to the complainant within the said period, the complainants may levy execution for recovery of the full amount as provided for in respect of civil judgments in the rules of this court.
6. Should such default be willful, the court may on application by the Director of Public Prosecutions and on not less than 3 days notice to the accused, bring into effect the whole or such part of the suspended sentence of imprisonment as it may deem appropriate.

Delivered in open Court on this theday of March 2013.

**N. J. HLOPHE
JUDGE**