



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE

Review Case No. 04/12

In the matter between

REX

and

**KARABO RAMANAMANE
THABO MATSE
NJABULO MHLANGA**

Neutral citation: *Rex v Karabo Ramanamane & 2 Others* (04/12) [2014]
SZHC 04 (3 February 2014)

Coram: Mamba J

Considered: **03 February 2014**

Delivered: **03 February 2014**

- [1] Criminal Law and Procedure – Plea – where one or more accused persons plead not guilty and their co-accused plead guilty and there is no application by the crown for a separation of trials, the court should enter a plea of not guilty in respect of all accused persons.
- [2] Law of Evidence – admissibility of evidence – on a charge of robbery, crown leading the evidence of the investigating officer instead of the complainant to prove the commission of the crime. Officer telling the court what the complainant allegedly told him on how

- the robbery took place. This is hearsay and inadmissible to prove the commission of the robbery.
- [3] Law of Evidence – Police officer’s evidence that a accused pointed out or handed over to him the stolen goods. This amounts to a confession under the guise of a pointing out and the crown has to show that it was freely and voluntarily made by the accused without him having been unduly influenced to do so.
- [4] Criminal Law and Procedure – multiple procedural irregularities. Though taken individually may not result in a failure of justice but cumulatively may in an appropriate case result in such failure of justice.
- [5] Practice and Procedure – sentencing – predominately within the discretion of the sentencing officer. However, the court is required or enjoined to take into account the period spent in custody by an accused before sentencing; Section 16 (9) of the Constitution.
- [6] Practice and Procedure – criminal cases on automatic review – matter taking over 2 years to reach review court – such inordinate delay inexcusable and prejudicial to the accused.
- [1] The three accused persons herein appeared before the learned senior magistrate in Mbabane on 28 July 2011 on a charge of Robbery. They were all not represented by Counsel. They were, of course duly warned of their rights to legal representation and this occurred on their first appearance in court.
- [2] On being arraigned, the first accused Mr Karabo Ramanamane, pleaded guilty to the charge whilst both his co-accused pleaded not guilty to the charge.

- [3] Immediately after the pleas were taken, the court apprised the accused on their rights to cross-examine the witnesses by the crown. Thereafter, the crown led the evidence of 5316 Detective Constable Jabulane Mdluli who was the investigations officer. Rather strangely or most surprisingly, he was the only witness called by the crown.
- [4] After the close of the case by the crown, the accused again had their rights explained to them by the judicial officer. They each elected to make a sworn statement in their defence. The first accused substantially admitted having committed the robbery with two of his friends. These were, however, not his co-accused herein. The accused further told the court that he had subsequently left some of the stolen items at the home of the other two accused persons herein. When he did so, these accused persons were not at their respective homes and had no idea that these goods were stolen. In fact the first accused specifically told the court that he had to divide the stolen goods between his co-accused because these items were many and each of the accused would have been suspicious if all such goods were being brought to his house for safekeeping.

- [5] For their part, the second and third accused denied having committed the crime. They also disavowed any knowledge or suspicion that the goods that were left at their respective homes by the first accused were stolen. They were, however, all found guilty of the crime of robbery – as charged.
- [6] The first and second accused were each sentenced to a period of three years of imprisonment without the option of a fine whilst the third accused was sentenced to pay a fine of E3000.00 failing which to undergo imprisonment for a period of 3 years. The accused were sentenced on 2 September 2011 and since the court did not indicate when these sentences will start running or come into effect, they are deemed to run with effect from the date they were passed.
- [7] There are several very serious aspects or features of this case that worry me. First, the accused persons were arrested and taken into detention around the 10th day of March 2011. They made their first court appearance on 15 March 2011 and remained in custody for the duration of their trial despite the fact that they were admitted to bail which was fixed at E5000 for each of them. Despite this fact, their sentences were not back-dated. They spent about eight months in jail before being sentenced. Without a doubt, their

sentences ought to have been back-dated. (Vide section 16 (9) of our Constitution and the plethora of decided cases by the Supreme Court and this court on this issue).

- [8] Secondly, in view of the separate and different pleas by the accused, the court should have either entered a plea of not guilty by all of them or ordered a separation of trials. The first accused ought to have been tried alone and separate from his co-accused who denied the charge. See *R v Albert Mpini Simelane*, *R v Phineas Mabuza 1970-1976 SLR 245* and *R v Henry Mankuntu Sibandze and Another Case No. 21/2009*, unreported where *Masuku J* referring to *R v Siboniso Dlamini and Another Case No. 390/2008* said:

“I interpolate to observe that the procedure that normally follows when more than one accused person is arraigned and the accused persons proffer different pleas, is to apply for a separation of trials, as envisaged by section 170 of the Criminal Procedure and Evidence Act No. 67 of 1938. In that circumstance, the one who pleads guilty is dealt with separately from his counterpart. It shocks my sense of justice to compel an accused person who has timeously indicated that he intends to plead guilty to the offence charged, to run the entire

gauntlet of a fully blown trial. He should be dealt with in terms of his plea and punished accordingly.”

- [9] Thirdly, the evidence of the complainant should have been led to at least establish or prove the case for the crown at least regarding the two accused persons who pleaded not guilty. The evidence of the police officer as to what he was told by the complainant on how the crime was committed was clearly hearsay and inadmissible as against these accused persons.
- [10] Fourthly, there was not even a shred of evidence to gainsay the evidence of the second and third accused on how they came to be in possession of the stolen goods. Their evidence on this aspect of the case was amply supported by the first accused.
- [11] Fifthly, the evidence of the investigations officer relating to how the stolen goods were recovered was, in my judgment, nothing but a confession made to a person in authority – the police officer under the guise of a pointing out or at the very least, a confession made to such police officer under the guise that the said discovery of the stolen items was as a result of information given by the first accused. The crown ought to have proven that such a

confession had been freely and voluntarily made by him in order for it to be admissible as evidence in court, notwithstanding the plea of guilty by the first accused. (See the judgment by this court in *R v Robert Vusi Sacolo, Case No. 223/2007* unreported, judgment delivered on 28 March 2013 and the cases there cited)

[12] The other very disturbing aspect of this case is that despite the accused being sentenced on 2 September, 2011, the clerk of court was only able to certify the court record and say that it was in a fit condition to be submitted for review on 2 July 2012. That is about ten months after finalization of the case. The judicial officer concerned, did so on 22 August 2012. That is certainly a rather long period for review purposes. The matter is further compounded by the fact that there is no indication on the file as to when it was received by the office of the Registrar of this court. What is certain though is that it was allocated and referred to me by the Registrar today, ie 03 February, 2014. The whole of 2013 is unaccounted for in the chain. This is a real cause for concern.

[13] Cases forwarded to this court on automatic review should not take this long. Such delays are grossly prejudicial to the accused and the administration of

justice in general. Such delays render the whole process nugatory, meaningless and ineffectual or even derisory and unjust. Both the trial and the processes consequent thereupon were conducted in slap-dash manner. The axiom 'justice delayed is justice denied' rings true in this case.

[14] The first five irregularities I have enumerated above are so gross in that even though perhaps taken individually they may not constitute a failure of justice, but taken cumulatively, they do render the trial in the court a quo so flawed as to constitute a failure of justice or mistrial.

[15] All three accused persons have been gravely prejudiced by these irregularities. Their convictions and sentences are hereby set aside. The accused are to be released forthwith from prison in respect of their respective convictions herein.

MAMBA J