IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 835/2017

In the matter between:

CHARLES MYEZA		**Applicant**
And		
THE COMMISSIONER OF CORRECTIONAL SERVICES	**1st**	**Respondent**
THE REGIONAL COMMISSIONER	**2nd**	**Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**3rd**	**Respondent**
THE ATTORNEY GENERAL	**4th**	**Respondent**

Neutral citation: ***Charles Myeza v The Commissioner General (835 /2017) [2017] SZHC 163 (28th July 2017)***

Coram: **M. Dlamini J.**

Heard: **07th July 2017**

Delivered: ***28th*** **July 2017**

Prisoner – **refers to "*a person, whether convicted or not, under detention in a prison*."**

- **Their Lordships were much alive to the fact that his speedy trial was frustrated by failure to observe rules 23 and 30. They then embarked on what was expected of them in accordance with their oath of office, *viz*., discharge justice without fear or favour. They did this in terms of our legal axiom "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" and *mero motu* released Mr. Myeza imposing upon him conditions to ensure that his return for his appeal is secured.**

- **He came to court fully prepared to argue his appeal but the machinery of justice grinded to a halt on that day. He had to be released without his say so. In the justice of the matter, it is my considered view that he cannot be jeopardised. He stands to benefit from the two prerogative of mercy announcements.**

Summary: By motion proceedings, the applicant seeks for his release from custody on the basis of two Prerogative of Mercy announcements made by His Majesty the King, in accordance with section 78 and 275 of the Constitution of the Kingdom of Swaziland, Act No.1 of 2005. The respondent refutes any right by applicant under the two Prerogative of Mercy announcements. They contend that when His Majesty the King made the two announcements, Mr. Myeza was not incarcerated.

The parties

[1] Mr. Myeza is an adult male of kaPhunga area, Shiselweni region. He is a former police officer.

[2] The first respondent is the Commissioner General for His Majesty's Correctional Services in charge of all the correctional institutions in the country. The second respondent is the Regional Commissioner for the Hhohho region, cited herein by reason that he is in charge of Bhalekane Correctional Services where applicant is presently incarcerated.

[3] The third respondent is the Director of Public Prosecutions seized with the powers to conduct prosecution of criminal matters in the Kingdom. The fourth respondent is the Attorney General who is the legal representative of first to third respondents.

The applicant's prayer

[4] The applicant prays amongst others:

> *"3. An order compelling and directing First and Second Respondent that the Applicant imprisonment sentence be calculated on the basis of the provisions of conviction and sentence* ***in Rex v Charles Myeza and three others, case 117/2006*** *on 22nd August 2013, as read with the pardon to every prisoners whose sentence at the time of making of the notice in Terms of the Prerogative of Mercy of the King, Notice of 2015 and 2016 respectively, had a remaining sentence of thirteen months or more which sentence should be reduced by six months only."*[1]

Chronicles

[5] It is common cause that Mr. Myeza was convicted of various counts of fraud, forgery with uttering and effectively sentenced to five years imprisonment. This was on 22nd August 2013. On 9th September 2013 Mr. Myeza applied for bail pending appeal. His bail application was declined by the same court. Effectively he remained in custody.

[6] On 7th November 2014 Mr. Myeza attended his appeal before the Supreme Court. The Supreme Court ordered his release from custody on the basis that the Registrar had failed to compile a proper record of proceedings of the court *a quo*.

[7] His appeal was later prosecuted and on 30th June 2016, Mr. Myeza lost on appeal. His sentence of five years was also confirmed. He returned to custody on the said date.

Gravamen of Mr. Myeza's case

[8] Mr. Myeza on asserting his right to benefit under the Prerogative of Mercy attested:

[1] see page 3 para 3 of the book of pleadings

"9. On the 9th September 2013 the Applicant applied for bail pending the appeal but it was then denied..... It should be noted that at all material times during the running of the imprisonment sentence, no bail was ever granted by the court to the Applicant to date of this application. Further, Applicant never applied for bail after it was denied on 9th September 3013 including the 7th November 2014.

10. On 7th November 2014 the Applicant went on appeal hearing at the Supreme Court but since there were no High Court records, the court wanted to release the Applicant pending the compilation of the proper court record. In this instance the Applicant was not released on bail based on any application by Applicant but it was the Director of Public Prosecutions who negotiated bail outside court to the Applicant. The main reason is that the Supreme Court was about to release Applicant because of the incomplete records from the High Court. Since there were no records of the court a quo proceedings Applicant was then ultimately released on bail in order to serve the gross procedural irregularity that was at the face of the Supreme Court and the Third Respondent duly represented by Crown Counsel Macebo Nxumalo.

11. It should be noted that the case was then ordered to come back to court on May 2015 with a full properly constructed records. This did not happen because the records were incomplete and the sentence of imprisonment was running because it was not Applicant's fault to postpone the matter at the Supreme Court.

12. On 30th June 2016, the Applicant went for appeal at the Supreme Court and he was sent back to prison to serve his remaining part of his sentence. It must be noted that his release on 7th November 2014 had nothing to do with any release on bail because bail was denied or was not granted as reflected in page 8 of annexure "B" hereof." [2]

[9] From the above, Mr. Myeza contends that he is entitled to benefit from the Prerogative of Mercy.

[2] see page 7 para 8, 9, 10 11 and 12 of book of pleadings

The Respondents

[10] The respondents have strenuously opposed the release of applicant based on the Prerogative of Mercy announcements. They assert that the two instruments under which applicant wishes to benefit do not apply to a convict who was not within the confines of the four walls of the Correctional Services at the time of pronouncement.

Adjudication

[11] Senior Crown Counsel, Mr. Macebo Nxumalo, who appeared on behalf of the Crown during applicant's first appearance for his appeal, has informed the court that owing to the incomplete record, the Supreme Court *mero motu* ordered that the applicant be released on bail. He confirmed that the applicant did not apply for bail on 7th November 2014. The Supreme Court admitted him to bail pending prosecution of his appeal.

[12] From the above set of events it is clear that the Supreme Court was guided in so admitting the applicant to bail by Rule 23 of the Court of Appeal Rules 1971 which reads:

> *"Record in appeals against sentence and/or conviction*
>
> *23(1) If an appeal is lodged against sentence only, the only record to be placed before the Court of Appeal on the hearing of the appeal shall be prepared by the Registrar of the High Court and shall consist of a short transcript of the charges pleas, judgment and all proceedings after judgment. Inclusive of any representations by or on behalf of the convicted person or the Crown and where there is a private prosecutor, by or on behalf of prosecution.*

Provided that other parts of the original record may be transcribed if especially so ordered by the Registrar or by a Judge of the Court of Appeal.

(2) If an appeal is against conviction the record shall be prepared by the Registrar of the High Court in the manner, so far as may be, set out in rule 30."

[13] It is common cause that prosecution of applicant was by the Crown and not private. The applicant having lodged his notice of appeal, the Registrar had to set the ball rolling. The Registrar was therefore bound to prepare the record of proceedings for the applicant's appeal to proceed without any hindrances.

[14] It is common cause that the Registrar did not comply with rules 23 and 30. In the minds of their Lordships, Justices of the Supreme Court, this slackness in the august office of the Registrar had serious repercussions on the right to a fair hearing, a cornerstone to democratic governance and a violation of Section 21 of the Constitution of the Kingdom of Swaziland Act No.1 of 2005. Section 21 of the Constitution promulgates that:

"*In the determination of civil rights and obligations or any criminal charge a person shall <u>be given a fair and a speedy public hearing</u> within a reasonable time by an independent and impartial court or adjudicating authority established by law.*"

[15] Their Lordships were much alive to the fact that his speedy trial was frustrated by failure to observe rules 23 and 30. They then embarked on what was expected of them in accordance with their oath of office, *viz*., discharge justice without fear or favour. They did this in terms of our legal axiom "*justice should not only be done, but should manifestly and undoubtedly be seen to be*

done"[3] and *mero motu* released Mr. Myeza imposing upon him conditions to ensure that his return for his appeal is secured.

[16] From the above full set of events, it is clear that Mr. Myeza was released as a result of the machinery of the administration of justice system failing him on the one hand (as his record of appeal had shortcomings) and on the other hand the same machinery upholding justice (by their Lordships securing his liberty).

[17] The main question is therefore, in the above circumstances should Mr. Myeza be denied the right to benefit under the two instruments? It is without doubt that had there been compliance with rules 23 and 30, the applicant would have benefited from the two prerogative of mercy announcements. He, however, found himself out of custody through no choice of his but the dictates of justice. The respondents are contending that he should not benefit despite that he found himself in a situation through no fault of his.

[18] I appreciate that he enjoyed liberty and therefore benefitted while out of custody. I am further alive to the definition of a prisoner as pronounced in the two announcements that it refers to "*a person, whether convicted or not, under detention in a prison*."[4]

[19] However, should he now suffer irreparable prejudice for finding himself in a situation which is not his making? The answer must be a certain no. He came to court fully prepared to argue his appeal but the machinery of justice grinded to a halt on that day. He had to be released without his say so. In the justice of the matter, it is my considered view that he cannot be jeopardised. He stands to benefit from the two prerogative of mercy announcements. This conclusion is

[3] The Chairman of Liquor Licencing Board v Joshua Mkhonta & 3 Others 01/2013 (unreported)
[4] See section 1 of the Prisons' Act 1964

fortified by the evidence that when their Lordships ordered his release under bail on the 7th November 2014, they ordered that his record of proceedings be ready by May 2015 for prosecution of his appeal. It is not disputed that in May 2015, his record of proceedings was still not complete. The relevant office took a lackadaisical attitude. Critical was that this was the first prerogative of mercy announcement (2015). The record was certified complete by the same office of the Registrar which ought to have prepared it in terms of Rules 23 and 30 only in 2016. In all honesty, justice would best be served by Mr. Myeza benefitting from the two announcements.

[20] It is appropriate to point out that it is not as if Mr. Myeza is praying for Ceasar's pound of flesh. He is not saying that he should be discounted for the period of his non-incarceration (between 7th November 2014 to 30th June 2016, being the period he was not in custody). He appreciates that during this period, he enjoyed liberty and he is willing to serve his custodial sentence inclusive of the period he was not in custody. He is only asking that he be considered under the two prerogative of mercy announcements only.

Calculation

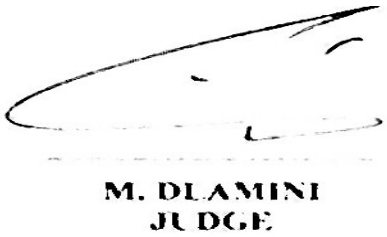
[21] During the hearing of this matter, both Counsel for applicant and respondents' agreed that if the court were to hold that the applicant stands to benefit under the two prerogative of mercy announcement, he ought to be released forthwith.

[22] In the above premises, I order as follows:

1. Applicant's application succeeds;

2. The first and second respondents are hereby ordered to compute the custodial sentence of applicant by taking into consideration the Prerogative of Mercy announcements by His Majesty the King made in 2015 and 2016;

3. No order as to costs.



M. DLAMINI
JUDGE

For Applicant: **L. N. Dlamini of Nkosi Attorneys**

For Respondent: **B. Mkhonta of the Attorney General's Chambers**