



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 116/19

In the matter between:

THEMBELA SIHLONGONYANE

APPLICANT

AND

MAGISTRATE TSABEDZE

(MANZINI MAGISTRATE COURT)

1st RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

REVIEW

Neutral Citation:

Thembela Sihlongonyane vs Magistrate Tsabedze & 2

Others [116/19] [2019] SZHC 117 (4th July, 2019)

Coram: FAKUDZE, J

Heard: 23rd April, 2019

Delivered: 4th July, 2019

Summary: *Criminal procedure – Review of proceedings of court aquo based on failure by court aquo to order separation of trial – also failing to observe doctrine of common purpose – nothing irregular about proceedings in court aquo – Application dismissed.*

BACKGROUND

- [1] The Applicant was jointly charged with one Mlondi Mkoko and convicted of one count of Robbery by the Manzini Magistrate’s Court.
- [2] The Applicant was together with his co-accused, sentenced to three (3) years imprisonment without the option of a fine on or about the 8th March, 2019 and the sentence was backdated to their day of arrest.
- [3] On the 26th March, 2019, the Applicant instituted an Application wherein he prayed for the above court to review, correct and set aside the conviction and sentence issued by the 1st Respondent in the court *aquo*.

THE PARTIES' CONTENTION

The Applicant's case

- [4] The Applicant contends that there should have been a separation of trial arising from the fact that he pleaded not guilty to the offence and his co-accused pleaded guilty. Since the accused was not legally represented, it was incumbent upon the presiding officer to consider the separation of trial *mero motu*.
- [5] The failure by the Presiding Officer to tackle the issue of the separation of trial led to the evidence by the First accused being admitted against the Second accused. There was real prejudice occasioned as a result of this failure. The evidence of each accused person should have been considered separately.
- [6] The Applicant further submitted that the consideration of the separation of trial is discretionary, and the potential prejudice to the accused who has pleaded not guilty is important.
- [7] If the intention was that the case should proceed as if the First accused had pleaded not guilty, the Presiding Officer should have made the plea in the record. The Applicant therefore alleges that throughout the case, the First accused's matter was dealt with under a plea of guilty. Further, the record does not show which rights were explained to the Applicant by the Presiding Officer. All that the Presiding Officer did was to make an entry that the rights were explained. The nature and the contents of those rights ought to be shown on the record.

[8] The other issue raised by the Applicant is that of common purpose. The Applicant avers that common purpose arises in two ways; by agreement or by active association. Where there is an agreement between the accused, clearly there is no problem. No attempt was made by the prosecution to prove the existence of an agreement and it is leaning towards active participation by the Applicant. The Applicant contends that there is no evidence that he participated in the robbery of PW 1. PW 1 could only say that the Applicant was there and therefore the First accused can only marry the Applicant by his mere presence. The mere presence at the scene of crime does not attract liability.

[9] The Applicant ought to be acquitted accordingly.

The Respondent's case

[10] The Respondent's case is that failure by the court *aquo* to order a separation of trial did not result into a miscarriage of justice. The record of proceedings shows that the issue of separation of trial was never considered by both the prosecutor and the Presiding Officer. Nonetheless, the record further shows that the crown's witness (complainant) was able to relate to the court what happened on the day of the robbery. The evidence led during the trial pointed out that the Applicant together with his co-accused attacked and robbed the complainant.

[11] In the case at hand, although a separation should have been ordered, the court proceeded as if both accused persons had pleaded not guilty as the crown accordingly called and led its witnesses in trying to prove the guilt of

the accused persons beyond reasonable doubt. The irregularity was not so gross so as to constitute a failure of justice.

[12] On the issue of the Applicant's allegation that the Presiding Officer failed to explain accused's rights during the course of the trial, the record shows that the rights were explained including the right to cross examine witnesses. The contents do not appear in the record, but there is evidence that the Applicant understand his rights. The way he cross examined PW 1 and the fact that he chose to give evidence without taking an oath (unsworn evidence) all point towards the fact that he understood the process.

[13] On the issue of common purpose, the Respondent avers that the record clearly shows that the Applicant acted in common purpose with his co-accused and he played a key role during the robbery as he allegedly pointed a knife to the complainant so as to enable the co-accused to pick pocket the complainant. The record also shows that the Applicant and his co-accused are the ones who robbed the complainant at a knife point. The complainant positively identified them. During cross examination PW 1 stated that he saw the Applicant pointing a knife at him and the knife was sharp and long. The Crown at the court *aquo* was able to prove active participation and association in the commission of the robbery with regard to the Applicant. Finally, the conviction did not come as a result of the First accused implicating the Applicant. Even if the court were to remove First accused's evidence from the equation still the evidence of the complainant would be enough to secure a conviction. The knife that was recovered by the police was the one used by the Applicant while the other went with the suspect who ran away.

The Applicable Law

[14] Section 170 of the Criminal Procedure and Evidence Act, 1938 states that:-

“If two or more persons are charged in the same indictment or summons whether with the same offence or any of the accused, direct that the trial of the accused or any of them shall be held separately from the trial of the others and for such purpose may abstain from giving a judgment as to any of such accused.”

[15] The principle in Section 170 of the Criminal Procedure and Evidence was restated in **R V Zondi and Others 1959 (3) SA 319 at 325 AD** as follows:

“Now it is clear that when the first Appellant pleaded guilty, the judge should have separated the trial, that is to say the case of the first Appellant should have been dealt with separately from that of the other two appellants. There is no statutory provision making such a course compulsory but it is an established and prudent practice..... its purpose is to save those who have pleaded not guilty from being prejudiced; for example by cross-examination or evidence of those who have pleaded guilty and vice versa. The basis of the rule is that when an accused pleads guilty, there is no issue between him and the Crown and there is no trial in regard to verdict.”

[16] On the issue that an accused must be informed of his right by a judicial officer especially where the accused is unrepresented, Didcott J in **R v Hlongwane 1982 (4) S.A. 321 at 323 C-D** stated as follows:-

“To let him know of that right yet not how to exercise it when he has no idea and starts running into trouble is not of much use. Mere lip

service to the duty is then paid. It is settled law that there rests on the judicial officer a duty to explain to the unrepresented accused the various procedural rights that the accused has in the conduct of his or her trial and when necessary, to assist him or her in the exercise of such rights.”

- [17] In **Mduduzi Dlamini V Rex Criminal Appeal Case No. 12/2008** the High Court explained the extent to which the rights must explained when it observed as follows:-

“[6] The court aquo kept a manuscript record of proceedings. For obvious practical reasons a verbatim recording of the explanation of the aim and purpose of cross examination is not written into the record. Instead, the trial magistrate recorded that rights to cross examination explained to the accused who states that he understands his rights. Practice in the lower courts where records are manually kept by Presiding Officers usually incorporates a proforma which details the precise explanation in this regard.”

- [18] On the issue of doctrine of common purpose in **Rex V Mfanawenkhosi Dlamini Criminal Case No. 472/2010**, Maphalala M.C.B, J. (as He then was) stated as follows:-

“It is trite law that in consequence crimes such as murder, robbery, malicious damage to property and arson, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability. However, the doctrine of common purpose dispenses with the causation requirement and seeks to criminalise collective conduct as a public policy initiative to combat

serious crimes committed by collective individuals. This policy was brought about by the difficulty in proving that the act of each person in the group contributed causally to the criminal result. It is well settled that in cases involving the doctrine of common purpose, the Crown has to prove a prior agreement amongst the co-perpetrators to commit the offence; in the absence of the agreement, the Crown has to prove active association of each of the members of the group in the commission of the offence by performing his own act of association despite foresight of the possibility of the outcome of the offence.”

COURT’S CONCLUSION

[19] There are basically two issues that the Applicant seems to be raising. The first one pertains to the separation of trial and the other one pertains to common purpose. The Applicant alleges that the failure by the Presiding Officer to call for a separation of trial amounted to a failure of justice. This is based on the fact that the Applicant had pleaded not guilty whereas the Applicant’s co-accused had pleaded guilty. The Respondent states to the contrary when it says that one act of failure of justice on the part of the Presiding Officer cannot amount to a miscarriage of justice. This failure is not so gross in nature. In any event the prosecution proceeded as if the Applicant had pleaded not guilty. The court’s assessment on this point is that it agrees with the Respondent. The Record of proceedings of the court *aquo* shows that all the rights of the accused were explained to him and he understood them. In **Rex V Karabo High Court Case No. 4/12**, Mamba J. stated that an irregularity that is taken individually may not constitute a failure of justice, but taken cumulatively, they render the trial flawed as to constitute a failure of justice or mistrial. It is also the court’s considered

view that the court *aquo* proceeded as if the Applicant had pleaded not guilty although I must point out that the Presiding Officer should have made this entry in the Record of the Plea of not guilty on the part of the co-accused.

[20] On the issue of common purpose, the Applicant states that the evidence of the co-accused, exculpated him. The Respondent states that the evidence of the complainant implicated the Applicant. The complainant point out both accused persons and went further to state that the Applicant pointed a knife at the complainant. Not only was the Applicant at the scene of the crime, he also participated. The court is in agreement with the Respondent's contention. As seen in **Mduduzi Dlamini V Rex** (Supra), all that the Crown must prove is the "active association of each of the members of the group in the commission of the offence by performing his own act of association despite foresight of the possibility of the outcome of the offence....."

The Respondent has managed to do that in the court *aquo*.

[21] Considering all that has been said above, the court has come to the conclusion that the court *aquo* did not misdirect itself on the issue of separation of trial and the issue of common purpose. The Application is therefore dismissed.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

APPLICANT: B.J. SIMELANE

RESPONDENT: M.S. DLAMINI