

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO.

1/2010

In the matter between

THEMBELA ANDREW SIMELANE

APPELLANT

AND

REX

RESPONDENT

CORAM: RAMODIBEDI, CJ

EBRAHIM, JA

DR. TWUM, JA

HEARD: 3 MAY 2010

DELIVERED: 27 MAY 2010

SUMMARY

Criminal Law and Procedure – Stated case – Unauthorised release of the unsigned judgment of the trial court to counsel and the press – Such judgment containing matters relating to sentence before mitigation – Whether the court a quo disqualified from proceeding with sentence.

JUDGMENT

RAMODIBEDI, CJ

[1] Essentially this matter comes before this Court by way of a stated case submitted by Agyemang J in the High Court in the following terms:

“The circumstances surrounding the unauthorized release of the unsigned judgment of this court which contains matters related to sentencing of the accused person to council (sic), even the press, compel me to send this matter to the Supreme Court as a case stated. The Supreme Court is to determine whether this court as at present constituted has disabled itself from passing sentence after due conviction. An order is made for the issuing of the sentencing of the accused person to be sent up to the Supreme Court immediately.”

[2] Properly put, the real question posed in the stated case is the following: is the trial court precluded or disqualified from passing sentence after conviction simply because it has already indicated the proposed sentence in an unsigned draft judgment made before hearing submissions in mitigation and before such sentence is officially pronounced?

[3] The short answer to this question which is without precedent in this jurisdiction must, in my view, obviously depend on whether or not the trial has resulted in a substantial miscarriage of justice in the final analysis.

[4] Before proceeding further on the point at issue it is necessary to mention that Mr. Mabila for the appellant has abandoned the appellant's purported appeal against both conviction and sentence in the matter. Counsel is well advised to adopt this approach because the proceedings before the court *a quo* have not yet been concluded. The so-called appeal was therefore not only premature but it was also ill-advised in the circumstances.

[5] With the above prelude I turn now to the stated case. It is no doubt convenient to commence with a brief resume of the relevant facts. The appellant, an attorney in this jurisdiction, faced an indictment in the High Court comprising six counts of theft of clients' monies arising from the Motor Vehicle Accident Fund.

[6] On 19 January 2010, the appellant was found guilty as charged on all the six counts of theft. The learned Judge *a quo* specifically made the following order:-

*"The sitting is adjourned to 22nd January 2010 for
counsel to make submissions in mitigation."*

[7] The parties are on common ground that before submissions in mitigation of sentence could be made the Judge *a quo*'s unsigned draft judgment containing the proposed sentence was brazenly stolen and leaked to the press as well as the appellant himself. Thereafter, the appellant adopted the view that the Judge *a quo* was disqualified from proceeding further because she had prejudged the sentence without hearing submissions in mitigation. Hence the stated case in this matter.

[8] It would, in my view, be premature for this Court to express a concluded view at this stage on whether or not the court *a quo* has committed any irregularity and if so whether such irregularity, if any, has resulted in a miscarriage of justice. That question, if any, can only arise after the trial in the court *a quo* has been concluded. I should be prepared, however, to state the following basic principle. It is of fundamental importance to recognise that it is not every irregularity that results in a miscarriage of justice. A decision on whether or not an irregularity has in turn occasioned a miscarriage of justice will obviously depend on the particular circumstances of each case.

[9] In *casu*, until the court *a quo* has officially pronounced sentence in the matter it is, in my view, premature to determine the issue of miscarriage of justice. After all, that court is not bound by the so called “sentence” contained in the unsigned draft judgment in question. The court is obviously still open to persuasion in mitigation of sentence. It is still open to the court to impose a harsher or lesser sentence than the one indicated in the unsigned draft judgment as it sees fit after hearing submissions in mitigation of sentence.

[10]It follows from these considerations that the question posed in the stated case as fully set out in paragraph [2] above is answered in the negative. The trial court is not precluded or disqualified from passing sentence in the matter.

[11]Accordingly the matter is remitted to the court *a quo* to pass sentence after giving the accused an opportunity to make submissions in mitigation.

[12]The Registrar of the High Court is hereby directed to give this matter first preference on the High Court Roll.

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree _____

DR. S. TWUM

JUSTICE OF APPEAL

For Appellant : Mr. M. Mabila

For Respondent : Mrs. M. Dlamini