



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CRIMINAL CASE NO. 13/13

HELD AT MBABANE

In the matter between:

CHARLES MYEZA

APPELLANT

v

REX

RESPONDENT

Neutral Citation : Charles Myeza v Rex (13/13) [2014] SZSC 46
(03 DECEMBER 2014)

Coram : S.A. MOORE J.A., M.C.B. MAPHALALA
J.A., P LEVINSOHN J.A.

Heard : 07 NOVEMBER 2014

Delivered : 03 DECEMBER 2014

Summary: Criminal Appeal - Record incomplete - Substantial portions of the record missing - Justice cannot be served with the hearing of the appeal upon such a record - Appellant has already served approximately half of his five year sentence - Admitted to bail upon certain conditions in these exceptional circumstances.

JUDGMENT

MOORE J.A.

THE OFFENCE

[1] The appellant was charged together with two other natural persons. Also charged was a corporate entity. The appellant was admittedly a director and signatory to that company's accounts. The quartet was indicted with 18 counts of fraud and 30 counts of forgery and uttering. According to the judgment of Hlophe J in which he refused the appellant's application for bail pending his appeal, the appellant was "convicted of various counts of fraud, forgery and uttering and sentenced to five (5) years imprisonment after considering the mitigation made on his behalf." The appellant's conviction was expressed in a judgment of the trial court handed down by it on the 23rd August 2013.

THE APPEAL

[2] The appellant filed five grounds of appeal. Synthesized, they alleged that the prosecution failed to prove:

- (i) The commission of criminal offences;
- (ii) The necessary criminal intent on the part of the appellant;
- (iii) The element of fraud.

The appellant also complained that the sentence was inappropriate. An additional ground advanced before us was that the record was so incomplete that a fair hearing of the appeal was not possible.

[3] By Notice of Motion dated 28th October 2014, the appellant sought an order:

1. Declaring that; the record of proceedings of the trial of the appellant at the High Court, as certified by the Registrar of the High Court Ms Fikile Nhlabatsi is incomplete and unreliable, as a true reflection of the proceedings of the trial at the High Court.
2. Declaring that an adjudication of the appeal based on the record of proceedings as it stands can lead to a failure of justice.
3. That the conviction and sentence of the appellant be set aside.

4. Granting the Appellant any further and/or alternative relief as this Honourable Court deems fit.

- [4] In the founding affidavit grounding his application, the appellant swore that:
- i. The record certified by the Registrar of the High Court on the 17th October 2014 lacked the exculpatory evidence of key defence witnesses.
 - ii. The evidence of six defence witnesses and eight prosecution witnesses was absent from the record.
 - iii. The appellant was in not responsible for the state of the record.
 - iv. The Registrar of the High Court was responsible for the preparation of the record.
 - v. His conviction and sentence ought to be set aside because the missing portions of the record are of high material importance to the adjudication of his appeal.

The averments of the appellant were supported in material particulars by the confirmatory affidavit of Attorney Sipho Gumedze who swore from his own knowledge as the representative of the appellant during his trial in the High Court. Counsel for the Crown quite rightly conceded that the state of the record did not allow for a fair hearing of the appeal.

[5] By Counsel for the Crown's reckoning, the appellant had already served approximately half of his sentence. Counsel for the appellant agreed. He urged that if the appellant was not granted bail, the period of his incarceration pending the hearing of his appeal would balloon to an even more substantial proportion of his overall sentence.

[6] In a judgment delivered on the 25th July 2014, Hlophe J had dismissed the appellant's application for bail. His principal reasons for doing so were:

- i. There were no prospects of success in the appeal.
- ii. The sentence imposed was "relatively long, making the risk of absconding a reality".
- iii. The noted appeal on the conviction and sentence was not prosecuted by the applicant.
- iv. There was not "any appeal on the dismissal of the application for bail pending appeal noted to be heard in the November 2013 sitting of the Supreme court of Appeal or even anytime later."
- v. "Although the Applicant now alleges that he could not prosecute his appeal because of an unavailable or incomplete record of proceedings; it is not difficult to reject such a contention if one considers the contents of the Applicant's letter referred to above which sought a postponement of the appeal as

early as the 30th March 2014 on different grounds altogether from the ground now being mentioned.”

- vi. “The circumstances of this matter do not warrant me to determine the correct position on this aspect of the matter.”

[7] The trial judge appeared to have placed overwhelming store upon his subjective determination that the appeal enjoyed little prospect of success. He correctly appreciated, however, that the absence or incompleteness of the record could, in an appropriate case, be a ground for allowing an appeal. It was his duty therefore to “determine the correct position on this aspect of the matter.” The judge accepted “that the discovery of new fact does oblige a court to hear a bail application afresh irrespective of its having heard it earlier.” He appears nevertheless to have given insufficient weight, at the time he discussed the application for bail on the 25th July 2014 - when the possibility of enrolment of the appeal in the November 2014 session loomed large - to the strengthening of the appellant’s claim for admission to bail by the continuing passage of time.

[8] The commencement of the next sitting of this Court is nearly six months away. No one has given the assurance that the record will be satisfactorily

completed by then. In these exceptional circumstances, the appellant is admitted to bail in terms agreed between Counsel and reflected in the order in paragraph [16].

[9] Returning to the dismissed application for bail, the judge appeared to be far from satisfied that the record was incomplete. Still, the question having been raised by the appellant, he does not appear - as he should in the interest of justice and fairness - to have called upon those responsible for its preparation to give him an accurate picture concerning the state of the record. His strictures upon the appellant that he “makes no mention of having asked for a complete record to be produced”: and for “not making any such request” are misplaced. It was the duty of the judge to be satisfied that the record before him was complete.

[10] No duty rests upon an appellant to ask for a complete record to be produced. That is the duty of the Registrar of the High Court. But an appellant enjoys a right to complain if a full and accurate record is not made available. Rule 23 of the Court of Appeal Rules, 1971 is to be found in PART III CRIMINAL APPEALS under the rubric “*Record in appeals against sentence and/or*

conviction”. If an appeal is lodged against sentence only, the provisions of sub-rule (1) of Rule 23 suffice. However, sub-rule (2) provides that:

“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.”

[11] Rule 30 (5), (6) and (7) are of particular importance. They mandate, particularly in criminal cases, where the liberty of the appellant may be in question, that the record must:

- i. contain a full record of all material which is requisite and necessary for a full, fair and just determination of the appeal.
- ii. observe the precepts set out in sub-rule (6) which are designed to ensure that the record is, in a word, user friendly.

[12] Sub-rule (7), in order to ensure the preparation of a proper record for the use of appellants, respondents, and of this Court, then requires that:

“the registrar of the High Court shall satisfy himself that the provisions of sub-rule (6) hereof have been complied with before furnishing the certificate required by sub-rule (1) hereof.”

[13] Our Criminal justice system would be poorly served if decisions of this Court were to be based upon incomplete or otherwise unsatisfactory records: or worse, if this Court is unable to make a determination on the merits or otherwise of an appeal, if no record, or no satisfactory record, is available.

[14] The discussion concerning the state of the record in both civil and criminal appeals is not being conducted in the abstract. Already, with approximately two thirds of the cases enrolled still to be heard, two matters have had to be adjourned because of deficiencies on the record. Adjournments have been necessitated in recent sittings of the Court for similar reasons. Regrettably, there appear to be a continuation of technical, technological, and human resource difficulties confronting the Registry in the preparation of records in criminal appeals and in the certifying of records in civil matters. This situation needs to be addressed urgently.

CONCLUSION

[15] In the circumstances of this case this Court has concluded that the interests of justice to the appellant and to the public could not be served by hearing

the appeal upon the record as it stood. The record must accordingly be reconstructed so as to bring it up to the required standard.

ORDER

[16] Accordingly, the order of this Court is that:

- i. The case be and is hereby adjourned to the May 2015 sitting of the Court.
- ii. The Registrar is directed to complete the preparation of the record in conformity with the requirements of Rules 23 (2), (3) and 30 (5), (6) and (7) of the Court of Appeal Rules, 1971.
- iii. The appellant be and is admitted to bail with effect from today upon the following conditions.
 - a. Appellant is to deposit with the Treasury Department the sum of E3,000.00 (Three thousand Emalangeni) cash.
 - b. To provide surety equivalent to the amount E12,000.00.
 - c. To report to ka Phunga Police Station every last Friday of the month.
 - d. To surrender his passport to the investigating officer on the first Friday after his release.

- e. Not to interfere with the reconstruction of the record of proceedings except on invitation by the Registrar of the High Court.

S.A. MOORE
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

For the Appellant : Mr. S. Gumedze

For the Crown : Mr. M. Nxumalo