



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Review Case No: 38/2002

In the matter between:

RICHARD PHENI MABASO

APPLICANT

VS

REX

RESPONDENT

Neutral citation: *Richard Pheni Mabaso v Rex (38/2002) [2016] SZSC 67 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA CJ,
DR. B.J. ODOKI, JA,
S.P. DLAMINI, JA
Z. MAGAGULA, AJA
M. LANGWENYA, AJA.**

Heard **11th May 2016**

Delivered **30th June 2016**

Summary

Criminal Law – review application in terms of section 148 (2) of the Constitution – applicant charged with murder and attempted murder and subsequently convicted by the High Court of murder and assault with intent to cause grievous bodily harm – applicant sentenced to death in respect of murder and five years in respect of the assault – conviction and sentence confirmed on appeal by the Court of Appeal.

The basis of the review application is that the applicant was not given adequate time to prepare for the appeal, and, that the record of proceedings on appeal was incomplete – another ground of review is that the applicant was not afforded legal representation in accordance with the tenets of justice.

Application withdrawn on the date of hearing after applicant’s death sentence was commuted by the Head of State to a life sentence – accordingly, the application is removed from the roll.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The applicant was charged with murder as well as attempted murder. He was arraigned before the High Court for trial and was subsequently convicted of murder in respect of the first count, and, assault with intent

to cause grievous bodily harm in respect of the second count of attempted murder.

[2] His Lordship Chief Justice Sapire found that there were no extenuating circumstances in respect of the charge of murder, and, he sentenced the applicant to death. In respect of the second count the applicant was sentenced to five years imprisonment without the option of a fine. The judgment was delivered on the 27th January 2003.

[3] The applicant subsequently appealed to the Court of Appeal in respect of both conviction and sentence. However, the Court of Appeal confirmed both the conviction and sentence, and, consequently dismissed the appeal on the 26th November 2004

[4] The present review application was lodged on the 10th July 2015 in terms of section 148 (2) of the Constitution. The Constitution provides the following:

“148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(2) The Supreme Court may review any decision made or given

by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court.

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench.”

[5] The Constitution was promulgated on the 26th July 2005; however, Parliament has not yet executed its mandate in accordance with section 148 (2) of the Constitution which requires that Parliament should enact legislation prescribing the conditions under which the Supreme Court would exercise its review jurisdiction. Similarly, the Chief Justice has not yet made Rules of Court in respect of the exercise by the Supreme Court of its review jurisdiction in terms of section 148 (2) of the Constitution.

[6] Section 142 of the Constitution deals with the administrative functions of the Chief Justice and provides the following:

“142. Subject to the provisions of this Constitution or any other law, the Chief Justice as head of the Judiciary may make rules for regulating the practice and procedure of the superior and subordinate courts, including the specialised and local courts as well as powers of judicial officers.”

[7] Notwithstanding the absence of the Act as well as the Rules of Court as envisaged by section 148 (2) of the Constitution, the Supreme Court has

since laid down the general principles applicable in the exercise of its review jurisdiction. The wheels of justice should always be in motion in order to serve the needs of the people.

In *President Street Properties (Pty) Ltd v. Maxwell Uchechukwu and Four Others*,¹ Justice J.M. Dlamini, AJA had this to say:

“[26] In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and, in its newly endowed review jurisdiction, this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is *functus officio* or that the matter is *res judicata* or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit of our

¹ Civil Appeal case No. 11/2014 at para 26, 27 and 28 of the judgment.

courts of justice, in particular, the apex court with the advantage of being the court of the last resort.

[27] It is true that a litigant should not ordinarily have a ‘second

bite at the cherry’, in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise *res judicata*. As such this review power is to be invoked in a rare and compelling or exceptional circumstances . . . It is not review in the ordinary sense.

[28] I accept that this inherent power of review, has always been

with the Court of Appeal, hidden from and forgotten by all concerned. Now, the Constitution has reaffirmed it to be so. It is nothing new. The fear and hesitation to invoke it or invoke it frequently, has been a fear of the unknown. Once unleashed, how was it to be regulated or controlled and exercised only for the greater good in the administration of justice? But judges in their ‘eternal’ wisdom have always been able to open and shut (legal) doors and windows unless somehow stopped and controlled by superior authority. In this the courts have otherwise relied on their inherent discretionary authority.”

[8] The basis of the present review application is that there was a failure of justice in the appeal hearing because the applicant was not given adequate time to prepare for the appeal notwithstanding that he had been convicted

of a capital offence. Furthermore, the applicant argued that the record of proceedings was incomplete; hence, he could not properly prepare his grounds of appeal as well as his legal arguments. Similarly, he argued that he was not afforded legal representation during the appeal notwithstanding that he was convicted of a capital offence.

- [9] The grounds of review raise serious constitutional issues relating to the fundamental rights of an accused person facing a capital offence in particular as well as an accused person in general.

Section 21 of the Constitution deals with the right to a fair hearing, and provides the following:

“21. (1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.

- (2) A person who is charged with a criminal offence shall be-**
- (a) presumed to be innocent until that person is proved**
or has pleaded guilty;
 - (b) informed as soon as reasonably practicable, in a**

language which that person understands and in sufficient detail, of the nature of the offence or charge;

(c) entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life;

(d) given adequate time and facilities for the preparation of the defence;

(e) permitted to present a defence before the court either

directly or through a legal representative chosen by that person;

(f) afforded facilities to examine in person or by a legal representative the witnesses called by the prosecution and to obtain the attendance of witnesses to testify on behalf of that person on the same conditions as those applying to witnesses called by the prosecution; and

(g) permitted to have, without payment, the assistance of an interpreter if that person cannot understand the language used at the trial.

(3) Except with the free consent of the person concerned and

for purposes of subsection (2), the trial shall not take place in the absence of that person unless that person acts so as to render the continuance of the proceedings in the presence of that person impracticable and the court has ordered that person to be removed and the trial to proceed in the absence of that person.

- (4) Where a person is tried for any criminal offence, the accused person or person authorised by the accused person shall, if the accused person or person authorised by the accused person so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.**
- (5) A person shall not be charged with or held to be guilty of a criminal offence on account of any act or omission that did not, at the time the act or omission took place, constitute an offence.**
- (6) A penalty shall not be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.**
- (7) A person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which that person could have been convicted at the trial for the offence, save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.**
- (8) A person shall not be tried for a criminal offence where that person has been pardoned for that offence.**

(9) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.”

[10] The application for review was set down for hearing on the 11th May, 2016 before the Full Bench of this Court as required by section 148 (3) of the Constitution of Swaziland. On the date set for the hearing, the application was withdrawn on the basis that the Head of State had since commuted the applicant’s death sentence to a sentence of life imprisonment in the exercise of his executive authority in terms of the Constitution.²

- “64. (1) The executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution.**
- (2) The King shall protect and defend this Constitution and all laws made under or continued in force by this Constitution.**
- (3) Subject to the provisions of this Constitution, the King may exercise the executive authority either directly or through the Cabinet or a Minister.**
- (4) The King in his capacity as Head of State has authority, in accordance with this Constitution or any other law, among other things to –**
- (a) assent to and sign bills;**
- (b) summon and dissolve Parliament;**

² Section 64 of the Constitution of Swaziland.

- (c) receive foreign envoys and appoint diplomats;
- (d) issue pardons, reprieves or commute sentences;
- (e) declare a state of emergency;
- (f) confer honours;
- (g) establish any commission or *vusela*; and
- (h) order a referendum.”

[11] Accordingly, the application is removed from the roll.

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree:

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree:

S.P. DLAMINI
JUSTICE OF APPEAL

I agree:

Z. MAGAGULA
ACTING JUSTICE OF APPEAL

I agree:

M. LANGWENYA
ACTING JUSTICE OF APPEAL

For Applicant

Attorney Sabelo Bhembe

For Respondent:

Principal Crown Counsel Phila Dlamini

DELIVERED IN OPEN COURT ON 30th JUNE 2016