IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CRIMINAL APPEAL CASE: NO. 06/2019**

In the matter between:

Rex **Applicant**

versus

Pleasure Mpumelelo Sibanyoni **Respondent**

Neutral Citation: Rex v Pleasure Mpumelelo Sibanyoni (06/2019) [2019] SZSC 41 (9th September, 2019)

Coram: JP ANNANDALE JA

Heard: 9th September 2019

Delivered: 9th September 2019

SUMMARY

Section 148 (1) of the constitution of ESwatini, Act 001of 2005 – Supervisory power of the Supreme Court – appeal against sentence by the Crown – Distinction between supervisory power and appeal – challenge against judgment and sentence may be subject to appeal – incorrect to seek invocation of supervisory power when sentence is sought to be altered. Application dismissed.

JUDGMENT (ex tempore)

Jacobus P. Annandale JA

[1] The supervisory jurisdiction of the Supreme Court is sought to be invoked by the Applicant herein, the Crown, under the terms of section 148 (1) of the Constitution of ESwatini, Act 001 of 2005.

[2] As background it can briefly be stated that the Respondent herein, Mr. Sibanyoni, was sentenced in the High Court following his conviction of the crime of culpable homicide. The Respondent, according to the Applicant, was sentenced on the 10th of June of 2019 to seven years of imprisonment, of which three years was suspended for a period of four years on condition that

he is not convicted of any offence of which violence is an element. Incidentally, Section 313 (2) of the Criminal Procedure and Evidence Act, Act 67 of 1938, limits the period of suspension to three years, not four as ordered by the High Court.

[3] The Crown is dissatisfied with the terms of the sentence imposed by the High Court in respect of a conviction of culpable homicide. What the Crown rather wants, according to its application, is a sentence of seven years without suspending three years thereof. What the Crown thus effectively wants is to appeal the terms of the sentence imposed by the High Court in order to dispense and do away with the suspension of a portion of the sentence. That is really what the Crown wants.

[4] The entire application as well as the heads of argument is devoted to an attempt to justify why the sentence is to be deemed and regarded to be inappropriately light or inappropriately ameliorated and that it should not have also included suspension of a portion of the sentence. Clearly from a reading of the application, it is very evident that the Crown wishes to appeal

the sentence by saying that the Court *a quo* should not have suspended a portion thereof.

[5] The Crown, instead of being before the Supreme Court on appeal is before the Supreme Court in terms of section 148 (1) of the Constitution, which reads that:

> *"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 supervisory power."*

I underline and emphasize, "Issue orders and directions". The Supreme Court also has review and appellate jurisdiction. The appellate jurisdiction which is available as a remedy where the terms of a sentence is challenged by an appellant reads as follows:

Section 147(1):

An appeal shall lie to the Supreme Court from a judgement, (sic) decree or order of the High Court-

a. as of right in a civil or criminal cause or matter from a judgement (sic) of the High Court in the exercise of its original jurisdiction;"

Section 147 (1) (b) makes reference to an appeal brought to the Supreme Court which does not originate from the High Court in its original jurisdiction but a matter which commenced elsewhere. That is where leave of the High Court is to be obtained for an appeal to be noted.

Section 147(2) goes on to read:

"Where the High Court has denied leave to appeal, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly".

[6] Instead of the Crown appealing a sentence of the High Court in its original jurisdiction as of right in terms of Section 147(1) (a) or with leave of the High Court under section 147(1) (b) or 147(2) where leave was declined and now sought to be granted by the Supreme Court, the Crown has incorrectly chosen to approach the Supreme Court to exercise its supervisory jurisdiction under the auspices of section 148 (1) of the Constitution. Supervisory jurisdiction is not the same as appeal jurisdiction. A distinction must clearly be drawn as to when an appeal against sentence is to be considered as in contrast to where supervisory jurisdiction has to be exercised.

[7] In the course of its supervisory jurisdiction, the Supreme Court is entitled to do various things, but in my considered view it does not also include, under the guise of supervisory jurisdiction, to directly consider the appropriateness of a sentence as is done when an appeal against sentence is heard. This is also demonstrated by the fact that the Constitution requires when an appeal is before the Supreme Court in its appellate jurisdiction, it shall be dealt with by a bench of three Justices of the Supreme Court. However, in the course of

its supervisory jurisdiction which differs from appeal jurisdiction, his Lordship the Chief Justice has authorized and empaneled a single judge to deal with an application for the exercise of Supervisory Jurisdiction, as has been done in the present matter. I have by way of a written communication from his Lordship been directed to preside over this matter as a single judge and accordingly I have proceeded to deal with it and have it enrolled for hearing today.

[8] During the course of preparing for and hearing of the application, I have noted that the respondent has not filed any papers whatsoever. He has not filed a notice to oppose, no opposing papers, no affidavits, no heads of argument or legal authorities. Today he is before the Court in person but he is also represented by an attorney, as he was in the High Court when the matter was heard. In the High Court it was Mr. Jele who appeared but today Mr. Nhlengetfwa makes an appearance, even though he has informed the Court that he has not been able to prepare and take full instructions. Initially he sought a postponement of the matter in order to do that, but having given regard to the circumstances clearly apparent in this matter, I did not deem it

appropriate to protract it any further and have the attorney present and file a full set of papers in a matter where there is no chance in any event of the application, in the form that is before the Court, being successful.

[9] I decline at this stage to make any judicial evaluation of the sentence imposed by the High Court. In other words, this Court refrains from expressing any view as to the appropriateness of suspending a portion of imprisonment following a conviction of the crime of culpable homicide, as was imposed by the High Court. That is an aspect which will duly be considered and pronounced upon in the course of an appeal against the sentence.

[10] I may also note herein that in the course of argument, Mr. Nxumalo sought to seek refuge under Section 6 of the Court of Appeal Act which he says precludes all sorts of actions to be taken by the Crown, especially to bar it from appealing a sentence. Whether or not that is so, and I do not express any view on it, no reference whatsoever has been made in the application for the Supreme Court to exercise supervisory jurisdiction as to the

appropriateness or otherwise of Section 6. Any reference to it is entirely absent from both the application and the heads of argument filed by Mr. Nxumalo. The entire application as well as the heads of arguments are singularly focused and has only application as to what would ordinarily be filed of record when an appeal against sentence is to be heard. This is clearly an appeal based on such aspects and arguments. It is nothing other than an appeal brought under the guise of section 148 (1). I do not now pronounce and it is also not necessary to do so, as to whether or not the Crown may or may not appeal against a sentence. There is also no reference to any leave that was sought and denied or declined for the Crown to note an appeal. The Constitution does provide for an appeal to be heard as of a right in a criminal case. The legislation further provides as earlier said, for leave to appeal to be sought where that is necessary. It also provides for the Supreme Court to reconsider leave to appeal which has been denied by the High Court. None of that is before this Court at this stage of the proceedings. Also, if Section 6 of the Court of Appeal Act places an impediment on the crown to appeal against a sentence, the entire application is conspicuously absent of any such basis in the quest to invoke supervisory power of the Supreme Court.

[11] It is therefore inevitable that the application brought before this Court under section 148(1) of the Constitution of the Kingdom of Eswatini, Act 001 of 2005, is fatally defective and cannot be favorably considered or granted to the applicant. Again I must reiterate in closing that this Court does not pronounce as to whether or not the High Court sentence was appropriate or otherwise. It does not come to be considered at present. All that comes up for consideration at present is that the papers which are relied upon to appeal against a sentence do not justify an invocation of the supervisory power of the Supreme Court.

[12] This matter was brought under a Notice of Application in terms of section 148 (1) of the Constitution dated the 24th of June of 2019. Therefore, it is incumbent upon this Court to pronounce that the application is dismissed. I make no order as to costs.

Jacobus P. Annandale

Justice of the Supreme Court

Counsel for the Applicant: Mr DM Nxumalo

Counsel for the Respondent: Mr S. Nhlengetfwa