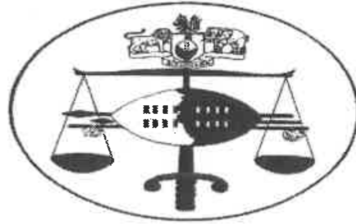


IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CRIMINAL APPEAL CASE NO.03/2019**

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

VERSUS

DUMSANE MAXWELL KUNENE **Respondent**

Neutral Citation: *The Director of Public Prosecutions versus Dumsane Maxwell Kunene (03/2019) [2019] [SZSCA] 70 (8th April 2020)*

Coram: **MCB Maphalala Chief Justice**
SB Maphalala JA
J.P. Annandale JA

Date Heard : 18th February 2020
Date of Judgment : 8th April 2020

Summary: *Appeal: Material and evidence for consideration – confined to record as it was before court a quo – Addition, importation, amplification and*

supplementation of record submitted on appeal not readily allowed. Appeal against upholding of appeal from court of committal by High Court. High Court in Appellate jurisdiction critical of absence of arrest warrant from record. Again, warrant omitted from record as submitted to Supreme Court. Omission sought to be rectified by inclusion of warrant in supplementary affidavit, in reply. Held that arrest warrant akin to raison d'etre *or central reason for existence of appeal. Appeal dismissed.*

JUDGMENT

Annandale JA

[1] The respondent herein, Mr Kunene, first appeared in the Magistrate Court at Pigg's Peak, which sat as a Court of Committal in extradition proceedings. Eventually, the learned Principal Magistrate issued an order in September 2018 that under Section 10(1) of the Extradition Act of 1968 (Act 13 of 1968), the respondent was to be detained in prison pending a decision by the Prime Minister. The latter was to consider a request by the Republic of Botswana to extradite him to the Requesting State in order to stand trial on a charge of possession of some 2 kilograms of cannabis/dagga/insangu. Apparently he

evaded trial and absconded while on bail. He was subsequently apprehended in this jurisdiction.

[2] There exist some controversy over the quantity of dagga or cannabis which is involved. The Botswana Bureau of Standards declared the mass to be 2019.2 grams. In the Court of Committal, the mass was alleged to have been 209.2 grams, or about one tenth of the mass in Bostwana. Whether the 90% reduction in mass is due to some unexplained reason or a careless administrative mistake, the fact remains that in the extradition proceedings held in Eswatini the entire extradition application and subsequent appeals to the High Court and twice to the Supreme Court, was based on the alleged possession of less than 210 grams (or 7.3 ounces) of dagga or cannabis. It is barely a handful.

[3] Entirely as an aside and *obiter,* the paradoxical perspectives which manifest themselves in this matter begs for some comment. In our Kingdom, criminal cases which involve around two kilograms of dagga or cannabis, let alone 209 grams, are routinely and frequently brought before our courts. Usually, the penal sanctions would result in sentences of the payment of a fine, virtually inevitably in an affordable amount, as alternative to a relatively short period

of imprisonment. Currently, there is an international trend to legalise and decriminalise the possession and use of dagga or cannabis. Locally, and also in Botswana, it remains outlawed. The amount of costs expended in this appeal is of concern, despite acknowledging that the cost of justice is priceless. Legal representation has never been cheap, and the respondent has appeared in different courts on many different occasions by now. In the Court of Committal which sat at Pigg's Peak, the respondent appeared on 21 (twenty one!) different occasions. Each time, the presiding officer, prosecutor, attorney, police, Correctional Services and sometimes witnesses expended time, energy and resources to deal with a matter of barely over 200 grams of dagga possession in a foreign country. The court record of the Botswana case indicates that there, the matter was enrolled on some twenty (20!) different occasions.

[4] Following the ruling of committal to prison pending the Minister's decision with regard to his surrender and extradition to Botswana, an appeal was noted to the High Court, and it was upheld. Subsequently, Mr Kunene sought to appeal the second judgment by the High Court in which the State was granted leave to appeal. In October last year, the Supreme Court dismissed the purported appeal against the order of the High Court which granted leave to

appeal against the upholding of the appeal. Presently, it is the Crown which now appeals against the upholding of the appeal by the High Court.

[5] It is abundantly clear that this trail of litigation must cost a small fortune. Rule 30(5) of the Court of Appeal Rule requires of an appellant, in this case it is the Director of Public Prosecutions, to lodge five copies of the record with the Registrar, in addition to also providing a copy of the record to the respondent, Mr Kunene. Obviously, the Crown would also need at least one copy for its own counsel to use in court, which equates to at least seven copies at present, excluding voluminous papers which have preceded this appeal, as outlined above.

[6] The record which I have received contains around 1300 pages. Multiplied by 7 copies, at least 9000 A4 size pages were consumed, and this in times of economic hardship and depleted resources, let alone the impact on our environment and natural resources. I will not venture to estimate a cost per printed page, nor the amount of money spent on salaries and allowances of Judges, Prosecutors, Magistrates, Support staff, Legal Representation and further incidental expenses in both the Kingdom of Eswatini and the Republic of Botswana.

[7] By no means whatsoever do I purport to trivialise the criminal offence of dagga possession. Nor does the maxim of *de minimis non curat lex* find any application. The only question which I struggle with is this: Is the pudding worth the sauce? Does the alleged possession of 200 grams or 5 ounces of dagga justify the resources already expended in this protracted chain of events? Every single day, we hear of and read about severe economic budgetary constraints in Eswatini. In this context, I will remain sceptical of the decision to expend so much resources on a matter involving barely a handful of cannabis.

[8] In any event, the appeal by the Crown to the Supreme Court lies against the order of the High Court in its appeal jurisdiction, wherein it held that the appeal against committal pending extradition was upheld, and that the order for committal by the Court *a quo* (the Magistrates Court) of the 25th September 2018) be set aside.

[9] On the first occasion when this matter was brought before the Supreme Court, the respondent (Kunene) sought to appeal against the order of the High Court which granted the Crown leave to appeal its order of upholding the appeal

from the Magistrate's Court. Since the granting of leave to appeal was considered to be interlocutory in nature and no leave to appeal was granted by the Supreme Court, it summarily dismissed the "purported appeal".

[10] In its judgment, the Supreme Court observed that "The Respondent [presently the appellant, the Director of Public Prosecutions] intends to challenge the setting aside of the Committal Order by noting an appeal to this Court [the current appeal]. Thus, it is the appropriateness or otherwise of the High Court decision to set aside the Committal Order that is the real issue between the parties. This issue or dispute has not yet been determined, and it is this Court which will have the final word in respect thereof" [para 13].

[11] Presently before us is an appeal against the order by the High Court, which upheld an appeal against the order of the Magistrates Court, sitting as Court of Committal in an extradition application, and not an appeal against the granting of leave to appeal as ordered by the High Court (the first "purported appeal" to the Supreme Court, which was dismissed).

[12] The specific grounds of appeal against the order at the High Court wherein the Appeal was upheld is contained in different documents which are spread

out in the bulky and convoluted record. The first manifestation of the grounds of this appeal are contained in a Notice of Motion under Section 6(1) of the Court of Appeals Act of 1954. Therein, the Director of Public Prosecutions (D.P.P.) applied for a Certificate to appeal the judgment at the High Court in its appellate jurisdiction.

[13] The D.P.P therein stated its grounds of appeal as follows:

> "The Court erred in law and misdirected itself in holding that the extradition enquiry of the Appellant was pursued without a warrant of arrest and detention according to sections 7 and 8 of the Extradition Act 13 of 1968.
>
> The Court erred in law and misdirected itself in deciding the matter on technicalities rather than the merits.
>
> The Court erred in law and misdirected itself in setting aside the order of the Court of Committal dated the 25th September 2018 when there is a *prima facie* case to answer in the Requesting State and this is contrary to paragraph [68] of the Honourable Court's judgment."

[14] The DPP went on to say that:

> "I believe that there are reasonable prospects that another court would come to a different conclusion on the questions of law raised by the Crown. The prospects of success are as follows:
>
> A different Court could have reached a different conclusion in that the respondent is extraditable under the circumstances as per paragraph [68] of this Honourable Court (sic) judgment in that a *prima facie* case had been established.
>
> A different Court could have found that the missing warrant of arrest of the Respondent could have been remedied by conducting [a] fully fledged enquiry as to its existence or otherwise.
>
> The Honourable court did not give due weight to the foreign request as it relied on a technical aspect of the request of which the requesting state had fully complied with [in] all the provisions of the Extradition Act 13 of 1968."

[15] In its formal Notice to Appeal, the DPP closely followed the grounds of appeal as quoted above. It omitted the words "... rather than the merits" under the second ground, and in the third ground, the phrase of "...has a case to answer in the Requesting State ..." now reads: "...has a case to answer in the foreign court of the requesting state". Nothing much turns on these slight differences.

[16] In paragraph 68 of the High Court judgment on appeal which is referred to in the grounds of appeal, reference is made to an ineptly presented background and status of the judicial process in Botswana. However, the Court was inclined to agree with the Court of Committal that "a *prima facie* case was made by the prosecution showing that the appellant was accused and brought before a foreign court of the requesting state to stand his trial. The evidence is that trial commenced but was not concluded and that the appellant absconded and evaded trial proceedings only to resurface in this country where he was re-arrested".

[17] This finding by the High Court is uncontroverted, but it does not form the *ratio* as to why the appeal was upheld. The basis for its decision the conclusion it came to lies in the absence of a warrant of arrest. Sections 7 and

8 of the Extradition Act of 1968 (Act 13 of 1968) regulates the issue of a warrant of arrest in Eswatini under certain prescribed circumstances. This warrant, whether it be for the initial arrest or further detention of a person, is an integral part of subsequent proceedings, a *sine qua non* in the chain of events which could lead to the detainee being extradited to a foreign jurisdiction, following due legal process.

[18] In his judgment, the Learned Judge in the Court below makes pertinent reference to the fact that no such warrant was placed before the court which heard the appeal from the Court of Committal. He refers to a meeting in chambers with the legal representatives of the parties while still in the process of finalising his judgment. This was "…to seek clarity as to whether a warrant for the arrest or detention of the appellant had been obtained at the inception of the enquiry for his surrender. I was assured by Mr Nxumalo for the Respondent that such warrant existed whereupon he undertook to file same as according to him it appears it had been misplaced in the process of collating the record of the enquiry proceedings. I must say no such warrant was filed".

[19] The learned judge *a quo* further adversely remarked on the apparent conduct of the entire process with "…no evidence that the local authorities acted on

the request for the provisional apprehension of the appellant [Kunene] either at the commencement of the extradition proceedings or at all". He added that it was evident that after receipt of the request for provisional arrest, the office of the DPP "...brought the application to initiate the extradition process albeit on the basis of incomplete papers, pending receipt of the full suite or dossier comprising a proper request for extradition from Botswana".

[20] Remarkably, the Respondent was arrested without a warrant and detained by the Police on a charge of contravention of the immigration laws and remanded in custody pending receipt of the awaited extradition papers. In paragraph [80] of its judgment, the Court held that:

> "As appears from the record of the enquiry before the court *a quo* (record of enquiry) no prior formal warrant or writ for the provisional arrest or detention was sought or obtained from the court *a quo* and it may be assumed therefore that throughout the proceedings the arrest and further detention of the appellant was premised on his original arrest and detention on the immigration charges. It was not until the filing for the committal in anticipation of a request for extradition on the 27th June 2017 that the court formally became seized with jurisdiction to hold an

enquiry in terms of Section 9 of the Act for purposes of determining if the appellant was liable for surrender [as per the dictates] of Section 10 of the Extradition Act 13 of 1968".

[21] The High Court held on appeal that it was plain that when the appellant was brought before the Court of Committal, his arraignment had not been properly procured in the procedure and manner prescribed by the Act. Otherwise put, the absence of legality vitiated the proceedings. It is imperative that extradition proceedings, just as any other legal proceedings in our jurisdiction and Courts of Law, must by absolute necessity comply with the tenets of law and legality.

[22] It is my considered view that Maphanga J was entirely correct to conclude as he did and that the absence of legality, or the flouting of the Extradition Act by failing to procure a warrant for the arrest or further detention of Kunene, put paid to the notion that all was good and proper. The appeal against the order of the Court of Committal had to be upheld. The Learned Judge *a quo* succinctly and correctly set out the required procedure under the Extradition Act as follows:

"The Act provides that the process for the committal of a person for purposes of extradition must be set in motion by warrant. It follows logically that the *causa petendi* for a committal enquiry is derived from a warrant for the detention and production of the sought person before the Court of Committal. That warrant may be procured on the basis of a request for the provisional arrest of the person or in the absence of such request, it may also be issued by a magistrate solely on the basis of a local initiative as envisaged by section 7(1)(b) provided that the *causa* is set up or initiated by warrant for either the apprehension or continued detention of the sought person as the case may be *(See S v McCarthy (611/93) [1995] ZASCA 56; 1995 (3) SA 731 (AD) per Van Heerden* JA).. It follows that for an extradition enquiry to be properly brought, the fugitive must be brought before a magistrate acting as a Court of Committal by warrant either of arrest or detention of the person specifically for the purpose of conducting an enquiry for liability of the person to surrender under the Act.

Based on the emerging facts before the magistrate it can be concluded that the appellant was arrested and detained by the Royal Swaziland Police [as it was then known] without due compliance with the provisions of the Extradition Act under due warrant in terms of the

relevant sections of that Act but he was first arraigned and remanded for purposes other than the proceedings contemplated by the Act. He was brought before the Court of Committal improperly without either a prior warrant for his arrest or warrant for his continued detention under the Act."

[23] This failure to follow due process of law, according to both the High Court and this Court, deprives the committal proceedings of legality. In the absence of legality, the appellant cannot now seek to claim that the extradition proceedings complied with the provisions of the Extradition Act or even the Constitution of Eswatini. The fundamental tenets of Justice, as applied and practised in this Kingdom, cannot be negated to the extent that it has been done in this matter.

Surely, the D.P.P. cannot expect the Supreme Court to even attempt to clothe the tainted proceedings with legitimacy by ordering this appeal in favour of the appellant.

[24] This Court therefore cannot but agree with the Learned Judge of the High Court who upheld the appeal against committal to prison pending the decision of the Prime Minister to extradite the then appellant, now respondent, who

had to endure the full might of State against him in the absence of a warrant of arrest. A warrant of arrest in extradition proceedings is a *conditio sine qua non*. Seemingly, it was only once Mr Kunene had already been committed to prison that a warrant for his arrest belatedly came into play, *ex post facto*.

[25] For purposes of clarity, it needs to be restated that neither the High Court in its appeal jurisdiction, nor this Court, ever concluded that the Respondent does not meet the remainder of the criteria for extradition. It is not so that it could be held that he is not sought for continuation of a criminal prosecution in the Republic of Botswana, or that he has not *prima facie* committed any criminal offence or that the extradition request itself fails to meet the necessary requirements. The ratio for the outcome of the appeal in both courts is the absence of legality, the failure by the prosecuting authority to bring the arrested person before court in compliance with the law – utilising a properly obtained and executed warrant of arrest. In reality, the respondent was held on a charge under the Immigration Laws and the Court of Committal was then unlawfully persuaded to conduct extradition proceedings simply because there existed such a request. The absence of legality and due process of law tainted and vitiated all subsequent proceedings.

[26] At the time when this matter first came before the Supreme Court, it was in the form of a challenge to the granting of leave to appeal the upholding of the appeal by the High Court which resulted in the liberation of the present respondent. That challenge was summarily dispensed with without dealing with the merits of the High Court judgment on appeal.

[27] It was only in response to an answering or opposing affidavit which was filed in these pleadings, where the DPP then sought to cure a material and crucial defect through its replying affidavit. With the judgment of the High Court being critical about the absence of a warrant of arrest in respect of the then appellant, and with the proceedings being tainted by the apparent absence of legality, it was obvious from the onset that the warrant of arrest was central to the issue.

Astonishingly, the first time when this document sees the light of the day is when the DPP files a replying affidavit!

The Notice of Appeal, or the grounds for it, is devoid of any special prayer to belatedly bring this document into the open and have it admitted as an exceptional indulgence. Section 11(a) at the Court of Appeal Act of 1954 (Act 74 of 1954) allows this Court, when it thinks it to be necessary or expedient in the interest of justice to *"order the production of any document,*

exhibit, or other thing connected to the proceedings, the production of which appears to it necessary for the determination of the case".

[28] Quite obviously, this exercise of jurisdiction would not be an everyday occurrence and it must be exercised with due caution and only in exceptional circumstances. Furthermore, it is trite law that a litigant is expected to establish the grounds and merits of his case in the founding affidavit, and that a replying affidavit is not suitable for the introduction of new evidentiary material which is crucial to establish an applicant's case.

[29] Presently, the appellant has been very well aware that the warrant of arrest, as is detailed in the Extradition Act, was not placed before the Court *a quo* at the time of the hearing, the outcome of which is now sought to be appealed against. Even as late as the time when the presiding judge was in the process of drafting the reasons for his judgment, a belated opportunity was afforded to the Director of Public Prosecutions to come forward with the document. The present appellant failed to avail itself of the final opportunity to get its house in order.

[30] In my view, the origin of the principle that the determination of an appeal is confined to the four corners of the record, the record being that which was before the court *a quo* when the matter was heard on the first instance, is akin to the principle that a party cannot establish a crucial element of its case *ex post facto* in its replying papers. As was held for instance in Royal Swaziland Sugar Corporation Limited T/A Simunye v Swaziland Agricultural and Plantation Workers Union and Others Civil Case No 2959/97 [1997] SZHC 144(12 December 1997) at Page 3:-

> "The law to be applied in applications of this nature [striking out applications] has been the subject of numerous decisions of the courts of the Republic of South Africa, which have been followed by this court. The general rule emerging from these decisions is that all necessary allegations must appear in the founding affidavit and that an applicant will not (save in exceptional circumstances) be permitted to make out or supplement his case in a replying affidavit. An applicant must generally speaking stand or fall by his founding affidavit and the facts alleged therein and [he] cannot introduce for the first time in his replying affidavit facts or circumstances upon which he seeks to found a new cause of action."

[31] In that matter Dunn J relied upon the case of Mauerberger v Mauerberger 1948 (3) SA 731(CPD) where Searle J (at 732 – 733) reiterated this salient principle. It has resurfaced in numerous authorities over the years, resulting in the often repeated trite principle worded: "An Applicant shall stand and fall by the allegations in his founding affidavit. He shall not make out his case in reply". The same principle finds its way to the present matter. It is in the replying affidavit that the Appellant endeavours to cure the defect which manifested itself in the court *a quo*. The contentious warrant of arrest is only now sought to be introduced as part of the record on appeal, belatedly and through the back door, as it were. In Bhayat and Others v. Hansa and Another 1955 (3) SA 547 (NPD) Caney J stated at 553 D:

> "......the principle which I think can be summarised as follows .... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply

to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits."

[32] Transposed and applied to the appeal before us, I have no hesitation to hold that the same principle applies. The material which the appellant now wants to place before this Court in order to bolster his chances on appeal has never been before the High Court when the first appeal was heard. Just as new facts and evidence cannot be introduced in a replying affidavit, the same cannot be imported into the record to be considered on appeal.

[33] But yet again, now that an appeal has been noted in this Court, the appellant has failed to properly or at all apply for the belated admission of the document. The lame and unacceptable excuses for this failure takes the matter no further. Nor does the confirmatory affidavits in support of the replying affidavit cure the problem.

[34] Fact remains that this Court shall not *mero motu* or on strength of non-existent applications simply allow crucial documentation to supplement and amplify the record as submitted for the hearing of an appeal. The salient principle remains that unless specifically sanctioned by a court of appeal, the

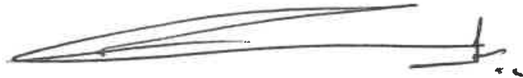
determination of an appeal shall be confined to the same record as that which was before the court from which the appeal originates. The hearing of an appeal is confined to the four corners of the record, and the record is that which was before the court *a quo*, not supplemented with new material in the manner now sought by the appellant.

[35] Neither the argument by counsel nor the material that has been placed before this Court on appeal has persuaded us that the Court *a quo* erred in law or fact when it pronounced upon the appeal before it. In a well-reasoned and comprehensive judgment, the High Court correctly upheld the appeal and set aside the order of committal dated the 25th September 2018. I cannot summarise it better than ending this judgment with the words of Maphanga J in the impugned judgment where he said (in paragraph 103):

> "If the arrest and detention of the appellant during the initial stages of the proceedings was flawed and thus unlawful, the *ex post facto* reception of an application for committal of the applicant (sic) [appellant] could not [render] a process that was unlawful *ab initio* to become valid and lawful. In my judgment the Director of Public Prosecutions could not presume to regularise such an unlawful antecedent detention and arraignment of the appellant by subsequently

bringing an *ex-post facto* application for his surrender without following the procedure set out in Sections 7 and 8 of the Extradition Act. This lapse in my view rendered the entire enquiry to be irregular. On account of this irregularity the order issued by the magistrate became equally tainted and liable to be set aside. It was improperly obtained."

[36] It is accordingly ordered that the appeal be dismissed and that the order of the High Court herein be confirmed.



JACOBUS P. ANNANDALE
JUSTICE OF APPEAL

I agree

MCB MAPHALALA CJ

I agree

SB MAPHALALA JA

Counsel for the Appellant: Mr S Gama

Counsel for the Respondent: Mr S. Ndlangamandla