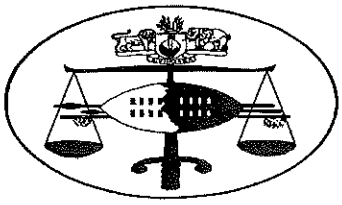

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No: 81/2017

In the appeal between:

BOYCE BHEKI GAMA	APPLICANT
And	
CHAIRMAN OF THE PREROGATIVE OF MERCY COMMITTEE	FIRST RESPONDENT
COMMISSIONER GENERAL OF CORRECTIONAL SERVICES	SECOND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	THIRD RESPONDENT
ATTORNEY GENERAL	FOURTH RESPONDENT

IN RE:

CHAIRMAN OF THE PREROGATIVE OF	FIRST APPELLANT

MERCY COMMITTEE

COMMISSIONER GENERAL OF CORRECTIONAL SERVICES SECOND APPELLANT

DIRECTOR OF PUBLIC PROSECUTIONS THIRD APPELLANT

ATTORNEY GENERAL FOURTH APPELLANT

And

BOYCE BHEKI GAMA

Neutral citation: *Boyce Bheki Gama vs Chairman of the Prerogative of Mercy Committee & Three Others (81/2017) [2023] SZHC 34 (2023)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE S. J. K. MATSEBULA, JA
JUSTICE J. M. VAN DER WALT, JA
JUSTICE J. M. CURRIE, JA
JUSTICE M. R. FAKUDZE, AJA

Heard : **08th August, 2023**

Delivered : **03rd October, 2023**

SUMMARY

Criminal Appeal – the respondent was convicted of murder and sentenced to a death penalty. Subsequently, he obtained a Royal Pardon commuting the death penalty to life imprisonment with the condition that he would be released from custody upon the attainment of the age of seventy-five years;

Pursuant thereto, the respondent sought an order before the High Court reviewing and setting aside the condition attached to the Royal Pardon on the basis that the condition conflicted with the Prisons Act of 1964 which limits the life sentence to twenty years imprisonment; the respondent further alleged that the condition deprived him of remission to which he was entitled in terms of the Prisons Act. In order to show that the sentence was severe, the respondent alluded to Section 15 of the Constitution of 2005 which puts the life sentence to a minimum of twenty-five years imprisonment. The court *a quo* granted the order;

On appeal to the Supreme Court, it was held that the court *a quo* is *functus officio* on the basis that it convicted the respondent of murder

and sentenced him to death, a decision which was confirmed by the Court of Appeal which is now the Supreme Court;

Furthermore, it was held that the Royal Pardon is provided for in the Constitution which is the supreme law of the land, and, that the Prisons Act cannot override the provisions of the Constitution;

Held further that the Royal Pardon can be granted either freely or subject to a lawful condition and that consequently the condition attached to the Royal Pardon was lawful and not susceptible to judicial review;

Held further that the only remedy available to the respondent is to petition the Prerogative of Mercy Committee for the review of the condition attached to the Royal Pardon;

Accordingly, the appeal is granted. No order as to costs.

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] The respondent was arrested on the 23rd March, 1992. Having been arraigned before the High Court, he was convicted of murder on the 23rd September 1993 and he was subsequently sentenced to death. He appealed against both conviction and sentence to the Court of Appeal; however, his appeal was dismissed by the court on the 21st April 1995, and his conviction and sentence were confirmed.

[2] In 2001 the Prerogative of Mercy Committee established in terms of the Constitution[1] considered the death penalty imposed by the High Court and further confirmed by the Court of Appeal. On the 05th November 2001, His Majesty the King, acting on the advice of the Committee in terms of the Constitution, commuted the death penalty imposed upon the respondent to that of life sentence on condition that the respondent would be released from custody upon attaining the age of seventy-five years.

[1] Section 92 of the Constitution of 1968

[3] On the 13th August, 2015 the respondent lodged an application before the High Court seeking the review and setting aside of the condition attached to the Royal Pardon that the respondent may only be released from custody upon the attainment of the age of seventy-five years. He further sought an order declaring that in terms of the Prisons Act[2], he had served the life sentence as required by the Royal Pardon and that he should be released from custody.

[4] The basis for the challenge of the condition attached to the Royal Pardon was that the Prisons Act provided that a prisoner sentenced to life imprisonment shall be deemed to be sentenced to imprisonment for a period of twenty years[3]. The respondent argued that the condition attached to the Royal Pardon was therefore unlawful and grossly unreasonable to the extent that it conflicted with the Prisons Act.

[5] The respondent further argued that he had been in custody for an effective period exceeding twenty years and that he had not earned

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[2] Section 43(2) of the Prisons Act of 1964

[3] Ibid 2

any remission to which he was entitled in terms of the Prisons Act[4] because of the condition attached to the Royal Pardon. He also alluded to the fact that the current Constitution[5] provides that a sentence of life imprisonment shall not be less than twenty-five years. Consequently, he argued that the condition of seventy-five years attached to the Royal Pardon was very excessive, and, that it should be reviewed and set aside for being in conflict with the Prisons Act and the current Constitution.

[6] The review application was vehemently opposed by the appellants on the basis that the court *a quo* was *functus officio.* The appellants argued correctly that the matter was put to finality when the respondent was convicted and sentenced to death by the High Court and that his conviction and sentence were upheld by the Court of Appeal which was at the time the final Court of Appeal in the land. The appellants further argued that the Prerogative of Mercy Committee considered the matter after the courts had dealt with it to

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[4] Section 43(3) of the Prisons Act

[5] Section 15(3) of the Constitution of 2005

finality, and, that consequently the Royal Pardon was not susceptible to judicial review.

[7] It was further argued by the appellants that the powers which vest in the King to pardon convicted persons in terms of the Constitution[6] were superior to the Prisons Act and that the condition attached to the Royal Pardon could not be reviewed. The appellants also argued that the exercise of powers of pardon and remission were vested in the King by the Constitution of 1968 and that the King was empowered to reprieve offenders either unconditionally or subject to lawful conditions, and to remit any fine, penalties or forfeitures.

[8] The King as the Sovereign has wide discretion not only under the Constitution[7] but even at Common Law to pardon offenders convicted of criminal offences. The Constitution provides the following:[8]

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[6] Section 92(1) of the Constitution of 1968

[7] Section 92 of the Constitution of 1968

[8] Section 275 of the Constitution of 2005

"275. The Prerogative of Mercy of the King under section 78 may be exercised in respect of any criminal offence committed before the commencement of this Constitution as it may in respect of a criminal offence committed after the commencement of this Constitution."

[9] The Constitution further provides:[9]

"78. (1) The King may, in respect of a person sentenced to death or life imprisonment –

(a) grant a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period;

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[9] Section 78 of the Constitution of 2005; Section 92 of the Constitution of 1968

(c) substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or

(d) remit the whole or part of that sentence, penalty or forfeiture otherwise due to the Government on account of that offence.

(2) In the exercise of the powers conferred upon him by subsection (1), the King shall act on the advice of a Committee on the Prerogative of Mercy made up of two persons appointed by the King drawn from the King's Advisory Council, the Attorney General, Minister responsible for justice and a suitably qualified medical practitioner recommended by the Minister responsible for health and appointed by the King.

. . . .

(5) Whenever any person has been sentenced to death by any court in Swaziland (Eswatini) other than a court-martial, the chairman shall cause a report on the case by the judge who presided at the trial (or, if a report cannot be obtained from that judge, a report on the case by the Chief Justice), together with such other information derived from the record of the case or elsewhere as the chairman may require, to be taken into consideration at the meeting of the Committee so that the Committee may advise the King whether or not to exercise the powers in terms of subsection (1).”

[10] A full bench of the High Court heard the review application lodged by the respondent and granted the orders sought by reviewing and setting aside the condition attached to the Royal Pardon that the respondent may only be released upon the attainment of the age of seventy-five

years. The Court further granted an order declaring that the respondent had served the life sentence in terms of the Prisons Act and that he should be released from custody because he had served his life sentence of twenty years.

[11] In its judgment, the Full Bench had this to say:[10]

> **"10. In coming to our decision we are persuaded by the following legislation:**
>
> **(a) The Prisons Act 40/1960 Section 43(2):**
>
> **'a prisoner sentenced to imprisonment for life, shall for the purposes of this section be deemed to be a prisoner sentenced to imprisonment for twenty years'**

[10] Boyce Bheki Gama v. The Chairman of the Prerogative of Mercy Committee and Three Others Civil Case No. 191/2015 at para 10, 11 and 12; (191/15) [2017] SZHC 199 (5 October 2017)

Section 43(3)

> 'For the purpose of giving effect to this section, a prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence or sentences as if he would not lose such remission'.

(b) Section 15(3) of the Constitution Act No. 5 of 2005 states:

> 'A sentence of life imprisonment shall not be less than twenty-five years'.

11. We are mindful of the fact that the Constitution was not promulgated when the applicant was sentenced to death and when he was granted a pardon which commuted the death sentence to life imprisonment.

We consider the relevant section in the Constitution as a compelling guideline and benchmark. What was in existence at the time of his imprisonment was the relevant section in the Prison Act No. 40/1964.

12. It is our considered opinion that the appellant has made out a good case for our intervention .... The Criminal Procedure and Evidence Act provides for the Royal Pardon and commutation of sentences."

[12] The Full Bench of the High Court delivered its judgment on the 5th October, 2017. The appellants lodged their appeal on the 6th October, 2017 on the following grounds:[11] Firstly, that the court *a quo* erred in law in proceeding to hear the matter notwithstanding that it was *functus officio* having convicted the respondent of murder and sentenced him to death. Secondly, that the High Court erred in law in holding that the age condition attached to the respondent's pardon was unlawful and that it had to be excised. Thirdly, that the court *a quo*

[11] Chairman of the Prerogative of Mercy Committee and Three Others v. Boyce Bheki Gama Civil Appeal Case No. 81/2017

erred in law in giving precedence to the Prisons Act over the Constitution.

[13] The commutation of sentence in terms of the Royal Pardon is deemed to be the sentence of the Court which convicted and sentenced the respondent to a death penalty or life imprisonment. Accordingly, the High Court cannot review its own decisions in terms of the Constitution. It is only the Supreme Court which has jurisdiction to review its own decisions.[12] The High Court exercises review and supervisory jurisdiction over all subordinate courts and tribunals and any other lower adjudicating authority, and it may in the exercise of that jurisdiction issue orders and directions for the purpose of enforcing its review and supervisory jurisdiction. [13]

[14] The Criminal Procedure and Evidence Act also provides for the Royal Pardon:[14]

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[12] Section 148 of the Constitution of 2005

[13] Section 152 of the Constitution of 2005

[14] Sections 329 and 330 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended

"329. The power at any time to commute or remit any sentence of any Court of criminal jurisdiction now hereafter established in Swaziland (Eswatini), or to grant a pardon either free or subject to lawful conditions of any offender convicted by any such Court, is vested in His Majesty under Section 91 [92] of the Constitution.

330. (1) If His Majesty extends mercy conditionally to any offender under sentence of death, he may, without the consent of such offender, commute the punishment to any other punishment provided by law.

(2) Any such commutation shall be signified in the form of an order

that the offender be punished in the manner directed by His Majesty, and such offender shall thereupon be allowed the benefit of such conditional pardon.

(3) Such allowance and order shall have the effect of a valid sentence passed by the Court before which such offender was convicted."

[15] The power of the King to grant a Royal Pardon to offenders convicted and sentenced to death or life imprisonment and the commutation of sentences is further entrenched in the Constitution; the pardon can either be free or subject to a condition. The judgment of the court *a quo* that the condition attached to the Royal Pardon was unlawful and had to be excised is both misconceived and misdirected. The Constitution gives the King wide discretionary powers to grant a Royal Pardon either unconditionally or subject to a

condition as well as commuting sentences to offenders.[15] The provisions of section 92 of the Constitution of 1968 relating to Royal Pardon were re-enacted in section 78 of the Constitution of 2005. Accordingly, the condition of seventy-five years attached to the respondent's pardon is lawful and in accordance with the Constitution.

[16] The Constitution imposes a legal obligation on the High Court and Supreme Court which are Superior Courts of Judicature to interpret legislation passed in Parliament with a view to bringing them in conformity with the Constitution on the basis that the Constitution is the Supreme law of the land.[16]

> "2.(1) **This Constitution is the supreme law of Swaziland (Eswatini) and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.**

[15] Section 78 of the Constitution of 2005

[16] Sections 2 and 3

(2) **The King and iNgwenyama and all the citizens of Swaziland (Eswatini) have the right and duty at all times to uphold and defend this Constitution.**

. . . .

"268. (1) **The existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution.**

(2) **For the purposes of this section, the expression 'existing law' means the written and unwritten law including customary law of Swaziland as existing immediately before the commencement of this Constitution, including any Act of Parliament enacted or made before that date**

which is to come into force on or after that date".

[17] Accordingly, the court *a quo* had no review jurisdiction to hear and determine the review application on the basis that it was *functus officio*. The court *a quo* had dealt with the criminal proceedings where it convicted and sentenced the respondent to a death penalty, and, both conviction and sentence were confirmed by the Court of Appeal. In addition, the Royal Pardon granted by the King constitutes the sentence of the High Court which convicted the respondent. The only legal remedy available to the respondent is to petition the Prerogative of Mercy Committee with substantive legal grounds on the possible review of the condition attached to the Royal Pardon. Legally, the condition attached to the Royal Pardon is not susceptible to judicial review on the basis that it is sanctioned by the Constitution.

[18] The following order is made:

(a) The appeal is granted.

(b) No order as to costs

For Appellants : Principal Crown Counsel
Ndabenhle Dlamini

For Respondent : Attorney Sipho Gumedze

JUSTICE M. C. B. MAPHALALA

CHIEF JUSTICE

I agree

JUSTICE S. J. K. MATSEBULA, JA

I agree

JUSTICE J.M. VAN DER WALT, JA

I agree

JUSTICE J.M. CURRIE, JA

I agree

JUSTICE M.R. FAKUDZE, AJA