IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 1951/2019**

In the matter between:

WANDILE MAGAGULA	**Applicant**
And	
SENIOR MAGISTRATE SIPHOSINI DLAMINI N.O	**1st Respondent**
THE CLERK OF COURT PIGGS PEAK MAGISTRATE COURT	**2nd Respondent**
REGISTRAR OF THE HIGH COURT	**3rd Respondent**
ATTORNEY GENERAL	**4th Respondent**

Neutral Cititation: ***Wandile Magagula v. Senior Magistrate Siphosini Dlamini N.O & three others (1951/19) [2019] SZHC (26th July 2019)***

Coram : Magagula J

Dates Heard : 7th June 2019

Delivered : 26th July 2019

[1] In this application the applicant seeks an order as follows:

" 1. Dispensing with the normal forms time limits and service relating to institution of proceedings and that this matter be heard as one of urgency.

2. That the applicat's non compliance with the above said forms, time limits and service be condoned.

3. That pending finalization of this matter a rule nisi do hereby issue returnable on a date and time to be determined by the above Honourable Court in the following terms.

3.1 Directing the first and second respondent to dispatch to the third respondent (Registrar of the above Honourable Court) within 14 days of service of the rule nisi and for purposes of automatic review, the record of proceedings under Piggs Peak Criminal Case number 706/14 involving the applicant.

3.2 That upon dispatch of the record in terms of prayer 3.1, the third respondent is to place the record before a judge of the above Honourable Court for purposes of automatic review.

3.3 That in the event of failure to comply with prayers 3.1 and 3.2 hereinabove, the applicant be forthwith released from custody of Matsapha Correctional Service Centre.

4. That orders 3.1 and 3.2 hereinabove operate with immediate effect as interim relief pending the return date herein.

5. That the respondents be called upon to show cause on the return date as to why the above rule nisi should not be made final.

6. That respondents pay costs of this application in the event of unsuccessful opposition.

7. Granting the applicant such further and/or alternative relief."

[2] When this matter first appeared before me on the 7th June 2019 I granted prayers 1.2 ; 3; 3.1; 3.2; 4 and 5. I purposely did not grant prayer 3.3 as I felt I would need to be fully addressed on that one.

[3] The respondents failed to comply with the interim order and I confirmed it on the 28th June, 2019. I also ordered that the confirmed order be served upon the respondents. In addition I postponed the matter to the 12th July 2019 and directed the parties to appear in court on the same day to address the court on prayer 3.3.

[4] On the 12th July 2019 the respondents did not appear and applicant's attorney appeared and filed his heads of argument together with some authorities. He undertook to file one further authority which he duly filed on the 15th July 2019.

[5] In prayer 3.3 applicant seeks an order that, in the event the respondents fail to file the record of proceedings at the Magistrate's court (***court aquo***), the applicant should be released from custody forthwith.

[6] I take particular note that in terms of section 79 of the Magistrate's Court Act, 1966 any sentence exceeding two years imprisonment or a fine exceeding E2000-00 is subject to automatic review by the High Court. In

terms of section 80 of the same Act the clerk of Court is required to submit the record to the Registrar of the High Court for purposes of review.

[7] Clearly, the record has not been filed with the Registrar of the High Court and it is on this basis that applicant now seeks to be released from custody. He contends that since the record has not been filed it is therefore impossible for the court to review his sentence and as such he should be released from custody.

[8] It is quite clear from the provisions of section 79 of the said Act that it is the sentence and not the conviction that the court is called upon to review. I also note that although the record containing the evidence led at the trial has not been filed, the charge sheet detailing all the charges preferred against the applicant is available and it is attached to applicant's papers. The applicant was charged with five counts of Robbery totalling E20,150-00; one count of fraud for the sum of E1150-00; one count of theft of property valued at E80-00; and one count of assault with intent to cause grievous bodily harm in which he assaulted one Thandeka Malambe by stabbing her with a knife several times on her upper body.

[9] The offences were committed on different days in the month of September, 2014. The applicant has also revealed that he was sentenced to sixteen (16) years imprisonment without the option of a fine for all these offences.it is worth mentioning that in fact the applicant has already noted an appeal in which he categorically states that he is not challenging his conviction but only the sentence.

[10] The question to be determined by this court is whether or not the applicant is entitled to be released from custody or to have the proceedings in the

court a quo set aside since the respondents, have failed for whatever reason to produce and file the record.

[11] In his heads of argument Mr M. Philiso who represents the applicant contends ***inter arlia:***

> ***" It is contended by applicant that the failure to transmit the record as required either for appeal or review denies the applicant not only his right to appeal but also his right to review and that such amounts to a failure of justice in circumstances where applicant is denied a right to a fair hearing which includes but not limited to a right to appeal or review as enshrined in the country's constitution."***

[12] Mr Philiso has referred the court to some three authorities. The first one is the South African case of THE STATE V. WILLEM LOITERING (KHS 3/2010) NCHC(10/9/10) where the court set aside proceedings of a regional magistrate's court on the basis that the record of a part – heard matter was missing. Olivier J stated at paragraph 7-9:

> ***" 7. When it comes to the question whether the proceedings in a criminal matter should be set aside, a distinction is often drawn between cases where the trial has been completed (and the accused has been convicted and sentenced), on the one hand, and cases where the proceedings have not yet been completed (either because the accused has not been convicted or because the accused has been convicted, but not sentenced), on the other hand.***
>
> ***8. In the case of completed proceedings the conviction and sentence will be set aside where it is found that the absence of a record would frustrate the accused's rights as regards an appeal or review. Such a finding and order will, however be made once it is clear that the***

record cannot be reconstructed and that the accused is not to blame for that fact.

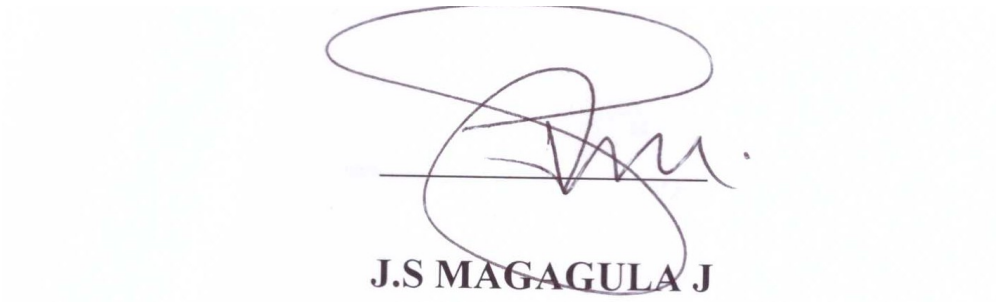
9. The test would therefore seem to be whether the absence of a record (or of a reconstruction thereof) would prejudice the accused in a particular case. In my view the test should be no different when it comes to incomplete proceedings".

[13] Applicant having stated in this application and in the appeal he has already noted that he is not challenging his conviction but only the sentence, it does not seem to me that the absence of the record will prejudice his rights in any way. It is only the record of evidence led in his trial that is missing. In my view this record was to establish his guilt or innocence. This part of the record that is missing does not therefore prejudice his rights on appeal or automatic review of sentence. In the presence of the charge sheet disclosing the offences he was convicted of and with his disclosure of the sentence imposed by the Magistrate, which sentence is not disputed, the court is in a position to make a finding as regards the propriety or otherwise of applicant's sentence.

[14] In imposing sentence the courts consider the nature and gravity of the offence, the interests of society and circumstances of the accused. The nature and gravity of the offences committed appear on the charge sheet which is available. This court is in a position to consider and determine the interests of society as regards these offences. It is also in a position to determine the circumstances of the applicant since he is available and can address the court on such.

[15] The court accordingly finds that the applicant's rights will not be prejudiced by the absence of the record of evidence in this case and the following order is accordingly made.

15.1 Prayer 3.3 of the Notice of Application is dismissed.



For Applicant: Mr M. Philiso

For Respondents: No appearance