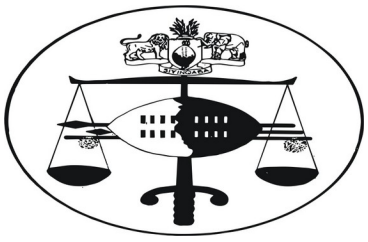

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 30/13

In the matter between

MUSA DLAMINI **Applicant**

and

SEBENZILE NDLELA-KUNENE N.O. **1st Respondent**

DIRECTOR OF PUBLIC PROSECUTIONS **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

Neutral citation: *Musa Dlamini v Sebenzile Ndlela Kunene N.O. & 2 Others* (30/13) [2013] SZHC 78 (08 April 2013)

Coram: Mamba J

Heard: **08 April, 2013**

Delivered: **08 April, 2013**

[1] Criminal law and procedure – s 282 of Criminal Procedure and Evidence Act 67 of 1938 prohibits the allegation of one's previous conviction on a charge sheet or indictment.

[2] Criminal law and procedure – accused charged with escaping from lawful custody – charge sheet alleging that he was a convict serving sentence at the time of his escape. Such charge sheet offends against s 282 and is a gross irregularity that results in a failure of justice.

[3] Criminal law and procedure – proving accused's previous conviction before verdict sins against prohibition in s 283 of the Criminal Procedure and Evidence Act and may in an appropriate case amount to a failure of justice.

[4] Criminal Law and procedure – failure by court to afford an accused a chance to cross-examine a crown witness – violation of s 171 of Act 67 of 1938 and constitutes a gross irregularity that results in a failure of justice.

[1] In this application, the applicant who filed his application through his then attorneys Leo Gama & Associates, seeks an order:

> "reviewing and setting aside [his] conviction and sentence imposed by the first respondent under case number ML154/2012 on the 15th October 2012."

The application is opposed by the respondents but no opposing affidavit or notice on a point of law or any indication has been filed to indicate their ground of opposition. Only a notice of intention to oppose has been filed by them.

[2] When the matter appeared before me during motion court on 5th April, 2013, the said attorneys were not in attendance and the applicant urged the court to hear the application in the absence of the said attorneys. Counsel for the 2nd respondent also indicated his willingness or preparedness to argue the matter on the papers as they stand; particularly because the court record of the proceedings in the court a quo had already been filed and formed part of these proceedings.

[3] It is undisputed that on 16th October, 2012, the applicant having been arrested on 14th October, 2012, appeared before the 1st respondent on a charge that alleged a contravention of section 48 (1) (a) of the Prisons Act 40 of 1964 'that upon (or about) 31st August 2012 and at (or near)

Bhalekane Correctional Services, …the said accused person, a convict, did wrongfully, unlawfully and intentionally escape from lawful custody of Zwelithini Bhembe while serving a sentence:' (The underlining has been added by me.) He was not legally represented in those proceedings.

[4] It is again common cause that he pleaded guilty to the said charge. The crown only led the evidence of the investigating officer who submitted the Prison records in respect of the applicant. These records indicate that the accused who is described in rather perjorative terms, I think, as a pagan, was serving a sentence of six years of imprisonment for various offices at the time that he escaped from custody.

[5] The court record further discloses and this is also common ground, that immediately after the court admitted or received the said prison records as an exhibit, the crown closed its case. Immediately thereafter, as one would expect, the applicant's rights on how to present his case, were explained to him. He chose to make a sworn statement which he proceeded to make. His statement was very brief; a one-liner. He told the court that he had in fact presented himself to the prison authorities (before) the alleged escape and therefore had 'no reason to escape.' This was not challenged by the crown.

[6] Again, rather disturbingly, there is no indication on the court record that the applicant closed his case. What immediately follows and what I should assume immediately followed, is that the crown made its submissions and urged the court to find the applicant guilty. The applicant was also afforded this opportunity to address the court. He however, had no submissions to make. In the end, he was found guilty as charged and after mitigation sentenced to a term of two years of imprisonment.

[7] In his grounds for review the applicant states and I reproduce his submissions verbatim; that

> '9. The 1st Respondent found me guilty although the prosecutor had not brought evidence aliunde to prove the commission of the offence, and sentenced me to a term of imprisonment 2 years without an option to pay a fine.
>
> 10. I have been advised that he 1st Respondent erred in returning a guilty verdict without the crown having led evidence to prove the commission of the offence.
>
> 11. I have been advised that once the crown chose to lead evidence rather than accept my guilty plea, it was obliged to lead evidence aliunde to prove the commission of the offence in order for the 1st Respondent to find me guilty.

12. The 1st Respondent effectively found me guilty on my plea because no evidence was led to prove commission of the offence.

13. I have been advised that in terms of section 238 of the Criminal Procedure and Evidence Act, if no evidence is led to prove commission, the court cannot impose a sentence without the option to pay a fine.'

[8] There is no merit whatsoever in the applicant's grounds of appeal. The fact of the matter is that the crown did lead the evidence of the investigating officer. This officer submitted to court exhibit A, which, as stated above proved that at the time that the applicant escaped from prison, he was serving a sentence of imprisonment. These records showed that the applicant was convicted on 24th February, 2012 and he was due to be released, without remission on 22nd September 2017 whilst his release on full remission was to be two years earlier than that. On the actual escaping itself, the crown witness stated that the information at his disposal was that the applicant unlawfully escaped from the relevant prison on 31st August, 2012. That, to my mind, was evidence aliunde proving or establishing the commission of the crime of escaping from lawful custody.

[9] There are, however, more disturbing features in this case than those complained of by the applicant.

[10] First, the applicant was not afforded the opportunity to cross examine the crown witness. Inspite of his plea of guilty, he should have been afforded this chance or opportunity. This is a basic and fundamental principle of our justice system or judicial process. It is founded or based on fairness; that an accused person should be afforded the chance to dispute or question his accusers before his fate is determined or adjudged. Anything short of this, is in my judgment a gross irregularity that results in a failure of justice. See section 171 of the Criminal Procedure and Evidence Act 67 of 1938 and *Simon Dube v R, 1979-1981 SLR 307* and the cases therein cited.

[11] Secondly, and very fundamentally, the applicant, after giving his own statement on oath, should have been afforded the chance to indicate whether or not he desired or wanted to lead a witness or witnesses in support of his case or evidence. There is no indication that he closed his case at all. Again, this is a gross irregularity. (vide *Caiphus Dlamini v R 1982-1986 (2) SLR 309).*

[12] Thirdly, the charge sheet faced by the applicant alleged that he unlawfully escaped from lawful custody whilst he was a convict serving sentence. Such a charge sheet should not have been permitted. It directly and

unashamedly sins against the provisions of section 282 of the Criminal Procedure and Evidence Act 67 of 1938 which provides as follows:

> 'It shall not be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Swaziland or elsewhere.'

[13] The elements of the offence created by section 48(1) (a) of the Prisons Act 40 of 1964 are :

(a) a prisoner, who

(b) escapes or attempts to escape from

(c) lawful custody, and

(d) with the requisite mens rea

This section is plain to me. The offence is committed by a prisoner – who may or may not be a convict. It is therefore totally irrelevant whether the accused was a convict or not. In fact it is totally prejudicial to the accused to allege in the charge sheet that the accused was, at the relevant time, a convict.

[14] In *Rex v Nhlanhla Sonnyboy Dlamini, Review case 84/2004* this court stated the following:

> "[6] First, by alleging in the charge sheet that the accused escaped from prison whilst serving sentence, the crown alleged that he was a convict or had

previously been convicted of some criminal offence. It is only persons convicted by a competent court that serve sentence in a prison. Thus, the charge sheet proclaimed that accused's incarceration was as a result of a conviction by a court. This should not have been done by the crown or permitted by the trial Magistrate.

[7] Section 282 of the Criminal Procedure and Evidence Act, 67 of 1938 forbids in mandatory terms the allegation of previous convictions in a charge sheet or indictment. The section reads as follows: "It shall not be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Swaziland or elsewhere"

[8] The charge sheet in the Magistrate's court is the equivalent of the indictment used in the High Court. It contains "the name of every accused person, with the name of the offence with which he is charged and the necessary particulars thereof concisely stated." See section 118 (1) and 114 (1) of the Criminal Procedure and Evidence Act 67 of 1938.

[9] The plain words of the section prohibits absolutely and without any exception, the allegation **in any charge sheet against any person for any offence that such person has been previously convicted of any offence,** (the emphasis is mine)

[10] There is no doubt in my mind that the charge sheet as framed against the accused sinned against the obligatory provisions of section 282 of the Criminal Procedure and Evidence Act and stands to be set aside.

[11] Section 48 (1) (a) of the Prisons Act prohibits all prisoners from escaping from lawful custody. The purpose or reason of their detention is not an element of the offence. It was therefore absolutely unnecessary and gravely prejudicial to the accused for the Crown to allege in the charge sheet that the accused had been detained as a convict when he escaped from prison."

And later the court held :

"[17] Suffice to say that the elements of escaping from lawful custody in contravention of section 48 (1) (a) of our Prisons Act are as follows:
(a) An escape, (b) from lawful custody and (c) mens rea. It is immaterial or irrelevant whether the escapee or accused was at the time of his escape an awaiting trial prisoner or a convict. This would of course become relevant and important upon conviction and for purposes of sentence. The prosecution has to allege and prove that the incarceration of the accused was lawful and in doing so, it need not lead evidence to prove that the accused was in custody following a conviction. The prosecution merely has to prove that the incarceration of the accused in prison was lawful by leading evidence to prove that the accused had been taken into custody on the orders of a court or other competent authority. It cannot be said that by pleading guilty to the charge as framed the accused voluntarily told the court that he was a convict and thus the crown was at liberty to lead such evidence.

[18] **JRL MILTON** (assisted by **N.M. FULLER)** in his book **SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE Vol 3** at page 225 states that "it is essential that the custody be a lawful one and an escape from unlawful custody is not an offence. In this regard the matter is influenced by the circumstances of the arrest, as an unlawful arrest necessarily results in the consequent custody being unlawful. It must then always be shown that the arrest was lawful, and the onus of proving this rests on the state which may not rely on the maxim **OMNIA PRAESUMUNTUR RITE ACTA** [all things are presumed to have been done regularly] to discharge this onus." (footnotes omitted by me)

[19] Section 248 of our Criminal Procedure and Evidence Act provides other exceptions to the rule. That section reads as follows:
"An accused person called as a witness upon his own application shall not be asked and if asked shall not be required to answer, any question tending to show that he has ... been convicted of or has been charged with, any offence other than that wherewith he is then charged ... unless ...
(d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then

charged."

> [20] I am unable to hold that in order for the prosecution to prove that the prisoner's incarceration was lawful, it has, as a matter of law, to prove that the accused had been taken into custody following a conviction, more so in a case like the present, where the accused has pleaded guilty to the charge and is unrepresented. For instance, where the accused escaped whilst still awaiting trial the lawfulness of his incarceration would be based on the court order remanding him into custody and not on a conviction. The status of the accused when he escapes must be that of a prisoner. That is what the crown would need to allege and prove. That the prisoner was a convict or an awaiting trial prisoner, seems to me, with due deference, not to be an element necessary to prove the offence of
>
> escaping from lawful custody. …
>
> [23] It is, however, one matter leading evidence of previous conviction during the trial, and another, totally different and perhaps more serious, alleging in the indictment that an accused has previous convictions. As stated in paragraph 10 herein, the latter is prohibited by section 283. Its violation constitutes an irregularity. This irregularity leads, **per se,** to a failure of justice because it is such a gross departure from the normal procedural rules of trial."

That was about seven years ago. To my knowledge, this is still the law in this jurisdiction.

[15] It was therefore grossly irregular for the crown to allege in the charge sheet that the applicant escaped from lawful custody whilst he was a convict. This irregularity resulted in a failure of justice and the resultant conviction cannot be allowed to stand.

[16] My fourth difficulty with the applicant's trial and conviction is the evidence led by the crown proving the applicant's previous convictions before the verdict. A similar situation occurred in *Nhlanhla (supra)* and the court held that

> "[12] Secondly, as a general rule, evidence of previous convictions may not be led at the criminal trial of an accused person [before judgment]. The reason for this is that it is highly prejudicial to the accused and irrelevant to determine whether he is innocent or not of the charge under consideration. **Ref : R V DOMINIC 1913 TPD 582, S.V. MTHEMBU AND OTHERS, 1988 (1) SA 145 (AD).**
>
> [13] Section 283 of Act 67 of 1938 gives effect to this common law rule and provides that "except in circumstances specifically provided in this act, no person may prove at the trial of any accused for any offence that such accused has been previously convicted of any offence, whether within Swaziland or elsewhere, or ask any accused, charged and called as a witness, whether he has been so convicted."
>
> [14] This section refers to the proof of previous convictions during the trial and before conviction. There are, however, exceptions to this rule and for purposes of this judgment, I shall only confine myself to examining whether a charge as that faced by the accused herein falls under one of such exceptions. The exceptions provided by section 283 are those "in circumstances specifically provided in this Act." One such exception is contained in section 263 of the act. This relates only to a charge of receiving stolen property knowing it to have been stolen. The other exceptions are found in section 248 of the Criminal Procedure and Evidence Act and is dealt with in paragraph 19 below.
>
> [15] In the Republic of South Africa, the position is governed by section 211 of

> the Criminal Procedure Act. This section provides that :
>
> "Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence."
>
> [16] It will be immediately noticed that our section 283 does not specifically provide for the exception where the fact of a previous conviction is an element of the offence with which the accused is charged. Commenting on the above exception, **Du Toit et al, COMMENTARY ON THE CRIMINAL PROCEDURE ACT AS AT 31/3/95** at page 24-21 states that such exception would apply in the Republic of South Africa "where, for instance, an accused is charged with escaping from custody it will be necessary to establish that he was in lawful custody following a conviction of a certain offence." I refrain from commenting on this opinion by the learned authors.

These remarks are apposite in this case and are hereby repeated. Again, this irregularity, leading the applicant's previous convictions before judgment, was gross. It resulted in a failure of justice. So, even if the charge sheet had not alleged that the applicant was a convict, it would still have been irregular to lead evidence of his previous conviction before the verdict. Consequently the conviction of the applicant cannot stand on this ground as well.

[17] For the foregoing reasons, the application succeeds. The conviction of the applicant by the court a quo is hereby set aside and so is the sentence that was imposed on him following such conviction.

[18] This case was not argued on Friday but today to enable counsel for the second respondent to study the decision in *Nhlanhla (supra).* After studying this case, Mr Dlamini, very properly in my view, advised the court that he could not support the applicant's conviction.

MAMBA J

For the Applicant: **In person**

For the Respondents: **Mr T. Dlamini**