



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 59/14

In the matter between

MOSES SIFISO MABUZA

Applicant

and

REX

Respondent

Neutral citation: *Moses Sifiso Mabuza v Rex* (59/14) [2014] SZHC 150
(11 July 2014)

Coram: Mamba J

Considered: **11 July 2014**

Delivered: **11 July 2014**

- [1] Criminal law and Procedure – Application for bail pending appeal. Applicant bears onus to show amongst other things that there are reasonable prospects of success in his appeal and that generally the interests of justice would not be adversely affected by his release.
- [2] Criminal law and Procedure – Bail pending Appeal – general rule is for the Court to lean in favour of granting liberty to the applicant where that can be done without endangering the proper administration of justice.

- [3] Criminal Law and Procedure – glaring procedural improprieties or irregularities on record. Appeal or review Court has duty to raise these mero motu, if such irregularities may have an impact on the validity or fairness or otherwise of the trial.
- [4] Criminal law and Procedure – on a charge of rape in a Principal Magistrate’s Court – Accused pleading guilty and crown leading evidence followed by a statement of agreed facts signed by both Counsel in support of its case. Presiding officer immediately giving verdict or judgment without the crown closing its case or the defence opening and closing its case. As the crown had opted to lead evidence, notwithstanding the plea of guilty by the accused, the crown was at liberty to lead whatever evidence it wished to lead before closing its case. Similarly, the accused had a right to be given the chance to open and close his case as he wished. A failure by the presiding officer to afford the parties these procedural rights was an irregularity which may result in a mistrial which is no trial at all. Reasonable prospects of success in the appeal thus established.
- [1] This is a bail application pending appeal. The applicant was convicted by the Principal Magistrate’s Court on 30 April 2014. He was sentenced to a term of 15 years of imprisonment for the crime of rape.
- [2] The applicant made his first court appearance on 27 July 2010 on a charge of rape. The allegations by the crown were that between 2008 and 2010 he unlawfully and intentionally had sexual intercourse with his step daughter who was at the time aged 13 years. The crown further alleged that the crime was accompanied by aggravating features or factors as defined in section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938. Amongst these features, the crown alleged, was the fact that the applicant raped his step daughter who was of a tender age and also did not use a condom of such

like protective device, and thus exposed the rape survivor to the possibility of contracting a sexually transmitted infection.

[3] The applicant was subsequently released on bail by this court in 2011. He was eventually arraigned on 31 May 2011 and he pleaded guilty to the charge. Notwithstanding this plea, the crown led the complainant in evidence. She was, she testified, 14 years old then and was 13 years old in 2010. That would mean that in or about 2008 when she was allegedly first raped by the applicant, she was around 11 years of age. She told the court that the applicant was married to her mother through Swazi law and Custom.

[4] The complainant testified that the applicant had, on several occasions during the material period, had sexual intercourse with her in both Siteki and Gundvuni area. This piece of evidence which was not disputed by the applicant, confirmed what was alleged by the crown in the charge sheet.

[5] It is not necessary for me for purposes of this judgment to narrate or repeat the sickening evidence that was led by the complainant herein. Suffice to say that her evidence was not challenged or disputed by the applicant and that after her evidence the matter was postponed on several occasions with

the crown inter alia, indicating that it had further witnesses to lead in support of its case. Meanwhile, the applicant himself decided to engage the services of two legal representatives and also changed his plea from guilty to not guilty and back to guilty again. After the last of such changes, a document titled 'statement of agreed facts' was handed in by the defence and confirmed by the crown. It was signed by both the defence and the crown. Again, the status of this document and its contents do not appear to me to be relevant for purposes of this bail application.

[6] What is of profound significance though is that immediately after the handing in of the statement aforesaid, the presiding officer proceeded to hand down her judgment without either the crown closing its case or the defence opening and closing its own case. In a very short and terse statement the court held that: 'Accused has pleaded guilty to the offence of rape. [The] crown called the complainant who narrated how her ordeal unfolded in the hands of the accused. This occurred on a number of occasions. Accused never contested the evidence.

Later on a statement of agreed facts was filed and a medical report. The crown's case has been proved beyond a reasonable doubt. Accused is found guilty as charged.'

- [7] In his grounds of appeal, the applicant in a rather inelegant and convoluted notice of appeal states that notwithstanding his plea, he should not have been found guilty of and sentenced on a charge of rape at common law. He argues that at best for the crown and worse for himself, he should have been convicted of a contravention of section 3 of the Girl's and Women's Protection Act of 1929. His submission on this aspect of his case is that the crown failed to prove that he had 'coerced' the complainant into having sexual intercourse with him. He argues further that because of this fact, and this fact alone, there are reasonable prospects of success in his appeal. I shall reserve my comments on the soundness or otherwise of these submissions by the applicant as I believe that such should be best left for the appeal court. This is moreso because of the distinct and firm judgment that I have reached herein as stated in the next paragraphs in this judgment.
- [8] During argument before me, I enquired from both counsel whether or not the procedure adopted by the learned trial magistrate as outlined above was in accordance with real and substantial justice. Neither counsel could say that it was.

[9] The fact that the applicant pleaded guilty to the charge of rape; the fact that such a plea was confirmed in the statement of agreed facts and the fact that the applicant did not challenge the evidence of the complainant, did not in my judgment have the effect of him waiving his right to open his own case in his defence or for that matter, the crown foregoing or waiving its rights to lead whatever further evidence it had in support of its case. As stated above, the crown having led the evidence of the complainant did not at any stage of the proceedings indicate to the court that it was closing its case. Similarly, the defence did not at any stage inform the court that it did not wish to lead any evidence in its defence. The defence was in fact never afforded the opportunity to open its case. However, the fact that the crown had not merely accepted the plea by the applicant (and led no evidence), it became, as a matter of procedural justice and fairness, incumbent on the court to permit or allow the crown to close its case and likewise permit the defence to open and close its own case. Anything short of this, was in my judgment, procedurally flawed and not in accordance with acceptable rules and procedures of a criminal trial.

[10] As already stated above, this is not a review or an appeal by the applicant. It is a bail application pending the appeal by him. One of the major

requirements that an applicant has to show or establish in such an application is that there are reasonable prospects of success in his appeal. The applicant has, in his notice of appeal, not complained about the procedural deficiencies I have referred to in this judgment. However, where such procedural lapses are glaring or apparent on the face of the court record, I do not think that this Court, or any Court for that matter, should close its eyes to them and act as if they are not there at all. To my mind, it is the duty of this Court to point out the existence of such lapses or inadequacies which negatively or adversely impact on the legality or fairness of a trial.

- [11] It is not the duty of this Court in these proceedings to determine or pronounce on what effect the above procedural lapses had on the overall proceedings in the Court a quo. This Court is, however, of the considered view that these irregularities or lapses in procedure may tilt the balance in favour of the applicant in the appeal. In a word, there are reasonable prospects of success in his appeal. That being the only issue before me, the applicant is entitled to be released on bail pending his appeal.

[12] I wish to add in parenthesis that although the record of the Court proceedings in the Court below which has been filed herein is a Photostat copy and has not been certified as a true and correct copy of those proceedings by the relevant officer of that court, both Counsel in this Court agreed that what was before this Court was the true and correct record of the said proceedings and that justice demands that this Court should proceed and consider it as such true and authentic record. I agreed.

MAMBA J

For the Applicant : Mr S.C. Simelane

For the Respondent : Ms N. Masuku