IN THE COURT OF APPEAL FOR SWAZILAND

Held at Mbabane

Case No 12/93

In the matter of

NKOSINATHI VILAKATI 1st Appellant

MAKWATA SIMELANE 2nd Appellant

And

THE KING

JUDGMENT

The two appellants were -found guilty in the Magistrate's Court -for the district of Lebombo on a charge of robbery and sentenced to 6 years imprisonment. The appellants appealed against the conviction and sentence to the High Court of Swaziland and the appeal against both the conviction and sentence was dismissed. The appellants appealed to this Court against the dismissal of their appeal by the High Court and the appeal was heard in this Court on 5th October 1993.

The -facts, brie-fly, as appear from the evidence on behalf of the Crown in the Magistrate's Court are that on 9th May 1992 at about 11pm when the driver of a light delivery van owned by Mlume Sugar (Pty) Ltd returned to his vehicle from a restaurant he was accosted by two persons, who at gun point forced him to start the van in which they then drove away leaving him behind. Later he identified the two appellants as the persons who had robbed him of the motor vehicle and his .22 calibre rifle which was in the van.

The sister in law of the 1st appellant testified that on. the night of the robbery he had brought a rifle to her to keep on his behalf. The rifle was subsequently identified by the driver of the van as the one he had in the van at the time he was dispossessed of the van. A witness, who was in fact, an accomplice in thefts from the van after the robbery con-firmed

that the two appellants were in possession of the van on the night in dumped and the grill of the van, its tyres and battery removed by them to sell in the area.

At the hearing of the appeal, Counsel for the appellants did not challenge that the presiding magistrate had correctly convicted the appellants on the evidence placed before the Court. He contended, however,that the conviction should be set aside on the grounds that:

1. The Magistrate had failed at the outset of trial,toinform the Appellants who were unrepresented of their procedurai rights and the possible verdicts that might be brought against them; and
2. The Magistrate failed to inform the Appellants of their right to address they Court at the conclusion of the evidence and to give them an opportunity so to do.

There was no note on the record of the proceedings in the Magistrate's Court of the Magistrate's having done either of the above and judgment was then reserved to enable the Magistrate to report on what he had done on these two aspects. The magistrate filed a written report, somewhat belatedly, to the following effect :-

1. "At the commencement of the trial the Accused were asked if they would conduct their defence or whether they had an attorney. They had no attorney hence 1 the entry in the record that they would both conduct their defence.
2. At the end of the trial, I will be candid, they were not informed that they were entitled to address the Court.
3. I wish to add that the Crown was also not given a chance to address the Court. I will add further that the fact that no party was given an opportunity to address the Court did not prejudice either party in the sense that my judgment was based on the evidence that had been placed before the Court. I do concede that what I did might have been a mishap but I do not believe it was an irregularity that could warrant an acquittal. Having said this I leave everything in the able hands of their Lordships who are handling the Appeal."

The report of the Magistrate was referred to the attorney acting for the Appellants and Crown Counsel who appeared in the appeal but neither wished to make any further submissions to those made when arguing the appeal.

Section 171 of the Criminal Law & Procedure Act 67 of 1938 provides that every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross—examined by his

counsel or other legal representive. There is no statutory provision enjoining a Magistrate or other judicial officer in ensure that unrepresented accused fully understand their rights but there is a general duty on the part of judicial officers so to do. In this connection I refer to the following dicta of Goldstone J in S v. Mbonani 1988 (1) SA 191 (T) at 196 F-J:

"If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances. "

The above dicta were quoted with approval in S v Mabaso & Another 1990 (3) SA 185 (A) at 203 D-G and S v Rudman & Another 1992 (1) SA 343 (A) at 382 D-G. In the latter case Nicholas AJA at 391 F-H said :

Did the magistrate's failure to inform the accused in terms of S v Radebe constitute an irregularity? In S v Mabaso at 204G, Hoexter JA said that it seemed to him that

'...in the instant case the magistrate's failure to inform the appellants of their right to representation before they pleaded would amount to an irregularity only if the appellants were shown to have been ignorant of that right'.

I concurred in the judgment of Hoexter JA, but on reflection I am not sure that this dictum is entirely correct. I am inclined to think that the better view is that a failure to inform an accused of his right to representation is an irregularity unless it is apparent to the magistrate, for good

reason, that the accused is aware of his rights (eg from his own statement or from the circumstances - for instance, that the accused is an attorney). Certainly it is the safer course always to inform the accused of his rights. But the difference

between the two views does not appear to be one of substance: whichever view be adopted, the result would be the same.

I can find no decided case in our courts where this duty has been defined and prescribed but I am of the opinion that this procedure is practised by most judicial officers in the country and it should be recognized and acknowledged that a breach thereof constitutes an irregularilty which in the particular circumstances of the case might lead to an unfair trial or a failure of justice. In this connection, further, I refer to the following extract from the judgment of Davies AJ in S v Makaula 1993 (1) SACR 57 at 59:

The record should, of course, reflect the substance of the presiding officer's advice and questions, and of the accused's answers. I should add in this respect that steps have been taken, or are in the process of being taken, by the Attorney-General to provide - all presiding officers with a roneoed form setting out in detail the manner in which a presiding officer should advise an undefended accused of. his rights in general and, once this form is available, presiding officers will be able to use it to record this part of the proceedings. "

The procedure set out therein could profitably be introduced in this country.

Section 175(1) of the Criminal Law & Procedure Act 67 of 1938 provides that after all the evidence has been adduced, the prosecutor shall be entitled to address the court, summing up the whole case and every accused shall be entitled by himself or his legal representative to address the Court.

The accused thus has a statutory right to address the court and the deprivation of his right so to do is in my view a material irregularity.

In S v Mabote en andere 1983 (1) SA 745 (0) at 746 the Court in relation to a similarly worded provision in the Republic of South Africa held that it is a basic principle that an accused has the right to address the court before Judgment regardless of his prospects of success and a failure to give him this right affects the essence of the criminal procedure and is a gross irregularity destroying the fairness of the trial and the validity of the proceedings.

It matters not in my view that the Prosecutor was also not given the right to address the Court and that this was all due to an oversight on the part of the Magistrate. The only issue is that the appellants were deprived of a statutory right and that this constitutes a gross irregularity to the possible prejudice of the appellants and in these circumstances the convictions and sentences should not be allowed to stand.

The correct procedure would possibly have been for the appellants to have raised the irregularities by means of an application for review but I am of the view that to insist on this procedure being followed, particularly in view of the delays in bringing the matter to finality, would be too formalistic an approach. All the parties involved have had ample-opportunity of dealing with the issues and raised and expressing their views.

The appeal is upheld and the convictions and sentences are set aside.

D A MELAMET JP

I agree.

W R SCHREINER JA

I agree.

R NUGENT AJA