IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Criminal Appeal Case No. 04/2016

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **1st Appellant**

COMMISSIONER GENERAL OF HIS MAJESTYS CORRECTIONAL SERVICES **2nd Appellant**

ATTORNEY GENERAL **3rd Appellant**

and

CELANI MAPONI NGUBANE **Respondent**

Neutral Citation	:	DIRECTOR OF PUBLIC PROSECUTIONS; COMMISSINER GENERAL OF HIS MAJESTY'S CORRECTIONAL SERVICES AND ATTORNEY GENERAL VS. CELANI MAPONI NGUBANE (04/16) [2016] SZSC 34 (30 JUNE 2016)
Coram	:	CLOETE AJA; MAPHANGA AJA and MANZINI AJA
For the Appellants	:	MS. L. HLOPHE
For the Respondent	:	MR X. MTHETHWA

Heard : 26 MAY 2016

Delivered : 30 JUNE 2016

SUMMARY : *Criminal proceedings – Accused found guilty and sentenced in High Court - Appeal to Supreme Court of Appeal – conviction and sentence confirmed by Supreme Court of Appeal – Application to High Court to interpret the sentence confirmed by the Supreme Court of Appeal – incompetent for High Court to interpret a Judgment of the Supreme Court of Appeal – Judgement of Court a quo struck out and matter struck from Roll.*

JUDGMENT

CLOETE -AJA

BRIEF BACKGROUND FACTS

[1] 1. The Respondent faced a number of charges in the High Court of Swaziland under Criminal Trial No. 46/2002 and on 05 May 2006, after having found the Respondent guilty of the following (in abbreviated form);

1.1 Count 1 - Murder;

1.2 Count 3 and 4 - Armed Robbery;

1.3 Count 5 – Armed Robbery;

1.4 Count 6 – Armed Robbery;

1.5 Count 9 – Armed Robbery;

1.6 Count 10, 11 and 12 – Unlawful possession of firearm and ammunition.

The Court *a quo* per Masuku J. sentenced the Respondent to the following;

1.7 Count 1 – Life imprisonment;

1.8 Count 3 and 4 – Ten (10) years imprisonment;

1.9 Count 5 – Ten (10) years imprisonment;

1.10 Count 6 – Ten (10) years imprisonment;

1.11 Count 9 – Six (6) years imprisonment, ordered to run concurrently with sentence in count 6;

1.12 Count 10, 11 and 12 – the Accused is sentenced to a fine of E5,000.00 on each count or five years imprisonment on each count. In the event that the Accused is unable to pay the fine, the custodial sentence in Count 11 and 12, shall be ordered to run concurrently with that in Count 10.

1.13 The Learned Judge then stated that **"the sentences on all the Counts are ordered to run consecutively to that in Count 1 and the**

sentences are ordered to run with effect from 24 March, 2002".

2. The Respondent then noted an Appeal in the Supreme Court of Swaziland under Criminal Appeal No. 6/06 against both the convictions and the sentences.

3. In a fully reasoned Judgment handed down by the Supreme Court of Appeal on 14 November 2007, the Supreme Court;

3.1 at Page 25 of that Judgment stated that **"despite the efforts of the First Appellant (Respondent in these proceedings) to escape the clear inferences of his guilt, he had no defence to these counts and his appeals against these convictions also fall to be dismissed";**

3.2 at Page 31 of that Judgment stated that **"First Appellant (Respondent in these proceedings) was obviously involved in an orgy of crime which he carried out in large measure in close association with the Second Appellant. Their contempt for other human beings is illustrated by the reference to the deceased in Count 1 as 'a dog' and the threat to shoot an infant in its**

mothers arms if the infant made a noise in Counts 3 and 4. This is certainly not an exhaustive list of the callous conduct of the Appellants. Masuku J. gave every point regarding sentence his anxious consideration and no misdirection can be observed in his reasoning leading to his decisions. The sentences imposed by him on the two Appellants were heavy, but no heavier than is justified in the circumstances. This Court will not interfere with those sentences and the Appeal against them is dismissed. In the result the appeals of the First (Respondent in these proceedings) and Second Appellants are dismissed and the convictions and sentences imposed upon them in the High Court are confirmed".

4. Incredibly the Respondent then, under High Court Case No. 46/2003, on 30 October 2015, brought an Application before the High Court of Swaziland for an Order in the following terms;

4.1 declaring that the sentences from Count 3 to Count 12 having been ordered by this Honourable Court to commence on 24 March 2002 have been served by the Applicant.

5. Before dealing with the matter any further, uncontested submissions made from the Bar by Ms. Hlophe, paint an extremely disturbing picture in that she advised the Court that;

5.1 the matter was first placed before Her Ladyship Mabuza J. who advised the parties that the High Court was not competent to hear the matter and that it should be heard by the Supreme Court;

5.2 the issue was again raised before the Court *a quo* and it was alleged that Attorney Bhembe, an associate of Mr Mthethwa advised the Court *a quo* that he had seen the Chief Justice (without Ms. Hlophe being present) and that the Chief Justice had purportedly stated that the matter could proceed in the Court *a quo*. This issue will be dealt with below.

6. The matter was argued before the Court *a quo* and the Court *a quo* granted the Application of the Respondent.

7. The Appellants sought leave to Appeal the Judgment of the Court *a quo* and such leave to Appeal was duly granted by the Court *a quo*.

SUBMISSIONS BY COUNSEL FOR THE RESPONDENT

[2] 1. The sentence was handed down by a Judge of the High Court and therefore the High Court had the inherent right to review that decision but could not refer to any law or rule or decision or authority to support that point of view.

2. He conceded that the issue at hand was not raised in the original Appeal before the Supreme Court of Appeal.

3. He conceded that the Judgment of the Supreme Court of Appeal takes precedents over a decision of the High Court.

4. On the merits of the matter he referred the Court to his Comprehensive Heads of Argument.

5. He submitted that the High Court was able to hand down the Judgment which it did in interpreting the Judgment of the original Court *a quo*.

SUBMISSIONS BY COUNSEL FOR THE APPELLANTS

[3] 1. The Supreme Court of Appeal pronounced itself on both the conviction and the sentence.

2. Accordingly, the High Court did not have the authority to interpret a decision of the Supreme Court of Appeal.

JUDGEMENT

[4] 1. Firstly, this Court does not accept the allegation that the Chief Justice would have interfered in the matter in any way and that he would have left the decision as to whether to hear the matter or not to the Court *a quo*.

2. The original Court *a quo* handed down a reasoned Judgment in respect of the conviction and a further reasoned Judgment in respect of the sentencing of the Respondent and gave the matter careful consideration.

3. The Respondent then lodged an Appeal to the Supreme Court of Appeal and again that Court handed down a fully reasoned Judgment in terms of which it confirmed all of the convictions relating to the Respondent and specifically, in some detail, dealt with the issue of sentencing and at the end of the Judgment specifically confirmed the sentences imposed on the Respondent.

4. At the conclusion of the Appeal, the Judgment of the Supreme Court of Appeal clearly superseded the Judgment of the original Court *a quo* and as such became the final Judgment.

5. That being the case, it is clearly beyond comprehension on what basis the Court *a quo* decided that it had the necessary jurisdiction to in effect review the final decision of the Supreme Court of Appeal. It clearly did not have such a right and should not have heard the matter in the first instance.

6. Under the circumstances it is not necessary for this Court to analyse or make any finding on the findings of the Court *a quo*.

7. Having said that, we do believe that the words of the Judge **"the sentences on all the Counts are ordered to run consecutively to that in Count 1 and the sentences are ordered to run with effect from 24 March, 2002"** may give rise to some confusion and may require some interpretation by this Court.

8. However, there is no formal or proper Application before this Court either in terms of the Court of Appeal Act 74 of 1954, nor the rules promulgated thereunder nor the provisions of the Constitution of the Kingdom of Swaziland and in the absence of such required formal Application, this Court is not in a position to deal with the matter in any form or shape.

9. Accordingly, the Judgment of this Court is that;

9.1 the Judgment handed down by the Court *a quo* in favour of the Respondent is struck out as having been granted unprocedurally;

9.2 the matter is struck from the Roll of this Court with no Order as to costs.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

C. MAPHANGA
ACTING JUSTICE OF APPEAL

I agree

M. J. MANZINI
ACTING JUSTICE OF APPEAL