

IN THE HIGH COURT OF SWAZILAND

In the matter of: Case No. S.137/1981

REX

vs

DIANAH SHUB

CORAH: NATHAN C.J.

FOR CROWN: THWALA

FOR DEFENCE: DUNSEITH

JUDGMENT

(Delivered 22nd Sept. 1981)

NATHAN C.J.

In the indictment as amended the Accused is charged firstly with contravening Sec. 4 (1) (a) of Act 46/1938, and secondly with contravening Sec. 82 of Act 6 of 1889.

Count 1, as amended, alleges that the Accused is guilty of contravening Sec. 4 (1) (a) of Act 46/1938, in that upon or about the month of April 1981 the Accused did unlawfully and with seditious intention write the seditious poem in Schedule A.

Count 2, as amended alleges that the Accused is guilty of contravening Sec. 82 of Act No. 6 of 1889 in that upon or about the month of April 1981 the Accused did unlawfully write the indecent and/or obscene poem in Schedule A.

The so-called poem is set out in an Annexure to this judgment. I direct that the media shall not publish it as such. It is scurrilous doggerel in the worst possible taste, with no literary merit, but very wounding and insulting to the Swazi nation. It cannot be in the public interest to publish the whole of this "poem" which refers to the alleged thieving habits of Swazis, alleges that they are

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ill-bred, arrogant and anti-white, poor at sport, refers to their alleged uncleanness, cowardice and treachery, to prostitution and the spreading of venereal disease, to them as being bad payers, poor farmers, poor drivers, and to the inefficiency and cowardice of the Police. The Assistant Commissioner of Police was correct when he suggested in his evidence that this "poem" might well deter any white person who was thinking of investing in Swaziland. And there can be no doubt in regard to the corresponding disaffection and resentment which the "poem" would raise in the mind of any Swazi reading it. The Accused herself said in evidence that it was "not very pleasant. Disgraceful actually."

Section 4(1)(a) of the Sedition and Subversive Activities Act 46/1938 provides that "Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention ..... shall be guilty of an offence. The section goes on to prescribe the penalties for contravention.

"Seditious intention" is defined in Sec. (3)(1). The subsection lists five sub-paragraphs. Sub-paragraphs (d) and (e) are relevant to the present case. These refer to an intention to "(d) raise discontent or disaffection among His Majesty's subjects or the inhabitants of Swaziland; or (e) promote feelings of ill will

and hostility between different classes of the population of Swaziland," Sec, 3(3) of the Act provides:

"In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself,"

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Section 82 of Act 6/1889 provides:

"Any person who writes or transmits, or knowingly is a party to the writing or transmission of a communication contravening threats of bodily injury to a person or indecent or obscene matter, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment thereof, imprisonment not exceeding six months."

At the inception of the trial Mr. Dunseith for the defence moved to quash the indictment on the ground, in relation to Count 1, that the indictment did not allege a seditious intention; and, in relation to Count 2, that there was no allegation of the communication of indecent or obscene matter. I refused this application. It really fell away in regard to Count 1 because the indictment had, prior to Mr. Dunseith being instructed in the matter, but unknown to him, been amended to allege a seditious intention. I pointed out that it would depend on the evidence whether this was established or not. I equally ruled, in relation to Count 2, that it would be a question of evidence whether there was a communication or not, and that it is indeed not clear on the section or whether the writing of the indecent or obscene matter is not in itself an offence. I may point out that the indictment does not contain any allegation of communication. But, assuming that it is in fact necessary to establish this, it appears to me that the writing of an indecent or obscene poem may itself, in the light of the evidence, amount to a communication of its contents if it is left where other people can see and read it. He who runs may-read,, Compare Old Testament, Habbakuk 2.2.

Evidence was given by three people who were employees at the time of Shield Chemical Co., of which the defendant is a director, in regard to the finding of the "poem", the reading of it, and what happened thereafter. These three witnesses were Mr. Colin Dlamini, the then manager of the Company; Mrs. Siphwe Shongwe, the secretary; and Diana Nkambule, the cleaner and cook. It is common cause that the "poem", Ex. A. is in the handwriting of the defendant,

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although there is not agreement in regard to the circumstances in which it came to be written. There are minor differences between these three witnesses as to how much of the "poem" was initially ready by Siphwe and Diana, and exactly who took it to Colin Dlamini; but these are not of any material importance, and it may be accepted that the "poem" was picked up by Diana on an afternoon in April 1981. She had knocked it off the Accused's table at the Factory while cleaning or dusting. It had not been there in the morning. Diana and Siphwe took the "poem" to Colin Dlamini and he read it out to them. They were all upset by its contents. It was decided that it should be sent to the office of the Deputy Prime Minister as Colin had reservations about entrusting it to the Police. It appears from Diana's evidence that on a previous occasion she had reported to the police another disgraceful remark that was made by the Accused concerning His Majesty King Sobhuza II, but that no action was taken thereon. Colin Dlamini endeavoured to give the "poem" to the Deputy Prime Minister but was not able to do so and the "poem" was eventually delivered to the Deputy Prime Minister's office by one Joyce Sibandze who had earlier worked at the Factory.

After the letter was received by the Deputy Prime Minister it was handed over to the Police and the Assistant Commissioner of Police Mr. Sotsha Dlamini went and interviewed the Accused and her husband. The Accused told him she had received the "poem" anonymously through the post in about June 1979. It was in type; she had made a copy in her handwriting and had sent the original to the Police under cover of a typed letter. Mr. Dlamini said that the Accused and her husband had said they could

produce a photocopy of the covering letter, and Sotsha Dlamini said that they could give no satisfactory explanation of where the original copy of the covering letter was. The Accused's husband did produce to Mr. Dlamini the photocopy Ex. C and in the course of the Accused's evidence the original copy, Ex. D was also produced.

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Diana said she had given the "poem" to Joyce to take to the Deputy Prime Minister on 24th April 1981. On 4th May 1981 the Accused tackled her about the matter and asked her why she had given them (i.e. her and her husband) a bad name with the Police. Apparently she had been tipped off by some member of the Police Force. Diana said the Accused told her she would shew her what she would do about "the Swaziland of which you are so proud." There was a meeting between the Accused, Colin, Siphwe and Diana at which the Accused made various threats and said Diana was a spy. According to Diana, later in the day the Accused fired her, on an alleged pretext that there had been complaints about Diana's cooking - this after Diana had been in the Company's employ for six years. Diana in fact we went to His Majesty the King about the matter. The Accused in her evidence denied that she had fired Diana, and said that Diana had left of her own accord. Although there is clearly some animus between Diana and the Accused - apart from anything else Diana's evidence and demeanour indicate a strongly motivated patriotism and pride in her country - Diana's version appears to me to be the more acceptable.

Colin Dlamini has, more recently, been fired from the firm - the Accused says suspended - as a result of an alleged contravention of the Road Traffic Act which is still being investigated.

Mr. Dunseith applied for the discharge of the Accused at the conclusion of the Crown case. I refused this application. Mr. Dunseith submitted, on the authority of my decision in R v Gilbert S Shabangu, 1970-76 SLE 396, that the Crown must establish a specific intention under Sec. 3(1) of Act 46/1938, more clearly established than the general intention which is presumed to flow from the doing of an act. See the report at p. 397 D.

It does not appear to me that my decision in Shabangu's case, supra, applies to the present type of case., In the first place, the Accused, in Shabangu's case, when in a befuddled condition, uttered words abusive of His Majesty., It was held that the Crown had not established the

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necessary seditious intention. But the circumstances here are quite different and clearly call for an acceptable answer. Secondly, Sec. 3(3) of Act 46/1938, which I have set out earlier in this judgment, is not referred to in the judgment in Shabangu's case. I cannot, at this stage, say whether or not it was considered by me in that case, but it appears to me to cast upon the Accused the obligation to rebut the presumption that is raised by the subsection. Specifically, in the present case, the Accused is called upon to rebut the presumption flowing from her leaving of the "poem" where it could be and was read by other people, Mr. Dunseith also relied upon the decision in S v. Kubheka, 1974 (3) 443 (N). But that case is immediately distinguishable in that it does not appear that in the legislature there under consideration there was any provision similar to Sec. 3(3) of Act 46/1938.

The same considerations apply in regard to Count 2.

The Accused gave evidence in her defence in line with what had been adumbrated by her in the course of the Crown case. She recounted the story of how she had received the "poem" through the post in 1979, how she had copied it and sent the original under a covering letter to the police at Manzini. She said she had copied it in longhand at home as she had no typewriter at home. Nor did she have a photostat machine until 1980. It is noteworthy in this connection that she said that not long after they got a photostat machine it was burned. She did not say she replaced it. She said the photocopy Ex. C was made by her husband when Mr. Sotsha Dlamini asked for a copy of the letter. It will be remembered that he said the Accused spoke only of a photocopy and not of an original copy of the letter sent to the Police.

The Accused said that she kept the original copy at home, as also the copy of the "poem" that she had made. She said that the copy of the "poem" and copy of the covering letter had been kept in a drawer in her wardrobe, and she suggested that the copy of the "poem" must have been abstracted by Diana when she helped the Accused move house from Manzini

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to Mbabane in March 1981. This had been put to Diana in cross-examination and she denied it. The great difficulty in this story is that the copy of the covering letter had somehow found its way from the Accused's wardrobe to the correspondence file at the factory. The Accused knew this and was able to get her husband to make a photocopy when Mr. Sotsha Dlamini asked for a copy. She agreed that Diana could not have placed the copy of the letter on the file.

The above considerations confirm the view that I expressed during the course of the case, namely that the Accused's story was unacceptable. But there is more to the matter than that. The "poem" itself bears all the hallmarks of having been composed when it was penned, and of not being a copy of a typed poem. I refer, for example to verse 13. The 3rd and 4th lines of this read "The gates of Hell are standing "open" ajar, For them who will come from afar."

This clearly indicates that lines 3 had originally been intended to read "The gates of Hell are standing open"; it was then amended to read "are standing ajar" and line 4 was composed to rhyme with "ajar". These alterations could never have been perpetrated by a person typing the "poem" from some manuscript copy. This "poem" was never composed on the typewriter. Similar comments apply in regard to the altered first line of Verse 4, and the other alterations in the "poem".

I do not believe that the "poem" was received by the Accused in 1979 and sent under covering letter to the police at Manzini. It is significant in this connection that the letter was never traced at Manzini, and what is more significant is that the Accused, who says she regarded it as a trap, never made any enquiries about it, nor did she refer to it in a long letter that she later wrote detailing various matters of importance that had happened to her.

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In my view the alleged copy of the covering letter and photostat thereof first saw the light of day when Mr. Sotsha Dlamini asked to see a copy of it. Of even more importance is the fact that the Accused's account of how she received and made a copy of the "poem" is quite unacceptable.

The Court would have had much more sympathy for the Accused if she had said that she had written the poem for the amusement of herself and her husband when she was particularly upset and irritated by some incident that had happened. She could not, however, say this in view of the story she made up in regard to having received the letter through the post and having made a copy of it and sent it off.

In his argument Mr. Dunseith repeated the submissions he had made in the application for discharge of the Accused. He made the further point that the indictment alleges an act of writing the "poem", and not the act of leaving it around. But, as I pointed out earlier, the mere writing of the "poem" may be an act falling within Sec. 4(1) where there are no circumstances justifying the writing and leaving around of the poem.

It is to be noted in this connection, as was pointed out by Mr. Twala for the Crown that Sec, 4(1)(a) creates the doing of an act with seditious intention an offence while Sec 4(1)(c) creates it an offence to publish seditious matter. This tends to show that in considering Sec, 4(1) (a) you need only look to the act and not to the publication which is a separate offence.

Mr. Dunseith further submitted that the Crown must establish mens rea. Assuming this to be necessary, the Crown has in my view established this. See the "poem" itself and the Accused's guilty behaviour in regard thereto as evidenced by her treatment of her employees and the elaborate defence which she concocted.

In regard to Count 2, the indictment refers to an indecent and/or obscene poem. I do not consider that the "poem" can be said to be obscene. See the discussion of what constitutes obscenity - a tendency to deprave and corrupt - in *Publications Control Board v William Heinemann Ltd.*, 1965 (4) S.A. 137 (A.D.) at page 150-151. In my view, however, there can be no gainsaying the fact that the "poem" is indecent. "Indecent" in the context does not in my opinion necessarily have the rigid sexual connotation that 'obscenity' has; but if it did have to have this connotation verses 8 and 9, with their references to illicit cohabitation with prostitutes and to the ensuing venereal disease, are sufficient to satisfy the text. Compare the discussion on "indecent or obscene" in *Claassen's Dictionary of Legal Words and Phrases*, Vol.2 p. 242. "Indecent" means something less than obscene; and I do not agree that because the two words are in Juxtaposition, "indecent" must be given the meaning that has been given to "obscene".

In the result I find the Accused guilty on Count 1 and on Count 2.

C. J. M. NATHAN

CHIEF JUSTICE

ANNEXURE ODE TO A SWAZIS stands for Swazi, A nation unknown, with Sobhuza as King, sitting on His Throne.

All can ask why were they born, I like the last letter, they'd be the first to fall.

They are good for nothing except to steal, Not to talk of booze, what do they feel, On the other hand, they have talent and grace, At breeding kids, at a good steady pace.

Train a Swazi, they say it takes only months, Centuries would be more like it, the rotten runts. They are ill bred, arrogant and anti-white, Against us, with all their might.

The all blacks team is not a patch on them, At sport they excel, when they play, you can tell. Never a victory have they gained, Like their socks, they are filthy and stained.

They have never heard of a bar of soap, But don't lets give up all our hope. That one day they will discover the bath, For this is not an easy path.

Their army is composed of only braves, Never a human have they saved. In war they are the first to go, Hacked to pieces, like a garden mow.

To trust a Swazi is like loving a snake, All they know is how to take. Give them an inch and they take a mile, About this there is nothing to smile.

They are black as coal and dark as pitch, Each of the girls, you can say is a bitch, On Friday nights go to the Spa, You'll find them waiting for a car.

There they have their pick of men, And lure them quietly to their den, When the jobs over, they have left their mark, Disease is the name, which they sell in the dark.

A girl you can buy for just a cent, Sometimes you might have to pay the rent. With them it is just for money, This is really not too funny.

When it comes to paying, they are just the best, At taking years and the rest. They have no brains, and can they lie, With a coin, them can you buy.

The Police are drunks and never come, When you need help, they are on the run, You help, teach them and pay them well, Their bodies they would rather sell.

They are famous for taking more than one wife, This is part and parcel of their life. The gates of Hell are standing ajar, For them who will come from afar.

They make excellent farmers, nothing grows, Too lazy to work, and it certainly shows. They want things for nothing and everything free, Wish they would all drown in the sea.

They are ugly and filthy and know no love, Wouldn't I like to give them a shove, Nasty and selfish and really pests, In driving they have never taken the test.

To gain their licence, they would have to drive, For years and years, almost losing their lives.

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