

IN THE HIGH COURT OF SWAZILAND

In the matter of: CRIM CASE NO. 225/85

THE QUEEN

VS

DABULUMJIVA HETRICK S. NHLABATSI

BENARD AZARIAH J. DLAMINI

CORAM

DUNN A. J.

FOR THE CROWN

MR DONKOH

FOR DEFENCE

MR PUPUMA

JUDGMENT

(Delivered on the 14th May, 1986)

DUNN A. J.

The two accused are jointly charged in an indictment of 4 counts.

On count No. 1 accused No. 1 is charged with the crime of perjury.

On count No. 2 accused No. 1 and accused No. 2.) are charged with fraud alternatively with the crime of Defeating or Obstructing or Attempting to Defeat or Obstruct the course of Justice.

On counts nos 3 ana 4, the accused are charged with forgery and uttering a forged document well knowing that it was forged respectively.

The case against the accused was first called before me on the 5th August, 1985. The accused were not asked to plead on that day ana the Director of Public Prosecution stated that he was withdrawing the charge "for the time being".

Notices of Trial dated 4th March, 1986 were issued by the Registrar of the High Court and served on the accused setting this case for hearing on the 5th, 6th and 7th May, 1986, When the case was called and the accused asked to plead accused No. 1 requested a post-ponement of the case in

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order to enable him to engage the services of an Attorney. It transpired that the Notice of Trial had been served on accused No. 1 on the 4th April, 1986. Accused No. 1 was asked as to why he had not made arrangements for legal representation upon receipt of the Notice of Trial and he replied that he was engaged in the preparations for the Coronation on the 25th April, 1986. He indicated that he had approached 2 Attorneys on the morning of the trial ana that because of the short notice neither of the attorneys were prepared to appear on his behalf. I was not satisfies that accused No. 1 had taken any steps to secure the services of an attorney during the one month period immediately before the trial. It is inconceivable that he could have had no time at all to attend to his personal matters during this period or during the 9 days period following the Coronation. I reluctantly agreed to post-pone the trial to the 6th May ana emphasised that the trial would be proceeded with on that day whetner or not accused No. 1 had engaged the services of an attorney.

When the case was called on the 8th May Mr Strydom, instructed by fir Pupuma appeared on behalf of both the accused,

The allegations in the indictment are as follows:

count 1

The Director of Public Prosecutions presents and informs the Court that accused No. 1 is guilty of the crime of PERJURY.

In that, whereas upon or about 31st December, 1984, the said accused appeared as a witness in the Civil Case No. 121/83, in the matter between He-trick Siphu Nhlabatsi Versus Thato Margaret Nhlabatsi, in the High Court of Swaziland, which was held before Mr Justice J. A. Hassanali, a Judge of the High Court of Swaziland, he, the

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the accused, being then and there duly sworn, did unlawfully and intentionally depose and swear in substance and to the effect following:

That on 28th December, 1984 at about 3.00p.m. he (the accused) served a copy of an affidavit, a Notice of Motion and annexure at the offices of the Attorneys, Mathse, Earnshaw and Malinga;

That on the morning of 31st December, 1984 he (the accused) aid phone the offices of the Attorneys Mathse, Earnshaw ana Malinga and found a young lady who then told him that she had related a message to her boss;

That on the morning of 31st December, 1984 he (the accused) went to the offices of Mathse, Earnshaw and Malinga to ensure that the matter then before the High Court would be heard between the hours of 11.00 a.m. to 12.00 noon.

Whereas in truth the said accused, when he deposed and swore as aforesaid well knew that:

On 28th December, 1984 at about 3.00p.m. he (the accused) did not serve a copy of an affidavit, a Notice of Motion and Annexures at the offices of the attorneys Mathse, Earnshaw and Malinga.

On the morning of 31st December, 1984 he (the accused) did not phone the offices of the attorneys Mathse, Earnshaw and Malinga to find a young lady who told him that she had related a message to her DOSS.

On the morning of 31 st December, 1984 he did not go to the offices of the Attorneys Mathse, Earnshaw and Malinga to ensure that the matter then before the High Court would be heard between the hours of

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11.00a.m. to 12.00 noon.

and thus the said accused did commit the crime of PERJURY.

COUNT 2

The said accused are guilty of the crime of FRAUD. In that on or about 31st December, 1984 and at or near Mbabane, in the district of Hhohho, accused No. 1, at all times relevant in this case the Applicant and accused No. 2, his (accused - No. l's) Attorney - at - Law and legal Representative in the Civil Case No. 121/83, in the matter between Hetrick Siphu Wlhabatsi Versus Thato Margaret Nhlabatsi, in the High Court of Swaziland held before Mr Justice J. A. Hassanali, did unlawfully and with intent to defraud

misrepresent that:

The Notice of Motion, Affidavit in Support and Annexures in respect of the abovementioned Civil suit were served by accused No.1 in person at the offices of the Attorneys Mathse, Earnshaw and Malinga on Friday, 28th December, 1984 at 3.00p.m.

On the morning of 31st December, 1984 accused No. 1 phoned the offices of the Attorneys Mathse, Earnshaw and Malinga and found a young lady who told accused No.1 that she had related a message purported to be from both accused to her boss.

On the morning of 31st December, 1984 accused No. 1 went to the offices of Mathse, Earnshaw and Malinga to ensure that the Civil Suit then before the High Court would be heard between the hours of 11.00a.m. to 12.00 noon and that there would be an Attorney from the offices of Mathse, Earnshaw and Malinga to represent the respondent; and also by means of the said misrepresentations induce Mr Justice J. A. Hassanali, to the prejudice of Mathse, Earnshaw and Malinga and or Thato Margaret Nhlapatsi and or the High Court of Swaziland to grant an order of Rescission of a High Court

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Order dated 21st September, 1983.

Whereas the said accused, at the time they made the aforesaid misrepresentations well knew that;

The Notice of Motion, Affidavit in support and Annexures in respect of the above mentioned Civil Suit were not served at the offices of Mathse, Earnshaw and Malinga on Friday, 28th December, 1984 at 3.00p.m.

On the morning of 31st December, 1984 there was no telephone call to the offices of the Attorneys Mathse, Earnshaw and Malinga, from Doth or either accused.

On the morning of 31st December, 1984 accused No. 1 did not go to the offices of Mathse, Earnshaw and Malinga to ensure that the Civil suit then before the High Court would be heard between the hours of 11.00a.m. to 12.00 noon and that they wanted to ensure there would be legal Representation for the Respondent;

Thus the said accused by the aforesaid misrepresentations did commit the crime of FRAUD.

ALTERNATIVE COUNT.

Alternatively the said accused are guilty of the crime of Defeating or Obstructing or Attempting to Defeat or Obstruct the course of Justice.

In that on or about 31st December, 1984 and at or near Mbabane, in the district of Hhohho, accused No. 1 at all times relevant in this case the Applicant, and accused No. 2, the Attorney and Legal representative of accused No.1 in the Civil Case No. 121/83, in the matter between Hetrick Siphon Nhlabatsi Versus Thato Margaret Nhlabatsi, in the High Court of Swaziland which was held before Mr Justice J. A. Hassanali, did unlawfully and with intent to defeat or obstruct the course of Justice misrepresent to the said Honourable Court that:

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The Notice of Motion, Affidavit in support and Annexures in respect of the above mentioned Civil Suit were served by accused No. 1 in person at the offices of the Attorney Mathse, Earnshaw and Malinga on Friday, 28th December, 1984 at 3.00p.m.

On the morning of 31st December, 1984 accused No. 1 did phone the offices of the Attorneys Mathse,

Earnshaw and Malinga ana fauna a young lady who told accused No. 1 that she had related the message puported to have been delivered by both accused to her boss.

On the morning of 31st December, 1984 accused No. 1 went to the offices of Mathse, Earnshaw and Malinga to ensure that Civil Suit then before the High Court would be heard between the hours 11.00a.m. to 12.00 noon and that there would be an Attorney from the offices or Mathse, Earnshaw and Malinga to represent the Respondent;

Whereas the said accused, at the time they made the aforesaid misrepresentations well knew that:

The Notice of Motion, Affidavit in support and Annexures in respect of the above mentioned civil suit were not served at the offices of Mathse, Earnshaw and Malinga on Friday, 28tn December, 1984 at 3.00p.m.

On the morning of 31st December, 1984 there was no telephone call to the offices of the Attorneys Mathse, Earnshaw and Malinga from both or either accused.

On the morning of 31st December. 1984 accused No. 1 did not go to the offices of Mathse, Earnshaw and Malinga to ensure that the civil suit then before the High Court would be heard between the hours of 11.00a.m. to 12.00 noon and that they wanted to ensure there would be legal representation for the respondent.

Thus the said accused, by the aforesaid misrepresentations

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did obtain a Ruling Order in the High Court of Swaziland in their favour and defeat or obstruct the course of Justice.

COUNT 3

The said accused are guilty of FORGERY:

In that on or about 28th December, 1984 and at or near Mbabane, in the district of Hhohho, the said accused did unlawfully, falsely and with intent thereby to defraud and to the prejudice of the Attorneys Matnse, Earnshaw and Malinga, forge an instrument in writing, to wit, the return of service of the Notice of Motion, affidavit in support and annexures in the civil suit No. 121/83' in the matter between Hetrick Siphon Nhlabatsi versus Thato Margaret Nhlabatsi at the High Court of Swaziland.

COUNT 4

The said accused are guilty of UTTERING A FORGED DOCUMENT, KNOWING THAT IT WAS FORGED.

In that, upon, or about 28th December, 1984 and at or near Muabane, in the district of Hhohho, the said accused did unlawfully and with intent thereby to defraud, ana to the prejudice of the Attorneys Mathse, Earnshaw and Malinga and or Thato Margaret Nhlabatsi, and or the High Court of Swaziland offer, utter and put off the said forged document to the High Court of Swaziland, they the accused, when so offered, uttered and put off the aforesaid instrument, well knowing it to have been forged.

The accused pleaded not guilty to all the charges. The facts of this case which are very brief and simple centre on an urgent application which was moved by accused No. 1, represented by his attorney accused No. 2, before Hassanali J. on the 31st December, 1984. The application was for the rescission of two orders that had been grantee against accused

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No. 1 in the case of THaTO MARGARET NHLABATSI v. HETRICK SIPHO NHLABATSI Civ T. NO.

121/83. The first order was made on the 21st September, 1983 and was for payment by accused No. 1 as the defendant in that case of a sum of E500.00 as a contribution towards costs and E400-00 per month as maintenance for accused No. 1's minor children pending the finalisation of proceedings instituted by accused No. 1's wife for a decree of divorce and certain ancillary relief. The second order which was made on the 18th December, 1984 was one committing the defendant for contempt of the first order. A brief history of the litigation between accused No. 1 and his wife is set out in the judgment of Maisels J.P. in the case of THATO MARGARET NHLABATSI v. HETRICK SIPHO NHLABATSI APPEAL CASE NO. 1/85 (UNREPORTED).

According to the Deputy Registrar of the High Court Mr Ntshalintshali, the offices of accused No. 2 indicated on the 28th December, 1984 that an urgent application would be moved in Court on behalf of accused No. 1 that day. Mr Ntshalintshali later learnt from accused No. 2's offices that the papers were not in order and that the application would in fact be moved on Monday 31st December, 1984.

The application was filed with Mr Ntshalintshali at about noon on the 31st December, The papers that were filed consisted of a Notice of Motion and a supporting affidavit by accused No. 1 together with a certificate of urgency by accused No. 2 and an affidavit by accused No. 1 setting out that the application had been served by him on the offices of Attorneys Mathse, Earnshaw and Malinga. (Mr Earnshaw of Mathse Earnshaw and Malinga represented accused No. 1's wife in the proceedings leading to the issue of the 2 orders already referred to.)

It was Mr Ntshalintshali's evidence that accused No. 1 gave evidence at the hearing of the application before Hassanali J. regarding service of the application on the offices of Mathse, Earnshaw and Malinga.

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Mr Ntshalintshali handed into Court, a transcript of the proceedings before Hassanali J. (Exhibit B). The effect of accused No. 1's evidence was that:

(1) he had personally served the application on a young lady, he presumed was Mr Earnshaw's Secretary, at the offices of Mathse, Earnshaw and Malinga at about 3.00p.m. Friday 26th December, 1984.

(2) That the young lady at Mathse, Earnshaw and Malinga signed the application acknowledging receipt thereof on 28th December, 1984.

(3) he had telephoned the offices of Mathse, Earnshaw and Malinga on the morning of the 31st December and had spoken to a lady in connection with the application

(4) he had, in addition to the telephone call, personally visited the offices of Mathse, Earnshaw and Malinga and there spoken to a young lady whom he informed that the application would be heard in Court between 11.00a.m. to 12.00 noon.

Mr Ntshalintshali stated that the application was heard and that relief was granted as prayed, in the absence of the Respondent (accused No. 1's wife) or her Attorney.

It is common cause that an appeal was noted by the respondent (accused No. 1's wife) to the Court of Appeal and that an application was moved in that Court for the hearing of evidence that there had been no service of the urgent application on the offices of Mathse, Earnshaw and Malinga. Mr Ntshalintshali handed into Court a transcript of the proceedings before the Court of Appeal in the matter between THATO MARGARET NHLABATSI VERSUS HETRICK SIPHO NHLABATSI (supra) (Exhibit D) in which Miss Anita Way, a secretary in the employ of Mathse, Earnshaw and Malinga and accused No. 1

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gave evidence regarding service of the application.

Mr Ntshalintshali was not cross-examined on his evidence.

Attorney Samuel Earnshaw denied that the urgent application of the 31st December was served on his office. It was his evidence that the offices of Mathse Earnshaw and Malinga were officially closed for the Christmas holidays from the 14th December, 1984 to about the 15th January, 1985. He stated that a secretary Miss Anita Way was in the office on the 28th December 1984 and that she had not been served with the application, pointing out that he had telephoned her at about 4.00p.m. and that she had not made mention of the service of any papers on her. Mr Earnshaw who stated that he was familiar with the signatures of his firm's employees denied that the signature on page 2 of Exhibit "A" was that of any of his firm's employees and in particular that of Anita Way.

As regards the 31st December, 1984 it was Mr Earnshaw's evidence that the offices of Mathse Earnshaw and Malinga were closed and that none of the staff members were in the offices on that day. Mr Earnshaw testified that he learnt of the application and its out-come for the first time, when it was reported in the local press on or about the 4th January, 1985.

Miss Anita Way denied that accused No. 1 had visited and served papers at the offices of Mathse, Earnshaw and Malinga on the 28th December 1984. She stated that she was at work between 8.30a.m. and 5.00p.m. She was alone in the reception area to which the main door opens. It was her evidence that she had the door closed out not locked. She denied that the signature on exhibit A was hers. Miss Way provided a specimen of her signature (Exhibit F) which is completely different from the signature on exhibit "A". Miss Way told the Court that she did not return to work on

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Monday the 31st December as the arrangement had been for her to assist in clearing a typing backlog until the 28th December. It was her evidence that she had the office keys and that a second set was kept by Mr Earnshaw. According to Miss Way other members of staff could not have gained entry to the offices without obtaining the keys either from herself or Mr Earnshaw. Miss Way was completely unshaken in her evidence and denied the suggestion that accused No. 1 had served any papers on her.

That was all the evidence led by the Crown on all the 4 counts charged.

Accused No. 1 gave sworn evidence in his defence. His evidence briefly stated was as follows:

He was given copies of the application on the 26th December 1984 by his Attorney (accused No. 2) to serve on the offices of Mathse Earnshaw and Malinga. He stated that he knocked on the open door to the offices. Miss Way was seated in the reception area. He informed her that he had been sent by his Attorney to deliver certain papers and that she should take them to her boss. Miss Way signed exhibit "A" acknowledging receipt of the documents and he left one copy with her. Accused No. 1 told the Court that he returned the signed papers to accused No. 2 and informed him that he had served the papers and that he had left a copy with the offices of Mathse, Earnshaw and Malinga. Accused No. 1 stated that he telephoned the offices of Mathse Earnshaw and Malinga on the morning of the 31st December, 1984. A lady replied and he reminded her of the application. The lady informed him that the papers had been passed onto her boss and that the application would be opposed. It was accused No. 1's evidence that he was anxious to know whether or not the application would be

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opposed and that that was the reason for his telephone call on the 31st December.

Accused No. 1 proceeded to state that later that morning he went to the offices of Mathse Earnshaw and Malinga and found nobody there. He then went to Court and testified on oath as to what transpired on the two days in question. The reason for the visit to the offices after the telephone call is not entirely clear as according to accused No. 1 he had already been informed that the application would be opposed.

Accused No. 1 stated in his evidence in chief that he adhered to the evidence he gave before Hassanali J and before the Court of Appeal regarding service of the application on the 28th December and his telephone call and visit to the offices of Mathse Earnshaw and Malinga on the morning of the 31st December, 1984, as being the truth.

Accused No. 1 was cross examined on the evidence which he gave before the Court of Appeal regarding his contact with the offices of Mathse Earnshaw and Malinga on the morning of the 31st December. According to the transcript (Exhibit D). Accused No. 1 denied the visit to the offices on the 31st December and insisted that he had only telephoned the offices. Malsels J. P. drew accused No.1 attention to specific questions which were put to accused No. 1 by his attorney before Hassanali J. regarding accused No. 1's visit to the offices of Mathse Earnshaw and Malinga on the morning of the 31st December. In reply to the questions by Malsels J. P. accused No. 1 replied that he had not actually gone to the offices and that he "was there by phone".

Accused No. 1 was asked in this trial to explain the contradiction in his evidence before Hassanali J and the Court of Appeal. He attempted to give as a reason, the fact

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that the events of this case occurred a long time ago, and that he could not now remember all the details. This explanation was of course not satisfactory as accused No. 1 had given evidence before Hassanali J. on the 31st December 1984 and had appeared before the Court of Appeal on the 27th March, 1985. He stated that he remembered and adhered to what he had said on the two occasions and it was only when his attention was drawn to the contradiction that he hurriedly fell back onto what he had stated before Hassanali J.

I am of course alive to the fact that the present charges against accused No. 1 do not stem from his evidence before the Court of Appeal but from his evidence before Hassanali J. Accused No. 1's evidence before the Court of Appeal on the same issues he testified to before Hassanali J does, however, have, a material bearing on the question of his credibility which this Court has to decide in assessing the evidence of all the witnesses in this case.

The witnesses Mr Earnshaw and Miss Way were most impressive and struck me as honest and reliable. Miss Way was identified by accused No. 1 as the person on whom he had served the application. Accused No. 1 appeared to have no doubt in his identification of Miss Way in his evidence in this case. This evidence is not however, in keeping with his evidence and the questions put to Miss Way on his behalf by accused No. 2 before the Court of Appeal on the question of the service of the application.

It will be noted from exhibit D page 7 that accused No. 1 told the Court of Appeal that there were persons he did not know in the offices of Mathse Earnshaw and Maling at the time he served the application on Miss Way. accused No. 1 has not repeated that evidence in this case.

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Miss Way denied accused No. 1's evidence. Her evidence is supported by Mr Earnshaw who stated that Miss Way was the only person in the office on the 20th December and that he telephoned her at about 4.00p.m. and was not informed of the service of the application. The application was an urgent one and if it had indeed been served Miss Way would have been expected to report this fact to Mr Earnshaw. The illegible signature on exhibit "A" provides further confirmation of Miss Way's evidence in that she would have had no reason to disguise her signature unless of course the offices of Mathse Earnshaw and Malinga had prior knowledge of the application and had embarked on a scheme to frustrate accused No. 1's attempts to bring the application to Court. This has not however, been the defence case and I can see no reason for Miss Way to lie before this Court.

Accused No. 1 has in my view shown himself to be a liar. There can be no doubt that he was fully aware of the questions which were put to him by his Attorney before Hassanali J regarding service of the

application and his visit to the offices of Mathse Earnshaw and Malinga on the 31st December. Accused No. 1 thereafter, on oath, before the Court of appeal turned on his evidence and has in this case sought to fail back on what he originally said before Hassanali J. I found accused No. 1 most difficult as a witness, He was evasive under cross examination and attempted to explain contradictions in his evidence by hiding behind the fact that a lengthy period had elapsed from the dates on which he had appeared before Hassanali J. and the Court of Appeal and that his memory was failing him. If this were the position it is difficult to appreciate how accused No. 1 so readily recalls the evidence before Hassanali J. and not that before the Court of Appeal.

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It is without any hesitation that I reject as totally false the evidence of accused No. 1 that he served the application on and thereafter telephoned and visited the offices of Mathse Earnshaw and Malinga. The evidence of Mr Earnshaw and Miss Way places the guilt of accused No. 1 on count 1 beyond any doubt. This evidence is far superior to that of accused No. 1 which I have rejected as totally false. Accused No. 1 well knew the falsity of the evidence he gave on oath before Hassanali J.

I find accused No. 1 guilty as charged on count 1.

Turning to count 2 and the alternative Count thereto it appears to me that there is merit in Mr Strydom's submission that there has been a splitting of charges when this count is viewed in the light of the evidence on count 1 in so far as accused No. 1 is concerned. There is in my view a clear overlapping in the perjury committed by accused No. 1 and the offences charged on count 2. The offences charged on count 2 are constituted by one and the same act of which accused No. 1 has been convicted on count 1. see Hunt, S. A. CRIMINAL LAW and PROCEDURE VOL II p 108 and the authorities there referred to.

In the light of accused No. 1's conviction on count 1 it would in my view be improper and to accused No. 1's prejudice to convict him on the charges framed under count 2. I find accused No. 1 not guilty, he is acquitted and discharged on count 2 and the alternative thereto.

With regard to counts 3 and 4 it appears to me that once Miss Way's evidence is accepted as I have indeed done, that there is no escape from the conclusion that accused No. 1 must be the author of the illegible signature on page 2 of exhibit A. The only person who was in the offices

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of Mathse Earnshaw and Malinga on the afternoon of the 28th December was Miss Hay who denies the signature on exhibit "A". Accused No. 1's evidence was to the effect that he was sent by accused No. 2 to serve the application at the offices of Mathse Earnshaw and Malinga. He had possession of the papers until the time when he returned them to accused No. 2 and informed him that he had effected service. Accused No. 1 referred to the signature as evidence of service. The only reasonable inference which can be drawn in the circumstances is that accused No. 1 was the author of the signature in the sense that he either wrote it out personally or that he caused it to be made with the full knowledge that it was not that of any employee of attorneys Mathse Earnshaw and Malinga and more particularly that of Miss Anita Way. The forged document was uttered when filed with the Deputy Registrar of the High Court.

I accordingly find accused No. 1 guilty as charged on counts 3 and 4.

Turning to accused No. 2 it appears to me that the Crown has failed to prove his guilt on any of counts 2, 3 and 4. All that can be said is that he presented an application on behalf of accused No. 1. The source of the questions which were put by accused No. 2 to accused No. 1 before Hassanali J must be accepted as accused No. 1, who would in the normal course of events as a client, have given instructions to accused No. 2. It was stated by accused No. 1 in his evidence before this Court that he was instructed to effect service of the application on the offices of Mathse Earnshaw and Malinga. Accused No. 2 was not present when accused No. 1 did whatever he did with the papers. It was accused No. 1 who reported to accused No. 2 the manner in which he had effected

service. It cannot on the evidence before the Court be held that accused No. 2 was a party to or had knowledge of accused No. 1's unlawful conduct. It became accused No. 2's duty to present accused No. 1's case as per the instructions and evidence he received from accused No. 1. The fact that accused No. 2 over looked or was not aware of the Rules of Court regarding service of applications as evidenced by his (accused No. 2) having sent accused No. 1 to serve the application on the respondent cannot be held against accused No. 2 as ignorance of the Rules of Court does not constitute an offence. The question of the dates on accused No. 1's Return of service and accused No. 2's certificate of urgency Goes not take the Crown's case against accused No. 2 any further. In the absence of any evidence that accused No. 2 presented the application on behalf of accused No. 1 with knowledge of the falsity of accused No. 1's evidence or of any suggestion that it was on accused No. 2's advice that accused No. 1 fabricated and tendered the evidence he gave before Hassanali J. on the 31st December 1984 accused No. 2 is in my view, entitled to his acquittal on counts 2 and the alternative count thereto; count 3 and 4. I find accused No. 2 not guilty he is acquitted and discharged on those counts.

B. DUNN

ACTING JUDGE.