

IN THE HIGH COURT OF SWAZILAND

MBABANE

CRIMINAL CASE NUMBER: 17/93

DATE: 2 APRIL 1993

In the case of:

REX

versus

HARRY SIBHAHA DLAMINI

BAKHONBISILE R. MKHWANAZI

BEFORE THE HONOURABLE ACTING JUDGE S. SAPIRE

JUDGMENT

There are two accused charged before me. The Crown case is closed and counsel for both accused have applied for the discharge of their respective clients.

The charges arise in the following circumstances. Both accused were employed in the Department of the Registrar General. Accused No. 1, it was thought was reaching or had reached retirement age and there was apparently an intra departmental dispute or difference of opinion as to whether his retirement age was fifty five years or sixty years. This in turn depended upon when he was initially confirmed in his position as an employee of the State. If the age of fifty five was applicable, he should have retired in 1991. If the age at which he should have retired was sixty, then his retirement year will be 1996. At all times his age was assumed to be that stated in a birth certificate issued on the application of his father, many years after his birth, which reflected that he was born in 1936. These circumstances gave rise to an inference, of which there was no rebuttal, that feeling his position to be in jeopardy, Accused No 1, procured the issue of a further certificate of birth amending the original certificate to reflect his date of birth as being 1941. He then presented this certificate to the secretary in order to have his employment record reflect his date of birth as 1941 so as to avoid immediate retirement. If the certificate were false

and if his actual date of birth were shown to be other than 1941, then clearly the Swaziland Government would suffer prejudice or potential prejudice in the manner described in the charge sheet. Proof of the falsity of the amending certificate is crucial to all the charges.

As far as Accused No. 2 is concerned, she was also employed in the offices of the Registrar General. The evidence is that the Registrar himself, in or about April 1992, was engaged in a commission of enquiry which prevented him from paying full attention to his duties as Registrar. Accused No. 2 was appointed to deputise for him and to act in his place from the 18th of March 1992 to the 31st of May 1992. I assume that the Registrar was off duty during that period. During this period, however, the Judicial Service Commission selected Accused No. 2 to be the Deputy Registrar or Assistant Registrar of this Court. The effective date of the promotion was the 4th of May and a letter recording this was issued in June 1992. While Accused No. 2 was still working in the office of the Registrar General, Mr Mngomezulu, who was then the Permanent Secretary of

Justice, required her attendance at a conference in Harare and during the period of her absence ending on the 1st of May, Accused No. 1 was left to fill her post with Mrs Shongwe to assist him at the office of the Registrar of Births. This was recorded in the letter addressed to the staff of the Registrar General's office.

On Accused No. 2's return, it appears that the Permanent Secretary, Mr Mngomezulu, at the request of the relevant authorities saw to it that she reported for duty here at the High Court from the 4th of May. She was stationed at the Registrar's office at the High Court from that date.

There appears to have been no written communication between the Judicial Service Commission and her former employer. Mr Mngomezulu, who instructed her on the transfer, said in evidence in this Court, and what he has said has not been controverted, that he told her that she was to act as Deputy Registrar of the High Court and at the same time to keep an eye on affairs at the Registrar General's office, and to

assist them in the absence of the Registrar himself. Mr Mngomezulu was emphatic that the Accused No. 2 was empowered and entitled to put her signature to the application for an alteration of the particulars to Accused No. 1's birth certificate which is Exhibit P in this case, to certify that the amendment to the date of birth of Accused No. 1 had been given effect to in the records of the Registrar.

Although the Crown has led other evidence to show that this is most irregular and that in fact it is not possible for a person in the Civil Service to hold two different positions at the same time, the fact remains that Mr Mngomezulu said that this is what he did and this is how he instructed Accused No. 2. As much as Mr Donkoh, in a spirited argument for the State, attempted to jettison this evidence damaging to the Crown case, it cannot be ignored and creates a fatal contradiction in the Crown case.

The evidence was that Accused No. 1 received the application of the amendment of the birth certificate at the offices of the Registrar General. The

application was made by his father who laconically said, in the application form, that he wanted a change of the date of birth from 1936 to 1941. No reasons were given for the necessity of the change.

There are several things wrong with this application. The father had no right to make the application in the first place. In terms of the relevant statutory enactment if a person affected by an entry in the Registrar, is over 21 years of age, it is he who must make the application for an amendment thereof. The application is also defective in that it states, that a copy of documentary proof in support of the proposed change, is attached thereto. No such documentary proof exists.

The form was filled out by the District Registrar who brought it to Mbabane to have the application processed at the office of the Registrar. He expected that the form would be signed by either Mrs Shongwe or Mrs Mkhwanazi, the second Accused. Accused No. 1 knew about this application and he was apparently

anxious to have it processed and a new birth certificate issued reflecting his date of birth as being in 1941. The purpose of this is demonstrated by his letter, which he later wrote and with which he submitted the birth certificate with a request that the records of the Department be altered accordingly.

Mrs Shonwe, who was empowered to process the application, and in so doing to sign the form in the appropriate place to signify that the application had been processed, declined to do so and Accused No. 1 thereupon had the application sent by messenger, whose name was Lawrence, to Accused No. 2 at the High Court. There is no evidence of any prior arrangement between Accused No. 1 and Accused No. 2 that this would be done.

When Accused No. 2 received the form from Lawrence, she asked him whether there was not anybody in the office of the Registrar who could sign it. She was told that there was not and she thereupon affixed her signature in the appropriate space to signify that the application had been duly processed and that the

District Registrar could issue a new amended birth certificate. In signing the form she did so in the capacity as Registrar which in terms of the appropriate legislation includes the deputies and assistants of the Registrar. In view of what Mr Mngomezulu had told her and in terms of his instructions, she was entitled to do so.

The question then arises what did Accused No. 2 represent when she placed her signature on the certificate. She represented no more than that she was the Registrar in the wide sense of the word and as we have seen the Crown case does not establish that she did so falsely.

She appears to have failed in her duties in signing the form, because as I have already observed, the application was not in proper form and there was no documentary proof to substantiate the proposed change. Furthermore, the Applicant's father was not the proper person to make the application in the first place. These factors, however, do not make her guilty of fraud as alleged.

A reasonable Court could not come to the conclusion therefore that the representation made as alleged in the charge sheet, was so made by Accused No. 2.

There is also no evidence that Accused No. 1 was party to what took place on the transfer of Accused No. 2 and that he had any reason to believe that she had no power to sign the document. In any event, as I have observed, by placing her signature on the document, she did not represent anything other than that she was acting as the Registrar and that the application had been processed in the office of the Registrar.

The charge sheet alleges that the representation was, that the application to alter the date of birth had been approved by the Registrar. The document itself does not refer to the assent or approval of the Registrar. It is my finding that no false representation was made by either accused as alleged on Count 1. Both accused are entitled to be discharged on this count.

On Count 2, the allegation is that a representation was made to the Secretary of the Civil Service Board of Swaziland, that a certain document to which the birth certificate in question was produced as authentic proof that the first Accused was born on the 13th of March 1941.

As far as Accused No. 2 is concerned, I cannot see that she was party to any representation whatsoever and I cannot find any evidence that there was in fact a conspiracy or a common purpose to defraud the Government. This consideration does not apply in the case of Accused No. 1 who clearly presented this certificate in order to influence the department to change his date of birth. There is a fatal lacuna in the evidence supporting this charge. It is alleged that the accused at the time they made the false representation well knew that "the said Harry Dlamini was not born on the 13th March 19941 but on the 13th March 1936."

There is no evidence at all as to what Accused No. 1's true date of birth is. Neither is there any

evidence that either of the accused was aware of such true date of birth.

The prosecution argued that as Accused No. 1's original birth certificate reflected his date of birth as the 13th March 1936, in terms of the Act, this was proof of such fact. On the other hand, however, there is an apparently valid certificate stating that he was born in 1941. Looking at the evidence as a whole, no inference can be drawn either way.

In order to succeed on Count 2 or the alternative thereto, the State would have had to have demonstrated what the true date of birth of Accused No. 1 was and that the Accused were aware thereof.

It was necessary to have had evidence of someone who could say when Accused No. 1 was in fact born. The father of Accused No. 1 himself could have been called. I appreciate that he must be a very old man and that there may have been difficulties in this

connection. None of this, however, was put before the Court and there is really no explanation as to why there is no evidence as to the true date of birth of Accused No. 1. There may have been other people who know, and who could have testified to the actual date of birth of Accused No. 2. As things stand, however, there is no evidence before the Court as to the correct date and it cannot be said that either of the first Accused or the second Accused well knew that the first Accused was not born on the 13th of March 1941 but on the 13th of March 1936. This allegation and the evidence to support it is an essential part of the Crown case.

In the case of Accused No. 2 there are two reasons why her application must succeed. Firstly, she is not shown to have made any representations to anybody in regard to the certificate. In regard to Accused No. 1 and Accused No. 2 it cannot be said that the representation made by them was false and that it was false to their knowledge. Both accused must be found not guilty and discharged on both Count 1 and Count 2 and the alternative thereto.


S.W. SAPIRE A.J.

26/3/93.