IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **APPEAL CASE NO.179/93**

In the matter between

THE KING **APPELLANT**

VS

EDWARD MNCINA	**1. RESPONDENT**
THEMBI NSIBANYONI	**2. RESPONDENT**
WILLIAM HLAZO	**3. RESPONDENT**
THOMAS MAVIMBELA	**4. RESPONDENT**
THANDI KUNENE	**5. RESPONDENT**

CORAM: DUNN J

FOR THE APPELLANT: MR DONKOH
FOR 3RD & 4TH RESPONDENTS: MR DUNSEITH

JUDGMENT
20 MAY 1994

This is an application by the prosecution in terms of Section 92 of the Magistrate's Court Act No. 66/1938 to set aside a decision of the senior Magistrate, Mbabane striking the case of the 3rd and 4th respondents from the roll and releasing the said respondents from their bail bondage. The application has been overtaken by events and the reason for the crown proceeding with it was for purposes of guidance in future.

The respondents were jointly charged with the possession of counterfeit currency in contravention of Section 3(1)(c) of Act No. 31/1974. Counterfeit notes with a face value of R1 160 000.00 were alleged to be involved in the case. The 3rd and 4th respondents made their first appearance before the senior magistrate on the 18th February 1993.

They were remanded in custody until the 25th February for a hearing of an application for their release on bail. The application which was opposed by the crown was duly heard and the senior magistrate reserved his ruling until the 26th February when he granted the application. The conditions for the release of the respondents were fairly stringent and the respondents were unable to meet them. They continued, in the circumstances, to be remanded in custody for periods not exceeding 8 days at a time in terms of Section 102 of the Criminal Procedure and Evidence Act No. 67/1938 (the C.P. & E). It appears that on the 26th March 1993 the trial of the respondents was set for the 23rd June 1993. The record reflects that the public prosecutor was to issue summons to the two respondents and their co-accused who had been released on bail. The trial date is reflected on each of the days when the two respondents appeared for remand between the 1st April and the 13th May 1993. The record reflects that the respondents complained on several occasions, that the trial date was too far off and requested that an earlier trial date be arranged. The senior magistrate did not make any enquiries from the prosecution as to whether or not the prosecution would be in a position to proceed if an earlier trial date was available.

On the 19th May 1993 Mr Dunseith, for the two respondents, made his first appearance since the 1st April. The following appears in the record for that day-

> DPP states that she applies for a remand in custody till 26th May 1993 as trial is on the 23rd June 1993 but she is not sure in which Court. Stood down at 11.30 a.m.

> Matter resumes at 11.50 a.m. DPP states that she applies to stand it down for 5 minutes as the Acting Director of Public Prosecutions is coming. Dunseith states that he applies that it be struck off. That is all.
>
> Struck off as this matter has not yet been set for trial and albeit there is a tentative trial date (23rd June 1993) it has not been disclosed as to which Court is involved. Accused Nos. 1 and 2 to be refunded their bail.

It appears from the senior magistrate's reasons for striking off the case that Mr Dunseith attended Court on the 19th May following a letter which he had addressed to the DPP on the 4th May 1993. The relevant portion of the letter (the rest being in very poor taste and for which a retraction and apology were subsequently made) reads-

> You are hereby placed on notice that unless my clients are brought to trial within 14 days, I shall apply for the matter to be struck off to enable them to at least be released whilst you attempt to make a case against them.

The upshot of the senior magistrate's order was that the two respondents were released from custody. They returned to the Republic of South Africa, their country of origin. The DPP was subsequently granted an application for the summary trial of the respondents in the High Court in terms of Section 88(bis) of the C.P & E. The case was set down for hearing but could not be proceeded with because the whereabouts of the respondents was not known.

Section 92 of the Magistrate's Court Act which is headed "Review of decisions" provides-

> If a decision is given by a magistrate's Court in a Criminal case on a matter of law, and the Director of Public Prosecutions or his representative is dissatisfied with such decision, the Director of Public Prosecutions or his representative may seek the ruling thereon of the High Court, and the High Court may set down the matter to be argued before it.

The section does not set out the procedure by which the prosecution may approach the High Court in order to obtain a ruling. The present application was served on the Registrar and the respondents attorney. It was only when the matter was placed before me that I directed that the application should be served on the senior magistrate to enable him to file reasons for the order be made. In the absence of any direction as to the procedure to be followed under the Section, the proper approach by the crown should be by way of review under Rule 53 of the High Court Rules. I should point out that this aspect of the application was not argued before me as the interests of the crown lay in the merits rather than the form of the application.

The submission by the prosecution is that the senior magistrate " misdirected himself on points of law resulting in a gross miscarriage of justice in the following respects-

(a) The Honourable Magistrate erred in law when striking off this matter from the roll after the crown had applied for its postponement to the 26th May 1993, in as much as the Honourable Magistrate does not have such powers in law.

(b) The Honourable Magistrate when dismissing the charges against the accused, could only have acted under Section 277 of the Criminal

Procedure and Evidence Act No. 67 of 1938, which Section, in the circumstances of this matter, does not apply.

(c) The Honourable Magistrate erred in law when discharging the accused persons from their bail bondage in as much as the Director of Public Prosecutions had clearly indicated to the Court that he was persuing the prosecution.

In giving his reasons, the senior magistrate set out the history of the application and stated-

" By and large, I struck off the matter as it was clear that the Crown had not properly set down the matter for trial in as much as it was not aware which court would hear the matter notwithstanding that it had set it as early as the 26th March 1993. The court has jurisdiction to strike a matter off the roll in as much as it has the power remand the very matter. It is common cause that the crown applies for matters to be struck off every day in court and one wonders why it seems prudent to now challenge such power. Due to the short period of time I had in preparing these reasons I cannot refer to any specific statute but I am of the view that the court has power to strike off a matter. However, it is not Section 277 of the Criminal Procedure and Evidence Act No, 67/1938 as that section refers to the dismissal of a charge in default of prosecution. Finally, the court discharged accused persons from their bail bondage since their matter was no longer pending before any court. Once a matter is struck off it follows that the matter is no longer pending unless it has been referred to another court, which is not the case herein."

Section 277 of the C.P.&.E provides-

> If the prosecutor (whether public or private) in the case of trial by the High court has given notice of trial and does not appear to prosecute the indictment against the accused before the close of the session of the court before which he gave notice of trial or, in the case of a trial by a magistrate's court, does not appear on the court day appointed for such trial, the accused may move the court to discharge him, and the indictment or summons may be dismissed, and if the accused or any other person on his behalf has been bound by recognisance for the appearance for the accused to take his trial, may further move the court that such recognisance be discharged, and such recognisance may thereupon be discharged.

Section 278(2) provides-

> Any person who has been acquitted on any indictment or summons in a magistrate's court or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody.

The trial date was fixed and recorded as the 23rd June 1993. It is not clear as to when or how this date became a "tentative date". The respondents were aware of the date and had, according to the record, made representations to the senior magistrate and the DPP regarding an earlier trial date. Bail conditions were set by the senior magistrate and it was upon the respondents to meet these conditions in order to secure their liberty pen ing their trial.

The DPP is the person responsible in terms of Section 3 of the C.P.&.E for all criminal prosecutions in the country . It is the DPP who decides, subject to Section 88 (bis) of the C.P.& E, the level of court in which to prosecute any given case. The DPP is a senior officer of the Crown and the court and his decision to prosecute in a particular court should be taken seriously and accorded the necessary respect. If as appears from the senior magistrate's reasons, importance was placed on the need for the DPP to indicate the court in which the respondents were to be tried, the DPP should have been given the courtesy of the five minute adjournment which the prosecutor requested. The DPP would have had the opportunity of dealing with the question of an earlier trial date and the court in which the respondents were to be tried. The DPP may for example have been awaiting the outcome of an application for a summary trial in the High court or there may have been problems with obtaining an early trial date in the Principal Magistrate's Court. There may on the other hand have been difficulties and delays with regard to forensic analysis of the exhibits. Such matters could only have been clarified by enquiries involving all concerned.

It is no secret that there is a serious backlog of cases at all levels of our courts. Accused persons are forced to wait lengthy periods before they are tried. This is a problem to be addressed by the Ministry charged with the responsibility of providing the wherewithal for the judiciary to function effectively.

The trial of the respondents was set for hearing within 4 months of their arrest. Taking into account the backlog I have referred to this was a comparatively short period.

The points raised in the application must, in the circumstances be answered in favour of the crown. A date had been fixed for the trial. The two respondents had not satisfied the conditions for their release on bail. The crown was not in breach of any lawful conditions set by the court. If the Senior Magistrate was in any doubt regarding the trial date he should have made the necessary enquiries from the DPP. The two respondents were properly before the court for remand and the senior magistrate should have proceeded in terms of Section 102 of the C.P.& E. The release of the accused from their bail bondage was improper and irregular in as much as the provisions of Section 277 could only have been invoked on the date appointed for the trial namely, the 23rd June 1993.

The order of the senior magistrate of the 17th May 1993 is set aside.

B. DUNN

JUDGE