IN THE HIGH COURT OF SWAZILAND

Crim. Rev. Case No. 33/94

In the matter of:

1.

THE DIRECTOR OF PUBLIC PROSECUTIONS — Applicant

vs

1. THE SENIOR MAGISTRATE,NHLANGANO — First Respondent
2. PHILLIP KHESHE LUKHELE — Second Respondent

And in the matter of:

2.

THE DIRECTOR OF PUBLIC PROSECUTIONS — Applicant

vs

1. THE SENIOR MAGISTRATE, NHLANGANO — First Respondent
2. TIMOTHY MKHONTA — Second Respondent

CORAM: Hull, C.J.
Dunn, J.
Strydom, J.

The Director of Public Prosecutions in person
Mr. Lukhele for the first respondent
The respondents P.K. Lukhele and T. Mkhonta in person

Judgment

(26/10//94)

This is an application by the Director of Public Prosecutions under

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section 92 of the Magistrate's Courts Act, No. 66 of 1938.

That section states:

> "92. 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 application in fact relates to two separate criminal cases. On 25th March 1994, the respondent Timothy Mkhonta was arrested and charged with rape. The offence was allegedly committed on 15th March. On the following day, i.e. 26th March, the respondent Phillip Lukhele was arrested and charged also on a charge of rape, which was said to have been committed on that later day. The two charges were thus unrelated. Strictly, I think that there ought to have been two separate applications under section 92, but they can be heard conveniently together, as they involve the same point.

The men were first brought before a Magistrate, in the Magistrate's Court at Nhlangano, on 28th March, in Criminal Cases NHO 66/94 and NHO 65/94 respectively.

According to the court records, on that day each was remanded in custody until 5th April, pending the completion of police investigations. When they returned to Court on 5th April, each was again remanded in custody for two days, for the setting of a trial date.

On 7th April they were remanded in custody again, until 14th April, for the setting of trial dates and on that day in custody to 19th April, once more for the setting of trial dates.

On that last occasion, each came before the Senior Magistrate at Nhlangano, who is the first respondent here.

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In respect of Mkhonta, the court record is in the following terms:

> "Accused present. Public Prosecutor states that the Director of Public Prosecutions insists that a further remand be granted as the matter will be tried at the High Court.
>
> "By Court
>
> "The application for a further remand has not been substantiated sufficiently to warrant a further remand and the application is, therefore, refused.
>
> "M.L.M. MAZIYA."

The Court record in respect of Lukhele's appearance is to the following effect:

> "Accused present. Public Prosecutor (Mkhonta) states that the docket is yet to be sent to Director of Public Prosecutions. He applies to have the matter remanded once more and the Director of Public Prosecutions is not in a position to state when the matter will be set for trial. The Director of Public Prosecutions expects only the Registrar of the High Court to set the trial date.
>
> "By Court
>
> "Application for a further remand has not been substantiated sufficiently to warrant a further remand in custody. The application is therefore refused.
>
> "M.L.M. MAZIYA".

In these present proceedings before the High Court, the Director seeks rulings under section 92 to the following effect:

(a) That in insisting that the cases should be heard by him or by a court determined by him, the Senior Magistrate usurped or interfered unlawfully with the powers of the the Director of Public Prosecutions, as conferred by section 91 of the Constitution and "relevant" sections of the Criminal Procedure and Evidence Act, 1938 (No. 67 of 1938).

(b) That the Senior Magistrate's decisions on 19th April, refusing to remand each of the accused, were not made judicially.

As my brother Strydom pointed out during the hearing here, the second ground on which a review is sought must be sustained for the very short reason that in the reasons which he himself subsequently gave for his decisions, the learned Senior Magistrate acknowledged explicitly that it could not be said properly, in either case, that the Crown had delayed unreasonably in investigating and prosecuting the charge; and that the reasons why in fact he refused to grant further remands cannot be sustained in law, as we shall explain.

I also consider, however, that it is desirable to comment on the first ground of review on which the Director has sought to rely, and other aspects of the application.

The Director initiated the application on 27th April, by filing in the High Court registry a document described as an application for review in terms of section 92. It contained a narrative of facts. Although on the last page it was indicated that it was also given to the Senior Magistrate and to the other respondents, it was not a notice of motion as such, and it was not supported by any affidavit.

This document was put before me in chambers on the same day, at my direction. To summarise very briefly what happened after that, I directed the Deputy Registrar to set it down in open court two days later (in other words urgently, and on the document as it stood), to notify all parties and to bring up the record. After that there were various postponements. The first was to enable the Senior Magistrate to provide his reasons for his decisions (an order which was conveyed to him incorrectly, but perhaps understandably, by the then Acting

Registrar in terms suggesting that he was required to do so). The second was because I had come by then to the view that the Director's application should by way of notice of motion with a supporting affidavit, and I therefore gave him an opportunity to lodge them, indicating that the matter was to be heard on a basis of urgency. After that it was postponed partly, as I recall it, to allow the Director and the Senior Magistrate further time, but also in order that a full court could hear the application.

The Senior Magistrate took the unusual step of instructing counsel to represent him, and of filing an affidavit in opposition to one given by the public prosecutor at Nhlangano in support of the notice of motion. He also provided written reasons for his decisions.

His answering affidavit, as is commonly the practice here, contained not only averments of fact but also matters of argument. In it, he indicated that he wished to apply for my recusal and he also dealt with allegations of fact contained in the public prosecutor's affidavit.

At this time, I do not consider that any useful purpose is served by dealing in detail with the allegations of fact, the inferences and the arguments advanced by the Senior Magistrate in support of his application for recusal. Some of the matters he referred to are irrelevant. Some are improper. What the affidavit shows, clearly, is that the Senior Magistrate was upset by the course of the application - by which I mean the manner in which it was first brought and the way in which it thereafter proceeded, prior to the hearing.

When senior Counsel appearing for the Senior Magistrate argued the issue however, he confined himself to narrower grounds. In summary, he submitted that the application had not complied initially with rule 53. In particular, no supporting affidavit had been lodged in support of it. Because I had myself put in train the subsequent course of the application, i.e. by directing that a notice of motion and a supporting affidavit should be filed to comply with rule 53 - and also, I think (although Mr. Lukhele did not himself say so explicitly) because I directed, before any supporting affidavit had been filed, that the matter be accorded urgency - it appeared

reasonably to the Senior Magistrate that I had already prejudged the matter.

These submissions are, with respect, misconceived. As this court pointed out recently in Diamond v. The King (Criminal Review Case No. 93/94 at page 3)(a decision delivered, however, after the hearing of the present application), the High Court of Swaziland has very wide powers of review of the proceedings of all subordinate courts, at common law inherently and also by statute.

The fact that the court affords an applicant an opportunity to amend his papers to comply with the rules of court does not in itself properly give rise to an appearance of bias. On a review of the legality of a decision of a subordinate court, the fact that the High Court itself takes an initiative in according urgency to an application does not do so either.

As to the first ground on which the Director has sought the review of the Senior Magistrate's decisions, what the record of the lower court shows in each case is that on 19th April, the prosecutor requested a further remand, and that the Senior Magistrate refused to grant one. The record also does show that the public prosecutor informed the court in Mkhonta's case that the Director of Public Prosecutions had decided to prosecute the charge in the High Court. In Lukhele's case, it also indicates that at least by implication, the public prosecutor intimated that this course would be taken. However, it does not show that in either case the Director had already applied to the Chief Justice for summary trial in the High Court, and the public prosecutor's supporting affidavit, in paragraph 14, in fact makes it clear that the Director had not yet taken that step in either case.

The record does not show, either, that the Senior Magistrate insisted on determining the court by whom the charges should be tried. Moreover, he himself has given an affidavit saying that he did not do so.

There is, in my view, therefore no substance in the complaint that he usurped or interfered with the functions of the Director.

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The respective functions of a Magistrate and of the Director of Public Prosecutions are quite clear. It is important that each is understood by them clearly. This is essential for the efficiency of the criminal process, and also for the protection of the proper interests of accused persons.

Criminal trials, and applications for review, are of course not adversarial contests between judicial officer and prosecutor. It is wrong, and unseemly, that they should be allowed to acquire that flavour. Ordinarily, on a review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.

It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is, generally, undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him. In principle, there may be a need for a Magistrate to be represented by counsel upon a review if his personal conduct or reputation is being impugned but this, too, will only be in exceptional circumstance.

As to the functions of the court and the prosecutor, it is for the Director of Public Prosecutions alone to decide whether or not to pursue a prosecution, and in which court to do so. It is so well settled as to be properly regarded as trite that a court has no power to insist that a criminal proceeding shall be continued or, subject to any issue of jurisdiction or other provision governing the matter, in which court it shall proceed.

What this means, however, is that it is for the Director of Public Prosecutions alone to decide whether to continue to carry a criminal prosecution through to its conclusion, or to offer no evidence or further evidence, or to discontinue the proceedings. The consequences, for the accused, will vary according to the course that the Director takes and the point of time at which he does so. Thus, where the accused has pleaded, and thereafter the Director sees fit to stop the case against him under section 6 of the Criminal Procedure

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and Evidence Act 1938, the accused is entitled under that section to be acquitted.

Where a Magistrate's court is for the time being seised of a case, and the prosecutor is pursuing it, it is for the presiding Magistrate in the exercise of his judicial discretion to decide whether to require the case to proceed or to grant a postponement and, in consequence of that, any further remand: see sections 139 and 144 of the Criminal Procedure and Evidence Act 1938 (No. 67 of 1938).

These are of course procedural requirements of a nature that is fundamentally important because if it were otherwise, an accused person could be detained indefinitely, at the insistence of the Director, until he himself decided in which court to proceed.

In the present case, the charges were lodged in the Magistrates' Court at Nhlangano. By 19th April, the Director had not applied to the High Court for summary trial on indictment. The Senior Magistrate was for the time being duly seised of both cases.

The only question which therefore arose was whether or not the learned Senior Magistrate should grant further remands. The question was a matter for the discretion of the Senior Magistrate, which discretion fell however to be exercised judicially.

As I have already indicated, it is evident from the learned Senior Magistrate's own subsequent reasons for his decisions that he himself considered that it was not unreasonable to allow the Crown further time in each case. It is also evident that the reason why he in fact refused to grant further remands was that because he had formed a view that the Director was attempting to dictate to him the manner in which he, the presiding Magistrate, had to exercise his discretion in each case.

But that was not a relevant reason for refusing further remands. As my brother Strydom observed at this hearing, what the Senior Magistrate ought to have done, thinking as he did (and in our view quite correctly) that further remands were not unreasonable, was to say in effect "I will grant further remands, not because I am being

told to do so, but because as the presiding Magistrate, and in the exercise of my own discretion, I consider it reasonable to do so."

On that basis, the Director's objection on the second ground of review, on this application, is sustained. If the Director of Public Prosecutions is still proceeding on the charges, and the accused are not in custody, they should be taken into custody accordingly.

D. Hull

HULL, C.J.

I concur.

DUNN, J.

I concur.

pp. Strydom, J.
D. Hull

STRYDOM, J.

It is so ordered.

D. Hull

HULL, C.J.