HIGH COURT OF SWAZILAND

CASE NO.24/2001

In the matter between:

REX VS

1. DUMSANI MAGAGULA

2. CEDRIC NGWENYA

CORAM	MATSEBULA J
FOR CROWN	MS. VAN DER WALT
	(instructed by the DIRECTOR
	OF PUBLIC PROSECUTION)
FOR ACCUSED NO.1	MR. DLAMINI
FOR ACCUSED NO.2	MR. DUNSEITH

BACKGROUND

18th NOVEMBER 2003

The two accused are indicted on the main count 1 on defeating the ends of justice in that on or about 9th February 2001 and at or near the Manzini Magistrate's court in the district of Manzini, the first accused person, being a judicial officer and Principal Magistrate in the Manzini region, the second accused being a prosecutor at Manzini, the accused acting with a common purpose did wrongfully and unlawfully procure a

court file No.B138/2001 relating to Thembi Dlamini and cause (sic) it to be wrongfully removed to Manzini Principal Magistrate's court from Mbabane Magistrate's court which court had jurisdiction in the matter and wrongfully and unlawfully cause the said matter to be dealt with by the first accused in the Principal Magistrate's court, Manzini, which court did not have the jurisdiction in the matter and did there and then cause a liberation warrant to be issued in favour of Thembi Dlamini and a record to be made in the following terms :-

(a) That the said Thembi Dlamini had appeared before the "court" on production;

(b) That the proceedings took place in Mbabane;

(c) The court clerk Mr. Simelane was party of the 'proceedings';

(d) That the proceedings were in open court;

(e) That accused had authority to act in the matter.

Whereas in truth and in fact the said Thembi Dlamini was not before court but was in custody in terms of a committal warrant issued by Principal Magistrate Mngomezulu at Mbabane. The proceedings were not held in Mbabane. The Clerk of Court Mr. Simelane was not party to the 'proceedings' and that the matter

had not been enrolled at Manzini for hearing. In truth the matter was not before an open court but not so reflected in the "court record". Accused had no authority to act in the matter. As a result the accused acted against the due administration of justice to the prejudice or potential prejudice of the administration of justice in Swaziland and the government of Swaziland.

ALTERNATIVE COUNT - FRAUD

In that on or about 9th February 2001 and at or near the Manzini Magistrate's court in the district of Manzini, the first accused person, being a judicial officer and Principal Magistrate in the Manzini region, the second accused being a prosecutor at Manzini, the accused, acting in common purpose did wrongfully and unlawfully procure a court file No.B138/2001 relating to Thembi Dlamini and cause it to be wrongfully removed to Manzini Principal Magistrate's court from Mbabane Magistrate's court which court jurisdiction in the matter and wrongfully and unlawfully cause the said matter to be dealt with by the first accused in the Principal Magistrate's court, Manzini, which court did not have the jurisdiction in the matter and did there and that cause a

liberation warrant to be issued in favour of Thembi Dlamini a record to be made in the following terms:

(f) That the said Thembi Dlamini had appeared before the "court" on production;

(g) That the proceeding took place in Mbabane;

(h) The court clerk Mr. Simelane was party of the 'proceedings';

(i) That the proceedings were in open court;

(j) That accused had authority to act in the matter.

Whereas in truth and in fact the said Thembi Dlamini was not before court but was in custody in terms of a committal warrant issued by Principal Magistrate Mngomezulu at Mbabane. The proceedings were not held in Mbabane. The Clerk of Court Mr. Simelane was not party to the 'proceedings' and that the matter had not been enrolled at Manzini for hearing. In truth the matter was not before an open court but not so reflected in the "court record". Accused had no authority to act in the matter. As a result the accused acted against the due administration of justice to the prejudice or potential prejudice of the administration of justice in Swaziland and the government of Swaziland.

The Crown shall contend that the offences are visited with aggravating circumstances in that:-

1. The accused are officers of the court;

2. They are sufficiently experienced in the administration of justice and the procedure of courts;

3. The Society places total trust on court officials for the administration of justice."

At the commencement of the trial the defence raised certain objections against the indictment as framed and particularised. The basis of these objections were that the original indictment which were served on the accused differed materially from the present indictment upon which the accused were being called upon to plead. It was contended on behalf of the defence that the original indictment had no allegation of defeating or obstructing the administration/course of justice whereas the indictment to which the accused are called upon to plead this allegation has been included. The

indictment was then amended and the amended indictment was put to the accused and both accused

pleaded not guilty.

It is necessary to deal with the reason for the initial delay in bringing the matter for trial. The reason for the delay necessitates going into the personal circumstances of the accused, especially in the case of the High Court judges.

Accused No.l is a Magistrate who moved from the ranks in the judiciary from a junior Magistrate to a Principal Magistrate. It is common cause that those judges who did not have the opportunity of appearing before him were at some stage colleagues of his. I, for one had the pleasure of arguing cases before him when I was a legal practitioner and he was a Principal Magistrate. I personally formed the impression of him as a very brilliant judicial officer who handed, in my opinion down very, convincing judgments. Because of the above reasons the entire bench of the High Court was reluctant to preside over his case. Accused no.2 was only known as being a public prosecutor. Eventually the then Chief Justice applied some arm twisting on me and I agreed to accept to handle the matter. In so far as accused no.2 I had never met him before, I accept that he is a prosecutor with a considerable experience and highly legally qualified. From the contents of his evidence in chief, I formed the opinion that he was very intelligent and further formed the opinion that in so far as people who violate human legal sights and ignore the rule of law and cause injustice to others, accused no.2 does not tolerate. As soon as he realises violation of justice and irrespective of who the victim happens to be accused no.2 jumps in and deals with the situation immediately. Accused no.2 was on study leave and was in Mbabane when he was approached by a stranger but familiar woman. Apparently this woman knew accused no.2 as a prosecutor. She informed accused no.2 about a relative of hers against whom a summons had been issued. According to this woman the summons was served in the absence of her relative who was out of the country at the time. Subsequently accused no.2 ascertained the nature of summons and was convinced that the whole procedure of the issue of the summons was irregular.

Accused no.2 does not even find out what the name of this person against whom the summons was issued. Until as he puts "I handled the matter and that is when I realised that the person was Thembi Dlamini." Thereafter accused no.2 approaches

the prosecutor who was handling the roll at the time. He further asks the prosecutor who informed him that the presiding officer did not want to release the person on her own recognisances even though he, the prosecutor had no objection. The strange behaviour of accused no.2 is that he does not come anywhere near the victim to
ascertain the story that he has been told about her sister.

Accused no.2 is so concerned about an injustice caused to an innocent human being. However, for some reason he does not deem it fit to speak to the victim.
Led by his counsel the following appears at page 36 of the typed record. As she was arrested having been arrested when she was brought before a Magistrate who was supposed to hear her side of the story did not and I felt that was a miscarriage of justice, which needed to be corrected at the very moment."

His counsel put the following :-
You say that you considered what had been a miscarriage of justice is being put by the Crown in this case to ...I think to witness that it was not your function as a prosecutor to take the matter any further or to act as a defence counsel, what is your view of your role and duty as a prosecutor when you come across a matter which you consider amounts to a miscarriage of justice."

ANSWER:

"Your Honour, infact the way I did it I felt I was correcting a miscarriage of justice because as a prosecutor, I have always understood to be an officer of the court, the court should ensure justice is not only done but seen to be done and I have only considered myself as a prosecutor and not to press charges for a conviction even where there is no case against the accused person in as much as a guilty

person should go to gaol but an innocent one should not be sent to jail for no reason." The above is an attitude of accused no.2 towards injustice wherever it reads its ugly head.

Accused no.2's version in his evidence in chief gave a straight forward story that left me in no doubt about his concern where injustice was observed. However under cross examination by the Crown accused no.2 started getting slippery as if he was then

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walking on a clay path. It must be clear from the evidence what were the exchanges that passed between accused no.l and 2 in regard to the arrangement for accused no.l to come to Mbabane for the handling of the case. We do have a glimpse of the almost unavailability of accused no.l.

Accused no.l had to postpone all his personal roll in Manzini as he had been bereaved. He also had a serious financial problem with that of his motor vehicle which had some differential problems. In all accused no.l could be a man who could easily say, Sorry no way I cannot get myself involved in a case of a woman who needs to be released on bail. However, accused no.l for some he is passionate and he does his best to attend to this case of a woman who is subjected to a miscarriage of justice.

It is against this background that this court must decide the merits of this case. I have been addressed at length by the three counsel in a way prepared heads of argument and I must express my undivided appreciation for their assistance unreservedly. The crux of the case is the method and mechanisation set in motion by accused no.2, his extraordinary enthusiasm to come to the rescue of a victim of injustice. This attitude must be considered against the fact that he was not even on duty. He was going about his business of doing a research. His enthusiasm to get this woman out of custody raises more questions than answers. This court is very much alive to the trite law that no onus rests on an accused to prove his innocence.

The Crown has the overall burden to prove its case beyond any reasonable doubt. However, as argued by Ms. van der Walt both accused are not the ordinary accused courts deal with daily. They are a Principal Magistrate and a prosecutor. They were represented throughout the trial by their counsel who in my view had prepared the defence very thoroughly. I am satisfied for example that PW4 S.M. Simelane was misleading the court when denied certain portions of the contents of a statement he made to an officer of the Anti-Corruption Unit. However, PW4's evidence does not affect certain common purpose of the trial which in my view is the basis of the charge against the two accused e.g. the entry in the charge sheet that the accused Thembi Dlamini was before accused no.l. When infact she was not that accused no.2 had enquired from accused no.l telephonically if Thembi Dlamini would be required to be

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present and that accused no.l had said she was not required. That because Thembi Dlamini was not present, she was never warned for the next date of her case. This to me had a potential risk that she could not be present in court as she had not been warned for that date.

To get back to the evidence of accused no.2's evidence. It was his evidence that he needed the assistance of accused no.l for a bail application. According to accused no.l he never bothered to enquire whether or not this bail application was being opposed. Surely accused no.l beset with a motor vehicle breakdown, bereavement and failure to obtain the necessary advance to pay for the funeral arrangement he would have enquired about these. Because of the above problems he was facing he had postponed his own personal roll in Manzini. Why would he want to be bogged down by a matter whose particulars he was not aware of. I mention this fact because it tends to establish a link in the chain of a common purpose. Accused no.l did say in his evidence that Mr. Mngomezulu was a difficult man to deal with. But why not phone a colleague and inform him about this request by accused no.2. The failure on the part of accused no.l to contact Mr. Mngomezulu is a further link in the chain of a common purpose.

This court is convinced that the telephonic discussion between accused no.l and 2 was more detailed than both accused 1 and 2 want this court to believe. This fact becomes even more evidence when viewed against the behaviour of accused no.2 in totally distancing himself from having any contact with the woman Thembi Dlamini. Another option which was left completely not considered by accused no.2 is the fact that he was at Mbabane where the office of his boss - the Director of Public Prosecution. Accused no.2 could easily had phoned his boss and informed him about this miscarriage of justice perpetrated on the victim Thembi Dlamini. I mention these facts in my judgment because they tend to enforce the tendency of a common purpose between accused no.l and 2.

I was impressed by the evidence of PW3's evidence viewed against that of accused no.2 which clearly indicates that accused no.2 was misleading the court when he said PW4 had also expressed his concern about the way the Principal Magistrate treated Thembi's case, differently. It was never put to PW4 that the record of Thembi

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Dlamini was in court that afternoon of the commission of the offence. Accused no.2 also failed in cross-examination to explain how he accused no.2 could see. PW1 put the record of Thembi Dlamini aside when it was called for PW1 's attention.

It is obvious that Thembi's record on this day in question was never taken to PW1 on this date. PW1 stated clearly that he remembered having dealt with Thembi Dlamini's record when he last remanded her in custody.

It is clear from the evidence of PW9 that he ordered that Thembi was produced from the Correctional Services but she was never arraigned before PW1 but remained sitting in "B" court which was clearly not in session at the time. The reason why Thembi Dlamini was in "B" court it was still hoped that accused no.l would come and deal with her case. As Crown counsel has argued the version that Thembi Dlamini would have been taken to PWl's court after her production from the Correctional Services was never put to PW1.

Accused no.l does not deny that he endorsed the particulars on the documents and signed them. His defence is - he made a mistake. I find it difficult to accept this defence for the following reasons :-

(a) According to accused no.2's evidence it was at accused no.1's suggestion that Thembi Dlamini did not need to be present.

(b) As Ms. van der Walt has argued, accused no. 1 is not dealing with a roll of charge sheets but dealing with one and that is the charge sheet of Thembi Dlamini.

(c) He first recorded that PW4 was a District Commissioner but immediately rectified that mistake because PW4 was not a District Commissioner but an interpreter.

(d) Why would he have failed to record that Thembi Dlamini was not before but recorded "abc" and that cannot be accepted as a bona fide mistake.

(e) The explanation that accused no.2 would warn Thembi Dlamini of the remand date cannot be acceptable from a Principal Magistrate considering the serious potential consequences that may arise in the event that Thembi Dlamini failed to appear on that date.

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The evidence in this trial must be considered in its totality and in doing so the inescapable inference is that the two accused acted with a common purpose.

According to the evidence of accused no.2 he never discussed the matter of the bail application with

PW4. All he was concerned with was the safety of the documents. How then would PW4 have completed all the documents with appraised of facts about the result of the bail application. Infact, in the last paragraph PW4 stated that what he wrote in the warrant of liberation was told to him by the accused no.2.

The manner of how accused no.2 went about rectifying the so called injustice
perpetrated on the woman Thembi Dlamini clearly demonstrates beyond a reasonable doubt that accused no.2 was his intent to get this woman Thembi Dlamini out of custody at all costs. He could not succeed in doing so alone and he enlisted the cooperation of accused no.1.

I am satisfied that accused no.l was fully aware of the facts exchanged between him and accused no.2 telephonically. He, accused no.l was aware that this amounted to an attempt to defeat the end of justice.

JUDGMENT ON SENTENCE

27th NOVEMBER 2003

The two accused who are legal professionals have been convicted of an attempt to defeat the course of justice. This court reached this decision because fortuitously the woman who is in the centre of this trial turned up to court on the date the Principal Magistrate Mngomezulu had ordered her to do. I say fortuitously because neither of the accused had warned her when they remanded her in absentia to the said date that Mr. Mngomezulu had remanded her. The potential was there that she could have decided not to attend court on the remand date. In that event the Crown would have been placed in a predicament to cause her to be arrested because according to the charge sheet endorsed by accused no.l she was "abc" before court when he remanded her.

If one is a judicial officer/prosecutor you are expected, rightly so, by the members of the public to be above reproach so that members of the public have a complete trust in your handling of official duties. By members of the public, the woman Thembi Dlamini is included. If Thembi Dlamini would gain the impression that certain unorthodox things can be done by a Magistrate and a prosecutor in her favour, she, too when faced with a situation' where a court's finding would be against her. Will merely say the corrupt practice by the officers is this time around against me.

This court' views the actions of the two accused in a very serious light. There is presently a serious stalement affecting the judiciary machinery. Court orders are ignored and disregarded with impunity. The judiciary is functioning without a Court of Appeal. The business community is seriously contemplating relocating to other countries for fear that they cannot rely on any protection by the courts. The ordinary man i.e. the citizen is also very apprehensive whether he can rely on the courts for any redress. The situation is so serious that even His Majesty the King took the trouble to call all the stakeholders to come up with a solution of what to do with the impasse besetting the judiciary. His Majesty has gone to an extent of inviting even foreign prominent jurists to help find a solution for his country Swaziland. The executive arm of Government is adamant that it will not carry out certain court orders. It is against this background that this court views the action started by accused no.2 and completed by accused no.l in a very serious light. Accused no.l and 2's action fortifies the attitude taken by the executive arm of Government. The executive arm of Government can justifiably state, "We have adopted the attitude not to execute court orders because the officers manning the courts are unreliable themselves." It is against the above background that I have considered all the mitigating favours advanced by your counsel.

Accused No.1

In respect of accused no.l, he is a first offender aged 41. Married man with four minor children, all at school going age. Breadwinner for his family. Before conviction he was a civil servant. It is inevitable that he stands to lose his employment and of course the means of income.

The mere fact that he now has a conviction will haunt him for the rest of his life. That in itself is traumatic to his temperament.

The delay in finalising this case has had an adverse effect on him. The absence of the Court of Appeal is also a disturbing factor. Accused no.l will have no recourse to this check and balance even if he were to note an appeal against his conviction and sentence. A custodial sentence would leave him with no alternative remedy.

A wholly suspended sentence would be more appropriate in the circumstances or alternatively an option of a fine so argued his counsel.

He has been earning a net salary of E4,300.00.

Accused No.2

At the time of commission of offence he was a holder of a BA Law degree but has since successfully been conferred with an LLB degree.

He has lost all chances of being employed by Government as a result of this conviction.

He has been on suspension since February 2001. However, he was on full pay. The matter only came before court on 1st August 2003. He has been under suspension for two years nine months. His career as legal practitioner is doomed for the foreseeable future. The Director of Public Prosecution is run in such a fashion that inexperienced young persons like accused can easily commit errors.

He has been convicted of an attempt and Government has not suffered any prejudice. A custodial sentence will expose him to hardened criminals.

He earned a gross salary of E4,400.00 less E2,200.00 for payment of a motor vehicle loan. This left him with barely El,300.00

A mitigating factor weighing heavily in your favour is the delay that has occurred from the day that you were indicted to the date of your conviction and sentence, the court has taken that into account. I have taken each and every mitigating circumstance mentioned by your counsel into account. I do not consider to differentiate in the sentence to be imposed on either of you. This, is so notwithstanding the inexperience of accused no.2 vis-a-vis that of accused no.l. It was accused no.2 who sat in motion the whole saga of the release on own recognisances of the woman Thembi Dlamini. I have however considered that this is not an appropriate case calling for custodial imprisonment.

In view of the finding by this court that you have been convicted of an attempt, the court considers the following sentence an appropriate one. Each accused is sentenced to pay a fine of E2,500.00 (two thousand five hundred Emalangeni only) in default of payment each accused to undergo an imprisonment of 12 (twelve) months.

The court suspends half the amount of Emalangeni and months and attaches no conditions to such a suspension.

J.M. MATSEBULA

Judge