

THE HIGH COURT OF SWAZILAND

SIBUSISO NDLANGAMANDLA

Vs

REX

Criminal Case No. 57/2001

Coram

S.B. MAPHALALA - J

For the Crown: MR. S. FAKUDZE

For the Defence: MR. DLAMINI

JUDGMENT

(15th December 2005)

[1] The Applicant a police officer in the Royal Swaziland Police has filed this application in the long form seeking an order directing the Respondent to prosecute him in respect of the charges preferred against him within 10 days from date of service of the order, failing which to issue a nollie prosequi

certificate and to withdraw the said charges. In prayer (b) thereof Applicant applies for costs in the event the application is opposed.

[2] The background of the matter is that on the 4th July 2001, Applicant was arrested by other police officers on charges of having contravened the Crimes Act and was remanded into custody on the 10 July 2001 until his release on bail on the 24 July 2001 by the High Court under Case No. 57/2001. On the date of his trial, being the 5th December 2002, his matter could not be proceeded with at the instance of the Crown which advised the trial court that the docket in respect of his matter had been misplaced and was missing.

[3] He avers that the matter has not been tried to date and that he is prejudiced by the Crown's failure to try the case as:

- i) He is not able to work as a police officer as he was suspended;
- ii) He receives half a salary;
- iii) Justice delayed is justice denied.

[4] After a period of two (2) years had elapsed without being prosecuted, at his instance his attorneys wrote a letter to the Respondent demanding that he be prosecuted on or before the 10th January 2005. Thereafter followed two other letters to the Respondent which have not been responded to.

[5] The Respondent opposes the granting of this order and to this end has advanced three points in

limine. These objections are the subject-matter of this judgment. The points are formulated in the following language:

"Respondent humbly submits that Applicant is not entitled to the relief sought and/or it does not exist in law, in that:

- a) The Director of Public Prosecutions has an absolute discretion to initiate and prosecute criminal proceedings at the instance of the Crown. He does so upon his own responsibility, and in the performance of that duty is wholly independent of the court, which cannot interfere with the discretion conferred upon him by the Director of Public Prosecution's Order 1973, refer R v Sikhomba 1955 (3) S.A. 125 at 127 D - E, R vs Nxumalo and another SALR 1977 - 78 102 at 104.
- b) Applicant is not/would not be entitled to be issued a nolle prosequi as stipulated in Part III of the Criminal Law and Procedure Act No. 67/1938.
- c) Applicant has not exhausted all available remedies at the Magistrate Court in that he has not to date applied for a trial date since the matter's last appearance at which stage Applicant could have invoked Section 277 of the Criminal Procedure and Evidence Act

67/1938, but elected not to do so. As such, Respondent submits that the matter is still pending at the Magistrate Court".

[6] I shall address the above points in limine sequentially hereinafter, thusly:

- a) The Director of Public Prosecution's discretion to prosecute.

[7] Section 3 of the Criminal Procedure and Evidence Act No. 67 of 1938 vests the right of prosecuting all offences with the Attorney General in the following language:

"The Attorney-General, in accordance with the powers conferred upon him by Section 91 of the Constitution is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of His majesty the King in respect of any offence committed in Swaziland".

[8] Section 91 of the 1968 Constitution provides in extenso as follows:

"91 (1) There shall be an Attorney-General whose office shall be a public office.

(3) The Attorney-General may, whenever requested so to do, advise the King on any matter of law relating to any function vested in the King by this Constitution or any other law.

(4) The attorney-General shall have power in any case in which he considers it desirable so to do:

a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(5) The powers conferred on the Attorney-General by sub-section (4) (b) and (c) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this sub-section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(6) Notwithstanding the provisions of sub-section (4) the powers of the Attorney General under sub-section (3) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(7) For the purposes of this section, any appeal from any judgment in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court shall be deemed to be part of the proceedings:

Provided that the power conferred on the Attorney -General by subsection (3) (c) shall not be exercised in relation to any appeal by a person convicted in a criminal proceedings or to any case stated or question of law reserved at instance of such a person.

(8) In the exercise of the functions vested in him by subsection (3), the Attorney General shall not be subject to the direction or control of any other person or authority.

[9] It is common cause that the prosecutorial powers of the Attorney-General have been assumed by Director of Public Prosecutions as provided for by the Director of Public Prosecution's Order of 1973 where the latter has been vested with an absolute discretion to initiate and prosecute criminal proceedings at the instance of the Crown.

[10] Nathan CJ (as he then was) in the case of R vs Nxumalo and another 1977 -78 S.L.R 102 at 104 B - E considered the issue of the discretion exercised by the Director of Public Prosecutions, and after an interesting review of other decided cases stated as follows:

"In R v Sikumba 1955 (3) S.A. 125 (E) De Villiers J said at page 127 D - E: "The prosecutor, as the representative of the Solicitor General, is the dominus litis. It is within his power to withdraw a charge at any stage of the proceedings and no court can prevent him, just as no court can force him to prosecute, (see Gillingham v Attorney General and others, 1909 TS 572). In his concurring judgment Curlewis J, said: The Attorney General has an absolute discretion to initiate and prosecute criminal proceedings at the instance of the Crown. He does so upon his own responsibility, and in the performance of that duty is wholly independent of this court, which cannot interfere with the discretion conferred upon him by the Statute", and at page 127H: "I come to the conclusion that in effect the prosecutor had withdrawn the charge, and the accused was entitled to a verdict of not guilty at the close of the case for the Crown". (I should mention that the question in Sikumba's case arose at the conclusion of the Crown case, and not, as in the present case, in the beginning). The learned Judge continued, at page

127H- 128, "In Willis v The Solicitor General, 1926 EDL 321, Pittman J, adopting the words of Dove-Wilson J. in R v Kilyana 30 NLR 446 stated: "stopping proceedings requires no solemn act in court on the part of the Attorney General; he is the sole arbiter whether he shall go on with a case or stop proceedings: in the respect the court cannot control him. It matters not whether he intimates his intention of stopping proceedings by formal intimation in court, or whether he takes steps otherwise which make his intention perfectly plain". In my view these words are directly applicable to the instant case". See also S v Mthetwa 1970 (2) SA 310 (N) at page 314D; S v Dubayi 1976 (3) SA 110 (Tr). (my

emphasis)

[11] According to Swift's Law of Criminal Procedure, 2nd Edition at page 35 as a general rule the court will not interfere with the exercise of the functions of the Attorney-General and with the exercise of his discretion, unless there is proof either that the legal limitations of such functions have been transgressed, or the exercise of discretion is not bona fide, (see also State vs Nellmapius 1885 - 1888 S.A.R. 121, R vs Waldeck and Thine 1913 T.P.D. 568; Gillingham vs Attorney General and others 1909 T.S. 572).

[12] On the facts of the present case, it has not been shown that the Director of Public Prosecutions has either transgressed the legal limitations of her office or that her exercise of the discretion is not bona fide. For all intents and purposes the matter is still pending before the Magistrate Court. Further, I am in agreement with the Crown that the Applicant has not exhausted all available remedies at the Magistrate Court in that he has not to-date applied for a trial date since the matter last appeared at which stage Applicant could have invoked Section 277 of the Criminal Procedure and Evidence Act No. 67 of 1938.

[13] On the issue of a nolle prosequi certificate, it would appear that Applicant would not be entitled to be issued with such as stipulated in Part III of the Act. The Applicant does not fall under the persons entitled as provided in Section 11 thereof.

[14] Finally, I must state en passant that it is in the interest of justice that accused persons before the courts are prosecuted speedily for members of the society to gain confidence in the judicial system. The

old legal adage that "justice delayed is justice denied" is apposite in the present case. Therefore, the office of the Director of Public Prosecutions is duty bound to act with haste in the circumstances of this case.

[15] In the result, for the afore-going reasons the points of law in limine are upheld and I make no order at to costs.

S.B. MAPHALALA

JUDGE