

**THE HIGH COURT OF SWAZILAND**

**CRI.TRIAL 7 OF 2002**

**In the matter between:**

**REX**

**Vs**

**ABLON MANDLA DLAMINI**

**CORAM** : **MAS LRU J.**

**For the Crown** : **Mrs S. Wamala**

**For the Accused** : **Mr Musa J. Dlamini**

**JUDGEMENT**  
**19<sup>th</sup> April, 2006**

The accused stands before me indicted for the contravention of the provisions of Section 20 (2) of the Prevention of Corruption Order No. 19 of 1993, as amended. The indictment alleges that in June, 1998, at or near Sandlane Border Post, in the Manzini Region, the accused, then an employee of the Department of Customs and Excise and as such being a public officer, unlawfully and intentionally solicited and accepted an advantage in the form of two goats from Peter Gama as inducement or reward in consideration for the employment of one Mfanasibili Alexius Gama in the Department of Customs and Excise.

In the alternative, he is<sup>1</sup> alleged to have contravened the provisions of Section 22 (a) of the aforesaid Order, as amended. The particulars alleged in respect of the alternative count are substantially similar to those set out hereinabove and I will therefore not repeat them.

Section 20 (2) of the Prevention of Corruption Order, hereinafter referred to, as "the Order", provides as follows: -

*"Any public officer who, whether In Swaziland or elsewhere, solicits or accepts any advantage*

*as an inducement to or a reward for or otherwise on account of the public officer -*

*(a) performing or for bearing to perform or having performed or forborne to perform any act in his capacity as such public officer;*

*(b) expediting, delaying, hindering or preventing or having expedited, delayed, hindered or prevented the performance of any act, whether by himself or by another public officer in his or that other officer's capacity as such public officer, or*

*(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public or private body, shall be guilty of an offence. "*

Section 2 of the Order, interprets "advantage" as follows: -

(a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any other service, favour or gratification other than entertainment;

(e) the exercise or forbearance from the exercise of any right, power or duty; or

(f) any offer, undertaking or promise, whether conditional, of any advantage referred to in paragraph (a), (b), (c), (d) or (e).

"Public office" is defined as including a judicial office or any office or position (whether full time or not) held by any person engaged in a public or private body or any office or position (whether full time or not) in respect of which emoluments or allowances are payable from public funds or from the Swaziland National Treasury. "Public Officer", on the other hand is defined as meaning "the holder of a public office."

When called upon to plead, the accused pleaded not guilty, a plea that received confirmation from his attorney. The Crown thereafter called the evidence of four witnesses in order to prove its case. I shall proceed to enumerate the salient portions of that evidence.

Before I do so however, it is clear that the drafters of this legislation did not place a reverse onus on the accused. In this regard, it is clear that the onus to prove commission of the offence beyond a reasonable doubt, lies on the prosecution. It follows therefore, is conventional in criminal cases that the accused bears no onus to prove his innocence and that where a doubt persists or lingers, it should operate in his favour.

The accused, having been indicted, in the main Count under section 20 (2), of the Order, it was therefor incumbent upon the prosecution to prove the following beyond a reasonable doubt -

- (a) that the accused is a public officer;
- (b) that the accused in Swaziland or elsewhere, solicited, offered or promised an advantage, as defined above as an inducement, reward or otherwise, in order for him, in his capacity as a public officer, to carry out or forbear from carrying out those actions or omissions mentioned in Section 2 (a) to (c).
- (c) that the offer or promise of an advantage or an inducement or reward was done with the intention that it operates as a bribe.

With regard to the latter, it is clear that Parliament did not expressly include unlawfulness as an element in the nomenclature it employed. From the use of the words "as an inducement or reward or for otherwise", clearly refer to the state of mind i.e. the inducement or reward must be intended to operate as a bribe and the receiver must appreciate that intention. See **HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOL. II, JUTA, 1982**, at page 234. The learned author propounds the view that unlawfulness must be an element, as Parliament did not intend to penalize traps, persons coerced into taking bribes or somebody whose taking of the consideration is sanctioned by custom or consent. The absence of the words "corruptly", "immorally" or such kindred epithet in our legislation should not lead to a conclusion that *mens rea* is not an element in this offence.

In R V NDOBE 1952 (3) SA 562 (T), Ramsbottom J. said the following at p.563H -564A:-

*" If the fee or reward is received, it must be received 'as an inducement' to the recipient to do or refrain from doing something, or in consideration of his doing or refraining from doing. That*

*imports the idea of a mental state in the giver. A man can only receive something as an inducement to act or to refrain from acting, and he can only receive something as in consideration of his acting or for bearing to act if the giver intended the fee or reward to be inconsideration of an act or forebearance. "*

It is my considered opinion, in view of the foregoing authorities that it was Parliament's intention that *mens rea* is an element in this offence although that may not be apparent from the nomenclature employed.

#### The Evidence

PW 1 was Peter Wireless Gama, a resident of Maluta. He testified that he knew the accused as an employee at the Sandlane Border. He testified further that in the year 1998, he spoke to the accused, being a man in a senior position and requested that the latter should employ his son Mfanasibili Gama. PW 1's evidence was that the accused said he would try to find some work for PW1's son but that PW1 should contact him from time to time.

One day, continued PW1, the accused sent for him and his son. He told them that there is a vacancy and that he, the accused would have to travel to Mbabane with PW1's son. The accused told him that as a Swazi, PW1 knew how to "pay homage" since his son had secured employment. PW1 told the accused that he knew what "kühlehla", i.e. to pay homage means. An agreement was thereafter reached in terms of which PW1 would deliver two kids to the accused. These kids were eventually pointed by PW 1 to the accused as they were grazing on the accused's yard. It is PW1's evidence that although the goats were cleared to the accused, he kept them at his home for and on the accused's behalf. He testified that the accused would indicate to him when he was ready to take possession of the goats.

On another unspecified day, PW1 found the accused jacking his motor vehicle as it had sustained a puncture. He admired the accused's jack and the accused promised to obtain one

for PW1 if the latter could give him a goat in exchange. Indeed PW1 gave the accused a goat and he in turn collected a new 2-ton jack in a box from the accused's office.

After some time, PW1 informed the accused that one of the two goats of accused had gone missing whereas the second gave birth to a lamb. It is his evidence that the goat given in exchange for the jack was collected by the accused straight away and he slaughtered it. The lamb referred to earlier, was fetched by a Priest in the Methodist Church. Her evidence was admitted by consent.

After sometime, PWFs son reported that there were strange developments at work. When PW1 approached the accused to enquire what the problem was, the accused advised that he had nothing to say but the head office could comment. This irritated PW1 who expected that the accused would communicate any problems directly to him. The accused left PW1 in office, claiming that he did not understand PW1. According to PW1, he left the accused's office as a fool.

In cross-examination, PW1 testified that he was shocked at his son's dismissal. He denied being angry at the accused for his son's dismissal but insisted that he wanted his goats back and which had been taken through unlawful means. PW1 testified that he knew that it was wrong for him to offer bribes to any person in return for benefits. He stated, however, that the accused told him what was required and since his son was desperate, he found himself involved.

PW1 testified further that when he gave the two goats to the accused, they were alone. When the one given in exchange for the jack was pointed out, the accused was in the company of other persons who worked with him.

It was put to PW1 that he never pointed to any goat to the accused when the latter was alone. This was denied. It was put to him that one Moses Dlamini and Gilbert Shabangu would testify that they were present when the two goats were shown to the accused. It was further put to PW1 that on 4 November, 1997, he went to the accused's employment and found him with Moses, John Dlamini and Gilbert Shabangu fixing the accused's vehicle which had sustained a puncture. PW1 said the accused was alone with his children during the said

occasion.

It was further put to PW1 that it was on that day that he admired the accused's jack. At the end of November, 1997, the accused handed the jack referred to, whereupon PW1 pointed the goats to the accused who was with John and Gilbert. This was denied by PW1. He insisted that there was one goat for the jack and two for his son's employment. He testified further that his wife and son knew about the goats as he advised them.

It was put to PW1 that the goat collected by the accused was in relation to goats for the jerk, which PW1 denied. It was also put to him that the goats for the jerk were a male and a female. PW1 said both were female. It was also put to him that he (PW1) had slaughtered one of the two goats and that it would be replaced. PW1 said he never slaughtered the goat but it got lost. It was put to him that the replacement goat gave birth to the goat given to PW3. PW1 insisted that the one which gave birth related to his son's employment.

Lastly, it was put to PW1 that his son lost employment as a result of a directive from the headquarters in Mbabane. PW1 was unable to deny this. In response to questions by the Court, PW1 said he had told the accused after his son was relieved of his employment that it was because he (PW1) had given the accused goats and someone who had offered a cow had been offered employment in his son's place. He further described the goats given to the accused in relation to employment as a white goat with a brown neck which died. The other was black and white together with its kid. The one for the jerk was a white male with no spot.

PW2 was Alxcus Mfanabili Gama, PW1's son. He testified that he was employed at the border under the accused's supervision. PW1 had spoken to the accused regarding the employment. He testified that he found PW1 and the accused sitting under a tree at the gate and the accused informed him that he had secured a job but needed to go to Mbabane to complete the necessary forms. A date for the trip to Mbabane was set.

It was PW2's evidence that he commenced work on 1 July, 1998 as a cleaner until August, 2000 when he received a letter ordering him to stop working at the end of August. Some people from the head office assured them that there were some posts and were to continue

working after August. In October, 2000, however, PW2 received a letter terminating his services with effect from the end of that month. The accused protested his ignorance regarding the termination.

PW2 testified that the accused received some goats from PW1 in order for him to be employed and that his father advised him of that arrangement involving two female goats. It was his evidence that he did not find it necessary to have PW1 show him the goats as his interest was in securing employment. PW1 handed over some letters marked EXHIBIT "A" and "B", respectively.

Under cross-examination PW2 testified that the goats were shown to him by his father although he was not present when the deal was struck. It was further put to PW2 that if the accused had committed any offence, he PW2 had participated in it. This PW2 denied, saying that he did not know he was committing an offence. He denied that the goats were given in exchange of a jack. It was his evidence that his father told him of only one goat for the jack.

In re-examination, PW2 described the goats shown to him by PW1 were white with red necks. The goat given in exchange for the jack was white with a black neck. He testified that his father showed him the goats in case the accused came for the goats in his father's absence.

The evidence of PW3 Caiphus V. Msibi was to confirm that the accused and PW2 were employed by the Department of Customs and Excise where PW3 was the Personnel Officer. He testified that PW2 was employed on a temporary basis after a vacancy occurred. The accused was asked by PW3 to find a suitable person to fill that vacancy and he recommended PW2 and brought him for engagement. It was his evidence under cross-examination, that PW2's services were terminated pursuant to a circular from the Ministry of Labour and Public Service, directing the termination of their 189 employees, including PW2, who had recently been engaged.

PW4 was Pctros Msibi, an investigator with the Anti-Corruption Commission. He merely detailed his investigations and the persons he interviewed. Nothing of consequence turned on his evidence, both in chief and under cross-examination.

The accused, adduced-sworn evidence. He confirmed that in 1997, he was based at the Sandlane border post. The accused's version, was that in November, 1997, whilst at work, Gilbert Shabangu's vehicle sustained a puncture before knocking off from work. The accused then took his jack from his vehicle to assist Gilbert. John Dlamini was present. It was then that PW 1 came and admired the jack and asked the accused to give it to him in exchange for two goats, both of which would be female.

It is the accused's evidence that he decided to obtain a new jack since the one he had had been used for some time. He told PW1 to wait until the end of November, 1997. He then bought the jack and showed it to Moses Dlamini and Shabangu. He then sent Shabangu to take it to PW1 but Moses interjected and said PW1 should collect it himself. Indeed PW1 collected the jerk and undertook to show the goats to the accused and his companions when the said goats were nearby.

Indeed PW1, pointed out the two goats, one male and one female in the presence of the said gentlemen. According to the accused, the female was white with brown spots, whilst the male was white with black on the neck. The accused thanked PW1, together with the two men and asked PW 1 to keep the goats for some time.

In January, 1998, he went with Shabangu to fetch the male goat for purposes of slaughtering it. In March, 1998, whilst at SIMPA he received a call from Sandlane Border from Moses Zwane and John Dlamini. He was told that PW1 was looking for him. PW 1 told him that the accused's goat, which was about to give birth had developed complications and that he was of the view that he should slaughter it. It is the accused's evidence that he told PW 1 to see what to do as he, the accused was away.

On his return in April, PW1 came to the accused at work and said he had used that goat to feed his family. He promised to give the accused another goat. In relation to PW2's employment, the accused testified that he was called by Zanelc Shabangu to quickly find a



replacement for a cleaner who had died, preferably somebody from the neighbouring area.

It was his evidence that PW1 had been asking for a job for his son, PW2 for some time. It is his evidence that he spoke to the family of the deceased cleaner first to find out if they could get somebody but they declined. The accused then contacted PW1 and eventually took PW2 to the head office where he was employed. In 2000, PW2 was terminated and this culminated in PW1 asking why that had happened and if the accused was responsible for the termination.

It is the accused's evidence that PW1 was harsh to him and told him he would find a way to have the accused dismissed. At that juncture, he received a call from Japhter Dlamini and had to answer it at the Police post since his telephone was not functioning. He denied having run away, leaving PW1 alone in the office. On his return, PW1 had already left. PW1 had accused him of wanting to engage somebody who had promised him a cow.

All in all, the accused, denied having received two goats for securing PW2's employment. It was his evidence that when dealing with the accused over the goats, he was never alone. It was his evidence that PW1 was annoyed with the termination of his son's services and thought he had everything to do with it when that was not the case hence PW 1 concocting the story against him. He also explained that the goat handed over to the Priest was a progeny of the female goat given to him by PW 1 in exchange for jack.

DW1, Moses Dlamini gave evidence which supported the accused's version. It was his evidence that he was present when PW1 and the accused spoke about the jerk and the goats. He confirmed being present when PW1 showed them the goats, one male and one female. According to DVV1, PW1 apologized for giving a male goat which was against his earlier promise. According to him, the male was white with brown at the neck whereas the female was white with brown spots on the body. DW1 testified that Joseph Dlamini was present when this event occurred. He expressed surprise at the allegation that the goats were exchanged for corrupt purposes.

DW3 Gilbert Shabangu testified along similar lines as the accused and DW1. It was his

evidence that after purchasing the jack, the accused instructed him to call PW1, which he did. He was satisfied with the jack and around 16h00, he came with the goats and pointed to the accused, one male and the other female. The male was white with brown around the neck, whereas the female was neither white nor brown but somewhere in between. DW2 testified further that he accompanied the accused when he went to take the male goat for slaughter, leaving the female with PW1. Thereafter, the defence closed its case.

#### **Analysis of the evidence and conclusions thereon**

In this case, there is no controversy about the fact that the accused was a public officer, occupying a public office, within the meaning of the Order. There is also no dispute regarding, the accused receiving and PW1 giving him some goats. The only dispute is with regards to the purposes therefor. According to the accused, he received two goats from PW1 in exchange for a jack. According to PW1, the accused received one goat for the jack and two being an advantage within the meaning of Section 2 of the Order and as an inducement or reward for securing PW2's employment.

The major question for determination, is whether the Crown has proved, beyond a reasonable doubt that the accused received some two goats from PW1 as an inducement or reward for having performed i.e. secured PW2 employment with the Department of Customs and Excise, the accused having done so in his capacity as a public officer.

In this regard, I should mention that the Crown's case is faced with what I shall term a triple jeopardy. In the first place, PW1 was a single witness, who, in the scales did not prove to have been entirely honest in my view. He sought to say that his evidence regarding the accused receiving goats for PW1's employment would be corroborated by his son PW2, to whom he had showed the goats. He further alleged that his wife also knew about the deal.

Strangely, when PW2 took the stand, it was his evidence that he did not take any interest in the description of the goats as his main preoccupation and interest, was to secure employment. Later, PW 2 changed his evidence and alleged that his father showed him the

goats. This detracted materially from his credibility as a witness of truth. Furthermore, the evidence of PW1 and PW2, regarding the description of the goats allegedly given to the accused for the corrupt purposes was conflicting.

According to PW 1, there was a white one with a red/brown neck, whereas the other, was black and white. According to PW2, in his later version, as recorded above, the goats pointed to the accused by PW1, as shown to him, were white and red on the necks. Furthermore, although PW1 claimed that his wife was privy to the dealings, she was not called to shed a light on this issue. For that purpose, PW 1's evidence is that of a single witness, who was not corroborated and who was unfortunately not credible either.

The second disconcerting aspect to this matter is that if PW1's evidence is correct, that he offered a bribe to the accused, he is a briber and the accused is a bribee. In his evidence, he failed to deny this under cross-examination. It is therefore clear that he is an accomplice, warranting that his evidence be treated with caution i.e. the cautionary rule should apply. It is also clear, from the foregoing, that his evidence was, not corroborated by acceptable and competent evidence. On the contrary, his evidence was contradicted by the very witness who was to corroborate his story i.e. PW2. See HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE (*supra*). The cautionary rule in respect of accomplices was stated by SCHREINER J.A. in R V NCANANA 1948 (4) SA 399 (A.D.) at page 405 as the following:

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*"The rule of practice which it was intended to state and which is consistent with, if it is not expressly approved in, decisions of this court ...is that even where section 285 has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should wary himself or if the trier is a jury, that it should be warned of the special danger of convicting on the evidence of an accomplice for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in*

*material respects not implicating the accused, or by proof **aliunde** that the crime charged was committed by some one so that satisfaction of the requirements of section 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although section 285 has been satisfied, will be reduced, and in most a satisfactory way, if there is corroboration implicating the accused. But, finally also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question. "*

See also **S V GOKOOL 1965 (3) SA 461; S V GANIE 1967 (4) SA 203**, which states that a trap is not regarded as an accomplice.

It is clear even from PW 1 's evidence, particularly under cross-examination that he was an accomplice. His evidence had to be treated with caution. Being a single witness, whose evidence was not only uncorroborated, but controverted by the evidence sought to corroborate it would, in my view be risky to convict based on his tenuous and precarious evidence.

The last jeopardy, relates to the fact that it is common cause that PW1 **bona fide** believed that the accused was the not just the conveyer belt of PW2's misery regarding his dismissal but was the *causa causans* thereof. He believed that the accused had been offered a cow in order to employ another person in PW2's place. The Crown's evidence indubitably shows that this was not the case and that the accused had no role whatsoever in PW2's employment being terminated. It was as a result of a directive from the Ministry of Public Service. According to the accused, PW1 promised to get even with him for dismissing his son. In the circumstances, and considered with the issues raised above, it is clear that PW1 and PW2, had a motive to lie against the accused by concocting false evidence against him. In this regard, it is clear that PW1, in his initial report to the Anti-Corruption Commission investigators never mentioned the issue of the jack and only did so after the accused had placed his own version before the investigators. This action reflects negatively on PW 1's

*bona fides* in making the complaint. He appears initially, to have withheld certain necessary information from the investigators.

Lastly, it is clear that the accused has under oath, given a version that cannot be said to be beyond doubt false. His version is supported by two other witnesses. There are some worrisome aspects of their evidence though, e.g. some of the issues were not put to the Crown's witnesses; there were signs of hesitation in their evidence and the colour of the goats in issue was not consistent. I am alive to all these.

The law, as it stands, however, is that the accused has no liability to prove his innocence. It is sufficient for his acquittal, if he gives an explanation that can be regarded as reasonably possibly true. In this regard, **TEBBUTT J.A.** said in the case of **LESOLAME V THE STATE [1997] B.L.R. 60 at 67;**

*"The test in a criminal case is well known. Is there a reasonable possibility that the Appellants evidence may be true? The test has been applied in the courts in Southern Africa, including in this country, for 60 years or more. In **R v Difford 1937 AD 370 the South African Appellate Division** said that even if an accused's*

*version may be improbable, he is entitled to **his** acquittal if there is any reasonable possibility of its being true. In **R v M1946 A.D. 1023 at 1027**, it was said that in applying the test, the court does not have to believe it in all its details. It is sufficient if it thinks that there, is a reasonable possibility that it may substantially be true. This test has been consistently followed in this courts of this country as well."*

The above quotation holds true in this jurisdiction as well and has been consistently followed for a long time. I am of the view, putting aside the criticisms against the Crown's evidence, that the accused's story, as recounted above, is reasonably possibly true. I say so, particularly in view of PW 1 's tenuous evidence and the threat he made to get even with the accused.

**Verdict.**

The accused is in the premises, acquitted and discharged on both the main and the alternative count.

**Observation**

There is, however, one matter which I find it necessary to mention *en passant* and to which I adverted during the course of trial. In my view, cases brought to this Court for trial under r. 1 of the Order or its successor, must be of a sufficiently serious nature and thereby qualify to be so enrolled. It appears to me unfair to occupy this Court with cases including the exchange of goats and other items of lower value and thereby have other serious matters take a back seat. In my view, matters, of a less serious nature must be brought to the subordinate Courts for trial. This must not be viewed as a declination by this Court to deal with cases of corruption. Far from it. It is clear that corruption, at all levels is serious, but it is not out of place to enroll matters before the various levels of our Courts depending on their severity.

**T.S. MASUKU**

**JUDGE**