

## THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Criminal Case No.  
206/2002

In the matter between

REX

VS

SIPHO MARCO GAMA

Coram: BANDA, CJ

For the Crown: DPP/MASINA

For the Respondent: LUKHELE

### RULING

[1] The general rule is that the wife or husband of an accused is competent and compellable to give evidence for the prosecution without the consent of the accused, where the accused is prosecuted for any offence against the person of either of them or any of the children of either of them.

[2] The prosecution have intimated that they intend to call one Thembi Langa as a witness in their case against the accused. It is common cause that the proposed witness is the wife of the accused before this court. Learned counsel for prosecution, Mr.

Masina, has made that concession in open court and from the bar. The accused is charged with the offence of fraud. The section of the law which deals with the competence of a spouse witness in our courts, is Section 215 of the Criminal Procedure and Evidence Act. That Section provides in the following terms :-

*"S215. (1) The wife or husband of an accused is competent and compellable to give evidence for the prosecution without the consent of such accused if such accused is prosecuted for any offence against the person of either of them or any of the children of either of them or the offence of bigamy or incest or perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by one of them against the other, or in connection with or for the purpose of any criminal proceedings in respect of any offence included in this section, or the offence of abduction or any contravention of any law in force in Swaziland in regard to indecency or immorality."*

[3] The learned Director of Public Prosecutions and Mr. Masina have submitted that the provisions of the section should be liberally construed and be given a wide meaning beyond offences against the person. The prosecution has contended that the conduct of the accused in this case, when he falsely alleged that the children had died, was an outrage which disturbed the peace of the family. They have further submitted and have urged this court to include any offences which directly violets the right of an individual. They have cited an American authority in the case of **HUNTER VS STATE** Case Number No.

A-1657. This is a case which comes from the Oklahoma Court of Criminal Appeals. In that case there are the following passages from which the prosecution are drawing support:

*"A respectable array of authorities, we concede, might be cited in support of the narrower construction. But the courts in those cases, we respectfully submit, have blindly followed precedents not based upon reason, and have yielded to that foolish sentimental impulse which, as Mr. Wigmore so rightly remarks, is the real foundation of this rule. This court has declared more than once that it will follow no precedents not founded upon reason; that Oklahoma shall be ruled by the living and not by the dead.*

*"The authorities supporting the narrower doctrine hold that even adultery, incest, and bigamy do not come within the exception because no personal violence is inflicted upon the wife in such cases. We cite this to show to what extent the narrower construction leads. Let us not forget that the purpose of the rule was to avoid any disturbance of the family peace. And these decisions, holding the wife incompetent in such cases, practically say to the husband:*

*"You may break your wife's heart by criminal intercourse with other women; you may go so far as to be in the bed of a bigamous wife; you may even outrage your own children; and we will not permit*

*your wife to testify against you, because it tends to interrupt the harmony of your family relation.*

[4] It must be noted, however, that unlike in Oklahoma jurisdiction the offence of bigamy and incest are covered under the exception to the general rule in our law.

[5] The prosecution have also cited another American authority in the case of **BUSSET VS US** 137 US 506 where Chief Justice Zame stated as follows:

*"Whenever the act or conduct which constitutes a public offence or crime consists in a direct violation of the rights of the individual, the crime is against that individual as well as the public ... .cohabitation with another woman, as a wife, is often more injurious to the feelings of the lawful wife.... than a shake of a fist, coupled with a threat or an attempt to commit bodily injury....."*\*

[6] In the case of **HUNTER VS STATE** 1913 **OK CR 270** cited above J Furman stated as follows:-

*"We have always held that penal laws of this state should be construed according to their reason and spirit and they should receive that liberal construction which will enable (them) to reach and destroy the evils at which they are aimed..... acting upon this construction ... this court held that adultery was an offence against the wife, and she was a competent witness against him.*

*"A competent witness against her husband in such a prosecution"*

*"We Have always thought that it was an outrage that a wife could be a witness against her husband for a personal assault upon her body, which might involve but little injury... but that the wife could not testify as to matters involving virtue and womanhood, which directly affected her rights as a wife, and which would constitute much greater cruelty and injury than could be inflicted by personal "violence".*

[7] The prosecution have contended that a husband whose conduct has shattered the family peace should not be protected by silencing his wife from giving evidence against him.

[8] For the defence, Mr. Lukhele has submitted that the provisions of Section 215 of the Criminal Procedure and Evidence Act should be given the strict interpretation to mean that the offence charged against the accused must be one that involves personal violence and that any change in the law can only be brought about by an Act of Parliament. He has contended that the accused in the present case is charged with fraud, a far cry from any offence involving violence, to any spouse or children of either of them. He has submitted that since it is common cause that Thembi Langa is the wife of the accused, she is not a competent and compellable witness against the accused. He has contended that the offences which the accused is facing in this case do not fall within the exception envisaged under Section 215 of the Criminal Procedure and Evidence Act. Mr. Lukhele has referred to

passages in the Swif's Law of Criminal Procedure 2<sup>nd</sup> Ed., at pages 396 - 400. He has also referred to the case of **R VS TIMOTHY MABUZA 8B ANOTHER** 1979 - 81 page 8 where at page 9 Cohen J stated the principle as follows:-

*"The rules excluding one spouse from giving evidence against the other is based on public policy, the underlying motivation being the sanctity of marriage and the preservation of marital confidence flowing from the marital state. In my view the sanctity of the Swazi Marriage is as potent and valid in Swaziland as a marriage according to Civil Rites, and it is correct that the status thereby acquired by the parties should be accorded the same privileges and protection as far as the admissibility of evidence by one spouse against the other is concerned.*

*"I therefore rule that Siphwe Maziya is not a competent witness to give evidence against her husband."*

And in the case of Ex Parte Minister of Justice in re: **REX VS DEMINGO** 1951(1) SA 36 AT 40 the court there stated the principle as follows :-

*" For instance the spouse of an accused is not competent and compellable witness for the crown excepting in the cases referred to in Section 263. From section 263 it may be argued that there is an irresistible implication that a spouse is in other cases not a competent and compellable witness for the crown. But exclusion by implication, however strong that implication may be, is not the same as express exclusion. A spouse is, however, excepting, in the cases specified in section 263, an incompetent*

*witness for the crown under Section 320, for under English law he or she is incompetent and being incompetent he or she cannot be compelled to give evidence for the crown."*

Under our law section 215 of the Criminal Procedure and Evidence Act has expressly excluded only offences against the person of the spouse or any of the children of either of them. The prosecution have urged this court, by way of judicial activism to enlarge the ambit of exceptions and include cases where the accused has been charged with offences which have outraged and disturbed the family peace. It is my considered view that changing the law in such a fundamental way can only be done by legislation by the competent organ of Government. Changing the law in such a manner is not a function of the courts.

[11] The learned authors of **WADE & BRADLEY CONSTITUTIONAL AND ADMINISTRATIVE LAW** 11<sup>th</sup> Edition at page 53 have described the role of the judiciary in the following terms :-

*"The authoritative interpretation of the law is a matter for the courts. The interpretation of statutes is in one sense a vital part of the law making process as it is only after judicial interpretation that it is known whether the intentions of those framed the law have actually been carried into effect; but in this task the judges must not compete with the political authority of the Legislature."*

[12] There can be no doubt, in my judgment, that when courts invoke the principle of judicial activism as an aid in their judicial interpretation, they are taking part in the process of law making which is the primary function of Parliament. And that would be to disregard what Lord Donaldson the former Master of the Rolls in England said in the case of **R V H.M.**

**TREATURY EX PARTE**

**SMEDLEY** 1985 1 Q B 659 when he warned as follows:-

*"It behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or so far as this can be avoided even appearing to do so. Although it is not a matter for me I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the Courts."*

[13] My personal view is that courts should be slow to invoke the principle of judicial activism because, unless it is clearly circumscribed and condition in which it can be invoked clearly defined, it can create uncertainty in the law and might affect the orderly development of the law. I am an old fashioned judge who still believes in the traditional role of the judiciary in the administration of justice. The provisions of Section 215 of the Criminal Procedure and Evidence Act must be strictly interpreted. The offence which the accused is charged with does not fall within the exceptions envisaged and therefore I rule that the proposed witness is incompetent to give evidence against the accused.



**R.A. BANDA**  
**CHIEF JUSTICE**  
30/06/08