

# IN THE HIGH COURT OF SWAZILAND

REVIEW CASE NO. 16/09

In the matter between:

REX

VS

MBUSO MATSABA  
MZONDI MASHABA

JUDGEMENT 18<sup>th</sup>  
MARCH, 2009

[1] The two accused, who were both unrepresented appeared before a Magistrate at Simunye on 22<sup>nd</sup> December, 2008 on a charge sheet that told them that they were

"charged with the crime of contravening section 16(a) of the Public Order Number 17 of 1963. In that upon or about the 20<sup>th</sup> December, 2008 and at or near Saving Centre area in the Lubombo region, the said accused persons did wrongfully and unlawfully injeodised 5097 Constable Dlamini to fail in his duty by causing disorder and failing to keep and maintain peace by fighting at a public area despite demand from the said 5097 Constable Dlamini that [they] should keep and maintain peace and order in the aforesaid bar."

(The underlining is mine).

[2] Both accused persons pleaded guilty to the charge and were found guilty on their pleas and each sentenced to a fine of E2000.00 or a term of imprisonment for ten months.

[3] I do not know the meaning of the word I have underlined above and I have no inkling whatsoever as to what was said or explained to the accused persons when the charge was read to them in the court below. It is, however, clear from the way the charge sheet is framed that that word is crucial and or central to the charge as it contains or encapsulates that which the accused are alleged to have done in contravention of the cited provisions of the law.

[4] Section 16 (a) of The Public Order Act, 17 of 1963 states as follows:

"16. A person shall be guilty of an offence and liable on conviction to imprisonment not exceeding three years, if he-

(a) induces or attempts to induce a public officer or an officer or another member of any of the armed forces for the time being lawfully in Swaziland, or a servant of a local authority, to fail in his duty, or terminate his services in the discharge of his duty, or commit a breach of discipline;

The act of inducing or attempting to induce a public officer or in this case a police officer, to fail in his duty, relates to an unlawful and intentional act of commission directed by the accused to the public officer or policeman. It must consist of a positive act on the part of the accused aimed at dissuading the police man or public officer from carrying out his lawful duties as such public officer or policeman. The allegations in the charge sheet quoted above, bar the unknown word therein, are that the accused fought in a public place; a bar and did not heed the order by the police constable to stop fighting; or to "keep and maintain peace and order in the aforesaid bar". Under English law engaging in a fight in a public place to the terror of her Majesty's subjects, is known as an affray. It is, at least eo nomine, not an offence under our common law. I cannot, with due respect, fathom or understand how the fight by the two accused persons herein and their failure to heed the policeman's demands to keep the peace could be termed or referred to as an inducement or attempted inducement to cause

him to fail in his duty or to terminate his services as a police officer; or to commit a breach of police discipline.

An inducement to the police officer to abandon his duty, or fail to perform his duty arises where there is a duty on the officer to act and some one else, the accused, improperly prevails over him (the officer), to look the other way - to inaction - or as the relevant section provides, the officer ceases, terminates or ends his engagement as such public officer.

[5] The need to take good care in drafting a summons or charge sheet can not be over emphasized. These are the documents, afterall, that inform the accused in precise terms what he is alleged to have done and the case he has to meet or answer in court. In **R v Preller, 1952 (4) SA 452 (AD) at 470, Van den Heever JA** stated as follows:

"The language of a statutory enactment, considered as a general rule and wide command or prohibition, may be couched in clear and intelligible language. As a description of an offence in the abstract it may be above criticism. Yet it does not necessarily follow that by inserting a few dates, names of places and of persons, like fillings of lard in a haunch of venison, it can be made to charge an accused person with a specific offence. On the contrary, situations may arise in which a statutory provision turned into a criminal charge in that manner would be pure gibberish."

[6] In the present case, the charge sheet as framed does not disclose an offence; in particular it does not disclose a contravention of the cited provisions of the law. That being the case, the accused persons were wrongly or erroneously tried and convicted and sentenced. Their respective convictions and sentences are set aside and they are acquitted and discharged. They are to be released from custody forthwith, unless otherwise held for some other cause. If they have paid the fine imposed on them, such is to be refunded to them.

[7] Section 146(1) of the Criminal Procedure and Evidence Act 67/1938 provides that an exception that the charge or indictment does not disclose an offence must be taken before pleading. I do not, however, think that

such should apply in this case where the accused persons were unrepresented and an injustice has been unwittingly perpetrated on them. It cannot under such circumstance be said that the proceedings were in accordance with real and substantial justice.

[8] I am aware of the fact that the trial magistrate herein is currently not stationed at Simunye Magistrate's court and it may take a while before he returns to that court for him to implement this judgement. Consequently the Registrar of this court is directed to sign and execute the court documents to facilitate the immediate release of the accused from their captivity.

MAMBA J