IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 12/13

In the matter between

THE KING

And

LEO NDVUNA DLAMINI **ACCUSED**

Neutral citation: *The King v Leo Ndvuna Dlamini (12/13*) 2013 [SZHC] 218 (18 October 2013)

Coram: **OTA J**

Heard: **5-8 August 2013, 13 August 2013, 16-19 September and 30 September 2013**

Delivered: **18 October 2013**

Summary: **Criminal procedure: The Accused person a judicial officer holding the position of a magistrate was charged with offences contravening the Prevention of Corruption Act 30 of 2006 and for attempting to distract or defeat the course of justice. Accused had lodged an assault common complaint against the complainant for uttering certain words to the Accused which are alleged by the Accused to constitute said offence. Complainant and his father went to apologize to the Accused in terms of Swazi Law and Custom. The outcome of the event of the apology, as admitted by the Accused, is that he received the sum of E1,000 from the complainant who was to pay the balance of E4,000 of the total agreed amount of E5,000 to the Accused by the 31st of December 2011. Accused admitted instructing the investigating police officer when he approached him for a withdrawal statement for the assault common charge on grounds that it has been settled, to wait until the 31st of December 2011. Crown's case was that the total sum of E5,000 was a "fine" imposed on the complainant by the Accused for the assault common charge. The Accused's defence was that the E5,000 was compensation for a civil suit he instituted for defamation as a result of complainant's utterances. Held; Accused's defence is fraught with contradictions and inconsistences which render it unreliable, an afterthought and untruthful. Defence rejected. Accused found guilty and convicted on both counts as charged.**

OTA J

Judgment

[1] The Accused Leo Ndvuna Dlamini is charged with the following counts of offences:-

> **"COUNT ONE**
>
> **The accused is guilty of the crime of CONTRAVENING SECTION 33 (1) (b) READ WITH SECTION 33 (2) (b) (i) of PREVENTION OF CORRUPTION ACT 30 OF 2006.**
>
> **In that upon or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court in the Hhohho Region, the said accused being a Judicial Officer, did unlawfully demand or accept an advantage to wit, Emalangeni Five Thousand (E5000-00) from one Mihla Dlamini, for his own benefit and advantage which induced him not to proceed with laying criminal charge against Mihla Dlamini, an act which amounts to violation of duty or a set of rules and/or abuse of position of authority and thus did contravene the said Act.**
>
> **ALTERNATIVELY**
>
> **The accused is guilty of CONTRAVENING SECTION 42 (1) (a) read with section 42(2)(b) (i) OF THE PREVENTION OF CORRUPTION ACT 3 OF 2006**
>
> **In that upon or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court the said accused did unlawfully demand and accept an advantage to wit, Emalangeni Five Thousand (E5,000-00) from one Mihla Dlamini, an act which induced the said accused not to continue with laying charges against the said Mihla Dlamini thus amounting to an abuse of**

authority and violation of a legal duty or a set of rules, and contravened the said Act.

COUNT TWO

The accused is guilty of the crime of ATTEMPTING TO DISTRACT OR DEFEAT THE COURSE OF JUSTICE.

In that wheareas the accused was complainant in a criminal case RCCI 2234/2011, and whereas one Mihla Dlamini was a suspect in the aforesaid matter, the accused did on or about the 24th November 2011 and at or near Pigg's Peak Magistrates Court in the Hhohho Region, unlawfully and with intent to obstruct the course of justice solicit money in the sum of Emalangeni Five Thousand (E5,000-00) from the said Mihla Dlamini, in return for the accused not to pursue the criminal charges for which the said Mihla Dlamini was tried. In the premises the said accused did commit the crime of ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE OF JUSTICE."

[2] When the Accused was arraigned before this court, he pleaded not guilty to these counts of offences. Whereupon the Crown led the evidence of six (6) witnesses in proof of its case. At the close of the Crown's case, the Accused testified as DW3 and called the evidence of two other witnesses. It is imperative that I canvass the totality of the evidence led *in casu* in some detail in view of the nature of this matter. This will also serve to assuage the palpable anxiety of learned defence counsel Mr Bhembe in his contention that the Crown misrepresented the facts in its written submissions.

[3] Before dabbling into the nitty gritty of this matter, it is pertinent for me at this nascent stage to address a house keeping issue to wit; the allegation by

Mr Bhembe in the Accused's written submissions that the Crown engaged in unnecessary splitting of charges via the charges contained in counts 1 and 2 respectively. Mr Bhembe contended that since the charges arose from one single transaction, that is the incident of the 24th of November 2011, the Accused should have been charged under Section 33 of the Prevention of Corruption Act, and in the alternative, for attempting to obstruct or defeat the ends of justice. For this proposition, Mr Bhembe urged the case of **Nkululeko Freedom Sihlongonyane V Rex Criminal Appeal No. 31/2010 pages 9-13**.

[4] Let me say straightaway without the need of any long drawn out analysis, that after a very careful consideration of the law on this subject matter, I do not think, the whole of the criminal conduct imputed to the Accused can be said to constitute in substance only one offence which could have been properly embodied in one all embracing charge or charged in the alternative. I see no unnecessary splitting of charges *in casu*. I will thus dimiss Mr Bhembe's contention. It stands dismissed.

[5] Now, the relevant portions of the evidence of PW1 Mihla Dlamini who is the complainant, are that on the 24th of September 2011, he attended a party at a Da Silva homestead at the Luhlangotsini area, in the company of his sister one Sibongile Tsabedze who is a staff at the Pigg's Peak Magistrates Court. He had been drinking heavily from the morning of that day and was thus heavily drunk by around 4pm when the Accused arrived at the party.

[6] It was PW1's evidence that he jokingly said to the Accused *"Hey Leo you are here, what can you say if I can shoot you now"* PW1 told the Court that even though he knew the Accused prior to the day of the party, he did not however know that he is a Magistrate.

[7] A few days after the party his sister Sibongile Tsabedze telephoned him and informed him that the Accused was making enquiries as to his residence. Later police officers from the Pigg's Peak Police Station also phoned him. PW1 went to the police station. This was on 12th October 2011, where a complainant of common assault laid by the Accused was read to him. PW1 admitted that he was guilty of the complaint (exhibit A). He then requested the police officers to foster a meeting between him and the Accused so that he could tender his apologies. Based on the advise of the police that he should go and see the Accused together with some elders in the society, he approached his father one Samson Dlamini (now deceased) and his uncle Chief Mnikwa Dlamini PW2, to accompany him to the Pigg's Peak Magistrates Court to apologize to the Accused. When they got to the Pigg's Peak Magistrates Court Accused refused that PW2 should participate in the dialogue and asked PW1 and his father to come back at 2pm.

[8] PW1 told the Court that himself and his father met with the Accused at 2pm in his chambers at the Pigg's Peak Magistrates Court, where PW1 apologized to the Accused, but the Accused didn't want to hear him and told his father to leave the room because he wanted to fine PW1. After PW1's father left the room, the Accused and PW1 continued talking and that was when he saw a criminal docket with his name written on it on Accused's table.

[9] PW1 told the Court that it was then the Accused told him that he had to pay a fine of E5,000 and if he failed to do so, Accused will take the docket to another Magistrate who might convict him to more than 7 years imprisonment without the option of a fine.

[10] PW1 tried to negotiate the fine downwards. He showed the Accused exhibit B a letter demonstrating that his office is in provisional liquidation, therefore, he did not have the funds. Accused insisted on the fine of E5,000 and asked PW1 to show commitment that he will pay it. PW1 offered to pay a deposit of the sum of E900 which he had in his pocket and which money was meant for his children's school fees. Accused however insisted on a down payment of E1,000. PW1 then went to his father and collected E100 to make up the amount of E1000 which he gave to the Accused, who put it in a Standard Bank card holder and then put the card holder into his pocket in the presence of PW1 and his father.

[11] It was further PW1's evidence that the Accused then put him on terms to pay the balance of E4,000 before the 31st of December 2011 because, he the Accused, was going to be transferred from Pigg's Peak Magistrates court thereafter.

[12] There is also evidence from PWI that after this transaction in Accused's office he never heard of the matter again, until he was telephoned by Sgt Mlangeni of the Pigg's Peaks police station who asked him when he was going to pay the balance of E4,000. It was at this juncture that PW1 reported the matter to the Anti-Corruption Commission for investigation.

[13] Under cross-examination, PW1 admitted that in the newspapers which carried the photograph of the Accused, they reported that he is a Magistrate at the Pigg's Peak Magistrates Court. He agreed that he was therefore not telling the truth when he told the Court in his evidence in chief that he did not know that the Accused was a Magistrate prior to the 24th of September 2011. PW1 insisted that all he joking said to the Accused was *"Hey Leo, I didn't know you come here. What can you say if I can shoot you now?* He

insisted that he never said the Accused had convicted him because the Accused had never convicted him before. He said despite the fact that he was very drunk he was able to remember the words he said to the Accused and the events of that day. He said he remembers Dudu Nkambule reprimanding him because of the manner in which he spoke to the Accused, but that he did not see the importance of this piece of evidence so he did not relay it in his evidence in chief.

[14] PW1 further stated that he cannot remember Mr Da Silva coming to them after the incident and taking the Accused into the house. What he remembers is that the Accused came late after everyone had eaten and he was taken into the main house to have some food. He said it is not true that the Accused did not smile back at him when he made those utterances because his threatening to shoot him caused the Accused some fear as Accused didn't know him.

[15] He agreed that his intention to apologize to the Accused was so that he could withdraw his complaint about what happened, but that he does not know that this is a criminal offence because he was just apologizing.

[16] He said he saw the docket in the accused's office when he was with his father and he knew that it was the docket concerning his case because it had his name written on it. PW1 agreed that he does not know the difference between a docket and a Court record. He does not know if the Court file he saw with the Accused was a Court record and not a docket.

[17] PW1 insisted that prior to 24th September 2011 he had never been convicted by the Accused. He was convicted by Mr Khumalo for a traffic offence in respect of which a fine was imposed and by the time he met the Accused in

his office to apologize, he had paid the traffic fine. He paid the fine the very same day it was imposed before 3pm.

[18] PW1 insisted that after he apologized to the Accused, the Accused then told him to give him E5,000 and if he failed to give him the money he will take the matter to another presiding officer. That he never told the Accused to withdraw the matter with the police, but all he did was to apologize to the Accused for the incident. His intention was not for the Accused to withdraw the charges. His apology had nothing to do with the withdrawal of the charges.

[19] PW1 posited that Accused's instructions to the effect that he told his father to leave the office because he wanted to hear from him what his intentions were, is not correct. He said that his only reason for going to the Accused at 2pm was to be fined because his father had already apologized and he only called his father when he realized that the money he had on him was not enough to pay the deposit.

[20] PW1 further stated that it is not correct that when he was alone with the Accused, the Accused told him that he had done some investigations and discovered that he had been convicted by Magistrate Khumalo for driving under the influence, and that was what prompted his utterance that he will shoot the Accused. He said this whole story is cooked up. That the Accused is trying to link his conviction for the traffic offence with what happened at the party. That he never thought the file he saw on the Accused's table was in connection with the drunk driving offence because that case had nothing to do with the incident of the 24th of September 2011. He said the Accused never told him that the file that was on his table was in connection with the traffic offence. That the Accused never even opened

the file. He said the Accused never talked about the traffic offence or the fine and that the Accused's instructions in that regard is a lie.

[21] It was further PW1's evidence that the Accused never told him that he had also instructed his attorneys to institute civil proceedings for damages in respect of the threats he is alleged to have made to him. When it was put to PW1 that counsel's instructions are that it was when the Accused told PW1 that other than the criminal charge he had also instructed his attorneys to institute civil proceedings for damages, was when PW1 told the Accused to kindly withdraw both the civil and criminal action and PW1 will compensate him for what happened, PW1 denied this. PW1 further testified it is not correct that it was then Accused asked him what will be the amount of compensation since he has listened to him considering that he came with elderly people. He said it is also not correct that he then offered to compensate the Accused with the sum of E5,000.

[22] PW1 insisted that they never talked about the civil matter and Accused's attorneys. He only received summons in this regard, to which he has replied. He insisted that he showed the Accused exhibit B evidence that his company was under provisional liquidation when the Accused fined him and not when he allegedly offered to pay the Accused compensation. He said it is not correct that the Accused asked him to deposit a down payment so that he can see his intent to settle the matter amicably. The down payment was made towards the fine which the Accused asked for. Further, it is not correct that he told the Accused he will pay the balance before the end of December 2011, rather it was the Accused who was busy making dead lines because he said he'll be transferred from Pigg's Peak.

[23] He agreed that when he approached the Accused to apologize, he approached him in his capacity as the complainant in the common assault case. This notwithstanding, he thinks the apology still had something to do with Accused's position as a Magistrate because even the police officers refused to accompany him because of Accused's seniority. That is why he sought help from the elders.

[24] He said Chief Mnikwa Dlamini, PW2, does not know what transpired between him and the Accused in the Accused's office and he did not tell him. He said he does not know if PW2 called Mlangeni and asked him to go and close the criminal case.

[25] He agreed that he paid the fine for the traffic offence on 12th March 2012. He said he told the Court that he paid the fine on the same day it was imposed because on that day, he gave the money to his relative one Themba Dlamini who works at the Treasury to pay, only to later realize that he did not pay it until 12th March 2012. However, at the time he met with the Accused to apologize all he knew was that the fine had been paid.

[26] PW1 further told the Court that when he approached Chief Mnikwa to accompany him to go and apologize to the Accused, he told the chief everything including the fact that criminal charges had been laid against him and he is aware that Chief Mnikwa told the Accused that he had asked him to apologize as is demanded by Swazi law and Custom because he had caused trouble for the family. PW1 also agreed that both the criminal and civil proceedings instituted by the Accused are still pending.

[27] Under re-examination, PW1 stated that he has never been in Court in relation to the incident of 24th September 2011. He said he knew he had

been charged when he went to Pigg's Peak police station and a police officer read out the charges to him but that he has never appeared in Court in that regard. He said prior to receiving the civil summons exhibit C stamped 7th November 2012, he never received a letter of demand from the Accused's attorneys.

[28] PW2 Chief Mnikwa Dlamini, corroborated the evidence of PW1 that indeed himself, PW1 and PW1's father went to the Pigg's Peak Magistrates Court to apologize to the Accused for the insults occasioned to him by PW1. He however stated that he did not know the outcome of the meeting between Accused, PW1 and PW1's father because the Accused refused him audience. He was thus not a part of that meeting.

[29] Under cross-examination, PW2 told the Court that when PW1 and his father came to ask him to accompany them to go and apologize to the Accused he was not aware that a case had been opened at the police station by the Accused because of the misunderstanding and that PW1 had already been to the police station.

[30] PW2 told the Court that when he with PW1 and PW1's father went to see the Accused, they met him in the Court premises and walked with him back to his office where Accused told him to go back home and that he will see PW1 and his father at 2pm. He said they never discussed the nature of their business with the Accused in his presence.

[31] He admitted that himself and PW1's father got to the Magistrates Court earlier than PW1 who came later with a bus but that they waited for him to arrive before the three of them met the Accused.

[32] He said he never discussed this issue with Detective Constable Mlangeni and he never asked Mlangeni to go and obtain a statement from the Accused closing the case. He said he never told Accused that PW1's father had since passed on.

[33] He admitted that Accused approached him at the shopping complex at Pigg's Peak and asked him to come and give evidence on his behalf. He said he also asked Accused how much he fined PW1, this is because according to Swazi law and Custom a person is only fined a cow. There was no re-examination.

[34] PW3 was Sipho Sabelo Dlamini a Court clerk at the Pigg's Peak Magistrates Court. His duties as such include registering new dockets. PW3 told the Court that the normal procedure is that he receives new dockets with two charge sheets from the prosecutors based at the Pigg's Peak Magistrates Court or police officers sent by them.

[35] That upon receipt of a docket he will make an entry of it into the Court register. Then allocate a case number. Thereafter, he will retrieve one charge sheet from the docket put it into the court record folder. Then it will be taken to court as a fresh matter. The docket and the other charge sheet will be returned to the prosecutors.

[36] PW3 told the Court that regarding the docket of assault common in which the Accused was the complainant and PWI the Accused, this laid down procedure was not followed. He said he received the docket with No RCCI 2234/2011 from the Accused personally on the 16th of February 2012. After making an entry of it into the court register exhibit D, he then allocated a Case No which is 70/12. After this, he took the docket which was tendered in Court as exhibit E back to the Accused because he received

it from him and Accused had told him to take it back to him. PW3 told the Court that this was the first time he ever received a docket from a Magistrate for registration.

[37] Under cross-examination PW3 stated that though it is not the law, it is however common practice at the Pigg's Peak Magistrates Court that the clerks receive dockets from prosecutors for registration.

[38] PW3 told the Court that his immediate supervisor at Pigg's Peak is the Accused. He agreed that the Accused gave him the docket to go and register and he did. He said he is aware that the charge in the docket was assault common against PW1. That he was present at the party on 24th September 2011 when the incident occurred and that he is aware that the case has not yet been prosecuted. PW3 further stated that some days after he registered the docket Mlangeni approached him to sue out the summons and he did. He said after the summons were sued out, the Accused never came to Court and there were no returns. He agreed that it would have been impossible for him to sue out summons if he did not register the case. There was no re-examination.

[39] PW4 Nelsiwe Felicia Simelane and PW5 Elsie Matsebula are both prosecutors. They were based at the Pigg's Peak Magistrates Court at the material time in question. They told the Court that when a docket is brought to the Pigg's Peak Magistrates Court it is given to them. They go through the docket to ascertain if there is sufficient evidence to prosecute. If there is, they then give the docket to the clerks of court who register it and allocate a case number and then return the docket to them. If on the other hand they find insufficient evidence to prosecute, they will return the

docket to the Pigg's Peak police station for further investigation. This, they say is the established practice at the Pigg's Peak Magistrates Court.

[40] PW4 and PW5 told the Court that the docket of the common assault charge laid by the Accused against PW1 was never brought to them. PW4 said she has never seen the docket. PW5 for her part told the Court that she first saw the docket with Sgt Mlangeni who had come to ask her to issue summons in the case and by then the docket already had a case number. PW5 said she told Sgt Mlangeni that she does not issue summons and even if she did, she will not issue the summons sought because she did not approve of the case before it was allocated a case number. She directed Sgt Mlangeni to go to the clerks who are seized of that duty.

[41] Under cross-examination, PW4 told the Court that at the Pigg's Peak Magistrates Court, a criminal case cannot be registered and prosecuted without first passing through the prosecutors who read the file to ascertain if there is a case to prosecute. She told the Court that this is the procedure even in the case of traffic offences that go to Court on weekends. That even in those circumstances the prosecutors are called up to first read the file. She said she never witnessed the incident between the Accused and PW1 at the party because upon Accused's arrival they moved away to put some drinks in the car.

[42] It was further PW4's evidence that she does not know if Constable Mlangeni reported to the Accused that the prosecutors at Pigg's Peak Magistrates Court were refusing to prosecute the Accused's common assault case. That she got to know that the common assault case was subsequently enrolled only when the Anti-Corruption Commission officers came to enquire about same.

[43] PW4 also told the Court she is aware that in criminal cases after registration and Accused's appearance in Court, some dockets are taken back for safe keeping by the police but these are only few serious cases like murder and those which need further investigation.

[44] She said that she saw a letter of complaint by the Accused where he stated that he laid a charge against PW1 and it never took off. So, she is aware that the Accused is still pursuing the common assault case. She is however not aware that the Accused has applied to the Court to order the office of the DPP to prosecute or enter a *nolle prosequi.*

[45] For her part PW5 told the Court under cross-examination, that she was not aware the Accused had laid a charge with the police against PW1 even before the docked was brought to them. She said she left the Da Silva homestead on the day of the party before lunch after staying for about an hour. Therefore, it is not correct she was present when the Accused arrived the party, since the Accused arrived after her departure. She insisted that Mlangeni never came to the prosecutors with the docket to be processed prior to its registration, when it was brought to them it had already been registered. Therefore, it is wrong for Mlangeni to tell the Accused that they were refusing to process the docket. She insisted that she was never rude or discourteous to Mlangeni throughout this incident. That she has no reason to be rude to him. PW5 insisted that Mlangeni never approached her to record a statement and she refused.

[46] PW5 further testified that she had a good working relationship with the Accused, however, on the 26th July 2013, she received summons from Mkhwanazi attorneys instructed by the Accused to the effect that she

knocked his car and he sustained damages in the sum of E1,450. PW5 told the Court that she remembers an incident in 2011 when she almost knocked the Accused's car in the Court premises but was alerted by colleagues. That the Accused was present and checked his car and nothing was damaged. Thereafter, the Accused never approached her on the matter or make any demands in that regard until she received the summons. She said the Accused never confronted her because nothing happened to the car.

[47] It was further PW5's evidence that it is not correct that she instructed Mlangeni to take the docket to the DPP, rather she was instructed by the former DPP to ask Mlangeni to take the docket to her, which message she passed on to Mlangeni through an officer at the Pigg's Peak Magistrates Court, but that she does not remember whether it was before or after she recorded a statement with the Anti-Corruption Commission. She however remembers that it was after Mlangeni approached her to issue the summons.

[48] She said if she refuses to prosecute a matter after reading it and there is a problem she will refer the matter to the DPP, because though all prosecutors are *dominis litis* in criminal trials, they cannot however take the decision to issue a *nolle prosequi*. It lies with the DPP.

[49] PW5 further told the Court that she is aware that the common assault case has not been prosecuted and that the Accused wrote a letter of complaint to the police at Pigg's Peak which was copied to the Commissioner of Police and the DPP.

[50] PW5 told the Court that she heard that the Accused has moved an application at the High Court to compel the DPP to either prosecute the case or enter a *nolle prosequi*.

[51] She agreed that she prosecuted PW1 for the traffic offence in respect of which Magistrate Khumalo fined him E1,500 on 7th March 2011. She said a complainant in a criminal charge can approach the prosecutors to enquire about the charge only when the case goes to Court, prior to that, they talk to the investigators. She said that depending on the reason for refusal of registration the Accused was entitled to insist on registration of his matter. However, in this case the docket was already registered before it was brought to the prosecutors.

[52] PW6 was Bheki Dlamini an investigator with the Anti-Corruption Commission. He told the Court that in the course of investigating this matter, he telephoned the Accused who came to the Anti-Corruption Commission together with his attorney on the 19th of March 2012. PW6 told the Court that himself and his colleague, one Sipho Mthethwa, who is also an investigator with the Anti-Corruption Commission, first introduced themselves to the Accused and his attorney as investigators with the Anti-Corruption Commission. Thereafter, PW6 cautioned the Accused in terms of the judges rules. Accused responded by requesting to explain about the said allegation. He asked to be given time to prepare a statement.

[53] On the 21st of March 2012, the Accused approached PW6 at their office and after cautioning Accused in terms of the judges rules, the Accused submitted to PW6 a statement which he Accused, voluntarily made (exhibit H). Nothing turns on the cross-examination of PW6.

[54] In his defence the Accused testified as DW3 and called two other witnesses DW1 and DW2 respectively. DW1, 2259 Detective Constable Sergeant

Mlangeni told the Court that he is attached to the Pigg's Peak police station and that he investigated the common assault case which the Accused reported at the Pigg's Peak Police Station in 2011. DW1 told the Court that after going through the docket of the common assault complaint by the Accused he considered that he needed to get more witness statements to substantiate the three statements already in the file, belonging to the Accused, Dudu Nkambule (DW2) and one Sibongile Tsabedze. To this end, DW1 approached two of the prosecutors at the Pigg's Peak Magistrates Court, namely, Elsie Matsebula PW5 and Felicia Hlophe (PW4), who were all present at the party at the Da Silva homestead, and requested for statements from them. Elsie Matsebula informed him that she had already left the party when the alleged assault occurred. Felicia Hlophe told him that she did not witness any incident when the Accused came to the party. DW1 said that the attitude of these two prosecutors was unusually hostile.

[55] Similarly, Mrs Da Silva who was the hostess at the party also declined to give any statement saying that she also saw nothing and did not even hear that the Accused was assaulted.

[56] DW1 further told the Court that he then approached the Accused and reported to him what had transpired between him and the prosecutors, as well as Mrs Da Silva who had all refused to make any statement about the alleged assault. DW1 told the Court that it was then the Accused informed him that one Sibongile Tsabedze, could help to locate the complainant (PW1). Based on this information, DW1 approached Sibongile Tsabedze who gave him PW1's number which he called but it was not available. Sibongile then phoned PW1's wife and DW1 told Sibongile to tell her that

PW1 was wanted at the Pigg's Peak police station, which information Sibongile relayed.

[57] DW1 told the Court that the following day he phoned PW1 and gave him two hours to report at the Pigg's Peak police station in relation to the complaint. It was further DW1's evidence that on that same day PW1 came to the Pigg's Peak police station. DW1 upon meeting with PW1 introduced himself to PW1 as the officer in charge of investigating the alleged offence. He then cautioned PW1 in accordance with the judges rules.

[58] Thereafter, PW1 opted to say something. He then recorded exhibit A where he stated that he was apologizing for what happened at the party and he intended to go and apologize to the Accused. DW1 told the Court that it was at this juncture he informed PW1 that apologizing is very dangerous as it might elicit an additional charge of defeating the ends of justice leveled against him. DW1 says PW1's reaction to this information was that he and the Accused are related as they share the same grandfather and that no additional charge could be added because his brother is Chief Mnikwa Dlamini. DW1 said he did not allow PW1 to go and apologize. It was thereafter that DW1 released PW1 and gave him the day to go and prepare so that he could go to Court the following day.

[59] DW1 testified that the following day he was not at work but had come to Mbabane to attend a riot strike. That he received a phone call from an elderly person whom he thought was Chief Mnikwa Dlamini and who had introduced himself to DW1 on the phone as an elder brother to PW1. DW1 said the caller told him that they were very grateful because the two brothers, meaning PW1 and the Accused, have been able to reconcile.

DW1 said that based on this information he did not tell PW1 to come to Court the following day as the two had reconciled. He thus left the matter as it was.

[60] Thereafter, DW1 approached the Accused so that he could write a statement closing the case, but the Accused told him that he is not closing the case. Accused told him that the Chief was lying about the reconciliation and playing games with him and that DW1 should wait until the 31st of December 2011. The Accused however, never told him why he should wait until 31st December 2011.

[61] DW1 told the Court that 31st December 2011 came and passed and round about 12th of February 2012, he met the Accused in the Court premises and the Accused asked him to take the matter to Court. Thereafter, DW1 telephoned PW1 to ask when he was going to make himself available because the Accused had asked him to take the matter to Court. In response, PW1 informed DW1 that he had already lodged a complainant against the Accused with the Anti-Corruption Commission in Mbabane and that he had paid the Accused but the Accused wanted more money.

[62] DW1 told the Court that when he called PW1 he was not trying to collect any money from him. He called only to inform him that his matter was to be taken to Court.

[63] DW1 further testified that he immediately left to go and confront the Accused. He asked the Accused why he did not tell him that he had taken money from PW1 who had lodged a complaint against him with the Anti-Corruption Commission.

[64] It was further DW1's evidence that Sibongile then told him that PW1 never paid the traffic fine. DW1 said that he was going to verify this from the clerk of Court but Sibongile stopped him saying that the Accused was going to do the verification. DW1 said that the Accused then went to get the Court record and they verified that indeed PW1 did not pay the traffic fine because the GR number was not reflected in the Court record.

[65] DW1 told the Court that in the wake of this development, he told the Accused that their job was easier because they were going to charge PW1 with both common assault and contempt of Court. He said that he personally prepared the charge for the contempt of Court offence which was referred to another police officer.

[66] It was further DW1's evidence that thereafter officers from the Anti-Corruption Commission came to the Pigg's Peak Police Station and took the common assault docket from the Station Commander. A week after that, DW1 saw the common assault docket in the Accused's possession. Accused told DW1 that a police officer brought the docket to him. It already had a Case Number. The Accused showed him a receipt in respect of the traffic fine and told him that PW1 had since paid the fine therefore they will not pursue that charge.

[67] DW1 further stated that they then phoned the Director of Public Prosecutions (DPP), since she had promised to give them a neutral prosecutor to prosecute the common assault charge, in recognition of the fact that all the prosecutors at the Pigg's Peak Magistrates Court were present at the party where the offence allegedly took place.

[68] It was further DW1's evidence that he then took the docket to Elsie Matsebula and asked her to prepare the summons. But she refused saying that she does not prepare summons, that it is the responsibility of the clerks. He said the summons were eventually issued by Sipho Dlamini.

[69] DW1 told the Court that thereafter he received a call from Elsie Matsebula who told him to take the docket to the DPP. DW1 said that the day he took the docket to the DPP's chambers she was absent because she was being sworn in as a Judge of the High Court. He left the docket with one prosecutor he found in the chambers and the matter never went to Court. DW1 stated that there is no law that says that the registration of a case must start with the prosecutors as contended by Elsie Matsebula. He stated that in the course of his investigation he never heard of any agreement reached between PW1 and Accused that he was only informed of this via the phone. He said that there was never any attempt made by the Accused to withdraw the charge. That infact the Accused told him not to withdraw the charge. He further stated that he recorded a statement with the Anti-Corruption Commission.

[70] Under cross-examination, DW1 admitted that since 2007 when he has been stationed at the Pigg's Peak police station as an investigator, the procedure is that when he has completed an investigation he would take the docket to the prosecutors. The prosecutors then determine whether there is a case to answer. He said that he is aware of the fact that if the prosecutors determine that there is a case to answer, they have the case registered and it is thereafter given a number by the clerk. Thereafter, the summons is drawn and signed and he will then serve the summons on the suspect.

[71] He said in the common assault case involving the Accused he received a docket, he tried to get statements from witnesses but failed. He completed the investigation after which he took the docket to the DPP because all the prosecutors at Pigg's Peak were present at the party. He said he left the docket at the DPP's chambers with a prosecutor whose name he cannot remember. That was in 2012. He stated that he was still in possession of the docket before the 31st of December 2011. He said he did not carry on with the investigation or take the docket to the prosecutors but he waited until after the 31st of December 2011. He said that it is correct to say that he did not proceed on the ordinary course of the matter because the Accused asked him to wait until after the 31st December 2011. He re-iterated that when he saw the Accused in Court on the 12th of February 2012, the Accused told him to take the matter to Court but he did not tell him why he should then take the matter to Court.

[72] DW1 said that when he went to ask the Accused why the Accused did not tell him that he took money from PW1 and that a complaint had been lodged with the Anti-Corruption Commission, Accused told him that the money issue had nothing to do with him. He only wanted his case to be taken to Court. There was no re-examination of DW1.

[73] DW2 was Duduzile Cicelia Nkambule, a clerk as well as an interpreter attached at the Pigg's Peak Magistrates Court where she has worked for 29 years. She told the Court that she attended the party hosted by Mrs Da Silva. She was present at the party with Sibongile Tsabedze, Ncamsile Masuku, Felicia Hlophe, Elsie Matsebula, Sipho Dlamini. That Sibongile attended the party with PW1 Mihla Dlamini who is also known to her.

[74] She said that the Accused came late to the party and found them seated at the verandah. She was seated on a table with Elsie, Sibongile, Ncamsile, Felicia, as well as PW1 who was sitting on the ground.

[75] DW2 stated that when the Accused arrived he came to sit with them at the table. Shortly thereafter, PW1 spoke to the Accused saying:-

> **"Leo you are here what can you say if someone can take a gun and shoot you"**

[76] DW2 further testified that the Accused said nothing to PW1. She said she did not notice PW1's demeanor when he spoke to the Accused . DW2 said she spoke to PW1 and asked him why he was calling the Accused by name because he knew Accused was a Magistrate, PW1 was supposed to at least call him Mr Dlamini. Thereafter, the Da Silva family came and took the Accused into the house. After a while PW1 also disappeared into the house where the Accused was taken to.

[77] DW2 told the Court that Elsie Matsebula was the first to leave the party. DW2 left the party in the late afternoon around 3pm-4pm in the company of Felicia Hlophe and Ncamsile Masuku, but that she cannot remember whether PW1 was still at the party or he left earlier.

[78] DW2 said she had occasion to discuss this matter with the Accused after the party when the Accused asked her if she knew PW1's surname and who he came to the party with. DW 2 said she informed the Accused that PW1 is a Dlamini and that he attended the party in the Company of Sibongile Tsabedze.

[79] It was further DW2's evidence that she recorded a statement at the Pigg's Peak police station. She also told the Court that Mlangeni DW1 came to her and said she must register the case. That she told Mlangeni to start at the office of the prosecutors as per the procedure.

[80] Under cross-examination, DW2 told the Court that PW1 was very drunk at the party and that he sounded drunk when he spoke to the Accused. DW2 was not re-examined.

[81] Accused who testified as DW3 for his part told the Court, that he is a Magistrate based at the Pigg's Peak Magistrates Court and that he is not guilty of the offences charged. That on September 24th 2011 he attended a party at the Da Silva homestead at the Luhlangotsini area. Present also at the party were other staff members of the Pigg's Peak Magistrates Court namely Dudu Nkambule, Ncamsile Masuku, Elsie Matsebula, Sipho Dlamini, Felicia Hlophe and Sibongile Tsabedze.

[82] Accused stated that no sooner did he sit down than a certain gentleman whom he later came to identify as PW1, Mihla Dlamini, attacked him verbally using Siswati language and said to him words that are loosely translated as *"Aw Leo do you also come here. What can you do if I can shoot you now. Do you recall what you did to me in Court. The war between you and me is not over because you sentenced me in a drink and driving case."*

[83] Accused told the Court that he did not respond, but Dudu Nkambule intervened by telling PW1 *"why are you attacking Mr Dlamini because you don't know him.* Accused said that the host Mr Da Silva also intervened and took him to the other side of the house.

[84] It was further Accused's evidence that the words which PW1 said to him were very threatening to him because they were touching on his duty as a judicial officer. Since PW1 said he had convicted him he believed that PW1 was going to assault him. Accused said that with the nature of his job the statement was not a joke as alleged by PW1.

[85] Accused further told the Court that both PW4 and PW5 were present at the party when he arrived and they witnessed the incident.

[86] Accused further testified that after he was taken to the other side of the house, PW1 followed him there and continued with his verbal attacks until Mr Da Silva pulled him out of the house.

[87] Accused told the Court that on the Monday after this incident, he enquired from Dudu and Sibongile about PW1 and that was when he learnt that he is Mihla Dlamini. Accused then called his attorney Mr Sipho Mnisi who advised him to open an assault common case as well as issue civil proceedings against PW1. He then reported the matter at the Pigg's Peak police station and recorded a statement at the police station. Thereafter, Constable Mlangeni (DW1) who was investigating the matter gave him the feedback that Elsie Matsebula and Cecilia Hlophe who witnessed the incident were refusing to record statements. Mlangeni also told him that he had contacted the DPP who was going to send a prosecutor from her chambers to prosecute the matter since the prosecutors at the Pigg's Peak Magistrates Court were ordinarily witnesses in the matter. Accused said he waited for the prosecutor from the DPP's chambers but that nothing materialized.

[88] It was further Accused's evidence that thereafter, on the 24th of November 2011, Chief Mnikwa Dlamini (PW2) who is the Chief of the area, paid him one of his unsolicited visits. PW2 told him that he had come to apologize for his son (PW1) under Swazi Law and Custom as his son had *"committed an offence and his parents are vicariously liable."* PW2 then expressed his apology for the incident. Accused said he told PW2 that he had already made an official complaint with the police and a civil suit was reported to his attorneys. Accused told PW2 to go and tell his son to come and make a personal apology as a sign of his true sincerity of apologizing.

[89] The Accused told the Court that on the same day PW1 and his father came to him and apologized. He told PW1 in the presence of his father that he had already made a complaint with the police and has further instructed his attorneys to take out a civil suit. He also informed them that PW2 was with him earlier that morning to apologize on PW1's behalf. Accused then told PW1 that he has never sentenced him for any offence. That PW1 was sentenced by Senior Magistrate Khumalo for drink and driving offence in Case No. 46/2011.

[90] Accused said that based on the utterance PW1 made to him at the party he had retrieved Case No. 46/2011 from the Clerk of Court and he had the file in front of him when he was addressing PW1. It was further Accused's evidence that he informed PW1 that he had been given a fine of E1,500 which was deferred for one week and it appeared from the record that he did not pay the fine. Accused then asked PW1 whether he served the sentence in default of payment.

[91] Accused told the Court that it was then PW1 jumped up from the seat and pleaded with the Accused to allow him go home and get the receipt which

shows that he had paid. Accused also said that PW1 then made an offer of E5,000 as final settlement of the matter outside Court which he accepted because PW1 was apologizing sincerely. Accused told the Court that PW1 paid a deposit of E1,000 towards settlement of the civil suit and promised to pay the balance of E4,000 before the 31st of December 2011 and also to submit the receipt in proof of payment of the traffic offence fine before that day.

[92] Accused stated that it is not correct that he imposed a fine on PW1. That he told PW1 that he was proceeding both criminally and civilly and that he had already instructed his attorneys to commence civil proceedings but that there was a lawyers strike in Swaziland in those day, so the civil proceedings were delayed.

[93] Accused told the Court that he had no docket in front of him when he spoke to PW1. The only file he had with him related to the traffic offence.

[94] Accused said thereafter Mlangeni came to him to obtain a withdrawal statement after he received a call, but he told Mlangeni that he was not withdrawing the case but was proceeding with the criminal charges and he also told Mlangeni to wait until the 31st of December 2011 in order to ascertain the sincerity of PW1 as to what transpired during his apology. He said he did not tell Mlangeni not to take the docket to the prosecutors or process it before the 31st of December 2011.

[95] Accused admitted that he facilitated the registration of the docket with a Case No from the clerk's office. That he got the docket from the desk officer at the Pigg's Peak police station who delegated someone to give it to him for the said registration. That he wanted the docket to go to the DPP's

chambers as per her request that the case was to be dealt with by prosecutors from that office. That as a judicial officer there is no law precluding him from facilitating the registration of the docket since he is the complainant therein.

[96] Accused said that he then called Mlangeni and handed over to him the docket which already had a Case No. Accused told the Court that thereafter he received a letter from the Judicial Service Commission (JSC), with a statement attached from the Anti-Corruption Commission. He was later called by the Anti-Corruption Commission where he was interrogated about the matter and he recorded a statement.

[97] Accused admitted that Constable Mlangeni asked him why he did not tell him that he received money from PW1 who had lodged a complaint with the Anti-Corruption Commission. Accused told the Court that Constable Mlangeni's evidence to the effect that he told him not to concern himself with the issue of the money is not correct. Accused told the Court that what he told Mlangeni was that the issue of the money was part of the civil claim that he instituted with his lawyers in Case No. 1810/2012 pending at the High Court and that it was not part of the matter he was investigating.

[98] Accused said that PW1 did not pay the balance of E4,000 as he promised. That he then proceeded with the civil suit as per his instructions in 2011. His attorneys issued out a letter of demand round about February or March 2012. That the main reason why the civil suit was processed in 2012 as opposed to 2011 when the instructions were given to his attorneys was because of the lawyers strike in 2011, when things were upside down.

[99] Accused said he discussed the matter of the apology not in his capacity as a Magistrate but as a private person and a complainant in law. He said as a Magistrate he knows of instances where cases are withdrawn by the prosecutor.

[100] Accused told the Court that PW1 did not come to him with the receipt in proof of the traffic fine. That the receipt was retrieved by the police from the revenue and that the payment was made almost a year after the date of the deferred payment. Accused said he was not interviewed by the Anti-Corruption Commission at the Pigg's Peak police station and that when he facilitated the registration of the case, he was not aware that the officers from Anti-Corruption Commission had been to the Pigg's Peak police station, since he was not aware that they were investigating the matter. The docket was at all material times kept by the police.

[101] Under cross-examination, the Accused told the Court that exhibit E is the statement he made in his own handwriting on the 30th of September 2011 shortly after the incident at the Da Silva homestead.

[102] Accused admitted that his allegation that PW1 referred to his capacity as a Magistrate and to being convicted by the Accused do not appear anywhere in exhibit E. Accused said this was an omission but insisted that PW1 did make that statement.

[103] Accused admitted that it is correct as reflected on page 3 of exhibit E that the Da Silva family was not there when the alleged assault took place but says that this is when PW1 first attacked him.

[104] He also admitted that page 3 of exhibit E is correct to the effect that it was only on Monday the 26th of September that he learnt of two things whilst he was interviewing the staff at the Pigg's Peak Magistrates Court, namely, that PW1 had threatened to shoot him and that PW1 said he had sentenced him for drink driving. When it was put to him that the statement he made and the charge he laid a few days after the incidence when the matter was still fresh in his mind do not accord with his evidence, to the effect that PW1 said to him *"you also come here what can you say if I can shoot you here"* the Accused replied that though PW1 said that to him, he omitted to put it in his statement.

[105] It was put to him that the talk of shooting is the substance of the common assault without the shooting there is no common assault. The Accused replied that his case was a common assault case.

[106] It was further put to the Accused that his evidence to the effect that PW1 said to him *"Do you recall what you did to me in Court. The war between you and me is not over because you sentenced me*" is not reflected in the statement. The Accused replied that it is correct that this is not in his statement, but insisted that it was an oversight because PW1 uttered those words to him.

[107] It was put to the Accused that instead of dealing with the apology which PW1, his father and the chief who are both elderly people came to tender to him as allowed by Swazi law and Custom, he said he did not want the chief to be there and asked PW1 and his father to see him at 2pm. The Accused replied that he dealt with the chief alone in the morning and then saw PW1 and his father at 2pm. The Accused said it is correct that when PW1 and his father arrived in his office at 2pm, PW1 apologized, thereafter, he sent

PW1's father out of the office because he wanted to get the sincerity from PW1 on his apology. When Accused was asked whether it would not have been more in keeping with Swazi Custom for PW1's father to be present when he dealt with PW1, the Accused replied that the father was involved later. That since PW1 was the affected person he called his father after getting the explanation from him.

[108] Accused further stated that it is correct that he also dealt with the issue of PW1's failure to pay the traffic fine in the absence of his father. When it was put to the Accused that when he dealt privately with PW1 on his failure to pay the drink driving fine he was dealing with PW1 in his capacity as a judicial officer, a Magistrate, the Accused said that this is not correct because the issue of the traffic offence arose from what PW1 said at the Da Silva homestead. So he was just verifying this issue as a complainant not that he was using his office as a Magistrate. Accused admitted that he told PW1 that his failure to pay the traffic fine amounted to contempt of Court but denied that he then said he will receive E5,000 from PW1. Accused insisted, that PW1 made the offer which he accepted because the civil suit was already with his attorneys.

[109] Accused further stated that though he had already instructed his attorneys to institute civil proceeding, they however had not done so at the time he met with PW1. He said he did not give any written instructions to his attorneys in this regard because their offices were closed due to the strikes. He said he instructed his attorneys to institute civil proceedings claiming the sum of E500,000 for delictual damages. Accused said it is correct that he settled the claim for E500,000 with E5,000. The Accused further stated that he did not see the necessity of advising PW1 who is a lay person, to hire a lawyer before the claim was settled because matters are settled outside Court by

parties without the involvement of lawyers. The Accused also stated that he did not record the settlement in writing though he advised PW1 to go and reduce it in writing and bring it to him but that PW1 never did this. When the Accused was asked why he, as a judicial officer, did not reduce the agreement in writing, he said because he agreed with PW1 that PW1 was going to make the agreement. Accused further stated that after PW2 left in the morning that he talked to his attorneys who said PW1 must reduce the agreement in writing committing himself.

[110] When it was put to him that the issue of his attorneys advising him that PW1 should make an offer in writing is an afterthought which he conceived right in the Court room, the Accused denied this.

[111] He said that it is correct that his attorneys told him that PW1 should make an offer of settlement in writing. He said that his failure to request PW1 to make the offer in writing in his office was an oversight.

[112] When it was put to him that the reason why he excluded PW1's father from the encounter between him and PW1 is because he did not want a witness to what transpired in his office, the Accused replied that this is not a correct statement.

[113] Accused agreed that even though the matter was settled, on 7th November 2012 he still issued out a claim for E500,000 as evidenced by exhibit C.

[114] Accused admitted that the allegation in paragraph 4.1 of exhibit C is not reflected in his statement contained in exhibit E. Accused admitted that the allegation in paragraph 4.2 of exhibit C that PW1 said he will revenge for the alleged conviction is not reflected in his statement.

[115] Accused admitted that the allegations in paragraph 4.3 of exhibit C that PW1 said he will sort him out and shoot him are not reflected in his statement.

[116] Accused admitted that the allegation in paragraph 4.4 of exhibit C to the effect that the statement made by PW1 was understood by people present to mean that the Accused is not a fit and proper person to be a judicial officer, is not contained in his statement.

[117] Accused admitted that the claim in paragraphs 7 and 8 of exhibit C is for defamation as a result of the common assault but is not for common assault. When it was put to the Accused that since the matter was settled for E5,000 how could he still be claiming for E500,000. The Accused replied that the claim of E500,000 was made before the settlement. That the settlement was not fulfilled and is still pending in Court even today and that is why his attorneys issued the summons.

[118] Accused further told the Court that the settlement agreement was never cancelled and is a subject of debate in the civil proceedings pending in the High Court.

[119] It was further Accused's evidence that he did not dispute the evidence to the effect that PW1 was very drunk at the party because he was not in a position upon arrival to say who was drunk and he thought that PW1 was just trying to assault him.

[120] Accused admitted that when Mlangeni came to him to ask for a statement withdrawing the criminal charge on grounds that the matter was settled, he

told Mlangeni to wait until the 31st of December 2011 as the matter was not settled since he was still looking at PW1's sincerity.

[121] Accused said it is not correct that the purpose of waiting until the 31st December was to see if PW1 would pay the balance of E4,000, but because PW1 said he will bring the receipt for the traffic offence before the 31st of December. Accused further stated that he asked Mlangeni to wait until the 31st December because he knew that PW1 had problems at work and PW1 even produced a letter from a certain company he was working for in this regard exhibit B. Accused further stated that he never told Mlangeni to wait until the 31st of December before he could give him an answer as to whether he was withdrawing the charge. He said that there is a confusion that was created by PW2 who told Mlangeni that he was withdrawing the charges when he never told PW2 that. Accused said that all he told Mlangeni was that it appears in the traffic case that there was mischieve regarding payment of the fine. He was suspicious that there was foul play regarding whether PW1 paid the fine as the receipt would not come out. That was why he told Mlangeni to wait so that they could go and do some further investigation . Accused admitted that Mlangeni had nothing to do with the traffic fine.

[122] Accused stated that even assuming PW1 had paid the balance of E4,000 before the 31st of December he would not have still withdrawn the charge which is still pending in Court.

[123] Accused further told the Court that a police officer whom he did not know brought the docket to him but that he did not sign for the docket. When it was put to him that it is a very unusual procedure for the complainant to be

handed the criminal docket, the Accused replied that it is usual for the complainant to have access to the docket.

[124] The Accused admitted that quite apart from the two statements he made to the police at Pigg's Peak police station and to the Anti-Corruption Commission respectively, he made a third statement to the Pigg's Peak police station and to the prosecutors at the Pigg's Peak Magistrates Court. That is exhibit F. Accused said that exhibit F was attached to a complaint that he directed to the Commissioner of Police through the Station Commander at Pigg's Peak police station. He said that he also requested that the police should give a copy of the statement to the prosecutors at the Pigg's Peak Magistrates Court.

[125] Accused told the Court it is correct that paragraph 14 of exhibit F is a complaint by him against Constable Mlangeni for directing PW1 and his father to come and see him to apologize.

[126] Accused said it is not correct that by welcoming the introduction of PW1 and his father and entering an agreement with PW1 he participated in defeating the ends of justice he alleged in paragraph 16 of exhibit F.

[127] When it was further put to the Accused that his allegation in paragraph 17 of exhibit F to the effect that the conduct of the investigating officer, the chief, PW1 and PW1's father amounts to defeating the ends of justice contradicts the foregoing answer, the Accused replied that what he meant to say in paragraph 17 was defeating the ends of justice on the part of PW1 alone.

[128] Accused said it is correct that paragraphs 18-20 of exhibit F show that he made the complaint as a complainant and judicial officer.

[129] Accused further stated that in terms of exhibit F he brought a charge of obstruction and defeating the ends of justice against PW2 because he made false statements via a telephone call to Mlangeni alleging that Accused was withdrawing the case.

[130] When asked why he wanted to bring a charge of defeating the course of justice against Mlangeni as per count 4 of exhibit F, the Accused replied that he meant to say in the paragraph that the charge was against PW2 and not Mlangeni who was going to testify for him.

[131] The Accused admitted that there is no reference to any telephone call which PW2 allegedly made to Mlangeni on exhibit F (statement of 20th February 2013). Accused said that the charge against PW1's father as appears in count 4 of exhibit F is a mistake.

[132] Accused further stated that the charge against PW1 for obstructing the ends of justice, is premised on the fact that the telephone call between PW2 and Mlangeni engendered Mlangeni to request a withdrawal statement from him to the benefit of PW1 and this was completely wrong because he never talked to PW2 about withdrawing the charge.

[133] Accused re-iterated that he instructed his attorneys to claim for the balance of E4,000 on the settlement agreement for the delictual claim and that this is subject to the civil proceedings pending at the High Court .

[134] When it was put to Accused that his claim for E500,000 has been brought to divert attention from the bribe of E5,000 which he elicited from PW1, the Accused replied that this is not correct.

[135] Accused admitted that in law once a matter is settled, it remains settled and all he had to do was to claim in terms of the settlement agreement. He however told the Court that his claim for E500,000 was precipitated by PW1's failure to fulfill the initial offer he made.

[136] Under re-examination, the Accused told the Court that he made exhibit F as a complainant when he was already suspended from his duties as a judicial officer.

[137] He said he claimed the sums of E4,000 and E500,000 separately but that summons were not issued in respect of the E4,000 because his attorneys said it will be debated in the claim for E500,000.

[138] At the close of the defence, I ordered written submissions. The Crown's submission which was prepared by Advocate N. Kades SC assisted by learned Crown Counsel Mr A. Matsenjwa, was filed on the 26th of September 2013 as ordered. Similarly, the Accused's written submissions prepared by learned defence Counsel, Mr S. Bhembe, was filed on the 27th of September 2013 as ordered. The parties appeared before Court on the 30th of September 2013 and adopted their respective briefs. I thank both sides for the resource that went into their briefs which I have very carefully considered and will allude to as the need arises in the course of this judgment.

[139] Now, the *onus probandi* in a criminal trial rests on the Crown to prove its case beyond reasonable doubt. Speaking about this standard of proof in the Botswana Case of **Tetuka Tetuka v The State, Criminal Appeal No. CLCGB-039-12, Ramodibedi JA (McNally and Legwaila JJA** concurring) said the following:-

> **"[23] It remains for me to stress that the law was authoritatively articulated by Watermeyer AJA in R V DIFFORD 1937 AD 370 at 373 in the following terms:-**
>
> > **'It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal'**
>
> **[24] Similarly, in S V SHACKELL 2001 (4) SA 1 (SCA) at p12 para [30] the Supreme Court of Appeal of South Africa expressed itself in the following terms:-**
>
> > **'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true.' "**

[140] Similarly, in para 7.3.2 of the Accused's written submissions Mr Bhembe urged with approval, the case of **S V Van Der Meyden 199 (1) SACR 447**

at 449, where **Nuget J** elucidated this selfsame standard of proof in the following apposite terms:

> "**The onus of proof in a criminal case is discharged by the state if the evidence established the guilt of the accused beyond a reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (See for example R V Difford 1937 AD 370 at 373 and 383). These are no separate and independent test, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the quilt of the accused beyond reasonable doubt, which will be so only if there is, at the same time, no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseperable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too, does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true".**

[141] The question arising at this juncture is, has the Crown proved its case beyond reasonable doubt in light of the totality of the evidence which I have hereinbefore very carefully canvassed in extenso.

[142] The charges and the elements antecedent thereto bear revisiting at this stage for a proper determination of the above poser. In count one the Accused is charged with contravening Section 33(1)(b) read with Section 33(2)(b)(i) of the Prevention of Corruption Act (the Act). The allegation is that on the 24th of November 2011 the Accused being a judicial officer, did unlawfully demand and accept an advantage of E5,000 from Mihla Dlamini for his own benefit and advantage which induced him not to proceed with laying criminal charge against Mihla Dlamini, an act which amounts to violation

of duty or a set of rules and/or abuse of position of authority and thus did contravene the said Act.

[143] The essential ingredients of the alleged offence are detailed in Sections 33(1)(b) and 33(2)(b)(i) of the Act and are as follows:-

> **"(1) Subject to the provisions of subsection (2), a person who directly or indirectly.**
>
> **(b) being a judicial officer, demands or accepts or agrees or offers to accept any advantage from any other person, whether for the benefit of that judicial officer or another person, commits the offence of corrupt activities relating to judicial officers**
>
> **(2) An act under subsection (1) to constitute an offence must induce the judicial officer to act or influence another person so to act in a manner:-**
>
> **(b) that amounts to**
>
> **(i) the abuse of a position of authority."**

[144] Under the alternative count, the Accused is charged with contravening Section 42(1)(a) and (i) of the Act. It is alleged that on 24th November 2011 the Accused did unlawfully demand and accept an advantage of E5,000 from Mihla Dlamini, an act which induced the said Accused not to continue with laying charges against Mihla Dlamini thus amounting to an abuse of authority and violation of a legal duty or a set of rules, and contravened the said Act.

[145] The essential elements of this offence are detailed in Sections 42(1)(a) and 42(2)(b)(i) of the Act as follows:-

"(1) Subject to the provisions of subsection (2), a person who directly or indirectly

(a) Demands or accepts or agrees or offers to accept an advantage whether for the benefit of that person or of another person; or,

(2) for an offence to be committed under subsection (1), the act complained of must cause that person or influence another person to act in a manner

(b) that amounts to

(i) the abuse of a position of authority."

[146] Let me now consider the totality of the evidence led to ascertain if the essential elements of the offences with which the Accused is charged in count one has been proved by the Crown beyond reasonable doubt.

[147] The following are the common cause facts from the totality of the evidence tendered.

1. It is common cause that the Accused is a judicial officer holding the position of Magistrate and stationed at the Pigg's Peak Magistrates Court.
2. It is common cause that on the 24th of September 2011 the Accused attended a party at the Da Silva homestead at Luhlangotsini, where he met PWI who utterred certain words to him. The exact words uttered are vexed *in casu.*
3. It is common cause that the Accused lodged a complaint of common assault against PWI at the Pigg's Peak police station in consequence of PWI's utterances.
4. It is common cause that as a result of the complaint lodged by the Accused, PWI in the company of PW1's father and PW2, sought

audience with the Accused to apologize to him for the alleged insult occasioned to him by PW1 in terms of Swazi Law and Custom.

5. It is common cause that the Accused requested to see only PW1 and his father at 2pm.

6. It is common cause that the outcome of the meeting at 2pm, and as admitted by the Accused, was that the Accused received the sum of E1000 from PW1 leaving the balance of E4,000 which PW1 was to pay before the 31st of December 2011. The circumstances surrounding the total amount of E5,000 out of which PW1 paid a deposit of E1,000 leaving the balance of E4,000 are in dispute. I will come to this issue anon.

7. It is proved that the investigating police officer Mlangeni DW1, approached the Accused to obtain a withdrawal statement on the charge of common assault on the basis that the matter had been amicably settled between the parties, but the Accused told Mlangeni to wait until the 31st of December 2011.

8. Also common cause is the fact that PW1 failed to pay the outstanding balance of E4,000 to the Accused on or before the 31st of December 2011.

9. It is common cause that PW1 subsequently reported this matter to the Anti-Corruption Commission which elicited investigations thereon.

10. It is common cause that on the 12th of February 2012, the Accused ordered Mlangeni to take the common assault matter against PW1 to court.

11. It is also common cause that on the 16th of February 2012, PW3 Sipho Dlamini, a clerk of court at the Pigg's Peak Magistrates Court received the docket of the common assault charge from the Accused who ordered him to register it. PW3 duly registered the docket, gave

it Case Number 70/2012 and thereafter returned the docket to the Accused as he had instructed.

12. Also common cause is the fact that Mlangeni subsequently approached PW3 to issue out summons in the common assault case, which PW3 did.

13. Also common cause is the fact that up till date the common assault charge is yet to be prosecuted.

[148] It is established beyond reasonable doubt that the issue of payment of E5,000 by PW1 to the Accused did arise in this transaction. The Accused it will be re-called admitted receiving E1,000 out of this sum both in his evidence and in exhibit H, and told the Court that PW1 promised to pay the balance of E4,000 before the 31st of December 2011. The point of divergence in the case for the Crown and that of the Accused, is the purpose of payment of the said sum of E5,000 by PW1 to the Accused.

[149] PW1 told the Court that the E5,000 was the fine which the Accused imposed on him in settlement of the common assault charge which the Accused instituted based on his utterance to the Accused at the Da Silva homestead. PW1 testified that the said utterance constituted of nothing more than the following words he made in jest whilst he was very drunk: to wit *"Hey Leo I didn't know you come here. What can you say if I can shoot you now?"*

[150] After a careful consideration of the totality of the evidence led, I am inclined to believe PW1's evidence. I found him extremely convincing when he testified and his evidence remained unshaken under cross-examination. In coming to this conclusion, I have given due regard to the fact that PW1 admitted that his evidence under cross-examination as to

whether or not prior to the 24th of September 2011 he knew that the Accused was a Magistrate and as to whether or not he went together with his father and PW2 to see the Accused to tender his apology, conflicted with his evidence in chief. Therefore, his evidence in chief was untrue in this respect.

[151] I am however disclined to agree with Mr Bhembe that this state of affairs should disqualify the other pieces of material, consistent, credible and reliable evidence led by PW1 in support of the Crown's case. I say this in appreciation of the cardinal rule which is to the effect, that a Court is quite entitled while rejecting one position of the sworn testimony of a witness, to accept another portion. See **R V Khumalo 1916 AD 480 at 484**. This to my mind is, so more so, in the peculiar circumstances of this case where the inconsistencies relate to issues which are not steeped in the material elements of the offences alleged and thus capable of turning the result of the case one way or the other. The learning is that, for an inconsistency to be fatal, such inconsistency must be of a material nature capable of affecting the end result of the entire case. This is not such a case. See **The State V Goganneskgosi (1980) B.C.R. 133 (HC) at 140 B-C, Rex V Nhlonipho Mpendulo Sithole Criminal Case No. 370/2011.**

[152] I am fortified in the aforegoing deductions by the fact that whether or not the Accused is a Magistrate is not in dispute. It is an established fact as admitted by the Accused himself. It is also established beyond any peradventure, that PW1, his father and PW2 went to see the Accused to apologize to him at some point during the course of this transaction and that PW2 did not participated in the subsequent deliberations between the Accused, PW1 and his father. It is also established that PW1's father did not participate in the transaction between the Accused and PW1 which

culminated in payment of the sum of E5,000. I think this is the relevant portion of PW1's evidence which is also corroborated by the Accused.

[153] Then there is the posture of PW1 that the E5,000 was the fine which the Accused imposed on him for the common assault charge and that the Accused ordered him to pay the balance of E4,000 out of this amount before the 31st of December 2011. PW1 clung tenaciously to this evidence. He was in no wise shaken in this stanze all through this trial.

[154] Furthermore, PW1's evidence as to the utterance he made to the Accused at the party found corroboration in the evidence of DW2 Duduzile Cicelia Nkambule, who told the Court that all that PW1 said to the Accused were the following words:-

> **"Leo you are here what can you say if someone can take a gun and shoot you"**

[155] This utterance is in essence the same urged by PW1 in his evidence which I recaptured above. The minor variance in the context of the words said can be excused on grounds of passage of time between when the incident occurred and when the witnesses testified, therefore the witnesses cannot be expected to recall precisely all the minute details of the incident. As the Court observed in **State V Goganneskgosi (supra).**

> **"For an inconsistency to be material, such inconsistency must in my view, be of a material nature, capable of turning the result of the case one way or the other. For there could hardly be any witness of truth if the principles were otherwise, since in nine cases out of ten, witnesses are called upon to give evidence upon matters about which they have witnessed or given statements months or even years before. In such cases, the possibility of minor slips,**

which may be in conflict with their previous statements cannot be ruled out. But that should not necessarily make them untruthful."

[156] In light of the totality of the aforegoing, I adjudge PW1 a credible witness and accept his evidence.

[157] Now, the Accused is a different kettle of fish. I say this because there are several features of his testimony which render his evidence not only inconsistent in several material respects but downright untruthful.

[158] The Accused told the Court that PW1 insulted him at the Da Silva homestead by saying to him

"Aw Leo do you also come here. What can you do if I can shoot you now. Do you recall what you did to me in the Court. The war between you and me is not over because you sentenced me in a drink and driving case".

[159] The Accused told the Court that in the wake of this utterance he consulted with his attorneys who advised him to issue civil processes and also lodge a common assault complaint against PW1. Based on this the Accused alleges that he instructed his attorneys to institute a civil suit, whilst he lodged a common assault complaint against PW1 at the Pigg's Peak police station. Accused further told the Court that the E5,000 was tendered to him by PW1 in a bid to amicably settle the civil claim. That he told Mlangeni to wait until the 31st of December 2011 to gauge PW1's sincerely in this regard, as well as with respect to the promise PW1 made to produce evidence of payment of the traffic fine which was imposed on him on the 7th of March 2011.

[160] On the strength of the totality of the evidence tendered *in casu*, I find that the aforegoing testimony of the Accused must collapse like a house of cards for being fraught with inconsistences, contradictions and untruths. I now proceed to demonstrate why I say so.

[161] Firstly, the following inconsistencies and contradictions exist with respect to the utterance which Accused alleges that PW1 made to him at the party.

1. Accused admitted under cross-examination that he made no mention that PW1 alleged that he will shoot him or that the war between them was not over because Accused convicted him in a drink and driving case, in his statement as contained in exhibit E which he made on the 30th of September 2011 precisely 6 days after the incident, when the events were still fresh in his memory. All he alleged in exhibit E is that PW1 said to him at the party the following words in Siswati, *"Ngulo Leo lo!! ufunani la!! kantsi naye uyeta la!!*, which loosely translated into English is *"This is you Leo. What do you want here. You also come here?"*
2. The Accused also admitted under cross-examination that he made no mention of this portion of the alleged utterance in his statement as contained in exhibit F which encapsulates the statement which the Accused made in exhibit E on the 30th of September 2011, as well as a later statement made on the 20th of February 2013.
3. The reason why this alleged portion of the utterance was not included in exhibits E and F soon became apparent. This is borne out of the fact that the Accused never heard PW1 say those words at the party. Rather, those words are hearsay evidence which he allegedly gleaned from DW2 and Sibongile Tsabedze. I say this because the Accused by his own showing admitted, under cross-examination, that on 26th of September 2011, that is 2 days after

PW1 allegedly made these utterances, and whilst interrogating the Pigg's Peak Magistrates Court staff who had attended the party, he learnt of two things namely:

(a) That PW1 also threatened to shoot him and

(b) That PW1 attacked him on that day because Accused had sentenced him for a drink driving case.

[162] This admission is also established by the Accused's statement of the 30th of September 2011 as contained in exhibits E and F respectively, in the following terms:-

> **"On Monday 26th September 2011 I confronted Dudu Nkambule about this man and I learnt that he had threatened to shoot me. -------Further investigations from LaTsabedze are that this man attacked me on this fateful day because I had sentenced him at the Pigg's Peak Magistrate Court for drunken driving".**

[163] Even though the Accused alleged under cross-examination that his omission to include this alleged portion of PW1's utterances in his statements contained in exhibits E and F was an oversight, this line of argument in my view cannot avail him.

[164] I say this because, as rightly contended by learned Crown counsel in paragraph 10 of their written submissions, having regards to Accused's detailed exposition of the law relating to common assault which is contained in his statement of the 30th of September 2011, exhibit E, it is unlikely that the Accused would a few days after the event have omitted to include therein the allegation that PW1 threatened to shoot him because he had convicted him, which is the gravamen of the assault common charge. In any case, the Accused admitted under cross-examination as well as in

exhibits E and F, as I have hereinbefore demonstrated ante, that he only gleaned this information on the 26th of September 2011 after the incident. It appears to me therefore that Accused was being deliberately untruthful when he stated in his evidence in Court and in exhibit H, that PW1 uttered these additional words on the day of the incident. By so doing, the Accused was obviously striving to perfect his defence by changing his evidence.

[165] I notice that in the Accused's written submissions, Mr Bhembe sought to create a storm over the fact that PW1's testimony about saying that he will shoot the Accused at least corroborated the Accused's testimony in some material respect. This is however not the point in issue for the purposes of this exercise. I say this because it is immaterial that PW1 also confirmed the portion of his utterance about shooting the Accused. The paramount factor is that Accused did not hear PW1 utter those words at the party, he gleaned it on the 26th of September 2011 from Dudu and Sibongile. Therefore, he did not include it in exhibits E and F as part of the utterances that PW1 made to him. He was therefore untruthful when he urged it as such in his evidence in chief.

[166] Another angle to this issue, is that this state of affairs clearly renders the extra-judicial statement made by the Accused as contained in exhibits E and F respectively, contradictory to his evidence in Court, as to how the alleged additional utterance got to the Accused. Whether he heard it directly from PW1 on the day of the incident or he was informed about it thereafter. The law on this subject matter is trite. The Court cannot pick and chose which version of the Accused's evidence in this respect to rely on and which not to rely on. Therefore, the conflict renders both versions unreliable and an afterthought. I thus reject the evidence of the Accused on this issue and uphold the evidence tendered by PW1.

[167] I now turn to the allegation by the Accused that the E5,000 was tendered to him by PW1 as settlement for the civil process in the sum of E500,000 which he had instructed his attorneys to institute against PW1 as a result of the alleged utterances. I must say that I agree with Advocate Kades S C when he put it to the Accused under cross-examination, that the introduction of the civil claim was a calculated attempt by the Accused to divert attention from the fact that he had demanded a bribe of E5,000 from PW1 in respect of his claim of common assault. I say this because on the evidence led, the issue of the civil claim is improbable, ladened with inconsistencies and contradictions which show it up for what it really is *"a fabrication"*

[168] In the first place the Accused told the Court that his attorneys advised him to institute a civil claim along side the common assault claim in the wake of the Accused's alleged utterances. He told the Court that when PW2 came to see him on the morning of the 24th of November 2011, PW2 was alone. Accused said that he told PW2 to go and ask PW1 to come and apologize to him and that he also informed PW2 that he had taken out both criminal and civil processes against PW1. However, this line of defence was never put to PW2 under cross-examination. It was never put to him that he went to see the Accused alone on the said day, even though PW2 testified that when he saw the Accused he was in the company of PW1 and his father. It was also not put to PW2 that the Accused informed him that he had taken out a civil claim against PW1. This is inspite of the fact that PW2 testified under cross-examination, that when the Accused met him at the Pigg's Peak shopping complex and asked him to come and testify on his behalf, he asked Accused how much he fined PW1. This, PW2 said is because according to Swazi Law and Custom a person is only fined a cow. This

piece of evidence was not disputed by the defence. PW2's cross-examination only bordered on whether he was informed by PW1 that the Accused had laid a common assault complaint against him. It would have been a more prudent course for the defence to put this line of their defence to PW2, in view of the fact that PW1 vehemently contests it. Thus, to my mind, the failure to put this crucial aspect of the Accused's defence to PW2 under cross-examination, only leaves one inference to be drawn, which is that the Accused changed his story in the intervening period by his introduction of the allegation that he informed PW2 about the civil suit.

[169] This is the position of our law as elucidated in **R V Johannes Mfunwa Dlamini Criminal Case No. 189/1999**, in the following terms:-

> **"In R V DOMINIC MNGOMEZULU AND OTHERS CRIMINAL CASE NO. 94/90 AND S V P 1974 (1) SA 581 at 582 (Rhodesia AD), the need for the defence to put the accused's story to <u>all crown witnesses</u> was emphasized. I will lay blame squarely on the shoulders of the defence counsel. I can find no reason why these crucial issues were never put to the crown witness and as such, I will infer that there has been a change in the accused's story relating to these issues."** (emphasis mine)

[170] In the case of **Dominic Mngomezulu And Others (supra) page 17, Hannah CJ** made the following condign remarks:-

> **"It is I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of the prosecution witness testimony may place the defence at risk of adverse aspects being made and adversed being drawn. If he does not challenge a particular item of evidence then an adverse may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused, and if the accused subsequently goes to the witness box and denies the evidence in question the court may infer that he has changed his story in their intervening period of time. It is also important that counsel should put the**

defence case accurately. If he does not and accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused's story". See Rex v Dumisani Fakudze Criminal Case No. 47/97."

[171] More to the above are the inconsistencies and contradictions that reared their ugly heads in the evidence of Accused and his star witness Mlangeni (DW1), in many aspects of the defence, defeating the credibility of both witnesses and rendering the defence urged unreliable. The first issue I wish to visit is what was the exact response Mlangeni got from the Accused when he confronted him upon receiving the information that Accused had taken money from PW1? Mlangeni testified under cross-examination, that the Accused told him that he should not concern himself with the issue of the money. All he wanted was that Mlangeni should proceed with his case.

[172] Under cross-examination, the Accused for his part told the Court that Constable Mlangeni's evidence to the effect that he told him not to concern himself with the issue of the money, is not correct. Accused stated that what he told Mlangeni was that the issue of the money was part of the civil claim that he instituted with his lawyers in Case No. 1870/2012 pending at the High Court and that it was not part of the matter Mlangeni was investigating.

[173] This piece of evidence clearly contradicts Mlangeni's evidence which made no mention whatsoever of the civil suit. This is more so as learned defence counsel failed to elicit any manner of clarification of Mlangeni's evidence on this issue by way of re-examination. The defence which the Accused sought to set up in this regard is thus conflicted, and rendered unreliable in the circumstances. I reject it.

[174] I also find support in my conclusion above by the fact that the Accused alleged that in the wake of this incident he instructed his attorneys to institute a civil claim. However, the much vaunted civil proceedings was filed on the 7th of November 2012 judging by the Registrar's stamp appearing thereon. This was more than a year after the incident of the 24th of September 2011 and in the wake of the complaint which PW1 lodged against the Accused with the Anti-Corruption Commission.

[175] I am unable to subscribe to the Accused's proposition that his attorneys' delay in instituting the civil claim was borne out of the lawyers strikes which occurred in 2011. This is clearly an argument for another day. I take judicial notice of the fact that the lawyers strikes came to an end around November 2011, just one month after the incident of the alleged common assault which occurred on 24th of September 2011. It is thus clearly fanciful for the Accused to propose the lawyers strikes as a delaying factor in instituting the civil claim which was filed on 7th of November 2012, about one year after the strikes came to a halt.

[176] Also worthy of mention is the fact, that even though the Accused alleged that his attorneys issued a letter of demand to PW1 regarding the civil claim round about February or March 2011, PW1 vociferously denies this and no such document was ever tendered in these proceedings.

[177] I now zero in on the fact that the civil claim itself which was tendered in these proceedings as exhibit C, lends no credence to the Accused's version of these events, rather rendering it improbable and untrue. I say this because the allegations contained in paragraphs 4.1 to 4.4 of exhibit C, on which the claim of E500,000 for defamation is based, contradict Accused's

statement in exhibit E made in the wake of the incident of 24th of September 2011. The Accused admitted under cross-examination that the allegations in paragraphs 4.1 to 4.3 of exhibit C in which he re-iterated in substance his evidence that on the 24th of September 2011, PW1 told him he will shoot him and also war with him because he had convicted him for a drink driving case, is not reflected in exhibit E. Accused also admitted that the allegation in paragraph 4.4 of exhibit C to the effect that the words uttered by PW1 were understood to suggest that he unfairly treated PW1 and / or acted in a manner unbecoming of a judicial officer, is not also reflected in his statement contained in exhibit E.

[178] It will be re-called that I have hereinbefore in para [166] above, rejected the Accused's version of this alleged portion of the utterance made by PW1 on the 24th of September 2011, as unreliable, an afterthought and untruthful. It appears to me that exhibit C which is predicated on this alleged portion of PW1's utterance is also an afterthought which is borne out of the Accused's obvious and apparent effort to perfect his case. This, I find as a fact.

[179] The totality of the aforegoing state of affairs foreshadow the Crown's contention, that the issue of the civil claim of E500,000 is a contraption conceived in this matter by the Accused to divert attention from the bribe of E5,000 which he demanded from PW1. As observed by the Crown in para 19.2(a) and (b) of its written submissions:

> **"a) It is Accused's evidence that he settled the delictual side of his claim with the complainant in his office on 24th November 2011 in amount of E5,000 and that he received E1000 on account. He stated quite clearly that he never cancelled this settlement. The Accused being a lawyer he (sic) would know that the settlement once having been concluded in the amount of E5,000, it was no longer open to him to**

claim E500,000 as he has done. It was put to him and it is submitted that the much inflated claim of E500,000 is meant to create a diversion from the true issues in the matter which is the "fine" solicited by the Accused. His explanation that the E5,000 will be dealt with during the trial on the summons is of course untenable and he as a lawyer clearly knows so.

b) It is submitted that Accused, as he says, having had in mind a delictual damages claim of E500,000 would hardly settle for an amount of E5,000. Moreover, the so called settlement is arrived at in the absence of Accused's father who was excluded from the settlement talks as Accused wished to exclude any witness from such event"

[180] I respectfully align myself with the aforegoing exposition. I have no wish to depart from it. Consequently, I reject the Accused's version and accept PW1's version that the issue of the civil claim or Accused's attorneys never arose when he went to tender his apology to the Accused. Rather, the Accused imposed a fine of E5,000 on PW1 for the assault common charge. This, I find to be fact.

[181] This also lends force to the contention of the Crown that it was because Accused wanted to impose a fine on PW1 and did not want any witnesses to the transaction, that he sent PW1's father out of his office before the event. I agree entirely with this posture. There is no other reasonable explanation for this course adopted by the Accused in sending both PW1's father and PW2 away and dealing with PW1 alone, other than that he wanted a conducive forum to orchestrate his sinister enterprise. I say this in consideration of the fact, and as admitted by the Accused, that the whole flavor of the apology which PW1 embarked upon, was an apology in terms of Swazi Law and Custom. Such an apology, I take judicial notice of, is usually steeped in the atmosphere of participation of respectable elders in

the community, such as PW1's father and PW2. By dealing with PW1 alone in this crucial aspect of the apology, the Accused defeated the whole purpose in aid of his crafty stratagem. I find this to be a fact.

[182] Furthermore, are the inconsistencies and contradictions in the evidence of the Accused and that of Mlangeni on just why the Accused asked Mlangeni to wait until the 31st of December 2011, when Mlangeni approached him for a statement withdrawing the assault common case. This also buttresses the falsity of the Accused's version as to how the sum of E5,000 was introduced in this saga.

[183] I say this because Mlangeni testified that though the Accused told him to wait until the 31st of December 2011, the Accused however did not tell him why he should wait until that date. However, under cross-examination, Mlangeni admitted that it was the instruction that Accused gave him to wait until the 31st of December 2011 that caused him not to proceed in the ordinary cause of the matter until after that day.

[184] On the other hand the Accused's testimony in this regard was a startling revelation. I say this because he gave two versions of what he told Mlangeni on this occasion, clearly contradicting Mlangeni's testimony.

[185] Firstly, in his evidence in chief the Accused posited that he told Mlangeni to wait until the 31st of December 2011 in order to ascertain the sincerity of PW1 as to what transpired during his apology. This is clearly an evasive testimony which renders it unreliable. I thus reject it.

[186] Further down during his cross-examination, the Accused summersaulted and re-emerged with yet another proposition, which is that, all he told Mlangeni was that it appears in the traffic case that there was mischieve regarding payment of the fine. He was suspicious that there was foul play regarding whether PW1 paid the fine as the receipt would not come out. That was why he told Mlangeni to wait until the 31st of December 2011 so that they could go and do some further investigation. Accused however also admitted that Mlangeni had nothing to do with the traffic fine. This piece of evidence is indisputably in conflict with Mlangeni's version.

[187] My difficulty with this evidence is further compounded by the fact that according to Mlangeni's evidence, the first time the issue of the traffic fine came to the fore, was after the 12th of February 2012 when the Accused told him to take the assault common case to Court. Mlangeni testified that after confronting the Accused as to why he never told him that he took money from PW1 and also that a complaint was lodged against him with the Anti-Corruption Commission, was when Sibongile informed him that PW1 never paid the traffic fine. According to Mlangeni he was going to verify this from the clerk of court but Sibongile stopped him saying that the Accused was going to do the verification. Accused indeed collected the file from the clerk of court. They did the verification and discovered that indeed PW1 never paid the traffic fine. Mlangeni told the Court that it was then they resolved to charge PW1 with both common assault and contempt of Court, which charge Mlangeni personally prepared. Implicit from Mlangeni's evidence is that it was at this stage that the issue of the traffic offence fine arose and the contempt of Court charge was conceived, not at the stage when PW1 went to see the Accused, as the Accused alleged in his evidence. The Accused had contended in his evidence under cross-examination, that it was when he asked PW1 whether he served the sentence in default of the

traffic fine that PW1 jumped up and tendered the sum of E5,000 to him as settlement for the civil claim. This again shows up the Accused's version as to just how the sum of E5,000 was introduced into these transactions as untrue.

[188] This is more so as interestingly, the issue of the E5,000 being tendered upon Accused informing PW1 about the traffic fine was not the line of defence which Mr Bhembe put to PW1 when he was cross-examined. The line of defence put to PW1 was that he tendered the E5,000 when the Accused informed him of the civil claim. For the avoidance of doubts, I hereby recite the relevant portion of PW1's cross-examination as follows:-

"Q: I am instructed that Accused told you that other than the criminal charge he had also instructed his attorneys to institute civil proceedings for damages in respect of the threats you made to him.

A: He never told me that

Q: I am instructed that it was then you asked him to kindly withdraw both the criminal and civil actions and you'll try to compensate him for what happened

A: I never said that

Q: I am instructed that the Accused had informed you that he had already opened a file with his attorneys to institute those civil proceedings

A: He never told me that I only received summons and I replied to them

Q: Accused asked you what will be your compensation to him because he has been able to listen to you because you came with elderly people your uncle and father and he had forgiven you

A: He never said that. He only fined me

Q: I am instructed that you said to the Accused "I will compensate you with the sum of E5,000" not that it came from the Accused as you told the court

A: He is not telling the truth

Q: When the Accused asked you when you will give him the balance of E4,000 you said you don't know since you just lost your employment but you promised to pay him the balance before the end of December

A: That is not the truth. It was the Accused who was busy making deadlines in that he'll soon be transferred from Pigg's Peak"

[189] This is the extent of the entire cross-examination of PW1 on how the issue of the E5,000 arose. There is no where it was suggested to PW1 that he tendered the E5,000 to the Accused in the face of his default of payment of the traffic fine. It is inexorably apparent that the Accused failed to put this line of defence to PW1 under cross-examination. This state of affairs further steeps the defence urged in a quagmire of contradictions and inconsistencies, which entitle me to infer that the Accused consistently changed his story in a bid to perfect his case. This shows him up as an untruthful witness. I thus reject his evidence

[190] I also reject the Accused's version that he told Mlangeni to wait until the 31st of December 2011 because of the traffic fine and accept the Crown's case that the only reason why the Accused instructed Mlangeni to wait until the 31st of December 2011, was to actualize payment of the balance of E4,000 of the fine he imposed. The Accused admitted that PW1 promised to pay the balance of E4,000 by 31st of December 2011 and he asked Mlangeni to wait until that date to guage the sincerity of PW1 in apologizing. Moreover, the established facts of this case are that there was no activity on the criminal docket until after the 31st of December 2011. The Accused only galvanized into action in ensuring the laying of the charge, in the wake of default in payment of the balance of E4,000 by PW1 and the investigation mounted by the Anti-Corruption Commission.

[191] The aforegoing deductions are foreshadowed by the following axiomatic remarks made by Mr Bhembe, in paras 5.2 and 5.3 of the Accused's written submissions:-

> **"5.2 The Accused, after realizing that the complainant was not sincere in his apology and undertaking to compensate the Accused, insisted that his matter be brought before the Court and to that end facilitated the registration of the docket by asking that it be brought to him and asking PW3, Sipho Dlamini to register it.**
>
> **5.3 The Honourable Court is humbly drawn to the fact that the registration of the docket at the instance of the Accused was made after the officers from the Anti-Corruption Commission had enquired about the docket, at Pigg's Peak police station. Sergeant Mlangeni had handed it to the Desk Officer in charge of the criminal investigation department. This it is submitted goes to show that there was nothing sinister in the registration of the docket as Accused wanted it to be ultimately prosecuted despite the fact that complainant had reported him to the Anti-Corruption Commission."**

[192] We have thus heard it from the horses mouth i.e the defence, that the prosecution of the assault common case only re-surfaced in the wake of PW1's failure to pay the balance of the money and the advent of the investigation by the Anti-Corruption Commission. The question that has most agitated my mind is, if the Accused is to be believed that the sum of E5,000 was compensation for the civil claim, then what is the relationship between it and the criminal charge, which will cause the Accused to instruct Mlangeni to wait until the 31st of December 2011, when Mlangeni's sole purpose for approaching the Accused was to obtain a statement withdrawing the criminal charge.? I see no relationship whatsoever other than that the Accused is telling a cock and bull story. That instruction to Mlangeni was not necessary if the Accused is being truthful in his assertions that the settlement was for the alleged civil claim. The Accused

is, as is obvious and apparent, once again being untruthful in his evidence. I do not need a soothsayer or crystal ball to come to the ineluctable conclusion that, had the balance of E4,000 been paid on or before the 31st of December 2011 and the investigation by the Ant-Corruption Commission not ensued, the common assault case would have died in its cradle.

[193] The contention that the Accused was waiting for the DPP to assign a prosecutor to prosecute the case, thus occasioning the delay, is clearly untenable. This is because there is no evidence that the Accused took any steps to compel the prosecution of the matter either by the prosecutors at the Pigg's Peak Magistrates Court or by the office of the DPP until after the 31st of December 2011. The docket only saw the light of day on the 12th of February 2012. Whether the docket re-surfaced from the custody of the police or that of the Accused is immaterial. The paramount factor is that it re-surfaced in 2012, in the wake of the investigation by the Anti-Corruption Commission and PW1's failure to pay the E4,000. The Accused then took desperate steps to register it. He also ran to the High Court brandshing an application to compel the DPP to either prosecute the assault common case or enter a *nolle prosequi*. I see these activities of the Accused as a calculated attempt to save his own skin and escape the long hands of the law, but he failed woefully.

[194] In coming to the aforegoing conclusions, I am very mindful of the fact that there is no direct evidence to the effect that the Accused instructed Mlangeni not to continue with the laying of the criminal charge, however, this can be easily extrapolated from the totality of the evidence led and my analogy exhaustively demonstrated ante. As I aptly captured in my decision in the case of **Rex v Themba Magagula Criminal Trial No. 368/2009 para [24]**

"The principles that must guide the court in reasoning by inference was enunciated in the case of R V Blom 1939 AD 188 at 202-3 as follows:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:-

1. **The inference sought to be draw must be consistent with all proved facts. If it is not, the inference cannot be drawn.**
2. **The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct."**

[195] Lies beget more lies. That is the natural, but unfortunate order of things in most human beings. It appears to me that the Accused told a litany of lies in his fruitless struggle to cover up his unsavory act of indiscretion and evade justice. The inconsistencies in his evidence as well as the glaring untruths, strengthen the inference of his guilt. The untruths were deliberate and not told for an innocent reason. I find this to be a fact. See **Ndlovu V The State 2002 (2) (BLR) 158, R V Lucas 1981 QB 720, 73 Cr. App. R. 159 CA.**

[196] I thus come to the inexorable conclusion on the weight of the evidence and the proved facts, that the only reasonable inference that can be drawn, and I hereby draw that inference, is that the Accused elicited payment of the sum of E5,000 from PW1, which induced him not to continue with the laying of the criminal charge, hence his instruction to Mlangeni to wait until the 31st of December 2011, when Mlangeni sought from him a withdrawal statement in respect of same.

[197] As a Magistrate the Accused is a judicial officer of high standing. He is a man in a high position of authority. He held out that position of authority

as the sword of damocles over the heads of all the principal actors in this matter, employing it as a weapon to his advantage in his dealings with each of them.

[198] Thus, wielding this position of authority he imposed a "fine" of E5,000 on PW1 without due process. I say this in recognition of the fact that PW1 was not formally arraigned before a Court of law for the alleged offence; there was no prosecution of the alleged offence; PW1 had not been tried, found guilty and convicted for the alleged offence to warrant a sentence of the "fine" of E5,000 imposed. The said "fine" was thus borne out of the Accused's gimmicks premised on his position of authority as a Magistrate. Imposition of the "fine" was clearly unlawful in these circumstances.

[199] Furthermore, still holding his position of authority, he instructed PW1 to pay the balance of E4,000 before the 31st of December 2011 and ordered Mlangeni to wait until that day, when he approached him for a withdrawal statement in respect of the charge.

[200] When his scheme to extort the balance of E4,000 from PW1 failed, he again displayed his position of authority in full glare by obtaining possession of the criminal docket, which was clearly unusual in view of the fact that therein, the Accused was the complainant; he then ordered Mlangeni to proceed with the matter, as well as ordered PW3 to register the case without first passing it through the prosecutors at the Pigg's Peak Magistrates Court. This was in affront of the laid down procedure in that Court as testified to by PW3, PW4, PW5, as well as Accused's own witness DW2 Cicelia Nkambule, who has been stationed at that Court for 29 years. It is imperative that I mention here that Mlangeni, Accused's star witness, also admitted under cross-examination, that this is the laid down procedure at

the Pigg's Peak Magistrates Court since his advent at the Pigg's Peak police station in 2007.

[201] It remains for me to emphasise, that an essential condition for realizing the judicial role is public confidence in judges. This means confidence in judicial independence, fairness and impartiality. It means public confidence in the ethical standards of the judges. It means public confidence that judges are not interested parties to the legal struggle and that they are not fighting for their own power but to protect the Constitution and democracy. It means public confidence that the judge does not express his own personal views but rather the fundamental beliefs of the nation. Indeed the judge has neither sword nor purse. All he has is the public's confidence in him. The judge's authority possessed of neither the purse nor the sword, ultimately rests on sustained public confidence in its moral sanctions.

[202] Public confidence is ensured by the recognition that the judge is doing justice within the framework of the law. Inside and outside the Court, judges must therefore act in a manner that preserves public confidence in them. They must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes an impartial and objective search for truth. It is not fiat but reason; not mastery but modesty; not strength but compassion; not riches but reputation; not an attempt to please everyone but a firm insistence on values and principles; not surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held

beliefs and fundamental values. Admittedly, judging is a way of life. See **The Judge in a Democracy, by Aharon Barak.**

[203] Power corrupts, absolute power corrupts absolutely. The judge therefore ought to be aware of his power and his limits. The great power which the judge possesses in a democracy can be abused like all power. It is thus imperative that the judge realizes that his power is limited to realizing the proper judicial role. He must learn the limits imposed on him as a judge; he must know that power should not be abused and that a judge cannot obtain everything he wants. That, is the mark of our high calling.

[204] This is not such a case. I find that the Accused, riding on his position of authority as a Magistrate, was not only the complainant in his matter, but he also constituted himself into the prosecutor as well as a judge in his own cause. Little wonder then, why the Accused admitted in exhibit F that he laid the assault common charge not just as a complainant, but also as a judicial officer.

[205] It is beyond controversy therefore, that the Accused clearly violated his legal duty, a set of rules and abused his position of authority by using it to manipulate this matter to his advantage. His unethical conduct has the dangerous potential of bringing the entire administration of justice into disrepute in the eyes of right thinking members of the society.

[206] The Crown has thus proved that the Accused being a judicial officer unlawfully demanded, agreed to accept and accepted an advantage of E5,000 from PW1 Mihla Dlamini for the benefit of the Accused, which advantage induced the Accused not to proceed with laying criminal charges

against Mihla Dlamini, an act which amounts to violation of legal duty, a set of rules and abuse of position of authority.

[207] I find the Accused guilty as charged in count one and convict him accordingly.

[208] I now turn to count two where the Accused is charged with the crime of attempting to distract or defeat the course of justice. The Crown alleged that on or about the 24th of November 2011 at or near Pigg's Peak Magistrates Court in the Hhohho Region, the Accused unlawfully and with intent to obstruct the course of justice solicited the sum of E5,000 from Mihla Dlamini, in return for the Accused not to pursue the criminal charges for which Mihla Dlamini was tried.

[209] In the face of the dearth of local case law on this subject, it is convenient for me to have recourse to the jurisprudence of South Africa whose case law is of high persuation in the Kingdom, in order to distill the import of the offence of attempting to defeat or obstruct the course of justice, charged.

[210] Thus, in the case of **Greenberg and Another 1977 (3) SA 220 (RA) p. 223-6,** the South African Court made the following remarks which I recite in extenso:-

> **"The words used in defining this offence are a generic description of a variety of offences punishable under Roman and Roman-Dutch law. As Baker, J, points out in his judgment in S.V. Burger, 1975 (2) S.A. 601 (C) at p. 611, the offence, in the form in which it has developed in a series of decisions in the South African Courts, was, eo nomine, unknown in Roman law and this comment applies equally to Roman-Dutch law. In view of the origin of the offence, it is understandable that its definition varies from case**

to case. The extent of these variations is discussed by Hunt, South African Criminal Law and Procedure, vol. 2, at pp. 138 et seq.)

One of the very important points on which doubt exists is whether the offence consists of defeating or obstructing "the course of justice", "the ends of justice", or "the administration of Justice". The offence has its origin in offences in Roman law, aptly described by Hunt as "offences against the administration of justice" and I agree with the view expressed by Hunt as well as by Swanepoel and De Wet, Die S.A. Strafreg, that, properly defined, it consists of defeating or obstructing the administration of justice. The adoption, in some cases, of the description "ends of justice" has, in my view, had the effect of unduly restricting the scope of the offence, more particularly when regard is had to the development in modern societies of police forces with an extremely important role in the administration of justice at all its stages. I agree with the view that it is "a misconception that the law regards the ultimate result of the act" (R V Zackon, 1919 A.D. 175 at p. 182). If the offence is defined by reference to "the ends of justice", the mens rea required for its commission is likely to be different from the mens rea required in the definition adopted above. The words "administration of justice", have a wider connotation than the words "ends of justice". Nor, in my view, can there be any doubt that the words "defeating" and "obstructing" are not to be taken as synonymous if the offence is to have its appropriate scope. While "defeating" will always involve "obstructing", the greater including the less, the reverse is not the position and the word "defeating" simply describes a more serious manifestation of the offence.

Of all the problems associated with the formulation of the offence, perhaps the most vexed is what precisely the accused must be proved to have foreseen as a condition precedent to liability. The offence is concerned with the processes of the administration of justice before, during and after trial in both Superior and inferior courts. These processes have undergone fundamental charges since Roman times and, while the basic principles underlying the offence remain unaltered, they must necessarily be applied in very different circumstances at present. The Roman law offences related almost exclusively to the trial stage and thus it was not illogical that the condition precedent in the form of a particular state of mind on the part of

the accused should also relate to this stage of the proceedings. In modern systems of law, the administration of justice has, with the development of police forces, become increasingly involved in the investigation and prevention of crime. I agree with the view expressed by CENTLIVRES J., in R. V. Adey and Hancock (I) 1938 (1) P.H. H75, that

> **'it would be lamentable if the Court were to lay down that, when the police were investigating a suspected crime, anybody who tried to obstruct or thwart the administration of justice by persuading people to put false information before the police was not liable to be charged with the crime of attempting to defeat the due course of justice.'**

It is however, quite illogical for the courts, in harmony with modern development, to extend the principles to an actus reus committed at a stage before trial has commenced or even been decided upon, but, at the same time, to insist that the accused's state of mind (his knowledge or foresight as opposed to intention) to be proved as a condition precedent to liability, should advert not to such earlier state but to the later trial stage. A persual of the cases in text-books dealing with the offence reveals, however , that it is almost invariably said that a condition precedent for liability under it is foresight of at least the possibility that a prosecution might eventuate and that it is not enough that there is an intention to bring about the obstruction complained of in the absence of such foresight. If a person, knowing that police investigations are based on a suspicion that a crime may have been committed, does acts which obstruct the police in their investigations with the intention of doing so, it should, in the light of modern developments in the administration of justice, be no defence for the accused to plead that he never foresaw the possibility of a prosecution and that his motive for the intended obstruction was purely to harass the police and not to prejudice the end result of the investigation. Hunt suggests, as I understand him, at p. 144 of the volume referred to earlier, that it is sufficient for liability that the accused knows that "investigations are taking place with a view to possible proceedings". In my judgment this is all that is required so far as the accused's state of mind is concerned. There should be

'no narrow limit imposed on the character of the penal sanction aimed at conduct designed to interfere with the administration of justice'.

S. V. Daniels, 1963 (4) S.A. 623 (E) at p. 625. I agree with the view expressed by BAKER J., in S.V. Burger, supra at p. 616:

'What is of importance are the principles enumerated in the cases, not the specific instances of the offence of defeating or obstructing the course of justice which I have mentioned. The law grows and develops as time passes; it does not stand still. Since the time of the Roman-Dutch writers great developments have taken place in the field of criminal law. One of the most important of these is that we today have appointed civil servants whose duty it is to investigate alleged offences; and to see to it that they are properly tried in public. The police investigate alleged offences; the docket is submitted to the Attorney General; he decides whether or not a prosecution should be instituted. It is as equally serious to prevent an investigation from taking place as it is to attempt to influence the investigation after it has commenced, or to attempt to influence the course of a trial in order to obtain the accused's acquittal. All three types of conduct materially amount to the undermining of the course of justice. The first-mentioned conduct, the prevention of a police investigation, amounts to a defeat of the course of justice ab initio. Should it transpire that an attempt at preventing the investigation of an offence has been made, the Courts will not sit by idly. It is in the public interest that all suspected offences should immediately be investigated; and any person who tries to prevent such investigation is guilty of attempting to defeat or obstruct the course of justice (Juta's translation.)

But I would emphasize that it is not only the prevention of investigation to which the principles underlying the offence should logically apply. These should also apply to the obstruction of such investigation. As was said by BAKER, J., in an earlier passage of his judgment at p. 612.

" 'Obstructing' has a less drastic meaning than 'defeating'; and criminal proceedings are 'obstructed' if either the investigation by the police or the

court proceedings themselves are prolonged or otherwise delayed or disturbed (Hunt, ibid para. (a)"

In Burger's case, counsel submitted that the appellant's motive in committing the actus reus alleged was to postpone the day of reckoning and not to escape completely. Whatever the motive may have been, it seems to me that the intention was to obstruct the police in the investigation of a suspected crime with the knowledge that that was the purpose of the investigation.

The offence, both in its origin and its development, is concerned with protecting the processes of justice from obstruction and it is logically irrelevant to consider the particular motive (ulterior intention) with which an intended act of obstruction of such a process has been committed. It is in my judgment, particularly unfortunate that the mens rea required for the commission of the offence has, in the course of time, come to be defined by reference to the accused's contemplation of the possibility of prosecution. The introduction of this subjective element could result in a pessimist, innocent in fact of the suspected offence under investigation, being convicted and an optimist , guilty in fact of the suspected offence under investigation, being acquitted in precisely similar circumstances and criminal liability should not rest upon such an obviously unsatisfactory foundation. The mischief which the offence under consideration is designed to curb is a direct result of the prime intention with which acts of obstruction are committed and not of any ulterior intention or state of mind, and it is wholly illogical, therefore, to define the offence by reference to such ulterior intention or state of mind. Once it is universally accepted, as it has been, that guilt in this offence is in no way dependent upon guilt or innocence in the suspected crime under investigation, it serves no purpose and it is quite illogical to make guilt conditional upon the contemplation by the accused of his own or someone else's prosecution. Strictly applied, the requirement of the subjective element of foreeability of prosecution introduces an almost insuperable barrier to success in even the most blatant case of obstruction, where guilt in the suspected offence under investigation has not been established. This is because, in such circumstances, the innocence of the person suspected must be presumed and the accused should almost

invariably be given the benefit of the doubt when he pleads that, convinced of innocence of the offence under investigation, he never seriously contemplated the possibility of a prosecution for it." (emphasis added)

[211] I have already adequately canvassed the evidence led and analysed the proved facts *in casu*. They therefore bear no elaborate exhortation at this stage, order than to state that when the totality of the evidence is juxtaposed with the aforegoing established elements of the offence as espoused in **Greenberg and Another (supra),** I agree intoto with the Crown that the uncontested evidence from the police investigator Mlangeni, to the effect that the Accused instructed him to "wait" until the 31st December 2011, constitutes conclusive proof of the offence charged. This is because the instruction to officer Mlangeni to "wait" until the 31st of December caused the investigation by the police and the Court proceedings themselves to be prolonged or otherwise delayed or disturbed. It is proved beyond reasonable doubt that after this instruction given to Mlangeni to wait until the 31st of December 2011, the docket of the assault common case never saw the light of day and was not processed until after the 12th of February 2012, when the Accused reversed the instruction by telling Mlangeni to take the case to Court. It is immaterial in these circumstances what the Accused's motive or intention behind the instruction to "wait" was. **See S V Burger (supra) , and S V Gaba 1981 (3) SA 745 (the translated endnote) at 746.**

[212] In any case, the Accused himself as a legal mind was fully alive to the fact that his actions *in casu* constituted the offence of defeating the ends of justice. This is borne out of his statement of the 20th of February 2013(exhibit F), where he contended as follows:-

"16. <u>The deviation from the criminal justice system, introduction of Chief Mnikwa, Mihla's (sic) and Mihla to force an apology was unlawful</u>

and intentional to obstruct or defeat the ends of justice. From my statement it is clear that I made the statement as a complainant so that the offender is brought to justice instead obstructing or defeating the ends of justice by the police investigator and instigators of the forced introduction of these strangers in my case. There is no aorta of evidence in my complaint that I wanted any other alternative dispute resolution like calling Chief Mnikwa, Mihla's father and Accused Mihla Dlamini.

17. The conduct of the investigator, Chief Mnikwa, Mihla's father and Mihla Dlamini was defeating or obstructing the ends of justice in that it was unlawful and intentional aimed to defeat or obstruct the prosecution of Mihla Dlamini through the criminal justice system.

20. As a complainant and judicial officer I verily direct the police and the prosecution to pray to lay the following charges as follows:-

Count one

Common assault against Mihla Dlamini as indicated in my letter to DPP on 19th February 2013. (case 70/12) committed on the 24th September 2011 at Luhlangotsini.

Count two

Contempt of court ex facie committed by Mihla Dlamini at Luhlangotsini on 24th September 2011.

Count three

Contempt of court (in case T46/11) where Mihla Dlamini failed to pay the fine of 11th March 2011. This offence was committed at the Pigg's Peak Magistrate Court on 11th March 2011.

Count four

Defeating or obstructing the course of justice against the police investigator Constable Sergeant Mlangeni, Chief Mnikwa, Mihla's father and Mihla Dlamini. This offence was committed during the

investigations of case 70/12 from 12/10/2011 (see RSP 218 of 12/10/2011).” (emphasis mine)

[213] I agree with the Crown that the Accused cannot exenorate himself as a culprit in the aforegoing activities. By welcoming PW1 and his father and entering an agreement with PW1 which delayed the entire criminal process and would invariably have let PW1 off the hook in the common assault charge, he clearly also participated in defeating the ends of justice which he complains of in exhibit F. His feeble attempts under cross-examination to resile from some of the charges he sought to be laid in that exhibit cannot be countenanced.

[214] The inescapable conclusion from the aforegoing is that the Crown has proved its case beyond reasonable doubt in count two. I find the Accused guilty as charged in that count and convict him accordingly.

[215] CONCLUSION

The Accused person Leo Ndvuna Dlamini is found guilty as charged in counts one and two respectively. He is accordingly convicted of the offences as charged in both counts.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……DAY OF ……..….2013

OTA J

JUDGE OF THE HIGH COURT

For the Crown:	Advocate N. Kades S.C Assisted by A. Matsenjwa (Crown Counsel)
For the Accused:	S. Bhembe