IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case NO. 218/2021**

In the matter of:

THE KING

VS

1. **MDUDUZI BACEDE MABUZA**
2. **MTHANDENI DUBE**

Neutral Citation: ***The King vs Mduduzi Bacede Mabuza and Another (218/2021) [2021] SZHC 138*** **(30th June, 2022)**

Coram : **M. Dlamini J**

Heard : **14th June 2022**

Delivered : **30th June, 2022**

RULING ON APPLICATION TO AMEND THE INDICTMENT (COUNT 1 AND COUNT 4)

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[1] The two accused persons stand arraigned on an indictment which reads:

"COUNT 1

Accused 1 and 2 are guilty of the offence of ***CONTRAVENING SECTION 5(10 OF THE SUPPRESSION OF TERRORISM ACT 2008 READ WITH SECTION 2(2) (A) TO (D) OF THE ACT AS AMENDED.***

In that during the month of June 2021, in the Hhohho and/or, Manzini and/or, and Lubombo and/or and Shiselweni Regions, the said accused persons, each or all of them acting jointly in the furtherance of a common purpose with ***Mduduzi Magawugawu Simelane*** *(who is fugitive of Justice) did unlawfully commit a Terrorist Act by committing an act, attempted act or threat of action to wit by encouraging people in public statements to disobey the lawful banning by the Government of Eswatini of the delivery of petitions and/or to reject the appointment of the Acting Prime Minister and to thereby encourage civil disobedience which had one or more of the following intentions and/or consequences:*

1. *Death or bodily injury and/or*
2. *Serious damage to property and/or*
3. *Serious risk to the health of the public or a section of the public and/or*
4. *Endangering the lives of people and/or*

5. *Was designed or intended to disrupt the provision of essential emergency services, such as police and/or civil defence and/or medical services.*

WHEREAS*, as a consequence of the action of the Accused, there were riots in all the Regions in the country. These riots caused loss of life, bodily injuries to the people and destruction of private and public properties.*

And thus, the Accused persons did ***CONTRAVENE SECTION 5(10 OF THE SUPPRESSION OF TERRORISM ACT 2008 READ WITH SECTION 2 (2) (A) TO (D) OF THE ACT AS AMENDED.***

FIRST ALTERNATIVE TO COUNT 1

That Accused No.1 and Accused No.2 are guilty of ***CONTRAVENING SECTION 4(A) READ WITH SECTION 3(1) (A) – (E) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938.***

In that on or about the 24th day of June 2021 and at or near Summerfield in the district/region of Manzini, Accused No.1 and Accused No.2, committed an act and/or acts with seditious intention to wit, by encouraging people in public statements to dis obey a lawful banning order issued by the Government of eSwatini and/or to reject the appointment of the Acting Prime Minister and by so doing:

1. *Brought into hatred, contempt or excited dissatisfaction against the person of His Majesty the King, and/or the Government of eSwatini as by law established; and/or*

2. *Raised discontent or dissatisfaction amongst His Majesty's subjects or the inhabitants of eSwatini; and/or*

3. *Brought into hatred or contempt or excited disaffection against the administration of justice in eSwatini; and/or*

4. *Promoted feelings of ill-will and hostility between different classes of the population of eSwatini.*

And thus the Accused persons are guilty of ***CONTRAVENING SECTION 4(a) READ WITH SECTION 3(1) (a)-(e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938***

SECOND ALTERNATIVE TO COUNT 1

That Accused No.1 and Accused No.2 are guilty of ***CONTRAVENING SECTION 4(a) READ WITH SECTION 3(1) (a)-(e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938***

In that on about the 24th day of June 2021 and at or near Summerfield in the district/region of Manzini, Accused No.1 and Accused No.2, committed and act and/or acts with seditious intention to wit, by encouraging people in public statements to disobey a lawful banning order issued by the Government of eSwatini and/or to reject the appointment of the Acting Prime Minister and by so doing uttered seditious words and thereby:

1. *Brought into hatred, contempt or excited dissatisfaction against the person of His Majesty the King, and/or the Government of eSwatini as by law established; and/or*

2. *Raised discontent or dissatisfaction amongst His Majesty's subjects or the inhabitants of eSwatini; and/or*

3. *Brought into hatred or contempt or excited disaffection against the administration of justice in eSwatini; and/or*

4. *Promoted feelings of ill-will and hostility between different classes of the population of eSwatini*

And thus the Accused persons are guilty of ***CONTRAVENING SECTION 4(b) READ WITH SECTION 3(1) (A) - (e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938.***

COUNT 2

The Accused persons are guilty of the crime of ***MURDER.***
In that upon or about 29 June 2021 and at or near Hilltop along Mbabane/Mahwalala public road, the said Accused persons did unlawfully and intentionally kill one ***SIPHOSETHU MNTSHALI****, an adult male and did thereby commit the crime of* ***MURDER.***

COUNT 3

The Accused persons are guilty of the crime of ***MURDER.***
In that upon or about 29 June 2021 and at or near Hilltop along Mbabane/Mahwalala public road the said Accused did unlawfully and intentionally kill one ***THANDO SHONGWE****, an adult male and did thereby commit the crime of* ***MURDER.***

COUNT 4

Accused No.1 is guilty of the offence of ***CONTRAVENEING REGULATION 4 (3) (B) READ TOGETHER WITH REGULATION 4(8) OF THE DISASTER MANAGEMENT (CORONA VIRUS – COVID-19) REGULATIONS 2020 UNDER THE DISASTER MANAGEMENT ACT 01/2006***

In that upon or about 5 June 2021 and or near Hosea area near Shiselweni Region, the said Accused did unlawfully and wrongfully fail to keep a register as required by the Regulations for any gathering and sanitized participants in a gathering he had convened and did thereby contravene the said Act."

[2] The Crown seeks to amend Counts 1 and 4. In Count 1, the Crown applies for an amendment to read:

> *"Notionally it may be necessary to amend the wording in the indictment by changing the reference to Section 2 to read as follows: Section 2 (2) (a) to Section 2 (2) (j), rather than 2 (2) (d). The Crown hereby seeks such an amendment in terms of Section 154 of the Criminal Procedure and Evidence Act, No.67 of 1938."*[1]

[3] The Crown explained further in its heads:

> *"More*over, *the additional alternative sought in the amendment are simply further natural consequences of the alleged terrorist act and hence, could be inferred from the factual allegations as set out in the indictment.* ***S.V. Sithole 1997 (2) SACR 306 (ZSC)."***[2]

[4] In simpler wording, the Crown intends to add more consequences of the alleged crime under Count 1. Turning to Count 4, the Crown seeks to add the following words:

> *"...gathering he was in charge of or took part in..."*

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[1] Paragraph 31 of (1)
[2] Paragraph 6 of (2)

[5] The application by the Crown to amend the indictment is strenuously opposed on a number of grounds. The first ground is that the amendment is belated. It is submitted on behalf of the accused in this regard:

> *"It is submitted that it is not explained why the Crown waited from the 5th of May 2022, at the closing of its case, to the 30th of May 2022, before raising the issue of amendments to the indictment."*[3]

[6] The Crown further filed its heads of arguments very late on 13th of June 2022, with regards to the intended amendments. The procedure taken by the Crown was also attached.

[7] The second basis for the opposition to the amendment was that it would cause the accused persons prejudice. The prejudice was in two-fold. First, the application for the amendment came at a time when the accused were dealing with the application for a discharge in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 38 of 1967 (CP&E). The matter had already been delayed by the failure of the Crown to file transcribed record of exhibit S (video clips). The matter is now postponed due to Crown's late filing of its application to amend the indictment. Further, should the amendment be granted, it would precipitate a further delay in that the accused would have to recall some of the witnesses for cross-examination.

[8] Secondly, an amendment would prejudice the accused in their defence. The amendments sought are akin to new charges.

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[3] Paragraph 10 of (3)

[9] Having highlighted the contentions, both by prosecution and on behalf of the accused persons, I now turn to determine the application for amendment, commencing of course with the position of the law.

[10] At the arrest of an accused person, the law requires that he must be informed of the offence leading to his arrest. This usually comes in a form of a charge. Procedurally, as it is usually formulated by the police officers or if by prosecution, under a hurried condition, this is referred to as the holding charge. The accused person may appear for a remand(s) and even move bail under the holding charge. However, the position changes once prosecution has determined to prosecute the accused. Once the decision to prosecute the accused is taken, guided of course by *prima facie* evidence as can be deduced from the docket, the dictates of the law calls upon prosecution to serve a clear and well-crafted charge or indictment. These terms, 'charge' and 'indictment' are in law never used interchangeably. Accused persons arraigned before the Magistrate courts do so on the basis of a charge while at the Superior Court, on an indictment. The charge or indictment as the case may be, served for purposes of prosecution is not materially different from a holding charge in as much as the charge or indictment for prosecution must clearly outline not only all the elements of the offence but certain material facts supporting the elements of the offence.[4] This of course does not mean that prosecution must include evidence in a charge sheet. Attorneys ought to be able to decipher between facts supporting the elements of an offence and evidence to be adduced during the trial. This is because, in the instance of the High Court, "*a summary of the salient facts of the case*"[5] is attached to the indictment.

[4] See 1936AD 445 at 447

[5] JJ Joubert, " Criminal Procedure Handbook" 11Ed Juta (2013) at page 210

Further, other offences which were not present in the holding charge or indictment, may be added at this stage or some removed without any application to court.

[11] No doubt, from the above, the purpose of drawing and serving a charge or indictment is to inform the accused person of the offence he would face in court. It is further to enable him to prepare for his defence. It is for this reason that the indictment or charge must disclose an offence. It is therefore wise, if for instance an accused person is facing a legislative offence, to follow the wording of the legislature in crafting the offence rather than for prosecution to use its own terms. If levelling a common law crime, to follow the precedents laid down by **Hunt *et al*** or other authors of similar writing. The rationale is that more often than not, words do not carry the same meaning. This, therefore, does not only circumvent the need for an amendment but a number of other applications such as exception, quashing of the charge or indictment and others. **Steyn J and Marks AJ**[6] stated:

> *"As recently as 2012 the SCA has repeated the earlier warnings issued in **Legoa**[7] and **Makatu**[8] that care be exercised in drafting and preparing charge sheet(s) and indictment(s) to ensure that they correctly reflect all the necessary averments."*

[12] Having alluded to the above, the question is, 'Does the law permit an amendment of the charge or indictment after a plea or coming closer to the case at hand, after the close of the Crown's case?' **Professor SA Strauss *et***

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[6] Sayed Imitiaz Ahemd Essop v The State Case No. AR 931/2004 (HC) KZP SA at para 6
[7] [2002] 4 All SA 373 (SCA)
[8] 2006 (2) SACR 582 (SCA)

al[9] outline the position of the law in this regard. The learned scholars first give the background of an amendment to a charge or indictment. Pre 1959, following a sequence of quashing of indictments and charges on the ground that the charge or indictment did not disclose an offence, the legislature promulgated a section which gave discretion to the court to amend the indictment or charge. In our CP&E this is evident under section 154. It prescribes as follows:

> *"154. (1) If, on the trial of any indictment or summons, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars which ought to have been inserted in the indictment or summons have been omitted, or that words or particulars which ought to have been omitted have been inserted, or that there is any other error in such indictment or summons, the court may at any time before judgment, if it considers that the making of the necessary amendment in such indictment or summons will not prejudice the accused in his defence, order such indictment or summons to be amended, so far as it is necessary, by some officer of the court or other persons, both in that part thereof where the variance, omission, insertion, or error occurs, and in very other part thereof which it may become necessary to amend.*
>
> *(2) Such amendment may be made on any terms as to postponing the trial which the Court thinks reasonable.*
>
> *(3) The indictment or summons shall thereupon be amended in accordance with the order of the court and, after any such amendment, the trial shall proceed at the appointed time upon the*

[9] 'Criminal Procedure,' University of South Arica, 1976, at page 159

amended indictment or summons, in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(4) The fact that an indictment or summons has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder."

[13] It is settled law that this section has been under the constitutional dispensation developed to such an extent that an amendment to an indictment or charge, as the case may be, is permitted even on appeal or review. For instance, **Masuku J,** sitting as a review court in **The King v Moses Vusani Mvubu, Review No. 124/2009**[10] proceeded to amend the charge by correcting the citation of the legislation. The number of the section cited was incongruent to the evidence adduced. The court opined that from the evidence before the *court a quo* the court ought to have amended the section referred to as it so did and proceeded to confirm the conviction. **S v Basson**[11] is in point in this regard as the rationale for allowing an amendment where the indictment reflects discrepancies rather than throwing it out:

"In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the rights to life, and the prosecution of assault and rape a means of protecting the

[10] Review Case No. 124/2009
[11] 2005 (1) SA (CC) at paras 31-33

right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.

[14] From both section 154 of the CP&E and case law, an amendment before the trial court can be effected at any time before judgment is passed by the trial court. The critical question however, is when would a court effect or allow for an amendment. The answer lies in section 154 (CP&E).

[15] Section 154(1) stipulates for an amendment where such would "*not prejudice the accused in his defence.*" The cardinal poser facing this court therefore is, 'Will the amendment so sought at the instance of the Crown cause prejudice to the accused persons in their defence?' **Trengove J**[12], adjudicating on the same issue, eloquently summed up as follows:

> *"The vital consideration in an application that an appellant of this nature is, of course, whether there is any possibility that an appellant **might be prejudiced** if the amendment were allowed.*

[12] S v F 1975(3) SA 167 at 170F-G

According to the decision of our Courts, the test of prejudice, mentioned in sec. 180 (1), is ***whether the accused would be placed in no worse position than*** *if the charge had been framed in the amended form when he was first called upon to plead to it (S v Kearney, 1964 (2) SA 495 (A.D)); and, where the application to amend a charge is made on appeal, as in the instant case, the Court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary particulars. On appeal the Court would accede to an application for an amendment of a charge only if it were satisfied that there was* ***no reasonable doubt that the appellant would not be prejudiced*** *(R v Rohloff and Others, 1953 (1) SA 274 (C); S v Taiz, 1070 (3) SA 342 (N)."*

[16] Similarly, **Almiro Rodriques J**[13], presiding over a similar issue on an application to amend an indictment, espoused:

"The jurisprudence of the ICTY and ICTR on the exercise of the discretion contained in Rule 50 thus demonstrates that a decision

[13] The Prosecutor v Mladen Naletilic aka "Tuta" and Another, Trial Chamber – International Crimibnal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia

to accept an amendment will normally be forthcoming ***unless prejudice can be shown to the accused.*** *This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law."*

[17] The cardinal rule is that an amendment should only be allowed where there is no prejudice occasioned to the accused person in his defence. This resonates well with accused's constitutional right to a fair hearing. Section 21 of Act No. 1 of 2005 (the Constitution) guarantees the accused's right to a fair hearing. The right to fair hearing in criminal matters was well canvassed in **S v Langa**[14]. **Steyn J et Marks AJ**[15] summarised the position of the law on fair trial as follows based on the *ratio decidendi* outlined in the **Langa** case:

> *"In S v langa the majority of the Court recognised the principle that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole. It is for this very reason that a charge sheet ought to inform an accused with sufficient detail of the charge he or she should face. It should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed."*

[14] 2010 (2) SACR 289 (KZP)
[15] *Supra N*[6] at para [7]

[18] Turning to the application *in casu,* prosecution seeks an amendment to Count 1. The indictment upon which the two accused persons have pleaded upon reads under section 2(2) as consequences of the alleged unlawful conduct as:

> *"(a) causes-*
>
> *(i) the death of a perso;*
>
> *(ii) the overthrow, by force or violence, of the lawful Government; or*
>
> *(iii) by force or violence, the public or a member of the public to be in fear of death or bodily injury;*
>
> *(b) involves serious bodily harm to a person;*
>
> *(c) involves serious damage to property;*
>
> *(d) endangers the life of a person;"*

[19] Prosecution intends to add the following consequences:

> *"(e) creates a serious risk to the health or safety of the public or a section of the public;*
>
> *(f) involves the use of firearms or explosives;*
>
> *(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to-*
>
> *(i) any dangerous, hazardous, radioactive or harmful substance;*
>
> *(ii) any toxic chemical;*
>
> *(iii) any microbial or other biological agent or toxin;*
>
> *(h) is designed or intended to disrupt any computer system or the provision of services directly related to communications*

infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;

(j) involves prejudice to national security or public safety; and is intended, or by its nature and constext, may reasonablyu be regarded as being intended to-

(i) intimidate the public or a section of the public; or

(ii) compel the Government, a government or an international organisation to do, or refrain from doing, any act."

[20] Now the question facing this court is whether allowing the above additional consequences to the indictment would not prejudice the accused persons herein. I think the direct question should be, 'Is there any weight added to the indictment by adding the above consequences?' If the answer is positive, then prejudice is occasioned to the accused and the sought amendment ought to be declined. If the answer is in the negative, then the amendment ought to be allowed and the court give directions on how the trial should proceed. That is either to allow prosecution to open its case by calling further witnesses or recall some of the witnesses for purposes of cross-examination, tendering further evidence or both. The court may, as it was so suggested by prosecution proceed with the case by deciding on section 174 (4|) of the CP&E.

[21] Why does the court choose to enquire on whether weight would be added to Count 1? It is because as weight is added to the Count, then that bears on the length of sentence in the event a conviction is secured.

[22] In pleading with the court to allow the amendment, Counsel on behalf of the Crown submitted that such were natural consequences of the unlawful conduct demonstrated by prosecution. They can be inferred from the said conduct. In that regard, prosecution does not need to call further witnesses.

[23] In **Sayed Imitiaz Ahmed Essop**[16] the Court was asked to allow an amendment on a charge of fraud where prosecution had omitted to insert the word 'prejudice' as one of the elements of fraud. It was pleaded before the honourable Court to allow the amendment. The Court declined. In the present case the accused persons are called upon to infer that their alleged conduct is tantamount to, for an example, *"designed or intended to disrupt any computer system or the provisions of services directly related to communication infrastructure, banking or financial services.'* In fact they are called upon to infer all the highlighted outcomes from (e) to (j). I doubt, if, even a highly scholar professor would be able to infer all such outcomes, let alone the accused persons. This, no doubt, speaks to the presence of prejudice.

[24] Turning to the first question on the effect of the amendment, it is clear that an addition of the consequences of the conduct under trial would add weight to Count 1. This would aggravate the offence under Count 1. The end result is that such would be prejudicial to the accused persons. I say this bearing in

[16] *Supra N[6] para 7*

mind the stage at which the trial has advanced. Prosecution had closed its case and an application under section 174(4) had been moved. Reopening prosecution's case would prejudice the accused in their defence. They have to advance further defence attacking the intended consequences. The amendment sought stands to be declined except with regard to para 25 hereunder.

[25] However, there is one aspect which is clear in this matter. In drafting Count 1, prosecution included the consequence mentioned under (i) as it appears under consequence 5 of Count 1. Now clearly from the onset, the accused persons were fully aware that they had to meet a case of a consequence under (i). They have pleaded to this consequence and presumably cross-examined on it at this stage. It would therefore not cause any prejudice to amend Count 1 to read instead of "***READ WITH SECTION 2(2) (A) TO (D)***" to 'Read with section 2(2) (a) to (d) and (i).'

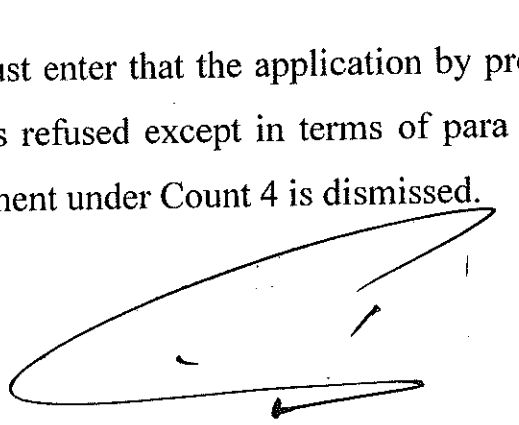
[26] Prosecution also applied to amend Count 4 from reading, "*he had convened*" to, "*...gathering he was in charge of or took part in...*". The question here is, would allowing this amendment not change the defence. If again the answer is yes, the amendment should be disallowed on the ground that it would cause prejudice. Prosecution submitted that permitting the amendment would not change the defence.

[27] The Crown's witnesses were cross-examined on this portion of the charge. It was that the meeting was not convened by accused 1 but by some mentioned individual. Now substituting the importation that accused 1 convened the meeting to saying accused 1 was in charge or took part in the gathering calls

upon accused 1 to change his defence. This will no doubt prejudice accused 1. It follows that the amendment under Count 4 must be rejected.

[28] Before turning to the order, I must highlight one aspect of the proceedings raised by the defence in their heads. It is that the procedure taken by prosecution is irregular. I do not think so. Applications permitted under the Criminal Procedure and Evidence Act No. 67 of 1938 are never supported by affidavits. They may be raised in heads of arguments, written submissions or made orally from the bar. This procedure is well known by the defence as it followed suit in its application under section 174(4). The term therefore, application is not used in the *strict sensu* as in civil matters when it pertains to our criminal procedure. There is therefore no basis for lamenting the procedure adopted by prosecution in its application for the amendment.

[29] In the final analysis, I must enter that the application by prosecution for an amendment of Count 1 is refused except in terms of para 25 herein. The application for an amendment under Count 4 is dismissed.



M. DLAMINI J

For the Crown : **GJ Leppan Adv. Instructed by DPPs Chambers**

For the Defence: **JLCJ van Vuuren SC instructed by Ben J Simelane Attorneys**