IN THE COURT OF SWAZUKAND

APP. CASE NO. 1/84

HELD AF MBABANE

in the matter between -

ROBERT MANAMA Appellant

DUMSAEE NXUMALO Appellant

ana

REGINA Respondent

HEARD BEFORE: ISAACS J.A.

WELSH J.A. WILL C .A.

JUDGEMENT

Welsn J.A.

On 8th July, 1983, the appellants were indicted on a charge of theft (alternatively fraud) and on a second charqe of theft.

They were found guilty on tne first count of fraud and not guilty on the second count. On 13th canuary, 1984, the trial court sentenced each of them to four years' imprisonment. Neither of them was legally represented at the trial. Notices of appeal, prepared by two separate counsel, were logged durinq January ana February 1984. At the hearing before this court, which took place on 26th March, 1985, the secend appellant was represented by Counsel, the contended that the proceedings in the court below were grossly irregular on the following grounds:-

"(a) It does not appear from the record that the Second Appellant was properly advised of his rights ander Section 174(5) ana (6) of the

Criminal Procedure and Evidence Act No.57 of 1938 ... The appellant was not represented and the Court a quo had a duty to explain to him his aforesaid rights.

"(b) It does not appear from the record that the Second appellant was invited to cross-examine the First Appellant and his witness as it was his right to
go so .....

"(c) The learned judge interfered with the cross-examination by the Second Appellant of the police witness Constible P. Ndlangamandla....

"(d) The Court a quo erred in not affording the Appellant an opportunity to address the court before judgement on the merits ..... This resulted in a grass irregularity .....".

Counsel for the Crown called eight witnesses, of whom the last was Constable P. Ndlongamandla, who was involved in the investigation of the case. At the conclusion of this witness's evidence in chief, counsel for the Crown is recorded as having asked the first appellant whether he had any questions, to which the answer was "No". When counsel for the Crown asked the second appellant whether he had any questions, he answered "Yes", and proceeded to put five questions to the witness. The second appellant is then recorded as having said: "What you are saying is not the truth. You did not say anything. You .....". The trial judge is then recorded as having intervened in the following terms:

"This is your chance to ask questions only. Do you still have more?"

The second appellant replied "No". After a brief re-examination of this witness, counsel for the Crown called no

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more evidence.

The record then contains the following heading: "EXAMINE- TION FOR BOTH ACCUSED". The first appellant gave brief evidence amounting to a total denial of the charges against him, based on an alipi. He was asked one question by counsel for the Crown, to which he replied at some length, concluding by saying; "That is all." The second appellant is then recorded as having said: "I have nothing to Say." counsel for the Crown then resumed his cross-examination of the first appellant at some length. His lest question to the first appellant was: "Anytning else yon would like to say?" The First appellant replied: "I would like you to call one Mr. Masuku, who saw me on the day I left for Simunye." Counsel for the Crown is then recorded as having asked the second appellant whether he had anything to say, to which the reply was: "Nothing". Counsel for the Crown then said: "That is all."

The witness Masuku was then called. Counsel for the Crown is recorded as having asked the first appellant whether he had "something to ask from Mr. Masuku", to which the first appellant replied "no I have nothing to say." Counsel for the Crown then said: "That is alright, I will cross-examine him." Counsel for the Crown then proceedad to put a number of questions to the witness, and after the last of those questions counsel for the Crown said: "That is all."

Another witness, police officer Simelane, was then Called. Although he is described in the record as a Crown witness, he was first examined by the first appellant and then cross-examined by counsel for the Crown. At the conclusion of the cross-examination, counsel for the Crown said, once again: "That is all."

The record then proceeds as follows:

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"Both accused persons are asked to stand up and to say anything they would like the court to take into consideration before passing judgement as they are found guilty."

Both the appellants proceeded to make statements (it does not appear from the record whether these statements were made under oath) concerning their respective personal circumstances.

The record contains a five-page judgement on the merits and a short separate judqement on the question of sentence. In the first of these judgements, the trial judge summarised the Crown

evidence and then said this:-

"At the conclusion of the Crown case, the 1st accused elected to give evidence. Accordinq to him he was in Simunye with one Richard Lukhele on 12/01/83. He returned home on 30/01/83 where he was arrested by the police. He said that he had told the police that he was in Simunye on the day in question and called one Masuku to support him on his alibi. According to Masuku the accused went to Simunye in Search of a job but he was not sure of the exact date. He also called D/Sergeant Simelane as a witness. Simelane stated that the accused had told him that he left for Simunye, two days prior to his arrest (26/01/83). The accused should have called Richard Lukhele to substantiate the facts that he was with him in Simunye on 12/01/83. This has created a certain amount of doubt as regard's to the truth of his alibi. I therefore reject the alibi raised by him.

"On the other hand, the 2nd Accused elected to remain silent. Although no onus rests on the accused to do so, he could have still given evidence refuting the

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serious allegations levelled against him by the Crown witnesses. His failure to do so only strengthened the case for the Crown since there is no testimony to gainsay it and therefore less occasion or material for doubting it.

"In the result I eccept the evidence of the crown witnesses in preference to that of the accused and his witnesses and I find Doth accused guilty on Count 1."

as I hove already said, this court heard argument on 26th March, 1985. On this occasion, the second appellant was represented by counsel. On 27tn March, 1985, the appeals were allowed and the convictions and sentences were set aside and it was intimated that reasons would be given later. The reasons follow.

If the record on appeal accurately reflects the course which the proceedinqs in the trial court took (and counsel for the Crown made no suggestion to the contrary), the following significant features emerge:-

(1) At the close of the evidence for the prosecution, neither the trial judge nor anyone else asked either of the appellants (as "the preper officer of the court" is required by section 174(5) of the Criminal Law and procedure Act, No. 57 of l938 to do) whether they intended to "adduce evidence" in their defence.

(2) The trial judge did not invite the second appellant to crass - examine the witnesses Masuku and Simelane, who had apparently been called by or at the request of the first appellant.

(3) The Second appellant was invited (very strangely, by counsel for the Crown and not by the trial Judas) to cross-examine the Crown witness Nalangamandla. The second appellant availed himself of this opportunity;

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but when he out it to the witness that what the witness was spying was not the truth and that the witness did not say anything, the trial judge interrupted and directed the second appellant "to ask questions only". The second appellant then desisted from any farther cross-examination
of this witness .

(4) In terms of section 1/5(1) of the Criminal Law and Procedure Act, each of the appellants was entitled to address the trial court after all the evidence had neon adduced. The trial judge did not invite either of the appellants to address him before finding them guilty. All that happened was that they were told that they had been "found guilty" and were invited "to stand up and to say anything they would like the court to take into consideration before passing judgement". The expression "passing judgement", in the context, clearly refers to the passing of sentence.

In regard to point (2) above, it is, of course, the duty of a trial judge to invite an accused person to cross-examine any witness who is called either by the Crown or by a co-accused. In regard to point (3) above, it is not uncommon for an accused person to put it to a Crown witness that he is not telling the truth; and I no not trunk that the trial judge should have behaved as summarily as he did towards the second appellant. there are other unsatisfactory features which emerge from the record of this trial. I do not, however, find it necessary to dwell any further on these matters, in view of points (1) and (4). It is clear that at the close of the evidence for the prosecution, the rights of the appellants were not properly explained to them

in terms of section 1/4(5) of the Criminal Law and Procedure Act No. 67 of 1938. It is equally clear that at the close of all the evidence, the trial judge did not invite either of the appellants to address him before finding them guilty, as he should have done in terms of section 175(1) of the Act.

These features of the case amount, in my judgement, to fetal irregularities which vitiate the entire proceedinqs. I refer, in this connect ion, to the judgement of this court in the matter of Caiphas DIamini (Appeal No.46/84), in which the relevant principles are fully discussed.

R.S. WELSH

JUDGE OF APPEAL

ISAACS, J.A.

I agree

I. ISAACS

JUDGE OF APPEAL

WILL, CJ.

I agree

D.D. WILL

CHIEF JUSTICE