IN THE APPEAL COURT OF SWAZILAND

APPEAL CASE NO 17/86

In the matter between:

PAULOS MAJAJI SIMELANE - First Appellant

PRINCE MFANASIBILI DLAMINI - Second Appellant

and

THE KING

CORAM: MAISELS J.P.

WELSH J.A.

DUNN A. J. A.

JUDGMENT (17.6.87)

MAISELS J.P.

The second appellant was indicted in the High Court on seven counts of defeating or of attempting to defeat or obstruct the course of justice. Each count contained an alternative charge of subornation of perjury. To all of them he pleaded not guilty. On Counts 6 and 7 he was indicted jointly with the first appellant who likewise pleaded not guilty to these counts.

In the result, the second appellant was acquitted on Counts 1 to 5, but both he and the first appellant were found guilty and convicted on Counts 6 and 7 of the crime of attempting to defeat the course of justice. The first appellant was sentenced on each count to five years' imprisonment to commence on 14 February 1986, the sentences to run concurrently, whilst the second appellant was sentenced to seven years' imprisonment to commence on 17 February 1986 on each count, both sentences to run concurrently.

The appeal by each of the appellants is against his conviction and sentence imposed by thelearned trial judge, Hannah CJ.

Because of an application to amend the notices of appeal to allege that the indictment disclosed no offence it is necessary to set out the charges on Counts 6 and 7.

"COUNT 6

The said accused No 1 and No 2 are guilty of the crime of Defeating or Obstructing or Attempting to Defeat or Obstruct the Course of Justice.

In that on or about 16 April, 1985 and at or near the Police Headquarters, Mbabane, in the district of Hhohho,

accused No 1, at all material times the Commissioner of Royal Swaziland Police Force and Accused No 2, at all material times a member of the Liqoqo (Supreme Council of State), and in the course of police Investigation of alleged High Treason and/or Sedition against Sishay Nxumalo, Hangomeni Ndzimandze, Abednego Dlamini, Titus Msibi and Edgar Hillary (hereinafter referred to as the suspects), did wrongfully, unlawfully and with intent thereby to defeat or obstruct the Course of Justice, instigate, procure and persuade Bhekuyise Elliot Ndaba to state in an Affidavit and/or sworn statement, the whole contents of which were to the knowledge of the accused, false, a copy of which is attached hereto, marked Annexure "E". In the premises the accused did Defeat or Obstruct or Attempt to Defeat or Obstruct the Course of Justice

COUNT 7

The said accused No 1 and No 2 are guilty of the crime of Defeating or Obstructing or Attempting to Defeat or Obstruct the Course of Justice.

In that on or about 26th April, 1985 and at or near the Police Headquarters, Mbabane, in the district of Hhohho, accused No 1 at all material times the Commissioner of the Royal Swaziland Police Force, and accused No 2 at all material times a member of the Liqoqo (Supreme Council of State), and in the course of Police

Investigation of alleged High Treason and/or Sedition against Sishayi Nxumalo, Mangomeni Ndzimandze, Abednego Dlamini, Titus Msibi and Edgar Hillary (hereinafter referred to as suspects) did wrongfully, unlawfully and with intent thereby to defeat or obstruct the course of justice, instigate, procure and persuade Johannes Dlanizinkomo Dlamini to state in an affidavit and/or sworn statement, what was to the knowledge of the accused false, to wit:

That on 18th March, 1984 a meeting was held at the house of the said Johannes Dlanizinkomo Dlamini, at Siteki, attended by the following:

1. Prince Sozisa

2. R V Dlamini

3. Princess Mnengwase

4. Dr. S S Nxumalo

5. Titus Msibi

6. Mangomeni Ndzimandze

7. Prince Dumisa

8. A short male, speaking Zulu.

That during the said meeting, he Johannes Dlanizimkomo Dlamini, heard Dr. S S Nxumalo say " we must do away with Liqoqo because it is spending Government money. We must do away with the Queen Regent, because she is too close to Liqoqo".

That after the said meeting, he observed the short Zulu-speaking male rubbing the (sic) or cleaning the floor.

In the premises the accused Defeat or Obstruct or Attempt to Defeat or Obstruct the Course of Justice".

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The statements referred to are annexed to and form part of this judgment as is a further statement made by Ndaba marked "A", "B" and "C" respectively. It is not necessary to set out the alternative counts of subornation of perjury with which the appellants were charged. The amendment sought to the grounds of appeal is set out in the heads of argument on page 17:

"The indictment in Counts 6 and 7 fails to disclose an offence and lacked essential averments inasmuch as there was lacking therefrom any averment as to the actus reus of the offence or the specific intent of the accused in relation to the actus reus".

Mr. Donkoh, who appeared for the Crown, objected to the amendments sought to each notice of appeal; but for the reasons which follow it became unnecessary to hear him as the application for amendment was refused.

Mr. Selvan for the appellants very fairly and properly drew the court's attention to certain South African decisions and to a passage in Hunt: South African Criminal Law and Procedure Vol 2 p 146. As stated by him the preponderance of judicial authority in South Africa is to the effect that the crime may be committed notwithstanding that the conduct constituting it is not committed in relation to a specific pending case. of R v Adey and Hencock (1) 1938 (1) PH H75 (C); S v Burger 1975 (2) SA 601 (C).

Mr Selvan contended that the indictment in both counts 6 and 7 was defective inasmuch as there was lacking an averment as to

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the actus reus or the specific intent relied on. He submitted that the accused were not informed in the charge as to what their alleged purpose was in causing Ndaba or Dlamini to make false statements under oath. I confess to having some difficuly in undestanding, let alone upholding, Mr Selvan's submission. Adey and Hancock was a case in which certain persons were charged with the crime of attempting to defeat the due course of justice "in that whereas it was material, during the investigation of a case of suspected theft of a tin of oil by the said H from the S. A. R. & H Administration, to ascertain whether he had obtained the said tin of oil from one C, an employee of Power Industries, Ltd. of Cape Town,the said A (1st Accused) and the said H (2nd Accused), well knowing that the said C had not supplied a tin of oil to the said H., ... wrongfully, unlawfully, with intent to defeat or obstruct the due course of justice, and to prevent the said H from being dealt with according to law, induced and persuaded the said C falsely to inform any member of the S. A. R. & H. Police who might make enquiries in the case that he, the said C, had supplied H with a tin of oil; as a result of which inducement and persuasion the said C thereafter falsely informed Sergeant 6 of the S. A. R. & H. Police, that he had so supplied a tin of oil to the said H; and thus the Accused did both and each or one or other of them attempt to defeat or obstruct the due course of justice".

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There was, as is pointed out in the report, no allegation in the indictment that proceedings in respect of the alleged theft were actually contemplated against H, but the indictment did state that the alleged attempt was made during the investigation of a case of suspected theft of oil and the indictment amounted to saying that: the Railway Police suspected that a tin of oil had been stolen and in connection with that suspicion they started investigations. Having suspected that a tin of oil had been stolen it was, as stated by Centlivres J. reasonable to assume that they contemplated criminal proceedings in respect of the supected theft. The report then reads.

"In any event it seemed to the Court that when an investigation was being made into a suspected crime, and a person persuaded another person to make a false statement which tended to show that the suspected criminal was not guilty of the suspected crime, he was then interfering with the due course of justice: see Rex v Zackon, 1919 AD at p 182; Fein & Cohen v Colonial Government 23 SC 750; Rex v Moss 1902 C.T. Law Reports Vol XII p 810; Rex v Sharpe 1938 AE Reports, Vol 1 Part 1 p 48. It would be lamentable if the Court were to lay down that when the police were investigating a suspected crime that 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. Exception to the indictment accordingly dismissed."

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I would with respect fully adopt the view taken by Centlivres J in that case.

So, too, in the case of S v Burger (supra) the Court (Baker and Van Zijl JJ, Burger J dissenting) held that the course of justice could be defeated in many ways and that a false statement to the police containing allegations intended to lead them off the track of the true offender was but one of them.

What did the indictment in this case state? It said that the appellants, both of whom held high office in Swaziland, "in the course of police investigation of alleged high treason and/or sedition" of the persons referred to in the indictment to as "the suspects", with the intention of defeating or obstructing the course of justice, procured and persuaded Ndaba in Count 6 and Dlamini in Count 7 to make affidavits which, to the knowledge of the appellants, were false. The accustoms was that of procuring affidavits, false to the knowledge of the appellants, implicating the socailed "suspects" in the crimes which the police were investigating against the su"suspects". The passages in Adey and Hancock quoted above appear to be particularly apposite to the present case. See, too, Hunt p 146, 151, 153.

If attempting to procure persons to make false exculpatory statements in favour of a "suspect" is a crime, as it undoubtedly is, it seems to me to be an a fortioricase,

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where it is sought to induce a witness to make a statement false to the knowledge of the person procuring the making of the statement, which is inculpatory of the "suspect".

That being so, there was in the opinion of this Court no ground for granting the amendment sought and it was refused.

At the conclusion of argument on 15 May 1987 the appeals of both the appellants against their convictions and sentences were dismissed. It was then stated that reasons would be given later. These now follow:

It will have been observed that the charges alleged that the first appellant was the Commissioner of the Royal Swaziland Police Force and the second appellant was a member of Liqoqo (Supreme Council of State). These facts have been proved. The constitution of Swaziland, Act 50 of 1968, has been amended from time to time by King's Proclamations. The King's Decree, No. 1 of 1982 dated 18 June 1982, stipulated that:

"(2) The King or, in the absence of a King, the Liqoqo may, at any time appoint, in accordance with Swazi Law and Custom, a person (Hereinafter referred to as "an authorised person") to perform on behalf of the Regent the functions of her office if the Regent is, for any reason, unable to perform those functions".

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In paragraph 4 there is a new definition of Liqoqo reading as follows:

"Liqoqo means the Supreme Council of State whose function is to advise the King on all matters of State and which shall consist of members appointed by the King to hold office at his pleasure in accordance with such terms and conditions (including emoluments and allowances) as he may determine".

Hannah CJ in his admirably clear and concise judgment sets out the background to the case which was apparently largely common cause. I quote from this part of the judgment.

"Early in 1984 there was an abortive attempt to remove certain members of the Liqoqo, including the second accused, from office.

In June of that year there was an incident at Matsapha Police College following which two Cabinet Ministers and a number of high ranking police and army officers were removed from office. It was a time, as one witness described it, of political strife and trouble.

"Among those who were removed from office either then for later in the year were Dr Sishayi Nxumalo, the Minister of Finance, Mr. Titus Msibi, his deputy, Colonel Ndzimandze, the Army Chief of Staff and another army officer, Major Abednego Dlamini. In November 1984 Dr Nxumalo was arrested and detained under a sixty day detention order which was subsequently renewed from time to time and later i in the same month Col Ndzimandze and Major Dlamini were also arrested.

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In January 1985 the same fate befell the two former police chiefs: who together with the two army officers were charged with sedition. The case against them was set down for hearing before the High Court on 15 April 1985.

"As I have alreday indicated, in 1984 the second accused was a member of the Liqoqo and, following the dismissal of Mr Msibi, the first accused was appointed Commissioner of Police. On 3rd December 1984 the first accused formed' a special unit of high ranking police officers to investigate the incident which had occurred at the police college and related matters. The unit submitted its report in February 1985 and a docket was opened by the Director of Public Prosecutions for the prosecution of Msibi, Hillary, Ndzimandze and Dlamini on charges of sedition."

Instead, as is usually the case in prosecutions in Swaziland, of a member of the staff of the Director of Public Prosecutions being assigned to prosecute in the matter, responsibility for the

prosecution was taken away from the Director of Public Prosecutions and a Durban advocate, Mr. Jansen SC, and Mr Eric Carlston, a local attorney, were instructed to conduct the prosecution. According to evidence given in the case, on 15 April Mr Jansen appeared before the High Court and withdrew the charge of sedition. He apparently took the view that the more serious charge of high treason should be preferred against the appellants and possibly other persons. However, further evidence was required to support this charge and, according to the evidence given by Mr Carlston, the first appellant assured him that such evidence would be

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forthcoming within two weeks. Within these two weeks further evidence did, in fact, come to light though not sufficient to satisfy Mr Jansen and/or Mr Carlston that a prosecution for treason would succeed.

On the very day set for trial, namely 15 April, a South African inyanga, one Ndaba, presented himself at Manzini Police Station where he asked for permission to visit Dr Nxumalo in jail in order to collect an outstanding debt. The station commander thought it proper to telephone the first appellant to seek advice as to whether she could permit the inyanga to visit Dr Nxumalo. The first appellant, according to evidence given by him, had met Ndaba at the office of the Prime Minister and at this meeting the second appellant was present. The first appellant also stated that prior to 15 April he met Ndaba at his sister's house.

According to the evidence given by the first appellant, Ndaba was presented to him as a prospective Crown witness, but if his evidence is to be believed he did not enquire from Ndaba what his evidence was likely to be. Ndaba, it may be stated immediately, denied that he had ever met the Prime Minister, but stated he had met the first appellant at the second appellant's house. A good deal of the argument of Mr Selvan was directed to the question as to whether the Crown or the defence should have called the Prime Minister to give evidence. Mr Selvan stated that the Prime Minister should have been called by the prosecution, whereas Mr Donkoh said he was content to rest his case without

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the evidence of the Prime Minister. It seems to me that the evidence of the Prime Minister would really have been totally irrelevant. What is important is that it was clear to the first appellant before 15 April that Ndaba was to be a Crown witness. It is difficult, to understand why a statement was not taken from this witness immediately by the investigating team of police officers set up by the first appellant to investigate the charges against the detainees. They were only instructed to do so as a result of the somewhat bizarre events that occurred after the first appellant received a telephone message from the station commander at Manzini that Ndaba was there and wanted to see Dr Nxumalo.

According to the evidence of the first appellant, upon receiving this telephone call he went immediately from his office in Mbabane to Manzini, saw Ndaba and, although he knew that he was a potential Crown witness, had Ndaba locked up for the night and instructed his investigating team to take a statement from Ndaba the next day after Ndaba had spent a night in the cells. It was contended by Mr Donkoh that this action by the first appellant was only consistent with his attempting to carry out a pretence, namely a pretence that he had never seen Ndaba before and a deliberate concealment from the investigating officers not only that he had met Ndaba, but that he had done so in the presence of the second appellant and also, if his evidence is to be believed, in the presene of the Prime Minister.

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The first appellantis explanation of the conduct to which I have just referred is completely unacceptable and not worthy of repetition.

The statement, which is Annexure "A" to this jugment, was taken from Ndaba on 16 April 1985, that is one day after Mr Jansen had withdrawn the charge of sedition and after the first appellant had assured him that evidence of high treason would be forthcoming within two weeks. In the course of that statement Ndaba referred to his going to a house on 18 March 1984 at Sidwashini where he said he had performed certain acts and was preparing the necessary muti. He apparently did not go into ther house itself, but stated that Dr Nxumalo had been at the house that night.

Strangely enough, on 26 April 1985 a statement was taken from Johannes Dlamini, the person referred to in Count 7, in which there was a description of the persons present at a meeting in the house in question and at which there were present the persons named in Annexure "B" and where he stated he heard Nxumalo say the words alleged in Count 7. This statement by Dlamini confirmed Ndaba's allegations in certain important respects.

The statements of these two persons were made available to the prosecutors who did not appear to be over-impressed with the quality either of Ndaba or Dlamini or of their statements. Eventually, the prosecutors came to the

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conclusion that a case of treason could not be established on the statements given by Ndaba and Dlamini. The prosecutors required further evidence and the first appellant said that further evidence would be forthcoming. Meetings took place between Mr Carlston and the first appellant and letters were written in connection with further evidence that was required. A number of other statements were obtained. It seems that the prosecutors were still not satisfied. These statements were made to and taken by the first appellant in August and September 1985.

On 2 October 1985 the first appellant was dismissed as Commissioner of Police and it was decided at a meeting with the Minister of Justice that the makers of the various statements which had been placed before the special prosecutors should be re-interviewed. As a result of these interviews any case of treason which there might have been against the detainees collapsed and consideration was given to prosecuting both the first and second appellants for attempting to defeat the course of justice.

Save for that portion of my review of the facts which deals with the manner in which the statement of Ndaba was obtained, what I have said seems to have been common cause at the trial. There is no doubt that both the statements made in Annexures "A" and "B" are false. There is also no doubt that the second appellant knew that both statements were false. If one looks at Annexure "A" and one

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substitutes the name of the second appellant for that of Nxumalo where it appears, this largely accords with the evidence given by a witness called Futhumele Dlamini who gave evidence at the trial. I quote here from the his judgment of the Chief Justice, because it summarises the essential aspects of the case against both the appellants.

"On 26th March 1985 the second accused, Futhumele Dlamini and two others connected with the household of the second accused drove to Johannesburg where they met Elliot Ndaba, an inyanga, and returned with him to Swaziland. According to Futhumele she is an acquaintance to the second accused who had given her financial assistance in the past and it was she who had

arranged the meeting with Ndaba after the second accused had asked her whether she knew anyone in South Africa who might be able to strengthen the case against the suspects. according to Ndaba when they met in H Johannesburg h the second accused explained to him in general terms that there were people in Swaziland who were trying to overthrow the Head of State and that he wanted Ndaba's help as a traditional healer. Ndaba would be paid R18,000 for his services.

"Ndaba said that they separated at the border post so that they would not be seen together -this is accepted by the second accused and indeed borne out by immigration documents produced to the Court - and having met up again on the Swazi side of the border they continued

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to the second accused's home. The second accused then explained the nature of the services Ndaba was to render in more detail. There were certain people under arrest - this was a reference to the detainees who had at one time been responsible for causing the arrest of the second accused and these people must not be permitted to leave goal. He wanted Ndaba to give false testimony against them on lines which would be rehearsed and the effect of which I will shortly summarise when I come to the statement Ndaba eventually made to the police.

"Ndaba said he was shown various houses where he was to say meetings had taken place, he was given photographs of the detainees so that he might be able to recognise them, he was shown a video film of the detainees and he was provided with the dates of the meetings he was to refer and telephone numbers at which he was supposed to have tried to contact Dr Nxumalo. Bottles containing muti were buried at certain entrances to the Parliament Building. He produced two of the photographs and one of the muti bottles which was subsequently recovered.

"While Ndaba was being rehearsed in his false story another man, it is alleged, was brought into the web of deception which was being spun. This was Johannes who, as I have already said, was a senior government official at Siteki and who, according to his evidence, had had the misfortune to be caught up in politics in March or April 1984 when he was prevailed upon by a number of senior princes to type a document to be signed by the Authorised Person

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dismissing the second accused and Dr George Msibi from the Liqoqo and the Attorney-General from office. He said that in March 1985 the second accused used this fact to force him to make a false statement saying that the detainees and others had held a meeting at his house in Siteki during which seditious or treasonous statements had been made. This was to corroborate Ndaba's false statement and he was obliged to rehearse the fictitious events of the evening in question with Ndaba.

"So it came about that on 15th April 1985 as part of the plan conceived by the second accused, and allegedly supported by the first accused, Ndaba presented himself at Manzini police station seeking to visit Dr Nxumalo in prison on the pretext of wanting to obtain from him money which Dr Nxumalo had agreed to pay him for his services as a traditional healer. When, as expected, that request was turned down he insisted on seeing the first accused and, as was also expected, he was, at least initially, regarded as manna from heaven by the investigating unit. Ten days later Johannes put in his appearance at police headquarters having, he said, been summoned there by the first accused and he also made a false catomen statement confirming much of what had been said by Ndaba.

"At this point it is convenient to summarise the two statements. In his statement (exhibit 6) (Annexure A) Ndaba commenced by describing himself as a prefessional herbalist from

Newcastle and then goes on to recall a day in March 1984 when he was approached at home by Dr Nxumalo.

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Dr Nxumalo told Ndaba that he was a Minister in the Government of Swaziland and had come to in him for treatment in order that he should become Prime Minister and that the present Prime Minister should be removed. Dr Nxumalo alleged that the Liqoqo was misappropriating Government funds and that he wanted it removed. Ndaba then quoted a price of R15,000 for his services, R5,000 to be paid as a deposit and the balance to be paid when Dr Nxumalo became Prime Minister. He would require some dust from a place where Dr Nxumalo was holding a meeting and Dr Nxumalo said one c such meeting would be taking place at Siteki on 18th March. The two then agreed to meet at a certain place in Swaziland on that day.

"Ndaba says that he entered Swaziland on 16th March 1984 and on 18th March he met Dr Nxumalo at the pre-arranged place. Together with another man they then drove to Siteki where Dr Nxumalo met other people. Ndaba sat on a verandah during the meeting but was later taken into the house. He describes two of the men at the meeting as wearing unifrom, another as a prince, a woman, a man with a limp and a man who wore glasses. Dr Nxumalo appeared to be the chairman. He says that the main topic discussed was the Liqoqo which was accused by Nxumalo of misappropriating Government funds and he XXX suggested that it be abolished. It was also said that the Prime Minister, the accused and the Queen Regent should be removed from their positions. At the end of the meeting he, Ndaba, swept some dust from the floor which he put

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in a plastic bank bag and Dr Nxumalo then drove him back to the place where they had met. They then arranged to meet again on 6th June so that Ndaba could collect more dust.

"Ndaba says that on 6th June Dr Nxumalo drove him to a house which he said was his own and where a number of people were waiting. Four of these he recognised as having been at the Siteki house and a meeting then took place. After the meeting Ndaba again collected some dust and the following day he returned to Newcastle saying he would return on 14th June.

"Ndaba says that in the evening of 14th June he was again picked up by Dr Nxumalo and accompanied him to the Parliament Building where Dr Nxumalo pointed out the entrance used by himself and the entrance used by the Prime Minister. Ndaba then buried a bottle containing muti at each entrance the idea being that this would cause Dr Nxumalo to be elevated to the position of Prime Minister and the Prime Minister to be removed. Arrangements were then made for the two men to meet at Newcastle in three weeks time when the deposit would be paid and Ndaba would take Dr Nxumalo to the mountains for the treatment to be completed. Dr Nxumalo did not, however, keep this appointment and Ndaba says he t led to contact Dr Nxumalo at three telephone numbers which he had been given but to no avail. He says he became worried and on 12th April 1985 had come to Swaziland only to discover that his client/patient was in prison. Some people then advised him to go to Manzini Police Station to obtain permission to see Nxumalo and that he had done on 15th Apri1.

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"The parts of this statement which deal with the socalled treatment are bizarre in the extreme and in many countries would be laughed out of court. But here in Swaziland where beliefs and superstitutions surrounding the use of muti still abound they would not necessarily have met such a fate.

"In a supplementary statement made on 22nd April (exhibit 5) Ndaba explains that on his two visits to Swaziland in June 1984 he entered through the border fence and not the control post as he did not want it to be known that he was in the country and he had entered in similar manner on 12th April 1985.

"In his statement (exhibit 7) Johannes said that he had at one time resided at the District Commissioner's house at Siteki and on 12th January 1984 the then Authorised Person, Prince Sozisa, moved in with him saying that he had learnt of a plot to assassinate him and he felt it unsafe to continue to reside at his house at Ezulwini. He says that during the period of his stay Prince Sozisa received many visitors and he then goes on to mention a meeting which took place at the house on 18th March 1984. Present were certain princes and three of the detainees including Dr Nxumalo. He speaks of a short Zulu speaking male who waited outside initially and who said he was waiting for Dr Nxumalo. During the discussion which took place he overheard Dr Nxumalo saying that they must do away with the Liqoqo because it was spending too much money and with the Queen Regent

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because whe was too close to the Liqoqo. When people were leaving he says he observed the Zulu speaking male on the ground as if cleaning up some spilt tea. He says he thought he would be able to identify this man.

"As may be seen the two statements corresponded in certain essential respects and there was a reasonable chance that the police, knowing of no connection between the two men, would be conviced of what they had been told".

Mr Selvan, who appeared in the court below as well as in the appeal before us, did not seek to argue in the High Court that Ndaba's statement, which is Annexure "A", was not a complete fabrication. Indeed, there is no doubt that the second appellant knew that it was false. With regard to the statement of Johannes Dlamini Mr Selvan argued in the court below that the Crown had not proved that the meeting referred to by Johannes in his statement might not have taken place. The learned Chief Justice did not accept this contention. He thought it was not in accord with his view of Dlamini as a witness or of the facts. He was satisfied that the stories given to the police by Ndaba and Dlamini were fabrications and he correctly stated that the only question which the court had to decide was whether the Crown had proved beyond reasonable doubt that one or other or both of the appellants had put Ndaba and Dlamini up to making them.

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I should here say that the learned Chief Justice was fully alive to the danger of relying on the evidence which Ndaba and Dlamini gave at the trial. He was aware of the necessity to exercise considerable caution before he accepted their evidence. The proper methos of dealing with accomplices' evidence - and Ndaba and Dlamini were clearly accomplices -is set out in the oft-cited case of R v Ncanana 1948 (4) SA 399 (A) at 405 and 405, In dealing with the necessity or otherwise of having the evidence of an accomplice corroborated, Schreiner J A stated that even where the requirements of Section 285 of the then Criminal Procedure Act and Evidence Act in South Africa were satisfied (there is a similar section in Swaziland, ie section 237 of the Criminal Law and Procedure Act, 67 of 1938) - "caution in dealing with the evidence of an accomplice is still imperative. The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused

but is such a witness perculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are truth. This special danger

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is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of sec 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although section 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But is will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused, is in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

The second appellant denied that he had any part in persuading Ndaba or Johannes to make false statements. It is impossible to believe this evidence. He was the person who went to Johannesburg to seek out the inyanga and if anybody knew that Ndaba's statement was false it was the second appellant. Mr Selvan quite rightly before us could not really challenge the correctness of the conviction of the second appellant.

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With regard to the rst appellant, there is no doubt that parts of the evidence of Ndaba are open to serious criticism.

Nonetheless, the conduct of the first appellant when Ndaba was at the Manzini Police Station to which I have referred, coupled with the numerous examples of what is patently false evidence given by Mr Donkoh in his forceful argument before us, satisfied us that the learned Chief Justice was, apart from the question of demeanour, entitled to come to the conclusion that he preferred the evidence of the accomplices Ndaba and Dlamini to that of the first and second appellant. The learned Chief Justice was under no illusions about the character of Ndaba, whom he correctly regarded as an unscrupulous rogue; and he warned himself of the special danger of convicting on the evidence of an accomplice. There is evidence implicating both the appellants with regard to the false statements having been procured by them. I refer, for example, with regard to the second appellant, to the whole episode of the visit, to Johannesburg and the procuring of the inyanga; and to the incident at the Manzini Police Station and the conduct of the first appellant there as evidence implicating the first appellant. I also consider that both the appellants showed themselves to be untruthful witnesses. There is other evidence which corroborates Ndaba, such as the contents of his pocket book in which the second appellant made certain entries. There is also the feature mentioned by the learned Chief Justice, that the statement made by Johannes on 26 April 1985 (Annexure "B" hereto)

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was no coincidence, but was a part of the preconceived plan of the appellants to fit in the two stories together: namely, that Ndaba had gone to a house but had not been present at the meeting which took place there and that Johannes filled in the circumstantial details of what is alleged to have happened at that meeting.

I do not think it necessary to consider in any detail the criticism of the evidence of Mr Amos Dlamini. It is quite clear that at some stage of the investigation he decided that there was

something wrong with what was going on and that he refused to have anything further to do with it. There are certain aspects of Amos Dlamini's evidence which appear to be contradictory, but these contradictions are minor and are of no real significance in the case. What is important in his evidence - and this is not really denied by the appellants - is that he stated that there seemed to be a good a working relationship between the first and the second appellants. Amos Dlamini stated that the second appellant spent much of his time in the first appellant's office. Amos Dlamini was the first appellant's Assistant Commissioner. Although the first appellant said that Amos DLamini's evidence was an exaggeration, it is clear that the acquaintanceship between the first and second appellants was not merely a casual one.

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The learned Chief Justice, in my opinion, correctly came to the conclusion that there was a conspiracy between the second appellant, Ndaba and Johannes Dlamini to fabricate evidence against the persons who were detained. He was also satisfied on the evidence that the first appellant was a party to that conspiracy. The learned Chief Justice found support for his view by the assurance given to the special prosecutors by the first appellant that evidence supporting a charge of treason would be forthcoming very shortly. That assurance was given on 15 April 1985. It was followed immediately by the statement of Ndaba made on 16 April 1985 and the statement of Johannes given on 26 April 1985. There is no doubt in my mind that his knowledge of Ndaba had come from the second appellant and I do not believe that he did not know what was going on between the second appellant and Ndaba.

There is also the evidence with regard to the first appellant's endeavour to repair the blemishes in Naba's account of 16 April of what had happened as to when he entered Swaziland. On his own version, the first appellant must have known that Ndaba was lying when he said in his statement that he entered Swaziland on 12 April 1985 and it was after this entry that he, Ndaba, went to see Nxumalo at the Manzini Police Station on 15 April 1985. The first appellant on his own evidence

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stated that he had met Ndaba on 10 April 1985; and knew that Ndaba had entered Swaziland on other occasions before that date. The date of 12 April did not appear on Ndaba's passport and Ndaba attempted to cure this by the statement which he made on 22 April. That the first appellant was a party to the second statement is, I think, clear. The failure of the first appellant to inform his Assistant Commissioner Amos Dlamini of the true facts does not seem to me to be consistent with his innocence.

I have, I hope, given careful consideration to the whole of Mr Selvan's valiant attempts to show that the learned Chief Justice erred in convicting the first appellant; but in my judgment no other conclusion was possible. Mr Selvan contended that the sentences were unduly severe having regard to (a) the personal circumstances of the appellants; (b) the extent of their disgrace and downfall; and (c) the troubled times during which the offences were perpetrated. He further submitted that this court should take into account that there was never any real prospect of the design succeeding. The failure of the design was not due to any want of effort on the part of the appellants. It was due to the fact that the prosecuting counsel was satisfied that the evidence produced by the appellants was false.

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The learned Chief Justice took full account of all the points raised by Mr Selvan in his judgment on the question of sentence. There is no ground upon which this court can interfere with the sentences which he imposed. They were more than fully justified. The Commissioner of Police and the member of the Liqoqo who held high office were guilty of a premeditated attempt to

procure false evidence. If that attempt had succeeded, the false evidence would have been placed before the High Court. The aim of the appellants was to have the persons named as "suspects" in the indictments convicted of one of the most serious of crimes, namely treason. Both the appellants were, as the learned Chief Justice put it, callously indifferent to the fate of these innocent persons and they were concerned with their own interests. To allow crimes of this nature to be treated lightly would be to bring the administration of justice into disrepute. The crime of which both the appellants were found guilty is a most serious one. Mr Selvan argued that the second appellant was undoubtedly the mastermind and that therefore the first appellant should have received a much lighter sentence than the one imposed upon him. The learned Chief Justice, in my opinion, gave full weight to the fact that, as he put it, the second appellant was the mastermind of the plot and that the first appellant was merely his loyal lieutenant.

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He did so by imposing a lesser sentence upon the first appellant than that which he imposed upon the second appellant. In the opinion of this court, no fault can be found with the manner in which the learned Chief Justice exercised his discretion in regard to sentence.

I. A. MAISELS

JUDGE PRESIDENT

WELSH J.A. R. S. WELSH

I agree JUDGE OF APPEAL

DUNN A. J. A. B. DUNN

I agree ACTING JUDGE OF APPEAL

Counsel for the Crown Counsel for the Appellants

A. K. DONKOH R. L. SELVAN AND MATSEBULA

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ANNEXURE "A"

STATEMENT OF BHEKUYISE ELLIOT NDABA

Statement recorded at Mbabane Police Headquarters on 16th April 1985. I am a professional Herbalist from Newcastle. I recall sometimes in March 1984 date which cannot remember, when I met a man who introduced himself as one Sishayi Nxumalo from Swaziland. This man came at my home in Newcastle at Emadadeno Location House No. 9090. He was driving a blue car and was alone alone. Mr. Sishayi Nxumalo told me that he was a Minister in the Swaziland Government. He said he had come to me for treatment. He said he wanted me to treat him in order that he become Prime Minister for Swaziland and that the present Prime Minister removed. He also told me that ther is an organisation in Swaziland known as Liqoqo the Liqoqo he said was misappropriating Government funds. He wanted the Liqoqo removed. He said he would appreciate if I could treat him t6 attain the position of Prime Minister. I then gave him my price for such treatment. My price was E15,000 he was to pay E5,000.00 as a deposit on the treatment and the balance paid when he attain the post he wanted. He accepted my price and he said he was prepared to pay. I told him that he will have to pay the deposit at my place, where I will have

to take him to the mountain for treatment which would be the last treatment. I told him that to do this type of treatment I would need, the dust from a meeting where he is participating. He then told me that they would be having a meeting at Siteki on 18th March 1984. Since I did not

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know Siteki I told him to meet me at Rosemary's house at Sidwashini on 18th March 1984. On 16th March 1984 I came into Swaziland through Oshoek Border Post. I went straight to Rosemary's house at Sidwashini. On 18th March 1984 in the eving Nxumalo came to fetch me from Rosemary's house with same blue car which he was driving when he came at my place. He was in company of another man who was tall wearing glasses and had a beard. This man had a big voice. Mr Nxumalo did not introduce me to this man. We than drove to Siteki. We got at Siteki at about 8p.m. WE got to a certain house. I sat in the verandah while Nxumalo and the man went into the house. There were other people there, some came when we were already there. There seemed to be having a meeting. I sat for a while in the verandah and was later taken into the house by a young man. I sat by the door. I was able to see everbody from where I was sitting. There were about eight (8) people at this meeting. I noticed the following people, two men were wearing uniforms like the Police or Army, one man was in Swazi attire, this man was heavy and light in complexion. He addressed as a Prince, one lady whs was middle aged, one man who was limping and using a walking stick and Mr Nxumalo, my client with the gentleman who was tall wearing glasses. The young man who led me into the house seemed to be helping in the house as he did not attend the meeting. Mr Nxumalo appeared to be the Chairman of the meeting. The main topic at this meeting

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was about Liqoqoq which was accused of letting the country down and misappropriating Government funds. These words were said by Nxumalo. He further said if the Liqoqo may be abolished this country may regain its good name. He then named three people who should be removed from their positions, these were the Prime Minister, Mfanasibili and Queen Regent. This is the only thing I can remember said at that meeting. The meeting ended. I cannot remember what time they finished. They all went out and stood outside the house chatting. At this stage I had a chance to sweep the dust on the floor which I needed. I got it and kept it in a bank plastic bag. After that we left with Mr. Nxumalo, the other man we came with did not return with us we left him there. Mr Nxumalo drove me to Rosemary's house where he left me. On 20th March 1984 I left for Newcastle. Before I left I told Nxumalo that I would need more dust and he told me that they would have another meeting on 6th June 1984. I told him that I would come back on 4th June 1984. On 4th June 1984 I returned and still went to Rosemary's house in Sidwashini. On 6th June 1984 Mr Sishayi Nxumalo came to fetch me from Rosemary's house at about 6.30p.m. He was alone and was driving the same blue car he was using before. He drove me to a certain house which he said was his. I remained in the car. There were other cars outside parked and were some people inside them. When Nxumalo arrived, the people who were in cars went into the house. They were in the house for quite a long time. I could not see all the participants at this meeting except the

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man who was in Swazi attire, the lady whom I saw at Siteki, two men who were in uniform at Siteki and they were still in uniform on this day. After the meeting when everybody had left Nxumalo a sent a man who appeared to be a driver to call me into the house. When I got into the house, I quickly swept the floor and took the dust which I neede in a handkerchief. Mr Nxumalo then drove me back to Rosemary's house. On 7th June 1984, I left for Newcastle and told Nxumalo that I would return on 14th June 1984 to further my treatment on him. On 14th June 1984 I returned and went to Rosemary's house. In the evening of the same day Nr Nxumalo came to fetch me. He was alone. This time I had told him that I wanted to treat a place where

they meet and he said this would be at the Parliament. He then drove me there. At Parliament he showed me an entrance used by him and others and another one used by the Prime Minister. I then put one bottle containing medicine at each entrance, I dug them into the ground. This medicine was intended to enable Nxumalo to be Prime Minister and the present Prime Minister removed from his position. After I had finished this went left for Rosemary's house where be left me. I told Nxumalo that he should come to my place after three weeks bringing my deposit of R5,000 and I would take him to the mountain to complete treatment on him. Mr Nxumalo did not come at my place after three weeks until today. I tried to call him to find out why he was not coming, but to no avail. I was

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phoning him at the following telephone numbers 22688, 53603 and 42136. I got worried and decided to come to Swaziland and look for him. On Friday 12th April 1985., I came to Swaziland through Oshoek Border and went to Rosemary's house. When I got there, I asked Rosemary how I would locate Mr Sishayi Nxumalo. Rosemary told me that Sishayi was in jail. Some people then advised me to go to Manzini Police Station to make some enquiries as to how I would see Sishayi in prison. I went to Manzini Police Station on 15th April 1985 and met the Station Commander to whom I related the matter. Rosemary's surname is Abner. I have known her since 1980. Rosemary's was not aware that I had any business deal with Sishayi Nxumalo and she never saw Sishayi Nxumalo fetching me from her house. I want to see Sishayi and discuss our business so that I could take out the bottles of medicine as they might be a problem to his family as I did not complete the treatment on him. Read over and admitted to be correctly recorded.

Recorded: Mbabane 14.30hrd 22.04.85 Further to my affidavit of the 16th April 1985, I wish to clarify a number of points.

When I came to Swaziland in 1984 i.e. the 4th June and 14th June and left subsequently, I did not pass through a Border Control Post, but went through the fence. I did not
wish for it to be known that I was visiting Swaziland.

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I had not been specifically asked t as to how I had entered/ left Swaziland when previous affidavit was recorded. I was however, asked as to how I entered Swaziland on the 12th April 1985 and in reply stated that I had come through Oshoek Border Control Post. This is wrong, I came through the fence also on that occasion. I knew it to be wrong and was afraid, hence my furnishing such explanation.

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ANNEXURE "B"

STATEMENT BY JOHANNES DLANIZINKOMO DLAMINI

I am presently occupying a house at Mabuta Avenue, Siteki.

I resided in another house on Club Road, Siteki until April, 1984 (The Old District Commissioner's residence).

On the 12th January 1984. The Authorised Person, Prince Sozisa arrived at my old house. He spoke and informed me that he had received a telephone call from South Africa, the unkown caller informing him that people would be coming to Swaziland with the intention of killing him i.e.

shooting him on th 15th January 1984.

I informed him that there was little if any security at Siteki that Manzini would be better for him. IN reply he cated that there were too many houses near his at Manzini.

He also mentioned that he did not feel safe at his residence at Ezulwini. He decided to stay at my old house.

The Authorised Person subsequently used to have lots of visitors i.e. Prime Minister, members of the Liqoqo, Government Ministers and Chiefs etc.

I did not join their discussions which were usually held in the dining room. When such discussions were conducted, I used to provide various refreshments, in fact they used to ask for, and I provided.

I remember distinctly one such meeting which was held at the house. It took place on the 18th March 1984. Present were the following people:

Prince Sozisa

R. V. Dlamini

Princess Mnengwase

Dr. S.S. Nxumalo

Titus Msibi

Mangomeni Nozimandze

also present was a short male speaking Zulu. I first saw the latter waiting outside. I asked him as to whom he was waiting for and in reply he stated he was waiting for S.S. Nxumalo. He was waiting near the door, I told him to go inside and he did. The discussions took place between all of them. I did not join them, but moved from the place where 1 had been in the kitchen. They remained for approximately ½ OR 1 hour leaving at about 2000 hours, at the end of their discussion 1 provided refreshments i.e. Coca Colas. The Zulu speaking man stated he did not like same and asked for and was given tea in lieu.

Whilst serving refreshments, I heard S.S. Nxumalo say: "WE MUST DO AWAY WITH THE L10000 BECAUSE IT IS SPENDING GOVERNMENT MONEY, WE MUST DO AWAY WITH THE QUEEN M REGENT BECAUSE SHE IS TOO CLOSE TO L10000. HE ALSO STATED WE ARE GOING TO DISCUSS THIS MATTER R TOMORROW. WE MUST MEET." The remarks were most unusaul that is why I took particular notice and subsequently made a note of the date in my diary. Whilst away for some 2-3 minutes they started to leave the house. I observed the Zulu speaking male, he was on the ground, rubbing as if cleaning the floor. Enquiring as to what he was t doing, he sated to the effect that he had

spilt tea and was cleaning up. I told him not to worry, that I would see that it was done and to

leave it. The following morning, 19th March 1984 at about 0700hrd. The Authorised Person and escort left for Lobamba. He came back late the same eveing.

There was no meeting held, certainly not at my house on that particular day.

I think I could identify the Zulu speaking man if confronted with him again.

Recorded by me: S. O'Connor.