IN THE COURT OF APPEAL OF SWAZILAND

Appeal Case No.19/90

In the matter of

DOMINIC MNGOMEZULU AND OTHERS

vs

THE KING

CORAM : MELAMET, J.P.
: WELSH, J.A.
: KOTZE, J.A.

J U D G M E N T

(01/10/91)

Melamet, J.P.

On the 26th October 1990 the six appellants were convicted by the High Court of Swaziland of contravening the King's Decree No.12 of the King's Proclamation of 1973 in that they were found guilty of unlawfully and intentionally organizing, and or attending a meeting of a political nature or alternatively participating in such a meeting without the prior written consent of the Commissioner of Police.

On 1st January 1990 at Mawelawela as alleged in count 5 of the indictment in addition and in terms of count 7 of the indictment the 1st, 2nd and 3rd appellants were convicted of contravening the King's Decree on 28th January 1990 at Kukhanyeni. In respect of count 5 the six appellants were each sentenced to six months imprisonment the maximum sentence prescribed by the King's Proclamtion. The sentence was back dated to 11th June 1990 in respect of 1st, 2nd, 3th, 5th and 6th appellants being the date on which they were arrested and taken into custody. In respect of the 3rd appellant the sentence was back dated to 15th June 1990 which was the day of his arrest. On count 7 the 1st and 2nd appellants were sentenced to 6 months imprisonment which sentences were to be served consecutively with the sentence which was incurred in respect of count 5. The effective term of

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imprisonment was therefore one year for each of them of which they had already served four months. The third appellant was also sentenced to 6 months imprisonment in respect of count 7 and his sentence was to run concurrently with the sentence imposed in respect of count 5. His effective sentence was therefore 6 months imprisonment. Sections 12 and 13 of the Proclamation provide:

> "12 No meetings of a political nature, no procession or demonstration shall be held or take place in any public place unless with the prior written consent of the Commissioner of Police and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration is directly or indirectly related to political movements and or other riotous assemblies which may disturb the peace or otherwise disturb the maintenance of law and order.
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> 13 Any person who forms or attempts or conspires to form a political party or who organizes or participates in any way in any meeting, precession or demonstration in contravention of this decree shall be guilty of an offence and liable, on conviction to imprisonment not exceeding six months."

It is clear from the provision set out above that the meeting must be of a political nature, must be held or take place in a public place. It will be seen from the indictment that although it is alleged that the meetings in question were of a political nature it is not alleged that the places where the meetings were held were public places. At the hearing of the appeal the appellants with the concurrence of counsel for the Crown and the court amended the notice of appeal to include the ground that neither the indictment nor the evidence alleged, disclosed or established the essential element of the offences that the gatherings were held or had taken place in a public place.

The indictment did not make this essential averment nor was there any direct evidence to this effect which could have cured such defect. The physical description in the evidence of the places where the so-called meetings had taken place gave no indication as to whether or not these were public places in the sense of places to which the public freely had access. It was not disputed on behalf of the Crown that there was no direct evidence that these places were public places.

The Crown said that the court must take judicial notice of the fact that Mawelawela and Ekukhanyeni were both properties belonging to the chiefs and as such properties to which the public freely had access. According to the representative of the Crown, land in Swaziland is held either by the Crown, the chiefs or privately. If it were competent for the Crown to rely on the judicial knowledge of the court to establish an essential element in the indictment, in respect of which I have grave doubts, the least I would have expected the evidince to show was that the place was in the area of a chief. In the indictment the allegation is that the place where the meeting allegedly took place was at or near Mawelawela and at or near Ekukhanyeni. It is not expected of the Appeal Court or the High Court or the Magistrates' Court which are all Swazi courts that they should have expert judicial knowledge of the customs of the land and provision is made for assistance by expert assessors in this field as and when the need arises. Customs must be proved to the satisfaction of the court by experts or some other acceptable evidence.

I am of the opinion that the Crown has failed to produce any evidence to prove beyond reasonable doubt or at all the esential allegation which it failed to make in the indictment that the alleged meeting took place in a public place and the appeal should be upheld on that ground alone.

Although it might not be necessary to do so I was of the opinion that I should deal briefly with the issues of whether the Crown proved beyond reasonable doubt that the gatherings held on the 1st and 28th January, 1990 were meetings of a political nature as

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envisaged in sections 12 and 13 of the King's Decree. It is common cause that at both these gatherings the appellants at the latter gathering, only three of them met with other persons to have a picnic at which they barbecued meat and consumed liquor. The idea to have the picnic was that of the 1st and 2nd appellants.

At the picnic various current political topics and issues were discussed and criticism was raised of certain actions of the King and the present form of Government in Swaziland. During the picnic the organisation PUDEMO was discussed as well as other political organisations and at the first meeting attendants jumped up at one stage and chanted a slogan "PUDEMO, PUDEMO is right". No permission was sought to attend or hold any of these gatherings from the police.

The above is a fair resumé of the facts which were common cause between the Crown and the accused. The learned Chief Justice in the court a quo had reservations as to certain material aspects of the evidence of the chief Crown witnesses on which he relied for the conclusion that the meetings of a political nature were held and rejected the evidence of the accused as not being credible. In such a situation having regard to the onus of proof it is safer to have regard to the undisputed facts rather than seek out isolated points on which there might be corroboration and see whether such facts constitute the offence under the Act. This is the course in our view which should have been followed by the learned Chief Justice.

The learned Chief Justice found that the picnic was a cloak for a meeting of a political nature to be held at the designated place. To obtain a conviction on this ground it was considered that it would be necessary for the Crown to establish beyond a reasonable doubt that this was the prime purpose of the picnic.

The concept of a meeting of a political nature is not defined in the Proclamation but it is used in section 12 as indicating something other than the procession or demonstration. What is prohibited is a meeting of a political nature and not a gathering

of a political nature. An indication of what is meant by such a meeting is given in the restraint placed on the power of the Commissioner of Police to authorise such a meeting. He may not authorise a meeting if he has reason to believe that it is directly or indirectly related to political movements or other riotous assemblies which may disturb the peace. What was envisaged are structured meetings organised directly or indirectly by political movements or which might lead to disturbing the peace or law and order.

Without in any way attempting to define or ascribe precise meaning to the concept of a meeting of a political nature it is clear from the evidence which is common cause, that the picnics were no more than unstructured gatherings of intellectuals at which current problems, political and social were discussed in an informal manner. In my view, by no stretch of the imagination could these have been described as meetings of a political nature as envisaged in section 12 of the King's Proclamation.

I would have upheld the appeal on this ground as well. In the result I would uphold the appeal, set aside the conviction and sentence.

D.A. Melamet

I agree R.S. Welsh

I agree G.P.C. Kotze