



Crim. Case No. 6/96

In the matter between:

Swazi Observer & 4 others

vs

The King

Coram:

S.W. Sapire, ACJ

J.M. Matsebula, J.

FOR THE APPELLANTS Mr. Shilubane

FOR THE RESPONDENT Mr Nsibande

Judgment

(26/8/96)

The five Appellants were charged in the Subordinate Court for the district of Hhohho held at Mbabane on various counts arising out of the business conducted by the first Appellant. The business of the First Appellant is the publication of a daily and weekend newspaper commonly known as the Observer, a well known and widely circulating daily journal.

It is surprising that a prosecution for relatively minor offences involving no complex legal or evidential problems received the personal attention of the Director of Public Prosecutions who appeared for the Crown at the trial.

The first two counts allege contraventions of 173(2) of the Criminal Procedure and Evidence Act and section 185 bis (3)(c) of the same act. The remaining charges allege contraventions of the Books and Newspapers Act 20/1963 on a continuous basis from February 1984 to the present time.

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Why the prosecution was delayed for eleven years during which time the first Appellant carried on its business without its alleged breaches of the provisions of the act being brought to its attention with a polite request to put its house in order is difficult to fathom. Why no admission of guilt was fixed is not apparent.

The first problem with which we have to deal on appeal is the citation of the appellants. In this connection I will first consider the position of the company THE SWAZI OBSERVER (PTY) LTD which was the first accused.

The procedure for the charging of a company with a criminal offence in the kingdom of Swaziland is antiquated and uncertain. The relevant sections of the Criminal Law and procedure Act 67/1938 appear to have remained unamended since originally enacted. Corresponding provisions in the South African Act have been amended from time to time to accommodate the difficulties which were experienced.

Section 332 of the South African Act provides a detailed procedure for bringing a company before a

court to answer criminal charges which find no parallel in the Swaziland legislation.

The first section to which reference must be made is the section relied upon by the Crown in citing the First appellant in the manner it has. This section provides that if it is necessary in any indictment or summons to name any company, firm or partnership, it shall be sufficient to state the name of such company, or the style or title of such firm or partnership without naming any of the officers or shareholders of such company, or any of the partners in such firm or partnership.

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This section as will readily be seen has nothing to do with the question as to who is to represent an accused company in court to answer and plead to the charge. The problem was raised in the court a quo but dismissed by the magistrate with little ado. The charges were put to the accused and in each case accused number two was called upon to answer for number one accused. He answered not guilty. Proof of his authority to represent and speak for the company was not sought or addressed.

A company acts through its board of directors and no individual director has the authority to represent the company in any transaction without the authority of the Board. In this case not only was it not alleged that the second Defendant had the authority of the board, no evidence was at the stage of plea, before the court to establish that he was a director of the first Appellant, let alone that he had authority as such to plead to the charges on behalf of the company. In this connection a decision in the Transvaal Provincial Division of the Supreme Court of South Africa is instructive. I refer to S V STOJILKOVIC 1995 (2) SA 951 (T) a full court decision, dealing with a situation similar to the present, but where of course section 332 (2) (a) of the South African Act applied. A conviction was set aside or review because there had been no compliance with the provisions of that section as there had been no proof of authority vested in the individual who pleaded on behalf of the accused close corporation.

Section 332 (2) provides that in any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question.

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There is no legislative provision similar to this to assist the prosecution in Swaziland, where although a company or other body corporate may be charged there is no way of dealing with the accused company unless the company itself vests the authority in an individual. The prosecution itself however has no power to cite an individual as representative of the company and to vest in him the power to act on behalf of the company.

In South Africa this power of the prosecution to nominate a representative comes from the provisions of Section 332 (2). In the absence of similar provisions this power does not exist in Swaziland. This does not mean that a company cannot be charged in the sense of being cited in a summons or indictment. All it means is that having been served with a summons or indictment there is little the prosecution can do to secure a conviction if the company itself ignores the document and does not appoint and authorise a representative to appear on its behalf at the trial.

This however is the reason for the provisions of section 339. While the company itself may because of this be incapable of being convicted, certain officers of the company may be cited together with the company and liable to be punished unless it is proved by the party so cited that he did not take part in the commission of the offence and could not have prevented it. This is the purpose and effect of Section 339 (1) of the Swaziland Criminal Law and Procedure Act.

What that section does not do, is to provide that the prosecution in citing the company may name one or more of its officers to represent the company. The only way in which this difficulty can be overcome is for an amending act to be passed by which section 339 is substituted with a new section in the same terms as Section 332 of the South African Act.

It follows from the above that the first appellant was not properly before the court. The convictions and sentences imposed upon it cannot stand and will have to be set aside. This conclusion to which I have come finds support in the decisions

R v Darwin Supply Stores (Pty) Ltd 1957 (2) SA 519 (SR)

LS v STOJILKOVIC\* 1995 (2) SA 951 (T)

S v Lark Clothing (Pty) Ltd 1973 (1) SA 239 (K)

I turn now to the remaining appellants who are individuals as opposed to a corporation.

Individuals who as servants of a company and by their own acts commit any crime within the scope of their employment and while about the business of the company which is their employer, incur criminal liability personally, and their employer may be vicariously criminally liable as well.

Section 338 (1) of the Criminal Procedure and Evidence Act 67/1938 provides:

"In any criminal proceedings under any statute or statutory regulation or at common law against a company, the Secretary and every director or Manager or Chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefore unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it."

This provision widens the scope of liability. An individual may in terms of the section quoted be criminally liable and punished for criminal acts carried out by other individuals who were servants or officers of the company notwithstanding that he himself took no active part therein. This is the converse of the vicarious criminal liability observed in the preceding paragraph.

In examining the charges in this case the distinction must be borne in mind.

The company, accused No. 1, was charged eo nomine simply as "THE SWAZI OBSERVER" both in the summons and in the amended charge. There was no allegation that any individual represented the company. Indeed it does not appear that any individual was authorised to represent the company or act on its behalf in relation to the prosecution. For this reason we have seen the prosecution against the company has to fail as it was not before the court.

Each of the other accused persons was "cited both in his personal and his representative capacity as....." of the company. The capacity of Ace 2 was said to be that of Managing Director and the other accused 3 through to 6 were said to be servants of the company. This method of citation reveals a complete lack of appreciation on the part of the draftsman of the distinction between direct and vicarious liability.

None of the individuals was in fact a representative of the company, one wonders whether these alleged representative were to consult each other or the directors as to how the case was to be defended. There was no resolution of the Board of Directors appointing any of the persons concerned to represent the company.

As far as vicarious liability of the individuals is concerned Section 338 applies only to "the Secretary and every director or Manager or Chairman....." Only Accused No. 2 is alleged to be one of these

namely a "Managing Director". The remaining individual accused as mere servants are not brought into the ambit of the operation of sec 338(1).

It has been held in South Africa S v Freeman 1970 (3) SA 700 (N) that Section 381 (5) of act "56 of 1955, which is the equivalent counterpart of S338(l) can only be relied upon by the prosecution if it is conveyed to the accused in the charge sheet that vicarious liability is relied upon, with particulars thereof. We see no reason to differ from this view.

Not only did the prosecution omit and fail to make any such mention but it also refused to furnish the particulars which were requested.

In view of this inept prosecution not only must the company accused No. 1 succeed in its appeal but the remaining individual accused must similarly succeed.

The convictions of all the accused on all the charges on which they were found guilty and the fines and sentences imposed are set aside.

S.W. SAPIRE J.M. MATSEBULA

ACTING CHIEF JUSTICE JUDGE