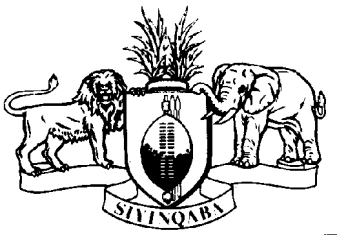

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.12/00

In the matter between:

HERMAN STEFFEN
AND
REX

CORAM	**:**	**BROWDE JA**
	:	**VAN DEN HEEVER JA**
	:	**SHEARER JA**

FOR THE APPELLANT
FOR THE CROWN

JUDGMENT

Browde JA:

This appeal has its origin in the contentious issue in this Kingdom arising from what is known as the Non-bailable offences Order. This Order lays down that no court shall have the power to grant bail to any accused person charged with any of certain scheduled offences. It seems that the learned Chief Justice has publicly expressed the view in an article published in the press that judges of the High Court should not have their powers limited in this way, while others are in favour of what is undoubtedly legislation of a draconian nature. This led the Times of Swaziland newspapers, which includes the Swazi News, to conduct a poll of its readers by asking them to phone in to express their support or otherwise for one of the two sides of the debate. It thus came about that the appellant was

one of 25 readers who telephoned the newspaper. He had a conversation with one of the journalists, Bongiwe Zwane by name, who later gave evidence of the conversation before the learned Chief Justice. Shortly after the conversation, i.e. on Sunday 29th January 2000, there was published in the newspaper a version of what was alleged to have been said by the appellant. It reads as follows:

> "We should not allow judges to have such powers as they too, are not above corruption. We have seen many cases where people have walked free because someone up there had been given a little something. The NBO is our only hope now and if granting judges such powers would be the worst thing we could ever do to our already crippled judicial we do away with it we will have streets infested with criminals. This may also lead to laxity within the police force as police will be reluctant to carry out their duties. How does one work diligently when the likelihood is that the criminal he had arrested will be roaming the streets soon, on bail."

It will immediately be observed that the sentence commencing with the words "The NBO" makes no sense at all.

It is this publication, coupled with an apology from the appellant which was published on 1st February 2000, which led to the appellant being indicted on a charge of contempt of court together with the journalist aforesaid and the editor of the newspaper. The latter two pleaded guilty before the Chief Justice, were found guilty and sentencing them was postponed for 3 years on certain conditions. The appellant who pleaded guilty was thereafter tried separately, also before the Chief Justice, was found guilty and sentenced to pay a fine of E25, 000.00.

He appeals against both the conviction and sentence.

In order to appreciate fully what the issues are in this matter it is necessary to reproduce the indictment in full. It reads:-

> "The Director of Public Prosecutions presents and informs the

honourable court that the above mentioned persons (hereinafter referred to as the accused) are guilty of the crime of contempt of court.

In that the first accused, shortly before Sunday 29th January 2000, with intent to insult and bring the High Court of Swaziland and/or its judges past and present, and/or and the administration of justice in Swaziland into disrepute, wrongly and unlawfully said to the second accused, a reporter employed by Times of Swaziland newspapers including the Swazi News.

> "We should not allow judges to have such powers, as they too are not above corruption. We have seen many cases where people have walked free because someone up there had been given a little something. The NBO is our only hope now and if granting judges such powers would be the worst thing we could ever do to our already crippled judicial we do away with it we will have streets infested with criminals."

Or words to the same effect.

The import of the words in their context was that Judges of the High Court could not be trusted to consider bail applications and to grant bail in appropriate cases because they were inclined to accept petty bribes to induce them to pervert justice. As such it is contemptuous of the High Court of Swaziland, its judges past and present, and calculated to bring them into grave disrepute.

The first accused when making such scurrilous statement to the second accused well knew that it was intended for publication and would soon thereafter be published in a leading newspaper. Both accused knew full well that the publication of such a statement, of the import aforesaid, was calculated to have the effect herein before alleged.

The second accused wrote an article quoting the said statement made by first accused, with intent to have the same published in the said newspaper.

> The third accused being the editor of the said newspaper did wrongfully and intentionally cause the said article containing the offending words with their contemptuous import to be published in "Swazi News" the masthead name of the Newspaper on Saturday January 29th 2000, in a column headed "People's Views" and circulated widely in Swaziland.
>
> The accused did thereby commit the crime of contempt of court."

It will be observed that what the Crown set out to prove were:-

(i) What the appellant said to Bongiwe Zwane.
(ii) That what he said was said with intent to insult …and bring the Judges…and the administration of Justice in Swaziland into disrepute.
(iii) That what he said were the words reproduced in the indictment – or *words to the same effect* (my emphasis).
(iv) That the words used by the appellant *in their context* (my emphasis) had the import attributed to them in the indictment.
(v) That in using the words he did, the appellant well knew that they were intended for publication.
(vi) That the appellant well knew that the words would "soon thereafter" be published in a leading newspaper.

I shall return to these ingredients of the crime relied upon by the Crown later in this judgment.

When the case started, a copy of the apology made by the appellant was handed in, as it was put by defence counsel at the time, "to exclude unnecessary formal evidence as to how the apology came about to be in that particular newspaper. That admission is confined to that fact. It is not an admission of anything else.. (then follow a few passages noted to have been inaudible)." It was made clear to the learned Judge that the admission in evidence of the apology was not an admission that what had appeared in the newspaper earlier was a correct version of what the accused had

said. Thus the record reads:-
JUDGE: I understand that to be an admission that he apologises for what had appeared earlier.
COUNSEL FOR DEFENDANT: No, My Lord.

The apology reads as follows:
APOLOGY

> "I Herman Steffen hereby unconditionally withdraw and apologise for my statement quoted in the Times of Swaziland on Saturday 29th January 2000.

The said statement was an emotional and irrational response to the fact that during last year the sum of E240 000 was stolen from Matata Stores and after we had delivered the culprits to the police station, they walked free having paid E4 000 bail each at the Siteki Magistrate Court.

I respectfully request that my statement be viewed in the above context and I once again apologise unreservedly for causing a perception of disrespect to the esteemed judges of Swaziland."

The Crown attempted to prove what was said in appellant's conversation by calling the journalist Zwane as a witness. She is obviously a person of limited experience who had only a vague memory of what had passed between her and the appellant. In describing the issue upon which readers' views were sought in the poll she said:-

> "The question was whether judges should be given powers – sorry, I have forgotten the proper question, but it was whether judges should be given the powers to use their discretion even in cases of Non-bailable Offences when passing a sentence."

She then said that of 25 persons who phoned in nine views were published. She had not seen the appellant before nor did she know "that such a person existed in Swaziland." She had "never heard his name before."

Then regarding the words that were used by the appellant she said, at various stages of her evidence:-

(i) That she recorded correctly what was said by Steffen.
(ii) That what was reported was said by Steffen.
(iii) I always make notes. I hope I still have them. I don't know.

(iv) In preparing for publication, she only takes part of what is said.

(v) Everything published is part of what he said.

I pause here to observe that unless one knows what Zwane chose to omit one is not in a position to judge properly what the full import of his words was. Nor do I believe that one is then in a position to judge the import of the words *in their context* (vide the indictment). Zwane, under cross-examination, conceded that only a portion of what was said was published and that was the portion which she though was relevant.

(vi) She did not recall whether she wrote down "sentences in the same sequence as he said to them."

(vii) She was asked how well she could "independently recall this telephone conversation with Steffen", she said:-

"Not very well, because like I say, you know like twenty-five people called almost in one day, so it's really difficult for me to single out this particular call".

(viii) She later was asked whether she had any recollection of the conversation. She said, "I remember it, but vaguely, like I said before".

In view of the fact that so much turned on what the appellant said to Zwane it is surprising that the learned Judge, when counsel for the Crown said that he would like to "find out about the notebook at Nhlangano" – this with reference to Zwane's notes – said, "Well, I don't think it necessary…" As a result the notes were never produced and the court was left with what can only be described as the vague and unsatisfactory evidence of Zwane. The reason for the learned Judge's attitude would appear to have been that he read the apology as an admission by the appellant that the report of the conversation correctly reflected what the appellant had said.

In regard to the report itself it is not without significance that the Crown charges the appellant with using the words set out in the indictment or *words to that effect.*

It is quite clear that the Crown could not contend that Zwane accurately reported what the appellant had said. In fact she admitted that she omitted the facts recounted to her by the appellant regarding a large theft he had experienced from his business and how the suspects were allowed out on bail and "walked free" – the facts which led to the appellant being sufficiently interested to participate in the poll. Zwane also admitted that she did not tell the appellant that it was intended to publish what he said. The appellant denied having said that judges were corrupt and denied that he intended to refer to judges when he said "someone up there, had been given a little something." To this denial the learned judge asked, "Well why couldn't you say it in your apology?" He then went on to say to the appellant that his apology proves that he said what appeared in the newspaper – "so you know that this is what you did. I mean I don't know why you are taking a different attitude today." In his judgment the learned Chief Justice relied heavily on the apology, which, he said, gave no indication that the report was inaccurate. He also found that Zwane gave "clear" evidence and that the appellant – despite his denial under oath – accepted the report as accurately reflecting what he had said. In my judgment there was no good ground for finding that the evidence of Zwane coupled with the apology proved beyond reasonable doubt the ingredients of the offence set out in the indictment. They do not prove what words were used by the appellant and also do not prove that he intended to bring the judges and the administration of Justice into disrepute. Because of the admission made by Zwane of her selective reporting of what was said, her admission that "mistakes could have slipped in "because she wasn't there and the further admission that what she wrote was not proof-read by her but was edited and re-edited by those above her in the newspaper hierarchy (and by the learned Judge who excised what he found to be an obvious error) the Crown failed to

lead any acceptable evidence to compel rejection of the appellant's testimony regarding the context in which he had spoken to her. (vide the indictment "in their context") It was also not proved that the appellant knew that the conversation was intended for publication. He denied this and, as I have already pointed out, Zwane admitted not telling him it was. What the learned Judge overlooked in my respectful view is that this was a poll, a counting of votes and as such could easily have resulted in a report in the newspaper that, say 60% of readers who responded were in favour of judges retaining a discretion and 40% were against it. There were no grounds for accepting as proven that Steffen knew that not only would the conversation be published but also that the appellant's name (unknown as it previously was to Zwane) would also appear. This is important because the learned Judge found that what made the contempt of court worse was that "people have regard to what a person of his stature in the community has to say."

As I have said the apology was used by the learned Judge in his reasoning adverse to the appellant. He also found that "the apology cannot redound to his benefit as much as it would have, had there been a disavowal and retraction of the offending words. There is no retraction." I disagree with that. "Retraction" and "withdrawal" are, in the context of the report and the apology, synonymous. The appellant's apology expressly contained an unconditional withdrawal of the statement and referred to a context which he explained at length in court: I agree with Mr. D. Kuny SC (who with Advocate vd Walt appeared for the appellant) that the apology could hardly have been more abject. The appellant says what he had said was "emotional" and "irrational" and he apologised unreservedly for causing a perception that he did not respect the esteemed judges of Swaziland. This apology is hardly that of a person who three days previously had intended to bring the judges and the administration of justice into disrepute.

In my judgment contempt of court was not proved and the appeal must therefore succeed.

The appeal is upheld and the conviction and sentence are set aside.

J. BROWDE JA

I AGREE : L. VAN DEN HEEVER JA

I AGREE : D.L.L. SHEARER JA

Delivered on this day of June 2001.