



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL CASE NO. 21/2013

In the matter between:

JUDGMENT

LEO NDVUNA DLAMINI

APPELLANT

and

REX

RESPONDENT

Neutral citation: *Leo Dlamini v Rex (21/2013) [2014] SZSC 24 (30 May 2014)*

Coram: A.M. EBRAHIM J.A., S.A. MOORE J.A., and DR. S. TWUM J.A.

Heard: 13 MAY 2014

Delivered: 30 MAY 2014

Summary: Magistrate charged with demanding E 5000 and receiving E 1000 from a member of the public for the benefit of himself which induced him not to proceed with laying charges against that member of the public – conviction and sentence of five years imprisonment affirmed.

JUDGMENT

MOORE JA

BACKGROUND

- [1] The appellant Leo Ndvuna Dlamini was at the material time a judicial officer holding the position of Magistrate and presiding at the Piggs Peak Magistrate' Court in the Hhohho Region of the Kingdom. It is common cause that on the 24th September 2011 the Magistrate, in his private capacity, attended a party at home of the Da Silva family situated at Luhlangotsini. A number of staff members of the Piggs Peak Magistrate's Court also attended that function.
- [2] As often happens at gatherings of this kind, the conviviality, enhanced by generous servings of alcoholic beverages, results in a reduction of the inhibitions consistent with sobriety: conduct becomes increasingly unrestrained, and 'liberties' are taken which would be eschewed by the sober and the sedate. A certain Mr. Mihla Dlamini, hereinafter Mihla, also attended the party. He was currently unemployed when he testified before the Court *a quo*.
- [3] The 24th September 2011 began as a happy day for Mihla. Early in the morning, he visited his sister Sibongile Tsabedze. His eye-opener of

choice was beer. By 11:00 a.m. when he arrived at the party – having apparently tagged along with his sister – he was, by his own admission, already a little bit drunk. His hosts plied him with both food and alcohol. By 4:00 p.m. his condition had deteriorated from being a little bit drunk to being heavily drunk. It was around that time that Magistrate Leo Dlamini entered the party. Mihla did not know him previously, but had seen him earlier in the daily newspapers. Mihla, yielding perhaps to an onset of familiarity, jokingly greeted Mr. Leo Dlamini, whom he mistakenly thought to be merely one of the people employed at the Piggs Peak Magistrate’s Court, rather than the Worshipful Presiding Magistrate himself.

[4] Endeavouring perhaps to humor this forward stranger, Magistrate Dlamini smiled indulgently hoping that the manifestly inebriated and pesky gentleman would disappear: and the social nuisance which his boorishness created would soon abate itself. Alarming to the magistrate however - but, from the evidence, to no one else - Mihla exclaimed “what can you do if I shoot you man?” The Magistrate smiled nervously. Mihla returned to his drinks. That was not however the end to the matter.

[5] A week or so later, Mihla got wind of information which suggested that the leg which he sought to pull at the party was not that of a mere

employee of the Magistrate's office; but that it belonged to no less a personage than the Presiding Magistrate himself. More worrying was the report that Magistrate Dlamini was asking around about him, and seeking to find out where he stayed. Significantly, he did not learn that the police were making inquiries about his whereabouts. Hearing that the Magistrate was actually thinking of opening a case against him, he asked his informers to apologize on his behalf. Then came a call for the Piggs Peak Police.

[6] As any good law abiding citizen would do, Mihla reported to the Piggs Peak police station to see if he could have been of any assistance to the officers there. To his surprise, an officer by the name of Mlangeni read a charge to him. He thereupon asked that officer if he could take him to Mr. Dlamini so that he could apologize. In the event, Mihla, the Chief, and his biological father went to see the appellant in his chambers to make the apology. They did so pursuant to the well established Swazi custom. The Chief, who saw and spoke to the Magistrate on the morning of the 24th November 2011, appears to have dropped out of the picture from that point. The Magistrate said that he would receive Mihla and his father that same afternoon.

[7] It thus came about that, upon the Magistrate's undertaking to see them, Mihla and his father duly presented themselves before this member of the

lower judiciary in his office. Mihla apologized to the appellant and excused his behavior on his being drunk. According to Mihla, the appellant was not mollified with the apology. He demanded that the father leave the room. Mihla's father dutifully complied. Alone now with Mihla, the Magistrate then indicated his intention to impose a fine upon Mihla who saw a criminal docket bearing his name upon a desk.

[8] According to Mihla the appellant told him that he would have to pay a fine of five thousand Emalangeni. If he failed to do so, the appellant would take the docket to another magistrate who might commit him to more than seven years imprisonment without the option of a fine. Mihla became afraid.

[9] He pleaded his inability to pay such a hefty fine because of his straitened personal circumstances. The appellant nonetheless demanded that the money be paid there and then. Mihla could manage only E900 which he happened to have at that time to pay his children's school fees. He augmented that sum with E100 which he borrowed from his father who was waiting outside the office. Mihla thus paid E1,000 to the appellant as an installment on the E5,000 which the appellant demanded be paid by 31st December of that year. The appellant pocketed the money without giving the appellant a receipt.

[10] Mihla did not pay the outstanding E4,000. Instead of doing so, he reported these happenings to officers of the Anti Corruption Commission who commenced an investigation into Mihla's complaint.

THE ELEMENTS OF THE OFFENCE

[11] Under Count 1 of the indictment, the appellant was charged with contravening section 33 (1) (b) read with section 33 (2) (b) (1) of the Prevention of Corruption Act 3 of 2006. The essential particulars of the charge are that:

- (i) On or about the 24th November 2011
- (ii) the Accused being a judicial officer
- (iii) did unlawfully demand or accept an advantage
- (iv) to wit E5,000
- (v) from Mihla Dlamini
- (vi) for the benefit of the said accused
- (vii) and the said advantage induced the said accused
- (viii) not to proceed with laying criminal charges against the said
Mihla Dlamini being

- (ix) an act which amounts to violation of legal duty or a set of rules and/or
- (x) abuse of position of authority, and thus
- (xi) did contravene the said Act.

ALTERNATIVELY

[12] Contravening section 42 (1) (a) read with section 2 (b) (1) of the Prevention of Corruption Act 3 of 2006.

The essential particulars are:

- (i) The appellant did unlawfully.
- (ii) demand and accept an advantage.
- (iii) to wit E5,000.00 from Mihla Dlamini being
- (iv) an act which induced the said accused
- (v) not to continue with laying charges against the said Mihla Dlamini.
- (vi) thus amounting to an abuse of authority and violation of a legal duty, or
- (vii) a set of rules and,
- (viii) contravened the said act

SPLITTING OF THE CHARGES

[13] The appellant was initially charged and convicted upon two counts. The Court *a quo* saw “no unnecessary splitting of the charges *in casu*”. However, upon an enquiry from this Court, Advocate N. Kades S.C. for the respondent, readily admitted that he could not support the finding of the Court *a quo* that there was no splitting of the charges. Consequently, he could not support the conviction on Count two. This Court is in agreement with Advocate Kades on this issue. The result is that, as learned Senior Counsel put it, the conviction and sentence on Count two fall away.

THE APPEAL AGAINST CONVICTION

[14] The appellant complained that the learned judge *a quo* erred in law and in fact by:

- (i) approaching the whole matter as if the onus was upon the appellant to prove his innocence.
- (ii) convicting the appellant yet the totality of the evidence did not prove his guilt beyond a reasonable doubt.
- (iii) not holding that the provisions of the statute were not applicable as there was nothing to show that the alleged

conduct of the appellant had anything to do with his position as a judicial officer.

UNDISPUTED FACTS

[15] The following facts are admitted by both parties:

- (i) The appellant and Mihla both attended a party on Saturday the 24th September 2011.
- (ii) Mihla spoke certain words to the appellant at that party.
- (iii) There was a meeting between the appellant in the appellant's chambers on the 24TH November 2011.
- (iv) The appellant received the sum of E1,000.00 from Mihla at that meeting. He did not issue a receipt for that money.
- (v) Mihla promised to pay the sum of E4,000.00 to the appellant on or before the 31st December 2011.
- (vi) At all relevant times, the appellant was employed as a Magistrate who was based at Piggs Peak Magistrates Court.
- (vii) The appellant testified "his (Mihla's) words were threatening to me because they were (Mihla's) (inaudible) on my duties as a Judicial officer since Mihla Dlamini said I had convicted him, I believed that he was going to assault me."

- (viii) The appellant deposed that: “On Monday, I inquired from my subordinates, ... about the man who had attacked me that day.”
- (ix) The appellant’s attorney was Mr. Sipho Mnisi at all material times. The appellant swore that his attorney had instructed him to institute assault proceedings against the attacker.
- (x) The appellant reported the matter to the Piggs Peak Police Station. He recorded a statement with the police Constable Mlangeni.
- (xi) Chief Mnikwa went to see the appellant to apologize for Mihla under Swazi law and custom. The appellant explained to the Chief that he had already made an official complaint to the police and the civil suit was reported to his attorneys.
- (xii) Notwithstanding the actions allegedly taken by the appellant addressed in (xi) above, he nevertheless told the Chief to tell Mihla to come and make the verbal apology to him as a sign of true and sincere apologizing. Later Mihla and his father went to see the appellant.
- (xiii) Mihla and his father went to see the appellant on the same day as the Chief who had spoken to the appellant earlier that morning.

(xiv) The following is an excerpt from the record at pages 280 – 283. It comes from the transcript of the appellant’s evidence in chief:

“DC: On what basis were you saying to Mihla Dlamini that he was sentenced by Senior Magistrate Khumalo for the drunken driving case?”

AC: My Lady there was a court record in front of me relating to what he said to me at the party, that I had sentenced him which I got from the clerk’s office.

J: Yes.

AC: I also told him that according to the record he was given a fine by Mr. Khumalo, My Lady.

J: Yes.

AC: Although I cannot remember the date but it was in 2011 somewhere around March and he was given a week to pay the sum of one thousand five hundred Emalangeneni my Lady.

AC: Also from the face of the record, I told Mihla that it appeared at the front that he had not paid the fine because there was no G.R. number indicating that he paid the fine, My Lady.

J: Yes.

AC: I also told Mihla Dlamini that it appeared on the record that he was a defaulter and I also asked him if ever he wants to serve the sentence for not paying.

J: Yes.

AC: He stood up from the chair where he was seated.

J: Yes.

AC: He pleaded for mercy and asked to go home and collect the receipts to show that he had paid the fine.

J: Yes.

AC: He made an offer on the civil matter of five thousand Emalangeneni as a final settlement of the matter outside court which I accepted because he was apologizing sincerely my Lady.

DC: Can you clarify Mr. Dlamini, was this offer made when Mihla Dlamini was up on his feet from the chair or was it made prior to your discussion about this case, this traffic offence where he did not pay the fine?

AC: It was when he was up on his feet when I was inquiring about the traffic offence.

J: It was made when, the offer of five thousand Emalangeni?

AC: It was made when he was up on his feet, because he changed his demeanour when he stood up.

J: Yes

DC: Yes he offered this five thousand Emalangeni which you accepted and what happened next?

AC: He paid the one thousand Emalangein as part of the five thousand My Lady.

J: Yes.

DC: How did he pay the one thousand, was it in cash or what?

AC: I explained to him that I was suspicious that he was in contempt but I will give him a chance to go and collect the receipt.

DC: Did he tell you when he was going to pay you the balance of four thousand Emalangeni, because he had

offered five thousand Emalangeneni as full and final compensation?

AC: Yes, he was specific he said before the 31st December 2011, My Lady. (inaudible).”

(xv) The appellant facilitated the registration of the docket for the common assault case and returned it to constable Mlangeni.

(xvi) The appellant knew of instances where matters were withdrawn in court in criminal cases.

(xvii) There is no reference in the statement made by the appellant about Mihla accusing him of convicting Mihla for a traffic offence.

(xviii) The appellant testified at pages 306 *et seq* of the transcript:

“CC: The complainant together with an elderly PW2 Chief, respective (sic) man in the community and the complainant’s father arrive in your office with intent to apologize, correct?”

AC: It is correct My Lady.

CC: Did they apologize, the father and son?

AC: It is only the son who apologized.

CC: And did you then send the father out because you wanted to deal with the son, Mihla?

AC: That is correct. I wanted to deal with Mihla's apology.

CC: Why did you send the father out and deal with Mihla only in the absence of his father?

AC: He was the person involved in the matter, My Lady.

CC: In what matter are you referring to?

AC: The assault common at the Da Silva's homestead.

CC: And you told him that his failure to pay the fine amounted to contempt of court?

AC: That is correct my Lady.

CC: And what did you instruct your attorney to claim?

AC: I instructed him to claim delictual damages and issued (sic) summons.

CC: In what amount?

AC: Five hundred thousand Emalangeneni my Lady..”

IN THE MAGISTRATE'S OFFICE

- [16] As the uncontroverted evidence for both the prosecution and the defence clearly demonstrates, the atmosphere in the Registrar's office when the money was paid over by Mihla to the appellant was unquestionably oppressive and intimidating to Mihla a lay member of the public in the presence of the official authority figure who possessed the judicial power to fine and imprison. Not only was Mihla being taxed about the alleged assault common, but also about a traffic offence for which he had been convicted many months ago. There was no connection whatever between the assault case and the earlier traffic conviction save that Mihla was the defendant in both. This merciless magistrate was clearly using Mihla's difficulties concerning the unpaid traffic fine as improper leverage to extract the 'fine' for the assault case from his unrepresented victim.
- [17] Upon the flimsy and unconvincing pretense that the sincerity of Mihla's apology could only be assessed if he stood alone before the appellant, the Magistrate ensured that there could be no eye witness who could possibly give an account of what transpired between him and Mihla in his office on that day when the admitted payment of E 1000 was made by Mihla to the appellant.

[18] According to the appellant, incredibly, he had been previously advised by his attorney that, in the event that his E5,000,000 claim was settled for E5,000, he should ensure that the settlement be reduced to writing. Common prudence and common sense would demand no less in the circumstances of the matter being handled by the Magistrate in the privacy of his office. The appellant was pressed by counsel for the prosecution for an explanation as to why, with his own experience and knowledge as a lawyer and a Magistrate, and in the light of the advice of his own attorney, and with the ready availability of writing materials, he had simply pocketed Mihla's money without reducing the transaction to writing, or even giving Mihla a receipt which he should have done, so that Mihla would have had written evidence of his payment if, for example, it was later alleged that he had not made that payment. The appellant could do no more than to blame this glaring absence of fairness and justice upon an oversight. Writing was even more necessary and just since the appellant himself admitted in his evidence that:

'this was the agreement between me and Mihla or he was committing himself.'

The appellant, be it remembered, was the Presiding Magistrate of the area: domineering over the unfortunate Mihla who was an unrepresented layman in the office from which the appellant wielded his judicial power.

Even more incredible, was the appellant's story that Mihla had undertaken to prepare a document evidencing the transaction after he had surrendered his E 1000 to the appellant and had failed to do so.

[19] The Learned trial judge was amply justified in rejecting the unconvincing subterfuge of the appellant: "it was an oversight then My Lady" as a satisfactory explanation for the appellant not reducing the transaction to writing. The episode in the appellant's office is but one of the many examples where the appellant's version of events was logically and rationally incredible as compared with the conflicting prosecution evidence. Ota J was therefore fully justified in persuading herself to accept the evidence of Mihla as being more believable and persuasive than that of the appellant when there was a conflict between the evidence given by these two parties. She was also on solid ground in finding that the testimony of the appellant was not reasonably possibly true. On the contrary, it was beyond any doubt false.

THE WORDS SPOKEN AT THE PARTY

[20] There are conflicting versions of the words spoken by Mihla at the party. Mihla himself testified that he merely said:

‘What can you do if I shoot you now’.

DW2, a witness for the defence swore that Mihla spoke to the accused saying:

‘Leo you are here, what can you say if someone can take a gun and shoot you?’

The appellant’s version in his sworn testimony is:

‘He said, “hawu Leo nawe uyefika lapha.” Meaning do you also come here. “What can you do if I can shoot you now do you recall what you did to me in court, the war between you and me is not over, because you sentenced me in a drunken driving case”.

The appellant made a statement to the Royal Swazi Police on the 30th September when the incident of the 24th must have been fresh in his mind. In that statement, he alleges that Mihla said: ‘ngulo Leo lo! Ufunani la !!, kantsi naye uyeta la !!’ The rough translation of his portion of his statement mirrors the first sentence of his testimony in the quotation above. As the appellant’s own statement reveals, what comes thereafter is pure hearsay told to him by one Sibongile Tsabedze. The relevant portion of his composite statement signed on 20 – 2 – 13 reads:

“On Monday 26th September 2011 I confronted Dudu Nkambule about this man and I learnt he had threatened to shoot me. However, I learnt that this man was accompanying LaTsabedze (Sibongile Tsabedze the cleaner) to this Da Silva homestead. Further investigations from LaTsabedze are that this man attacked me on this fateful day because I had sentenced him at the Pigg’s Peak Magistrate Court for drunken driving case.”

It goes without saying therefore that no reliance whatever can be placed on the appellant’s evidence that Mihla raised the question of his conviction for a driving offence at the party on the 24th September 2011. That the appellant should use that information, obtained second hand, to hold it *in terrorem* over Mihla’s head in order to extract E 5000 from him is inexcusable at best, and disgraceful of the office of Magistrate which he then held.

[21] In the several statements made by the appellant, he grasped at every opportunity he had to describe himself as ‘a Judicial Officer presiding over Criminal and Civil Cases within the jurisdiction of the Pigs Peak Magistrate Court.’ Revealing that his lofty status as a Magistrate was always uppermost in his mind, he referred to some of his fellow recipients of the Da Silva’s hospitality as ‘all of my subordinates’ and ‘my subordinate staff members.’ Upon the totality of the evidence, the judge a quo was undoubtedly correct to find that the appellant was acting

in his capacity of magistrate when he demanded the sum of E 5000 from Mihla and accepted E 1000 from him.

ASSESSMENT OF THE EVIDENCE

[22] The trial judge examined both the oral and documentary the evidence concerning the appellant exhaustively and meticulously. She tested it taken by itself, and again she did so in comparison with the contrasting evidence led by the prosecution. At the conclusion of this exercise, Ota J was driven to the logical and inescapable conclusion that the evidence of the appellant himself, taken together with all of the other material supporting his contentions could not stand up to critical scrutiny and that the case of the appellant as a whole ‘must collapse like a house of cards for being fraught with inconsistencies, contradictions and untruths.’

[23] As the appellant sank deeper into the morass of his own making, and as he struggled desperately to find a means of the escape, he was forced into the concoction of increasingly unconvincing falsehoods. This is how Ota J described the self-created predicament in which the appellant found himself at paragraphs [195] to [200] of her judgment:

“That is the natural, but unfortunate order of things in it appears to me that the accused told a litany of lies in his fruitless struggle

to cover up his unsavory act of indiscretion and evade justice. The inconsistencies in his evidence as well as glaring untruths, strengthen the inference of his guilt. The untruths were deliberate and not told for an innocent reason. I find this to be a fact. See **Ndlovu v The State** 2002 (2) (BLR) 158, **R v Lucas** 1981 QB 720, 73 Cr. App. R. 159n CA.

[196] I thus come to the inexorable conclusion on the weight of the evidence and the proved facts that the only reasonable inference that can be drawn, and I hereby draw that inference, is that the Accused elicited payment of the sum of E5,000 from PW1, which induced him not to continue with the laying of the criminal charge, hence his instruction to Mlangeni to wait until the 31st of December 2011, when Mlangeni sought from him a withdrawal statement in respect of same.

[197] As a Magistrate the Accused is a judicial officer of high standing. He is a man in a high position of authority. He held out that position of authority as the sword of Damocles over the heads of all the principal actors in this matter, employing it as a weapon to his advantage in his dealings with each of them.

[198] Thus, wielding this position of authority he imposed a “fine” of E5,000 on PW1 without due process. I say this in recognition of the fact that PW1 was not formally arraigned before a Court of law for the alleged offence; there was no prosecution of the alleged offence; PW1 had not been tried, found guilty and convicted for the alleged offence to warrant a sentence of the “fine” of E5,000 imposed. The said “fine” was thus borne out of the Accused’s

gimmicks premised on his position of authority as a Magistrate Imposition of the “fine” was clearly unlawful in these circumstances.

[199] Furthermore, still holding his position of authority, he instructed PW1 to pay the balance of E4,000 before the 31st of December 2011 and ordered Mlangeni to wait until that day, when he approached him for a withdrawal statement in respect of the charge.

[200] When his scheme to extort the balance of E4,000 from PW1 failed, he again displayed his position of authority in full glare by obtaining possession of the criminal docket, which was clearly unusual in view of the fact that therein, the Accused was the complainant; he then ordered Mlangeni to proceed with the matter, as well as ordered PW3 to register the case without first passing it through the prosecutors at the Pigg’s Peak Magistrates Court. This was in affront of the laid down procedure in that Court as testified to by PW3, PW4, PW5, as well as Accused’s own witness DW2 Cicelia Nkambule, who has been stationed at that Court for 29 years.”

[24]The trial judge’s final summation was expressed in this way:

“[204]I find that the Accused, riding on his position of authority as a Magistrate, was not only the complainant in his matter, but he also constituted himself into the prosecutor as well as a judge in his own cause. Little wonder then, why the Accused

admitted in exhibit F that he laid the assault common charge not just as a complainant, but also as a judicial officer.

[205] It is beyond controversy therefore, that the Accused clearly violated his legal duty, a set of rules and abused his position of authority by using it to manipulate this matter to his advantage. His unethical conduct has the dangerous potential of bringing the entire administration of justice into disrepute in the eyes of right thinking members of the society.

[206] The Crown has thus proved that the Accused being a judicial officer unlawfully demanded, agreed to accept and accepted an advantage of E5,000 from PW1 Mihla Dlamini for the benefit of the Accused, which advantage induced the Accused not to proceed with laying criminal charges against Mihla Dlamini, an act which amounts to violation of legal duty, a set of rules and abuse of position of authority.

[207] I find the Accused guilty as charged in count one and convict him accordingly.”

The trial judge had correctly convicted the appellant on the first alternative of count one of the indictment in contravention of section 33 (1) (b) read with section 33 (2) (b) (i) of The PREVENTION OF CORRUPTION ACT 3 OF 2006.

SENTENCING

[25] The starting point in considering the appropriate sentences in any given case must surely be the sentence prescribed by the legislature for the offence for which an accused has been found guilty. In the case before us, the learned trial judge found the appellant guilty as charged on count one of the indictment. The penalty set out in section 35 (2) of the Act for infringement of section 33 of the Act under which the appellant was convicted is liability to a fine not exceeding two hundred thousand Emalangeni or imprisonment not exceeding twenty years or to both. Section 36 provides for additional penalties in these terms:

“36. (1) Where a person is convicted of an offence under this Part, the court shall in addition to any penalty it may impose under section 35 order the person convicted to pay to the rightful owner the amount or value, as determined by the court, of any advantage actually received by that person.

(2) Where after reasonable inquiry, the rightful owner cannot be ascertained or traced or is implicated in the commission of that particular offence under this Part, the court shall order that the amount or value of that advantage be forfeited to the Government.

(3) In addition to the fine a court may impose in terms of section 35, the court may impose a fine equal to five times the value of the advantage involved in the offence.”

[26] Furthermore section 37 mandates, subject to any other law, the dismissal of a judicial officer convicted under Part III of the Act. The investigation and punishment of corrupt activities, particularly by judicial or public officers are among the principal purposes of the Act. That is why the penalties and additional penalties are coupled with, as far as employment is concerned, the ultimate sanction of dismissal. Subject, of course to the peculiar circumstances of the particular case which a sentencing court is dealing with, a trifling or trivial sentence – the proverbial slap on the wrist – simply will not reflect the clear prescription of the legislature that offences falling under Part III of the Act must be treated as being serious offences and punished accordingly.

[27] The detailed, expansive, and exhaustive submission of the appellant on the matter of sentence is to be found in paragraph 8 of the ‘Applicant’s Heads of Arguments’ under the hand of Advocate L. Maziya Appellant’s counsel. In all of its amplitude, it reads:

“It is submitted that even the sentence imposed was not only shocking, it in fact placed too much emphasis on the seriousness of

the offence and ignored the peculiar facts and circumstance was the fact that had the Appellant not being provoked in the manner he was he would not have done what he is accused of having done. The wording of section 33 presupposes that a fine should be a first option.”

[28] Fortunately for the appellant, it will appear from the judgment of Ota J on sentence that she took into account the submissions on mitigation of sentence which were made before her at the trial. Those may be summarized as:

- The Court should give the appellant the option of a fine in the sum of E5,000.00.
- Upon conviction, the appellant stood to be dismissed under 37 of Act. That was punishment enough.
- Dismissal would lead to him being struck from the roll of Attorneys making it impossible for him to do any kind of legal work.
- A custodial sentence would be inappropriate because he had six children two of whom were still dependent upon him.
- The appellant was fifty four years old and was of previous good character

[29] It is also clear from the record that the judge also took into account:

- The well known triad of circumstances.
- The appellant showed remorse.
- Only E1,000.00 was received from Mihla.

[30] The aggravating circumstances were serious. From start to finish, the appellant vaunted his status as a judicial officer and, despite pious assertions that he was acting at all material times as a private citizen, never doffed his judicial robes at any stage of the on-going saga. Counsel for the appellant could produce no authority in support of the novel proposition that where a penal section prescribed a fine, or imprisonment, or both, a sentencing court was bound to impose a fine. Nor could he point to any misdirection of the trial judge of herself in imposing the sentence she did. The sentences she imposed were well within her sentencing discretion having regard to the seriousness of the offence for which the appellant stood convicted, and the severity of the penalties prescribed by the Act under which he was charged.

[31] Unhappily, it is the sad duty of this Court to endorse the correct findings of the trial judge and to uphold both the conviction and sentence imposed by her.

ORDER

[32] It is the order of this Court that:

- i. The appeals against conviction and sentence on count one be and are hereby dismissed.
- ii. The conviction and sentence on count one are affirmed.
- iii. The appeals against conviction and sentence on count two are allowed.
- iv. The conviction and sentence on count two are set aside.

S.A. MOORE
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

For the Appellant : Advocate L. Maziya
Instructed by Mr. Xolani Mtsetfwa

For the Respondent : Advocate N. Kades S.C.