IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 701/85

In the matter of

BERNARD A. DLAMINI	First Applicant
LAWRENCE B.B. ZWANE	Second Applicant
TIMOTHY SHONGWE	Third Applicant
vs	
MINISTER FOR JUSTICE	First Respondent
DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
CORAM:	HANNAH, C.J.
FOR APPLICANTS:	MR. H. SHAKENOVSKY S.C.
WITH HIM:	MR. VAN DEVENTER
FOR RESPONDENTS:	MR WILMALARATNE

JUDGMENT

Hannah, C.J.

On 14th November, 1985 Mr. Shakenovsky on behalf of the applicants moved for an order:

"Interdicting the First and Second Respondents from instituting any further criminal proceedings or continuing such proceedings including the review thereof or taking any steps in respect of a prosecution or intended prosecution against the applicants for the purpose of obtaining conviction of the applicants of the crime of defamation on the facts as set out in the indictment, being Annexure "G" to the supporting affidavits to this application."

At the conclusion of submissions I refused to make the order sought, dismissed the application with costs and said I would give my reasons for doing so at a later date. This I now do.

The events leading to this application are as follows: On 2nd May, 1985 an application was heard by Hassanali J. in which certain relief was sought against the first respondent in his personal capacity. In its edition dated 2nd May, which I assume appeared on the following day, the Swazi Observer newspaper published a fairly lengthy report of those proceedings under what may be described as a sensational banner headline. Presumably the first respondent, or someone in authority, took exception to that report because some days later summons were issued against the three applicants alleging that the report constituted criminal defamation and that the applicants, who are respectively, director, general manager and editor-in-chief of the newspaper, were guilty of such offence.

The applicants appeared before the Manzini Magistrate's Court on 2lst May to answer the summons and what should have been a simple matter to dispose of, regrettably, turned into little short of a fiasco.

According to an affidavit sworn by a Senior Crown Counsel in certain other proceedings which are currently pending before this Court, and which was placed before me without objection, he prosecuted the case in the Magistrate's Court and his intention was to seek the committal of the applicants to the High Court for trial. To this end, he had signed a form which claimed that the Chief Justice, acting under Section 88(1)(bis) of the Criminal Procedure and Evidence Act, had allowed an application by the Director of Public Prosecutions to indict the applicants summarily in the High Court. In fact the Chief Justice had done no such thing.

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The proceedings in the Magistrate's Court apparently began with Crown Counsel reading out aloud the charge. Why he should have done so is not in the least clear. If the Chief Justice had indeed directed a summary trial in the High Court it was an unnecessary exercise; and, if he had not, and a preparatory examination was to take place, section 59 of the Criminal Procedure and Evidence Act provides that it is the magistrate who:

"shall read and explain the allegation" to the accused.

What happened next is the subject of dispute. Crown Counsel claims that the applicants raised certain objections concerning the lack of any investigation by the police and that they then proceeded to advance the defence of privilege in answer to the charge. The applicants, on the other hand, maintain that they entered pleas of not guilty and only then raised the defence of privilege. Whichever version be right it would seem that the proceedings took a most unusual and irregular course. The outcome was that the magistrate reserved any decision on the matter and on 24th May delivered a judgment which concluded with the acquittal of the applicants.

I shall refrain from making further comment on the Magistrate's Court proceedings as they are the subject of an application for review brought by the Director of Public Prosecutions in which their validity is challenged and that is a question which will have to be fully considered in due course. However, one matter which must be mentioned, as the applicants rely upon it, is the conduct of Crown Counsel on the day judgment was delivered. I take the following from his own affidavit. Having applied to withdraw the case from the magistrate before judgment was

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delivered, and that application having failed, he gathered up his files and papers and walked out of court. I am bound to agree with Mr. Shakenovsky that such behaviour was not only discourteous in the extreme but that it also bordered upon a contempt of court. Crown Counsel's unprofessional behaviour did not even stop there. Having thus removed himself from the court-room he then caused a fresh summons to be issued so that when the applicants emerged victorious they were served with a new process and marched off to another magistrate where Crown Counsel successfully applied for their committal to the High Court. If any conduct were designed to bring the Prosecuting Authority in Swaziland into disrepute this was surely it.

On 23rd September, 1985 the applicants appeared before the High Court for trial and each entered a plea of not guilty and a special plea of autrefois acquit. The point was also taken that they were wrongly before the Court because no direction for summary trial had been made by the Chief Justice and no preparatory examination had taken place. It would, I think, have been a point better taken before pleas were entered but that, apparently, was what occurred. The learned trial judge upheld the objection and adjourned the trial to enable the Director of Public Prosecutions to obtain the necessary direction. To date no such direction has been made. To complete the sorry history of this matter mention must be made of the fact that on 30th October, 1985 the Director of Public Prosecutions lodged an application to have the Magistrate's Court proceedings reviewed and set aside. It is a great pity that Crown Counsel did not recognise this as the appropriate procedure on 24th May. These proceedings are still pending.

I confess to having some sympathy for the applicants. The manner in which the case against them was

conducted by Crown

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Counsel was, to say the least, unorthodox, But this application cannot be decided on feelings of sympathy. For it to succeed it must be shown that the Court has power to grant the relief sought and, if it does, that the circumstances are such that the Court, in the exercise of its discretion, should grant such relief.

Mr. Shakenovsky submits that the Court has a power, derived from its inherent jurisdiction, to restrain the Director of Public Prosecutions from instituting or continuing criminal proceedings where it is shown that to prosecute such proceedings is vexatious and an abuse of the process of the Court. Mr. Wilmalaratne, on behalf of the Attorney-General, submits that no such power exists. Mr. Wilmalaratne bases his submission primarily on the terms of section 3 of the Criminal Procedure and Evidence Act. This section must be read with the Director of Public Prosecutions Order, 1973 which vests the powers previously exercised by the Attorney-General in criminal proceedings in the Director of Public Prosecutions. Section 3, as amended, provides:

"The (Directcr of Public Prosecutions), in accordance with the powers conferred upon him by section 91 of the Constitution, is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of His Majesty the King in respect of any offence committed in Swaziland."

The next step, Mr. Wilmalaratne submits, is to look at section 91(4) of the repealed Constitution as reinstated by the King's Proclamation made on 12th April, 1973. This provides:

"The Attorney-General shall have power in any case in which he considers it desirable

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"so to do -

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

Then regard must be had to the fact that section 142 of the repealed Constitution was not brought back into force. This section reads:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

Mr. Wilmalaratne points then to section 91(8) of the repealed Constitution which was brought back into force, namely:

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"In the exercise of the function vested in him by the subsection (4), the Attorney-General shall not be subject to the direction or control of any other person or authority."

and submits that the effect of this is to preclude the Courts from interfering in the exercise by the Director of Public Prosecutions of his discretion.

Mr. Wilmalaratne's submission derives considerable support from the judgments of the full Bench in the Transvaal Supreme Court in the case of Gillingham v Attorney-General and Others, 1909 TS 572. In that case the Attorney-General had declined to prosecute certain charges made by the appellant and an application made by the appellant to compel the Attorney-General to institute criminal proceedings was refused. On appeal Innes C.J. said:

"Now our system of the administration of justice in criminal cases is based upon this - that the duty and responsibility of prosecuting on behalf of the Crown is vested absolutely in the Attorney-General. The responsibility is his, and he discharges the duty of prosecuting all offences on behalf of the Crown - though provision is made for allowing persons having some special interest in the crime alleged to prosecute privately, upon their complying with certain formalities and giving certain security. Sec.6 of the Code is perfectly clear. "The Attorney-General is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the King all offences committed in or triable by the

"courts of this colony. This right and power of prosecution in the Attorney-General is absolutely under his own management and control." We are now asked to compel the Attorney-General to instruct the public prosecutor to take proceedings on behalf of the Crown, in a matter in regard to which he has already exercised his judgment and has decided that it is not one in which he can so prosecute. We cannot compel him to change his mind, or to take a step contrary to the free and unfettered exercise of the discretion which the Ordinance vests in him. That is clear and that is the only point with which we have to deal..... The only question before us at present is whether we can compel the Attorney-General to institute a public prosecution when he has decided that the case is not one in which he should so prosecute. I do not think we are entitled, or empowered, to make such an order: it would be a mere brutum fulmen."

In a concurring judgment, Curlewis, J. said:

"The Attorney-General has an absolute discretion to initiate and prosecute criminal proceedings at the instance of the Crown. He does so upon his own responsibility, and in the performance of that duty he is wholly independent of this Court, which cannot interfere with the discretion conferred upon him by the statute."

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worded to section 3 of the Criminal Procedure and Evidence Act, particularly if that section is read with section 91(8) of the repealed Constitution as brought back into force; and the judgment of the learned Chief Justice must be regarded as being of very strong persuasive force.

In the light of the statutory provisions cited by Mr. Wilmalaratne and the judgments in Gillingham v Attorney-General (Supra) I have no hesitation in holding that in the ordinary course the Director of Public Prosecutions has an absolute discretion whether to institute or continue criminal proceedings or not and that the Court has no power to interfere with such discretion. However, I find it difficult to accept that the Director has the freedom to act as he wishes without control by the Courts whatever the circumstances may be. Take, for example, a case where the Court has made a declaratory order that certain conduct is not unlawful and the Director is party to the application in which the order was made. Should the Director decide to prosecute on the basis that the conduct is unlawful is it to be said that the Court is powerless to prevent such an abuse of the process of the Court? In Central African Examiner v Howman and Others 1966 (2) 1 Lewis J. was clearly of the opinion that it was not. Having cited the judgments in Gillingham v Attorney-General and Others (supra) he said:

"Since the Attorney-General's discretion in regard to public prosecutions is absolute, it also follows in my view that the Court has no power to stop him prosecuting at the public instance if he wishes to do so, except on the basis that the issue is res judicata."

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In Kerr v Corporation of Preston (1877) 6 Ch.D. 463 Jessel MR also considered that circumstances might exist in which the Court might interfere with criminal proceedings although in general it would not. While it must be recognised that different consideration apply in England, it is nonetheless useful to note the approval of the courts to what is after all, a matter of public policy.

Another example, and one which is closer to the facts of the instant application, would be a case in which it is shown that the Director had undertaken a prosecution not with the object of having justice done to a wrongdoer but in order to harrass or persecute him. If it were to be shown that the Director is acting mala fide with an ulterior motive in launching a prosecution can the courts do nothing to restrain him? In my view the answer is that it can. In extreme cases such as this, and similarly where the issue raised in the prosecution is res judicata, the court can interfere on the ground that the action being taken is an abuse of its process and the court has the widest possible power to control its own proceedings and to prevent such an abuse (see Western Assurance Co. v Caldwell's Trustee 1918 AD 262). In my opinion, section 91 of the repealed Constitution as brought back into force does not, despite the wide terms used, deprive the Court of its inherent jurisdiction to prevent an abuse of its own process.

The circumstances in which the Court will intervene and restrain the Director from instituting or continuing proceedings are, however, wholly exceptional and a party who seeks such an order must satisfy the Court by clear evidence that such circumstances exist. In the instant case Mr. Shakenovsky submits that such circumstances have been made out and I now proceed to consider that submission.

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I hope I do full justice to Mr. Shakenovsky's submission if I say that it is based on the following. Firstly, that no reasonable, fair-minded prosecutor would take the decision to prosecute the applicants having regard to the defence of privilege which is available to them. Secondly, that as no police investigation took place the Director was not in a position to assess the strength of the Crown case with a proper sense of objectivity. Thirdly, that Crown Counsel produced a certificate to the magistrate's court which was false.

And fourthly, that Crown Counsel's conduct as portrayed earlier in this judgment indicates a degree of malice and bad faith and a desire to harrass the applicants. Mr. Shakenovsky submits that these factors, when viewed in their totality, are such that the Court must infer an improper motive on the part of the Director.

I do not attach much importance to the first point. It may well be that the applicants have a perfectly good defence to the charge of criminal defamation but it by no means follows from this that the Director has an improper motive in laying the charge. He may be wrong either in his view of the facts or the law to be applied but that, in my view, is as far as it goes. As for the lack of any police investigation, I accept that it is usual and desirable that the facts upon which a prosecution is to be based be investigated by the police and a report then given to the Director who decides whether to prosecute or not. That is not to say, however, that such an investigation must invariably take place. There must be cases, for example, where officials of a Government Department hand a record to the Director and the intervention of the police is not called for. These will normally be cases where issues of fact are unlikely to be in dispute and I am not prepared to say that the present case is not one of them.

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The remaining factor concerns the conduct of Crown Counsel and this can equally well be explained as being occasioned by a personal fit of pique with the magistrate or even lack of competence as it can as showing improper motive. In this regard, however, I find it a matter of considerable regret that the Director has not chosen to disassociate himself from such conduct.

Although I find the manner in which the applicants have been prosecuted deeply disturbing and although I consider there may be much merit in Mr. Shakenovsky's submission on the likelihood of the prosecution failing should a new trial be ordered I am not persuaded that improper motives can be attributed to the Director and accordingly I am not satisfied that this is an appropriate case for the Court to intervene.

In my opinion, the review proceedings should be allowed to take their ordinary course and, should the magistrate's court proceedings be found to be a nullity, it will be for the Director to decide whether to continue with the prosecution.

A subsidiary submission made by Mr. Shakenovsky was addressed to the effect of S 88(bis) of the Criminal Procedure and Evidence Act and was made to meet the eventuality of the review proceedings succeeding and a new trial being ordered. This section reads as follows:

"(1) The Chief Justice may, on ex parte application made to him in Chambers by the Director of Public Prosecutions and on being satisfied that it is in the interest of administration of justice so to do, direct that any person accused of having committed any offence shall be tried summarily in the

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"High Court without a preparatory examination having been instituted against him.

(2) Such summary trial in the High Court may be held at a time and place determined by the Chief Justice.

(3) The Director of Public Prosecutions shall not less than four days before the commencement of such summary trial cause to be served on the accused a copy of the charge upon which the accused is to be arraigned together with a brief summary of the substantial facts alleged against the accused as they appear from the statements of the witnesses for the prosecution against the accused, and a list of the names and addresses of the witnesses he intends calling at the summary trial on behalf of the prosecution; provided, however, that the omission of the name or address of any witness fro from such list shall in no way affect the validity of the trial.

(4) This section shall apply in respect of any offence committed before or after the commencement of

this Order."

This new section was added in 1973 and prior to its enactment the only way in which an accused could be brought for trial before the High Court was by committal by a magistrate following a preparatory examination. Today the procedure set cut in section 88(bis) is in common use and, I venture to think, is used in practically every case in which an accused is brought for trial in the High Court.

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The first point taken by Mr. Shakenovsky is that section 88(bis) should not be used as a rubber stamp for directing summary trial in the High Court. He submits that it deprives an accused of his previous right to hear and test the evidence which is to be adduced at his trial and, in an appropriate case, to apply for a discharge on the ground that no sufficient case against him has been made out; and, accordingly, the power should be exercised with great care. I do not dissent from this proposition. However, in exercising the power, the Chief Justice has to be guided by what, in his view, is in the interests of the administration of justice. This involves much wider considerations than the advantages which may accrue to an accused by having a preparatory examination although obviously such advantages rank among them. Such considerations include matters such as the likely length of a preliminary enquiry, the availability of a magistrate to conduct such enquiry, matters of security and so on. What is not included, however, is a consideration of the strength of the prosecution case. In my opinion, the Chief Justice should be concerned solely with the procedural question of how an accused is to be brought for trial before the High Court and not whether he should be tried.

The next point advanced by Mr. Shakenovsky is that although the application to the Chief Justice is an ex parte one the Chief Justice has a discretion to invite oral or written representations from an accused. Mr. Shakenovsky bases this submission, in the main, on the judgment of the Court of Appeal (Criminal Division) in R v Raymond 1981 2 All E R 246 in which the opinion was expressed that in an application for leave to prefer a voluntary bill of indictment the judge may have such a discretion in relation to written representations. I am inclined to the view that there is merit in this submission. After all, if an accused were to make written representations to the Director

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of Public Prosecutions as to why a direction should not be made under section 88(bis) the Director would, I think, be under a duty to bring these to the attention of the Chief Justice, And if, as is the case here, the Chief Justice has knowledge of matters affecting the application he might feel obliged to seek the Director's views on them and give such weight to them as he thinks fit. Why then should the Chief Justice, in an appropriate case, not invite representations of a written kind? However, such an invitation would, I think, be most exceptional. And, as I have already indicated it would not be directed to the merits of the prosecution case. It is on this question, I suspect, that Mr. Shakenovsky would seek an opportunity to address the Chief Justice should the occasion arise.

I conclude this judgment by making a few observations on the practice, which I believe is followed by the Director, of seeking the committal of an accused by a magistrate in those cases where the Chief Justice has made a direction for a summary trial before the High Court. In my view, such practice is unnecessary as section 88(bis) sets out a self-contained procedure and this procedure does not include committal by a magistrate. In this regard I would respectfully endorse the comments of Dunn A.J. in R v Nxumalo (Criminal Case 167/85). Strictly, a magistrate has no power to commit an accused for trial unless a preparatory examination has been held and once the Chief Justice has made a direction under section 88(bis) a magistrate before whom an accused previously appeared on remand is no longer seized of the matter. Once the certificate of the Chief Justice is produced to the magistrate all he need do is cause the fact that the accused is to be summarily tried in the High Court to be endorsed on the court record and remand the accused either in custody or on bail.

N.R. Hannah

CHIEF JUSTICE