IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.352/86

In the matter of

DOUGLAS LUKELE	Applicant
and	
SUB-INSPECTOR MABUZA	1st Respondent
COMMISSIONER OF POLICE	2nd Respondent
ATTORNEY-GENERAL	3rd Respondent
CORAM:	HANNAH. C.J.
FOR THE APPLICANT:	MR. P. FLYNN
FOR THE RESPONDENT:	MR. J.M. DLAMINI

J U D G M E N T

Hannah, C.J.

This application raises the important question of the right of an individual held in custody by the police to have access to his lawyer. The facts of the case are not now of any real consequence because the hearing of the application has been overtaken by events. On the one side a practising attorney claims that certain police officers refused him permission to consult with his client while the latter was in police custody: on the other side the respondents deny any knowledge of the applicant ever seeking such permission. Wherever the truth may lie the parties accept that further investigation of the facts would be pointless as "the client" in question is no longer in police custody having been duly tried and sentenced to a term of imprisonment. However, as the Court is seized of the matter and as the applicant wishes to have a ruling on the question whether a detained person has a right of access to his lawyer and whether a lawyer has a right of access to his client when in detention I shall proceed to

consider the arguments advanced.

In many countries, certainly in the many Commonwealth countries which have accepted a written Constitution, the right of an individual to have access to his legal adviser is entrenched in the Constitution itself. In many of the countries which do not have a written Constitution the right is to be found in the Common law having its roots in the acceptance by civilised societies that it is in the interests of justice that a person accused of crime is entitled to have legal representation and as a corollary thereof has a right to seek legal advice, Swaziland in no exception. (While having no written Constitution guaranteeing civil liberties the common law recognises the fundamental right of every individual freely to obtain legal advice and assistance. See Brink and Others v Commissioner of Police 1960 (3) S.A. 64; Mandela v Minister of Prisons 1983(1) S.A. 938. And as was said by Jansen J.A. in Mandela's case;

"On principle a basic right must survive incarceration except in so far as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration."

This right to have access to a legal adviser has also received statutory recognition. Section 93 of the Criminal Procedure and Evidence Act provides:

"(1) Subject to any law relating to the management of prisons or gaols, the friends and legal advisers of an accused parson shall have access to him.

(2) An accused person shall be entitled to the assistance of his legal advisers while the preparatory examination is being held."

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The Deputy Attorney-General submits that this provision only applies to a person actually charged with an offence but I see no reason to give it such a restricted meaning. If a person has been taken into police custody on suspicion of having committed an offence and is held by the police pending investigations he is in reality an accused person and as much in need of legal advice as a person who has been formally charged on completion of the investigation. In any event, whether Section 93 should be given a narrow or wide construction the fact remains that the common law recognises the right of access to one's legal adviser whether one is sitting in one's office or home or sitting in a police charge office while enquiries are being carried out.

The Deputy Attorney-General doss not contend that a person held by the police, whether on a charge or pending investigations, does not have a right of access to his legal adviser but contends that such a right is not an absolute right and that it is the right of the person detained and not that of his lawyer. Dealing with the second point which is directed to the locus standee of the applicant in the present case I can see no reason in principle why a lawyer, duly instructed on behalf of a person being detained by the police, should not have as great a claim to a right to see his client so as to take his instructions or tender such advice as is being sought as the client has to see his lawyer. Usually an application such as the present one will be brought in the name of the client but if exceptionally it should be brought in the name of the client I see no reason for finding that it is technically incorrect. In substance it is seeking to enforce the fundamental right already referred to.

The first submission made by the Deputy Attorney-General does, however, have more force. No case has been cited to me in which the Courts which apply the Roman Dutch law have qualified the fundamental right of a person apprehended or arrested by the authorities to have access to his lawyer nor have I bean able to find any myself but it

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by no means follows from this dearth of authority that the right must be an absolute one not qualified by or subject to other considerations. As I have said, the right has its roots in what the Courts see to be the interests of justice or, perhaps, in the fundamental principle of natural justice, and there is more than one side to what is in the interests of justice. While the Courts are deeply concerned to protect the interests of the individual they are also concerned to ensure that the interest of the public at large in seeing that crime does not go undetected is not unduly interfered with.

Although I have seen no formal adoption by the judges of Swaziland of the Judges Rules published in England in 1964 I have, while sitting in another capacity, been informed by the Director of Public Prosecutions that as a matter of settled practice the judges of this Court have applied these rules and certainly that has been my practice. The appendix to these rules refers to five "principles" the third of which is:

"That every person at any stags of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

This proviso clearly recognises the need to achieve some balance between the rights of an individual and the due administration of justice when seen in a wider context. As the judges of this Court have for many years recognised the English judges rules incorporating the foregoing "principle" together with its proviso I

would require strong reason for finding that our common law, while recognising the basic right of access to a legal adviser, does not also recognise that such right must, in certain circumstances, give way to other weighty considerations.

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The only argument Mr. Flynn was able to advance in support of his proposition that the right of access to a lawyer is an absolute one is that to hold otherwise would be dangerous in that it would open an avenue for abuse. I accept that there is, indeed, a risk of abuse but not, I think, a great one. A person held in custody has a right to consult his legal adviser at the earliest possible moment and if the exercise of that right is to be held in abeyance the burden is on the police to show that such a consultation would unreasonably delay or hinder their investigation or the administration of justice. The emphasis should be on "reasonableness". The police may well consider it undesirable that a suspect should be advised by his own attorney of his right to say nothing of of the undesirability of answering certain questions but that would not be a "reasonable" cause of delay or a "reasonable" hindrance to the processes of investigation. Indeed I apprehend that the circumstances in which the police could legitimately refuse a suspect access to his lawyer would be very limited as where, for example, there is a real risk that the lawyer might, unwittingly or even, perhaps, intentionally warn others involved in the crime being investigated and thus provide the opportunity for offenders to escape justice or destroy evidence. In such circumstances the police would be under an obligation to pursue their enquiries swiftly so as not unreasonably to curtail the suspect's right to consult his lawyer.

One remaining matter is the question of costs. As 1 indicated earlier the allegations made by the applicant are hotly contested and the issues of fact cannot be resolved without further investigation. For the reason I have given it was decided that such further investigation was not warranted. In these circumstances I consider it would be right to make no order on the application and no order for costs.

N.R. Hannah

CHIEF JUSTICE