In the High Court of Swaziland

Crim. Case No. 356/93

In the matter between:

The King

vs

Ntombi Nzalo

CORAM:	Hull, C.J.
FOR APPLICANT	Mr. Donkoh
FOR ACCUSED	Mr. L. Mamba

Judgment

(13/12/93)

This is an application brought by the Acting Director of Public Prosecutions on a basis of urgency under section 92 of the Magistrate's Courts Act, No.66 of 1938.

The facts leading to the application can be shortly stated.

The accused has been charged on two counts of breaches of the game laws relating to elephant tusks and one count of contravening the Pharmacy Act, No. 38 of 1929. The case was originally before the Magistrate's Court but then on 29th November 1993, on the application of the Acting Director under section 88 bis of the Criminal Procedure and Evidence Act 1938, I directed that the offences were to be tried summarily in the High Court without preparatory examination.

Subsequently, His Worship Mr. Nkambule entertained a bail application by the accused.

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The Acting Director, being now dissatisfied with the learned Magistrate's decision to do so, seeks to have it reviewed under section 92.

His first ground of challenge disposes of the matter. He contends that on the granting of the application for summary trial in the High Court, the Magistrate's Court thereupon ceased to be seised of jurisdiction.

That, in my view, is undoubtedly correct. I agree, with respect, with the observations by my predecessor Hannah C.J. in Dlamini and Others v. Minister for Justice and Director of Public Prosecutions 1982-86 (II) SLR 367, at paragraphs G and H on pages 374. Upon the order directing summary trial in the High Court, the Magistrate was no longer seised of the matter. All he then had to do, and what he did have to do, was to endorse that fact on the count record.

It was evidently the view of the Magistrate, and it was also contended here by Mr. Mamba, that it remained open to the lower court to decide whether to remand the accused in custody or to grant him bail. That view is based on an apparent misunderstanding of the last sentence in the judgment of Hannah C.J. in Dlamini. When the learned Chief Justice concluded his observations by saying that after endorsing the fact of summary trial in the High Court on the record, the Magistrate was to "remand the accused either in custody or on bail", he was saying that if the accused was already on remand in custody, then the Magistrate was to continue to remand him, and that if he were already on bail, he was to continue his bail. Upon the direction for summary trial, all questions of remand in custody or bail become matters for the High Court.

Before me, Mr. Mamba had also argued that the jurisdiction of the Magistrate's Courts to grant bail in such cases is saved in any event by section 96 of the Criminal Law and Procedure Act, which states, shortly: "The accused may at

the time of the commitment apply verbally to the judicial officer granting the warrant of commitment, to be liberated on bail."

That section must however, as Mr. Donkoh pointed out, be considered in its context. It refers to the case in which a Magistrate commits a person for trial in the High Court after a preparatory examination. It does not apply in the case of a direction under section 88 bis for summary trial in the High Court. As Hannah C.J. also explained in Dlamini, in the final paragraph of the judgment, section 88 bis sets out a self-contained procedure which does not involve committal by a Magistrate.

Accordingly, no further proceedings may continue in the Magistrate's Court in respect of the application by the accused for bail. ~~He~~ She is remanded in custody, pending his trial in the High Court. ~~If he wishes to seek bail, he must apply to the High Court itself.~~

The Acting Director had also sought to review the decision of the Magistrate on two other grounds, namely: (a) that Mr. Nkambule, having been appointed to sit in the Hhohho District, had not been competent to hear the case in any event, as it related to offences allegedly committed in the Shiselweni District and (b) that because Mr. Nkambule's appointment as a Magistrate had never been notified in the Gazette, he was in any event not competent to try any criminal case.

I do not consider that there is any merit in these objections, for the following reasons.

In the first place, they were not taken before the Magistrate. The proceedings in the lower courts in fact go back to 2nd November 1993. On 9th November, the prosecutor applied for the case to be transferred to the Principal Magistrate's Court for trial. This was done. Trial was set

for 23rd November. On that day however, the Crown was not ready to proceed, and asked for a postponement. The defence opposed this, but the Principal Magistrate granted the application and adjourned the case until 30th November, to be heard before another Magistrate, as he himself was going on leave.

It came before Mr. Nkambule on 30th November. In the meantime, however, the Acting Director had on 25th November applied to me for summary trial on indictment in the High Court. The application was received in the High Court Registry on 29th November and, as I have already indicated. I granted it on that day.

Although he did inform Mr. Nkambule on 30th November that the case was now to be tried in the High Court, the prosecutor did not at that time oppose, on the ground that the Magistrate was no longer seised of the proceedings, the application for bail that defence counsel then proceeded to make to the Magistrate. On the contrary, on that day and on 1st December (to which Mr. Nkambule postponed the case for the leading of evidence on the bail application) the prosecutor continued to participate in the bail proceedings. He in fact led evidence on the bail application on 1st December. It was not until 8th December, after Mr. Nkambule had postponed the bail application for decision, that the Acting Director then lodged this present application. In that way, therefore, the prosecution itself contributed to the error that occurred in the lower court, i.e. in continuing to deal with the case there after the direction had been issued for summary trial in the High Court.

Moreover, the prosecutor did not object in the proceedings before Mr. Nkambule that he did not have jurisdiction to deal with a case arising in Shiselweni; or more broadly that he did not have jurisdiction to try any criminal cases because his appointment had not been notified in the Gazette.

It in fact appears from the record that the case had first been brought to Mbabane at the wish of the prosecutor, because the Principal Magistrate had said that he would not be able to give a trial date before February of 1994.

The issue of a Magistrate's jurisdiction on his appointment has also been dealt with by Hannah C.J., in the case Phillip Dingane Nkosi v. The King (Appeal No. 21/86), a decision of this Court given on 28th January 1987.

In that case, defence counsel had argued that because the Minister for Justice had failed to designated by notice in the Gazette the area in which a particular Magistrate was to exercise his jurisdiction, the Magistrate concerned had no jurisdiction.

For that submission, defence counsel had relied on subsections (1) and (2) of the Magistrate's Courts Act 1938 as amended by the Second Schedule to the Judicial Service Commission Act 1982 which subsections provide as follows:

"(1) Subject to subsection (2), a magistrate or a magistrate's court shall have jurisdiction over such area as the Minister may, by notice in the Gazette, determine and a magistrate above the rank of Senior Magistrate or a magistrate's court presided over by him shall, unless otherwise stated in any notice under this subsection, have jurisdiction within every district in Swaziland.

"(2) The areas of jurisdiction of magistrates' courts as set out under the General Administration Act, 1905 in accordance with Legal Notice No. 121 of 1963 shall, until such Notice is amended or revoked, be deemed to be areas of jurisdiction determined under subsection (1)."

Rejecting that submission, the learned Chief Justice held that subsection (1) conferred a discretion on the Minister for Justice to define the areas of jurisdiction of

Magistrates. He pointed out that the principal object of the 1982 Act was to transfer from the Executive to an independent Judicial Service Commission the power to appoint Magistrates, and that it would be wholly wrong to construe the consequential amendments in its Second Schedule as empowering the Minister, by default to render nugatory decisions of the Commission to appoint Magistrates. He concluded that in the absence of any such direction, a Magistrate duly appointed by the Judicial Service Commission has jurisdiction to sit in the magisterial district in which he is directed to sit by the Judicial Service Commission, through its secretary. With respect I agree, though in two respect I myself would go further. Subject to the requirements that a Magistrate must for the time being exercise his jurisdiction within a district, as defined by section 4(2) of the 1982 Act, and of course to any notice in the Gazette actually issued by the Minister, I consider that it is within the purview of the Chief Justice as administrative head of the Judiciary to direct that a magistrate shall for the time being sit in a particular district, if the business of the Judiciary so requires. I also think that the intention of subsection 4(1) is essentially of an administrative nature, i.e. to provide for the convenient division (as the Minister thinks fit) of Swaziland into magisterial districts for the better provision - at the administrative level, rather than on an individual basis - of judicial services throughout the country.

In the present instance, however, Mr. Nkambule was appointed by the Commission to sit in the Hhohho District, and has done so since his appointment in 1992.

Mr. Nkambule having been appointed by the Commission to be a Magistrate, under the Judicial Service Commission Act 1982, in the Hhohho District, it then fell to the Principal Secretary for Justice, who is ex officio secretary to the Commission, to ensure that notice of his appointment, i.e. his appointment as such, was duly notified in the Gazette.

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That should be done at once, but adopting the same approach as Hannah C.J. in Nkosi, I consider that his requirement, in section 5 of the General Administration Act 1905, is directory rather than imperative: see Howard v. Bodington (1877) 2 PD 203 per Lord Penzance at page 211, cited in Nkosi. Default or delay in publishing the appointment does not render it nugatory. To construe section 5 otherwise would also have the effect, contrary to the intention of the Judicial Service Commission Act, 1982, of frustrating decisions of the Commission.

DAVID HULL
CHIEF JUSTICE