



# **IN THE HIGH COURT OF SWAZILAND**

**CRIMINAL CASE NO.84/01**

**In the matter between:**

**REX**

**VS**

**MARIO MASUKU**

**CORAM**

**FOR THE CROWN**

**FOR THE DEFENCE**

**MATSEBULA J**

**MR. L. NGARUA**

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## **JUDGMENT**

**23/08/02**

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The accused is charged with the crime of sedition and contravention of Section 1(1)(b) of Act 46/1938 as amended on count one and count two. The accused is alleged to have on the 7<sup>th</sup> November 2000 at a public place and at or near old bus rank in Mbabane, District of Hhohho. The said accused did unlawfully and intentionally in the presence of numerous members of the public and His Majesty's subjects utter the following words: "Phansi ngembuso waMswati". The words translated to English language which to mean "Down with His Majesty King Mswati's reign".

Accused is therefore guilty with the crime of sedition in contrary to Section 4(1) (b) of Act 46/1938 as amended.

Count two, the accused person is guilty of sedition contrary to Section 4(1) (b) Act 46/1938 as amended in that on or about the 24<sup>th</sup> day September and at or near the Salesian Sports Ground in Manzini, District

of Manzini the accused person did unlawfully and intentionally and in the presence of numerous members of the public and His Majesty's subjects made a statement persuading the churches, schools, colleges, Universities everywhere and every house that all these places there should be houses for revolution and that everyone should now join including teachers, traditional healers for the overthrowing of the Tinkhundla system of Government which PUDEMO has been orchestrating since 1973. The accused is therefore guilty of the crime of sedition contrary to Section 4(1) (b) of Act 46/1938.

Take notice that in both counts one and two the Crown shall involve the provisions of Section 3(3) Act 46/1938 as amended. The accused person shall begin therefore to intend the consequences which will naturally follow from his conduct the time and under the circumstances in which he called for the end of His Majesty's reign. Take further notice that the Crown shall allege that the crimes committed by the accused are accompanied by aggravating circumstances in that:-

- i) The accused made a seditious statement despite in the past by the police not to utter seditious statement at public rallies.
- ii) That the two crimes were committed within a duration from each indicating clear a remorseless trend.
- iii) That the commission of the offence reveal a moris perperandure and a systematic defiance articulated by the accused person in varying degrees of intensity building up from 1973 with a view to inducing among His Majesty's subjects, disaffection and disrespect towards the King harmonating the call for the termination of His Majesty's reign.

As I have indicated, the accused pleaded not guilty to both counts. The evidence was led and at the close of the Crown case, an application was made in terms of Section 1744 of the CRIMINAL PROCEDURE & EVIDENCE ACT 1967/1938 as amended. The application succeeded in respect of count two and failed in respect of count one and therefore it is not

necessary for this Court to repeat the reasons why the accused was acquitted at the close of the Crown case. The court will now deal with count one where the two main Crown witnesses were led by the Crown PW1 being Aaron Tambo Mavuso Superintendent in the Royal Swaziland Police.

His evidence was to the effect that on the 7<sup>th</sup> November 2000 he and PW2 Superintendent Lukhele were in charge of police operation at the old bus rank. And at plus minus 11 hours, some members of an organisation calling itself SDA emerged and grouped at the old bus rank. PW1 said accused was in that group. PW1 testified that he informed the accused and others that he and PW2 had received instructions that the assembly and the march to the Prime Minister's office should not take place. He said the intended march had been banned by their superiors.

I would wish to pause here and state that members of the public unlike the police force members can only be obedient to the banning orders by the police in terms of recognised public order at or some other properly gazetted order. The Commissioner under his command has the police and public order under which there is a Police Act of 29/1957 Section 8 is the relevant Act and it would be advisable in future that when there are such prohibition of meetings should be clearly stated under which law not just instructions from above.

Adhering to these recognised procedure also protect members of the police force so that for PW1 to have informed the accused that he had been instructed by his superiors that the gathering and the march had been banned is not good enough. No wonder the accused and his group reacted the way they did but it is good to actually state that under this law which is recognised by the public such gathering or such march had been banned.

However, PW1 said he and his colleague then barred the procession. It was PW1's evidence that accused started uttering slogans like 'VIVA COMRADES VIVA' and he thanked his comrades for having assembled and told those assembled that they should stand by the resolution taken at Mpumalanga Province on the 5<sup>th</sup> November 2000. Accused then uttered

the following according to PW1:- “PHANSI NGETINKHUNDLA PHANSI”. PW1 interpreted this into English as reading, “AWAY WITH TINKHUNDLA AWAY” and too “PHANSI NGAHHULUMENDE WEBAGCILATI PHANSI” and PW1 interpreted this into the English language as “AWAY WITH THE GOVERNMENT OF THE DICTATORS AWAY” and thirdly “PHANSI NGEMBUSO WAMSWATI PHANSI” this was also interpreted by the witness meaning “AWAY WITH MSWATI’S REIGN AWAY”.

May I just point out that the evidence of PW1 and PW2 do not corroborate each other on the sequence on how these were said but in my judgment this does not affect the Crown case at all. It was at this stage that PW1 touched accused at his mouth and informed him that he was committing an offence by these utterances relating to His Majesty. PW1 told the court of all the affirmations who were present and intending to march to the Prime Minister’s office. He said he estimated the number of the people who gathered there to plus minus 300 to 350. It was PW1’s evidence that accused shouted these words loudly.

The said Mphumalanga declaration was handed in as exhibit “A”. It is a document entitled MPHUMALANGA DECLARATION – 5<sup>TH</sup> NOVEMBER 2000 and addressed to the Prime Minister, Cabinet House, Hospital Hill, Mbabane. And accused and others according to the witness intended to go to the Prime Minister’s office to deliver exhibit “A”.

According to the contents of exhibit “A”, I have gone through it myself, none of the contents contravenes the sedition and subversive activities at under which the accused is charged. On the contrary the contents of exhibit “A” contains defences, enumerated under Section 3(2) of the Act which reads as follows:-

“Notwithstanding subsection 1 (that is the Act tabulating the seditious intention) notwithstanding subsection 1 an Act, speech shall not be seditious by reason only that it entails. 2(a) show that His Majesty has been misled or mistaken in any of his measures or (b) point out errors or difference in the Government or constitution of Swaziland as by law establish in legislation or in the administration of justice with a view to the remedying of such errors or defects; (c) persuade His Majesty’s subjects or

the inhabitants of Swaziland to attempt to procure by local means by all fashion of any matter in Swaziland as law established; (d) point out with a view to their removal any matters which are producing or having a tendency to produce feeling of ill-will and enmity between different classes of the population of Swaziland.”

For the sake of completion, subsection 3 has got a deeming, what I can refer to as a deeming clause which reads as follows:-

“In determining whether the intention with which any Act was done or anywhere was spoken or any document was published was or was not seditious every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.”

As I have indicated the exhibit “A” that is the Mpumalanga declaration if one reads it with the defences raised under Section 3 subsection 2 would not amount to any crime of sedition.

PW1 told the court that accused also informed those gathered that the 14<sup>th</sup> November were to be stay away day in accordance with the Mpumalanga resolution exhibit “A”. Accused finally told the crown to go away and it did so according to this witness peacefully. PW1 and his colleague did not effect their arrest immediately for fear that an arrest could have evoked resistance and led to chaos. Accused was arrested subsequently. PW1 told the court that he was not aware of any bad blood between him and the accused.

PW1 was cross-examined extensively and in my view he stood his ground and was not shaken. However, PW1 was also asked if accused had wanted to do away with the King and PW1 stated in answer that accused had never wanted to do away with the King but rather he wanted to do away with Government put in place by wrong advice.

Then the evidence of PW2 1606 Superintendent John Lukhele was led. In nature degree except to what I have referred to the sequence, PW2 corroborated the evidence of PW1 in all material respects. It was his evidence that he is being in the police force since 1975 and he said on the 7<sup>th</sup> November 2000 he was at the old bus rank on duty in the company of

PW1 and another police officer. The accused and some other organisations referred to by PW1 were also there. The present were plus minus 300 he said. He and PW1 went to accused and informed him that they would not be allowed to have the march to the Prime Minister's office. PW2 corroborated PW1 in so far as the barring of the people from proceeding with the march. Thereupon, the accused, according to PW2 uttered the following slogans again, not in the sequence in which PW1 had said but I again say that is of no material contradiction in so far as this judgment is concerned.

According to PW2 the accused would then have said "Phansi ngaHulumende Phansi! Phansi ngaHhulumende waSibusiso Phansi! Phansi ngembuso waMswati Phansi!" The interpretation were given in each case as I have indicated above. PW2 said he then heard PW1 warning accused that he was committing an offence. PW2 said addresses under 3 were understood by him as meaning "Away with reign of King Mswati III Away! Again, I attach no importance where the witness say "Away with the Reign of King Mswati leaves out the III or any of the figures after King Mswati. That is not very material in so far as my judgment is concerned.

Two, PW2 this slogan lowered dignity of His Majesty the King who is authority over the Kingdom of Swaziland. It is to be noted that there are some differences in the sequence and the exact words uttered by the accused according to one witness and the other but as I have said these contradictions or differences are not of material nature. It was PW1's evidence that these slogans were shouted at the top of accused's voice. Accused was finally arrested according to this witness on the 10<sup>th</sup> November 2000. PW2 had no bad luck with the accused. It was his evidence that the slogans were uttered in a public place.

PW2 was also cross-examined extensively by counsel and in my view he also stood his ground and was not shaken. It is true that his evidence **viva voce** differed slightly but in so far as the material nature of the offences concerned in so far as the uttering of the slogans that does not detract or make any material difference that this court can take into

account against the witness. In my judgment the difficulty encountered by both PW1 and PW2 would have been avoided had used been made of some of the recording devices like electronic devices. PW2 admitted that accused made a short statement when he addressed the gathering however, both PW1 and PW2 only recorded what their memory could recall. They both were unable to remember the rest of the accused's statement obviously that creates problems when this court should determine whether or not the alleged words were quoted in the context of the main speech. Saying that one should not loose sight of the fact that according to our decided cases locally and otherwise the intention in this matter is one which is specific. In other words it would be difficult for anyone to come here and say "Phansi ngembuso waMswati Phansi! And not refer to the context in which it is made because you have to prove at the end of the day the specific intention in order to get a conviction.

PW2 cannot remember if accused mentioned the so-called 27 demands nor can he remember accused mentioning Section 40 to 52 of the Industrial Relations Act which incidentally are contained in some other documents like exhibit "the 27 demands".

PW2 also admitted that accused was dissatisfied with the way Government was being run. PW2 was convinced and satisfied that the phrases uttered by accused were seditious. This court will deal with this issue when referring to the legal issues.

The next Crown witness was 1061 Detective Inspector Maphosa whose evidence did not take the matter any further. On the contrary PW3 through his evidence brought a lot of confusion when he admitted having said "something in exhibit "C" that is statement which was written by him and which was different from the typed statement" but again I do not take those differences seriously to affect the Crown case.

There was also the evidence of PW4 Michael Dlamini who also gave evidence. PW4's evidence to a lesser degree corroborated the evidence of