IN THE HIGH COURT OF SWAZILAND

In the appeal between	CRIM. APP . NO. 8/80
SHOKOSHO NKAMBULE	(Appellant)
vs.	
THE KING	(Respondent)
CORAM:	ACTING CHIEF JUSTICE, D . COHEN AND
	MR. JUSTICE D. LUKHELE
FOR THE APPELLANT:	MR. V. DLAMINI
FOR OTHER PARTIES:	MR. A. TWALA AS AMICUS CURIAE

JUDGMENT

(Delivered on 11th July, 1980)

COHEN, A. C. J. :

This is an appeal from the judgment of the Judicial Commissioner against his confirmation of certain decisions given in the lower traditional courts. The appeal is in fact a sequel to an application made on appellant's behalf to this Court on the 14th day of December 1979 in which leave to file a Notice of Appeal to the High Court was made. That application was not granted in the terms of its prayers as will appear more fully in my written judgment on it (see Crim. Case No. S.151/79). In it I however ruled that as the matter had not yet been decided by the Judicial Commissioner I could not decide on the appeal. I accordingly made the following Order:-

It is ordered:-

1. "That in the event of the Judicial Commissioner not hearing the Appeal noted on or before the 14th January, 1980 and not giving judgment on or before the 21st January, 1980, the Applicant is hereby granted leave to appeal against the conviction, sentence and order of confiscation to this Court.

2. That should such appeal to the Judicial Commissioner be heard as aforesaid and should appellant thereafter, desire to appeal against the decision of the Judicial Commissioner in whole or in part, he is hereby granted leave to note an appeal against it to this Court within 14 days from the date of such judgment; the Notice of Appeal to be simultaneously served on the Judicial Commissioner".

Thereafter the Judicial Commissioner heard the Appeal and having found against the Appellant it is now in order for this Court to hear the appeal against his judgment. The notice of appeal which has been served on the Judicial Commissioner and the Registrar of the Higher Swazi Court of Appeal is based on 4 grounds reading as follows -

(a) That the Honourable Court erred in relying on inadmissible hearsay evidence of the Crown witnesses;

(b) The Crown failed to prove the charge beyond reasonable doubt.

(c) The Honourable Court erred in not giving Appellant a chance to put his version.

(d) The sentence of a fine of E100 or 12 months imprisonemnt plus an Order for attachment or removal of

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20 head of cattle and the Order for confiscation of the sum of B449 is unduly severe and harsh under the circumstances.

The Appellant had been charged with the crime of theft, it being alleged in the charge that he and two others stole the sum of E3006 from Chief Maloyi Dlamini in or about December 1976. All three of them appeared before the Swazi Court of the First instance on the 17th November, 1978 and pleaded not guilty. That Court, however convicted all three of them and sentenced them as follows -

Appellant to a fine of E100 or 12 months imprisonment, the second accused to a fine of E50 or 5 months imprisonment and the 3rd accused to E30 or 3 months imprisonment. Only the present appellant however appears to have appealed.

The original case was heard before Mr. D. Dlamini as a Court President but there is nothing to show if he sat with any assessors. The appellant then noted an appeal in which he stated, inter alia, that he had been ordered to pay 10 head of cattle; he complained that the Court President had not given him a fair hearing and also dealt with the merits. The Court President on the 12th January supplied written reasons for judgment in which, inter alia, he denied the accusation against him that he had not given accused a fair hearing.

The matter was then heard in the Court of Appeal on the 28th February and 26th March 1979 before the Court President and two assessors. I may state that the parties are incorrectly described in the record of the Appeal Court

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proceedings as "Shokosho Nkambule, appellant versus Chief Maloyi Dlamini, respondent. The Swazi Court Act No. 80/1950 as in all other systems draws a clear distinction between civil and criminal cases. See for instance Sections 7 and 8 of the Act. This was a criminal case and the parties should have been described as Shokosho Nkambule, appellant versus The King, respondent. In all criminal cases the King should be cited as respondent as the head of State. In Latin which is used in the non-traditional Courts, he is described as "Rex". This comment is not entirely irrelevant because had this been a civil case the question of costs might have arisen, whereas it does not in criminal proceedings. Moreover as criminal proceedings in the National Courts do not fall under the Director of Public Prosecutions, some provisions should therefore be made for representation on behalf of the Crown in Criminal Appeals to this Court from the National Courts.

Be that as it may, however the Court of Appeal not only confirmed the judgment and sentence of the Court of First instance but in addition ordered the Appellant to restore the stolen money to Chief Maloyi, amounting to E3006 or hand over to him 20 head of cattle.

Against that decision the appellant appealed to the Higher Court of Appeal in a letter dated 29th March 1979. It appears that some of his cattle were attached, as well as 10 head of cattle plus E375, an engine with its pipes and three rolls of barbed wire. He criticised the judgments of the two lower courts.

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The Higher Court of Appeal (which also incorrectly describes the parties) heard the matter on the 20th June 1979 with Mr. Mambiwa Dlamini presiding assisted by two assessors. It purported to confirm the judgment of the Appeal Court which according to it had sentenced the appellant to 12 months imprisonment or E100 fine. In fact that Court had also ordered appellant to restore the stolen money to

the Chief and this part of the Order was likewise confirmed. It also ordered one of the other accused Jerome Dlamini to pay the Chief 2 head of cattle for failing to balance his books.

The appellant, now acting through an attorney, then noted an appeal to the Judicial Commissioner which eventually heard it (still incorrectly described) and gave a written judgment on the 22nd January 1980 in the following terms;-

It reversed the Order of the lower Court and made the order that these (i.e, the barbed wire and the water pump and the pipes) should be returned to the appellant. It however confirmed the conviction and sentence and declared the amount of E449 found on appellant to be confiscated and returned to the complainants, or failing this, the amount to be handed over to the community via the Chief and to be used for the community project for which it was collected. The herd of cattle (i.e. 20 head) were to be retained by the community through the Chief as compensation for the loss suffered through theft. The reasonable value of the cattle plus the sum of E449 were to cover the amount of E3006 lost by the community.

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The judgment of the Judicial Commissioner is noted on the papers placed before this Court as having been given on the 22nd January, 1980. If indeed it had been so given the notice of appeal would have been outdated, as Section 33(5) of the Swazi Court Act states that an appeal must be noted within 30 days of the judgment. In a criminal case judgment should always be given in the presence of the accused or his legal representative. I accept Mr. F. Dlamini's statement that he and his client were only apprised of the judgment some time in June 1980, and that by chance and that he could therefore, not note it before the 24th of that month. In these circumstances the Court condoned the late noting of the appeal and heard argument on it.

It is not always easy to entangle the web of evidence most of which was given orally before 4 judicial authorities, - and at least four lay assessors, but the gist of the Crown case seems to be thus;

Appellant as Induna was given the task to collect emalobolo in order to pay the emalobolo to Chief Maloyi Dlaiaini's mother. This lobola had apparently never been paid and despite the passage of time it was at no stage contested that the Chief was entitled to have his followers pay this lobola either by way of head of cattle or in lieu thereof, cash. It is also not disputed that appellant infact did collect money and some cattle and the Crown contended that this money amounts to E30060 It was of course appellant's duty to account to the Chief for this money and if he had indeed collected it, no good reason, if any at all, has been

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advanced for his failure to account for it and the inference would under such circumstances seem to me to be inescapable that he converted them to his own use, thereby committing theft. It is not at all clear to me on what evidence the other two accused were convicted of theft and sentenced, but as they did not appeal against either the conviction and sentences this Court cannot, in the absence of an opportunity for any of the traditional Courts to explain their reasons, at this tage interfere with them, I shall however refer again to what appears to me to be an obvious and serious irregularity committed by the Higher Court of Appeal in ordering the second accused to pay the Chief two head of cattle for failing to balance his books.

Before dealing with the specific grounds of appeal I wish to re-iterate my remarks made in the case of Lukhele vs, Mkhonta 1977-8 S. L. R. 47 in which I dealt with the approach to issues of fact by the Court in its appellate jurisdiction against the findings of the traditonal courts. At page 50 I said, inter alia:-

"In any event in the instant matter we are not concerned only with the findings of an "intermediate appellate Court". Here three Courts presided over by three different Court Presidents and assisted in all by eight assesors have all come to the same conclusion. On the factual issues, and I do not think that this can be disregarded by me, more especially, as I have tried to indicate earlier, because of the traditional and informal manner of giving evidence in the National Courts and the

expected lack of accuracy and fulness in the recording of such evidence. I consider that an appellant to succeed in this Court must clearly show why the lower court was wrong. Naturally when a matter has been heard in three traditional courts with witnesses testifying in each of these courts there must be some confusion as to what actually took place. But the persons who sat and listened to the evidence were much more able to appreciate and understand this confusion than a court of this kind. Although I do not have to go so far I would say that this court would be extremely reluctant to disturb the findings of fact by any National Court and in my view would only do so in extreme cases, e.g. where it is shown that the judgment was palbably wrong or that the triers of fact had acted arbitrarily".

The first ground of appeal that reliance had been placed on inadmissible hearsay evidence is so broadly stated that it is of little value or assistance to the Court. The appellant should have referred specifically to the evidence which according to him was inadmissible. Presumably however it has reference to the evidence as to the actual amounts paid to the appellant by donors as the statements relating to such payments to appellant were not made in his presence. It is known of course that hearsay evidence is not admissible in the State Courts of this country, subject to certain well known exceptions. The law on hearsay evidence is not however applicable to the National Courts. Section 21 of the Swazi Courts Act No. 80 of 1950 provides in terms that the practice

and procedure of Swazi Court shall be regulated in accordance with Swazi Law and Custom. Section 223 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides that "no evidence which is in the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case pending in the Supreme Court of Judicature in England". As Section 40 of the Swazi Courts Act specifically excludes the provisions of the 1933 Act from the proceedings of a Swazi Court or appeals therefrom Section 221 has no application to the National Courts. Nor is there any ground for suggesting that hearsay evidence is not permitted according to Swazi Law and Custom. I may add that both in England and South Africa statutory inroads have been made into the earlier rigid enforcement of the hearsay rule in their respective courts. And text book writers, judges and other legal luminaries have with increasing frequency been critical of past attitudes in respect of such rule (see .e.g. Hoffmann, South African Law of Evidence Second Edition pages 87-88). Of course it is to be expected that the National Courts will consider the weight of the evidence to be attached to it having regard to all the surrounding circumstances and that the statements relied on have not been under oath or exposed to cross-examination.

In the present matter the appellant had admitted the receipt of certain cash donations; it was only the amount of them which was in dispute. The final amount was arrived at from the evidence of Richard Masina, the Secretary of the Chief's Libandla who had been instructed to ask the

appellant for his books which the latter failed to produce. He detailed the sources from which he ascertained how the final figure of E3006 was arrived at. The appellant did not cross examine him at all on this evidence. Moreover Masina's evidence was verified by Detective Inspector Malinga who in the Swazi Court of Appeal testified how he checked Masina's records and found that the community had indeed donated E30060 He told appellant the result of his investigations and that he recovered E449 from appellant. When Masina. virtually repeated his evidence before the Judicial Commissioner appellant was represented by an attorney, but the latter hardly cross examined him on his investigations at all. Before the Judicial Commissioner, Sub Inspector Malinga actually stated that appellant had told him that out of the E3006 received by him he had used E560 in buying cattle. Clearly appellant was not able to give the sub inspector an adequate reply. In all these circumstances I consider that there was ample justification for the placing of full reliance on Masina's evidence that the appellant had received a total amount of E30060

There is need only for a brief reference to the third ground of appeal, namely, that the Court did not give appellant a fair opportunity to be heard. Not only is this denied by the Court President, but the record reveals that appellant in fact did state his case fully on a number of occasions and that before the Judicial Commissioner he was represented by an attorney who made a statement and cross examined witnesses. I reject this ground of appeal without any hesitation. Mr. Dlamini however complained that the

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record was by no means complete and did not reveal his cross examination in full nor the fact that appellant was hindered in presenting his evidence. This Court is, however bound by the record as presented to it - it would be for the appellant to take the required steps to have it rectified or to apply for a review of the proceedings on the ground of irregularity. But he has not done either of these steps.

On the main grounds of appeal, namely, the merits of the conviction itself and the sentence, I can not fault any of the courts involved in their decisions. Apart from the reluctance of this Court to interfere with factual findings of the lower courts and particularly the National Courts, I think there was full justification for the conviction of the crime of theft.

There does however appear to be some confusion in so far as the sentence is concerned, both by appellant's attorney and the Judicial Commissioner. The appellant was initially sentenced to pay a fine of E100. Subsequently he was also ordered to make compensation for the money he had stolen. That was not an additional penalty; it was the Court's right, nay its duty, to order such compensation. Where the Courts erred, however, is that in fixing the amount of the compensation, they did not take into account that E449 had been recovered - the forfeiture of that sum can not be regarded as part of the punishment. In arriving at an alternative to the payment of E3006 the Courts, including the Judicial Commissioner, apparently assessed the value of a beast at E150 and ordered that failing to pay the E3006 appellant should deliver 20 head of cattle. As the

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appellant was only obliged to compensate for the loss sustained by his theft, namely E3006 loss E449 i.e. approximately E2550, and as I am not prepared to disagree as to the average value placed on the beasts to be delivered, the order for compensation will be reduced to E2550 or alternatively the delivery of 17 head of cattle.

It appears further that 10 head of cattle belonging to appellant have already been attached (see Malinga's evidence before the Judicial Commissioner at page 13 lines 11 and 12). Therefore the appellant only has to deliver 7 more head of cattle or pay E1050, Moreover although the Judicial Commissioner in his judgment correctly ordered the return to appellant of the barbed wire, the water pump and pipes found in his possession these have in fact not been returned to him.

In these circumstances the appeal is partially successful and the Court makes the following Order to be substituted for the original Order:-

1. The conviction of theft and the fine of E100 or 12 months are confirmed.

2. The accused is ordered to pay to the community through the complainant Chief Maloyi Dlamini the sum of E3006 as compensation or, alternatively, to deliver 20 head of capital, less the sum of E449 or 3 head of capital (i.e. E2550 or alternatively 17 head of cattle) less a credit of 10 cattle (or E1500) already seized. In the result the appellant must pay E1050 or 7 head of cattle. If the 10 head of capital have-in fact not been seized then the appellant must deliver them or pay an additional sum of E1500 to the community through the Chief.

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3. The barbed wire, the water pump and pipes found in appellant's possession are forthwith to be restored to him in the same order and condition as when attached.

Accused No. 2 (i.e. Jerome Dlamini) who did not appeal against the theft conviction and sentence, was sentenced by the Higher Court of Appeal in addition to the fine for theft, to pay 2 heade of cattle to Chief Maloyi for failing to balance his books. That accused had not boon charged with the crime of failing to balance the Chief's books. Indeed I know of no such crime in our jurisprudential system and I doubt very much if it exists in Swazi tradition which surely had little occasion in its long history to have had to deal with the keeping of books of account which is a European innovation. Apart from that I consider that basic human rights are transgressed when a person is punished for an offence (assuming such an offence exists) with which he has not even been charged. That sentence is accordingly set aside and if Jerome Dlamini has already delivered the cattle to Chief Maloyi the latter is hereby ordered to return them to him

(D. COHEN)

ACTING CHIEF JUSTICE

I agree.

(D. LUKHELE)

JUDGE OF THE HIGH COURT

7th July, 1980