IN THE HIGH COURT OF SWAZILAND

CRIM. APPL. NO.11/85

In the appeal of:

MAURICE VON GROENING

vs

THE QUEEN

CORAM:	WILL, C.J.
FOR APPELLANT:	MR F. NDZIMANDZE
FOR THE CROWN:	MR C. MGADZA

JUDGEMENT

(3/9/85)

Will, C.J.

Tha Appellant, Maurice Von Groening, appeared before a Magistrate charged with malicious injury to property of his Uncle Richard Groening. It was alleged that the Appellant damaged his uncle's crops as a result of which he suffered damages in the sum of E216-00. As the charge was subsequently withdrawn the record does not disclose how the crops were damaged.

The case came before the Magistrate on 14th December 1984 but was postponed to 11th January 1985. On that date the public prosecutor advised the Court that Richard Groening had settled the case with the Appellant. The court then called Richard Groening and he said that although the Appellant had asked for the case to be tried in the Tribal court he would prefer it to be tried in the Magistrate's court.

The case was then further postponed to 1st February 1985. On that date the Appellant was present at court but the case was postponed to 1st March 1985.

On 1st March the Appellant did not appear and, on the

application of the public prosecutor, a warrant of apprehension was issued. The warrant was issued on a form headed "Warrant of Apprehension (Sections 34, 105, 119, and 302 B)". These Sections, either of the Criminal Procedure Act or of the Magistrates Court Act, have no bearing whatever on warrants of arrest. The explanation appears to be that the form used for warrants of arrest before the present Criminal Procedure Act No.67 of 1938 was enacted, is still being used but has not been amended to bring into line with Act 67 of 1938. Obviously the matter must be looked into and the attention of the Deputy Director of Public Prosecutions has been drawn to it. The warrant of arrest in this case was issued, apparently, in terms of paragraph (b) of the form, but the word "summoned" has been deleted and the word "warned" substituted. In its present amended form paragraph (b) therefore reads as follows: "(b) Was warned to appear before the Magistrate at 9 o'clock in the forenoon on a charge of malicious damage to property and failed to appear as aforesaid".

It is doubtful whether this warrant of apprehension was valid at all but, even assuming it to have been valid, the grounds on which the warrant was issued are by no means clear. It does not appear that the warrant of apprehension could have been issued in terms of Section 117 (3) of the Criminal Procedure Act

because that Section refers to an Accused person who fails to appear on a summons and the word "summoned" has, as I have stated, been substituted by the word "warned".

I can only assume that it was intended that the warrant of apprehension was for contempt of court at common law or under Section 87 of the Magistrates Courts Act in which case it should have been issued in terms of paragraph (a) of the Warrant; the

offence of contempt of court should have been mentioned; and there should have been evidence on oath before the Magistrate.

Although I have dealt at some length with the validity of this warrant not very much turns upon it because in fact, the Appellant was not arrested on the warrant.

The Appellant voluntarily appeared before the Magistrate on the 15th March having, apparently, been advised by the public prosecutor by telephone that a warrant of apprehension had been issued and that he should come to court. On the 15th March a Magistrate other than the Magistrate who subsequently convicted the Appellant of contempt of court, postponed the case to the 15th April without making any order in regard to the warrant of arrest or the Appellant's failing to appear at court on 1st March. To avoid confusion I shall refer to this magistrate as the "other magistrate".

On the 15th April the magistrate asked the appellant for an explanation for his failure to attend court on the 1st March and the Appellant stated that he had been under the impression that the case against him had been withdrawn and therefore did not believe it was necessary to attend court. The Magistrate asked the Appellant why then he had appeared on the 15th March and the Appellant replied that the Public Prosecutor had advised him to do so. The Magistrate then convicted the Appellant of contempt of court and fined him E30.

On the 10th May the Complainant in the malicious injury to property charge came before the other magistrate and applied for the charge against the Appellant to be withdrawn as he was his nephew. The other magistrate accordingly discharged the Appellant on the charge of malicious damage to property.

The Appellant noted an appeal against his conviction for contempt of court. one of his grounds of appeal was that the magistrate "failed to recognise the fundamental principle of our law of fair trial to prevail in any court of law". Another ground of appeal was that the magistrate did not give him an opportunity of calling witnesses in his defence. A third ground of appeal was that he had voluntarily appeared at court and that the other magistrate had discharged the warrant of apprehension, when that magistrate had been informed that the Appellant had come to court voluntarily after he had received a message from the public prosecutor.

It may be that some or possibly all the grounds of appeal raised by the Appellant should have been raised by means of review proceedings and not by means of an appeal but the court has the power in terms of Section 81(4) of the Magistrates Courts Act to exercise powers of review if a case is before it on appeal so that I shall deal with this matter as if it were before me either as an appeal or as a review.

In his reasons for judgement the magistrate stated: "Again it is sad to gain the impression that the public prosecutor and the police in this case appear to be acting in cahoots with the present Accused". Later in his judgement the following appears: "Or would the Accused have preferred that I should have called Mr Dhladhla the Crown Prosecutor in the case and Mr Magagula, the interpreter to change their roles and be called as his witnesses in the one and same case".

It is necessary at the outset to ascertain, if it is possible to do so, what was the nature of the proceedings before the magistrate when he convicted the Appellant of contempt of court. The proceedings were of a

summary nature. No charge was

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put to the Appellant nor was there a proper trial. No witnesses were called. I can only assume that the magistrate dealt with the matter according to the summary procedure permissible for a contempt in facie curiae.

Hunt "South African Criminal Law and Procedure" Vol. II p. 190 states:

"To be in facie curiae the contempt must take place in the presence of the court whilst it is sitting ... and failure to obey a subpoena, summons or other order of court is treated as being ex facie curiae. The reason why it is important to define the boundaries of contempts committed in facie curiae from those committed ex facie curiae is because certain courts - notably magistrates courts - are not empowered to employ summary procedures for an ex facie curiae contempts".

Summary procedure in the magistrates courts is provided for in Section 117 (9) of the Criminal Procedure Act but, as I have already pointed out, that procedure could not have been employed in the circumstances of this case.

Jones and Buckle "The Civil Practice of the Magistrates Courts" 6th Ed., under examples of contempts ex facie curiae, mentions the case of an Accused person who fails to attend a criminal trial or to attend court after warning.

Section 87 of the Magistrates Courts Act which corresponds with Section 106 of the South African Magistrates Courts Act is as follows:

"Any person wilfully disobeying or neglecting to comply with any order of a magistrates court shall be guilty of an offence".

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Gardin and Lansdown Vol.II 6th Ed. p. 1129, in commenting on Section 106 of the Magistrates Courts Act state that the Section "contemplates a charge of a criminal offence in the usual way, and does not authorize summary procedure".

The magistrate was not entitled to deal with the Appellant in a summary manner. In doing so he committed a gross irregularity of the nature contemplated by the case of R vs Moodic 1961 (4) S.A. 752 and the conviction and sentence must therefore be set aside.

Because the appeal succeeds on the ground I have mentioned it is not necessary to consider other grounds of appeal but I shall nevertheless shortly do so for no other reason than to demonstrate the dangers which can arise if summary procedure were permissible in the circumstances of this case.

One of the Appellant's defences to the charge of contempt of court if it had been properly laid against was that he believed that the charge of malicious injury to property had been or would be withdrawn and therefore his failure to attend court did not show wilful contempt of it. If he had been able to prove that his disobedience was not wilful due to a bone fide and non-culpable ignorance of the legal position he would have been entitled to an acquital.

Another defence appears to have been that because he had voluntarily surrendered himself to court when he heard from the public prosecutor that his case had not been withdrawn and the "other" magistrate before whom he then appeared took no action on his default and that magistrate must have regarded his contempt as having been purged.

It could be that the Appellant would have called the public prosecutor and the interpreter as his witnesses

and that the

Appellant's wish, to do so could have accounted for the extracts from the magistrate's judgement in which he referred to them being "in cahoots" with the Appellant.

The appeal is upheld and the conviction and sentence are set aside. In terms of Section 85(2) of the Magistrates Courts Act I direct that the Appellant's deposit of E4 be refunded to him.

D.D. Will

CHIEF JUSTICE