IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE In the matter between:

CRIM. CASE NO. 348/08

REX

APPLICANT

VS

ACCUSED

MARIO MASUKU CORAM

MAMBAJ

FOR THE CROWN FOR THE ACCUSED

MRS M. **DLAMINI (DPP)**

ADV. N. KADES, SC

Ruling on application in terms of Section 174(4) of the **Criminal Procedure and Evidence Act, 67 of 1938**

_____23rd September, 2009_____

[1] At the close of the case for the Crown, the defence applied for the acquittal and discharge of the accused (per section 174 (4) of the Criminal Procedure and Evidence Act) on the grounds that there was no evidence implicating the accused in this case or, alternatively, that the quality of the evidence is so poor that it requires no response

from the Accused. Both Counsel made very brief submissions, lasting no more than five minutes each.

[2] In view of the fact that at the end of this application, I had reached a firm and definitive view on the matter, I allowed the application and I acquitted and discharged the Accused. I indicated that written reasons for my ruling shall follow in due course. Because the Accused was in custody, it would have been oppressive and unfair to keep him in detention awaiting my reasons for my decision. These are my reasons.

[3] Section 174(4) of the Criminal Procedure and Evidence Act 67 of 1938 provides as follows:

> "If at the close of the case for the prosecution, the court considers that there is no evidence that *the* accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."

The meaning and import of these provisions were explained by Masuku J in the case of **REX V OBERT SITHEMBISO CHIKANE AND ANOTHER, Crim 41/2000** Q'udgement delivered on the 16th July, 2002) as follows:

> "An analysis of the application of this Section in our jurisdiction was undertaken by Dunn J in THE KING VS DUNCAN MAGAGULA AND 10 OTHERS, CRIM. CASE NO. 43/96 (unreported). He came to the following conclusion at page 8 of the judgement:- ı >
>
> This section is similar in effect to section 174 of the South African Criminal Procedure Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict.'
>
> From the legislative nomenclature employed, it is clear that the decision to refuse a discharge is a matter that lies within the discretion of the trial Court. The use of

> the word "may" is indicative of this. In the case of GEORGE LUKHELE AND 5 OTHERS VS REX C.A. CASE NO. 12/95 (unreported); it was held that no appeal lies against the refusal of a trial Court to discharge an accused at the conclusion of the prosecution's case. It is however important to mention that this discretion must be exercised judicially and whether in any case the application will be granted is dependant upon the particular circumstances of the matter before Court."

[4] According to PW5, Senior (Assistant) Superintendent Mike Zwane, the Accused was arrested at his home on the 15th October, 2008 and was charged for contravening the **Suppression of Terrorism Act** No. 3 of 2008. This was after a search at his house by the Police had led to the discovery of certain incriminating documents. These documents were seized by the police but it would appear that they bear no relevance to the present indictment faced by the Accused.

[5] After his arrest, the accused was taken into detention and has been in custody since then. It would appear that his first remand hearing before this court was on the 17th November, 2008.

[6] The trial of the Accused began on the 21st September, 2009 and on being arraigned he pleaded not guilty to both the main charge and its alternative. The indictment alleges that

> "...the accused is guilty of the crime of contravening section 11(1)(b) of the Suppression of Terrorism Act No. 3 of 2008. In that upon or about the 27th September, 2008 and at or near KaLanga area, in the Lubombo region, the said accused did unlawfully and knowingly give support to the commission of terrorist acts by uttering the words to the effect that theywill continue with the bombing of vital installations and structures of the Government of the Kingdom of Swaziland and did thereby contravene the said Act.
>
> [ALTERNATIVELY]
>
> The Accused is guilty of the crime of contravening Section 5(1) of the Sedition and Subversive Activities Act, [46] of 1938 as amended.
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> In that upon or about the 27th September, 2008 and at or near KaLanga area, in the Lubombo region, the said accused did unlawfully and with subversive intention utter the words to the effect that they will continue with the bombing of vital installations and structures of the Government of the Kingdom of Swaziland and did thereby contravene the said Act."

[7] One notes immediately that the substance of the indictment is that the accused Contravened the stated provisions of the Act by giving support to the commission of terrorist acts by saying that "they will continue with the

bombings" of vital Government installations and structures. This is the nub of the case for the crown and this is what was in essence or substance the evidence of the three (3) crown witnesses, namely Mbambiseni Maseko, Sifiso Dube and Banele Dlamini who gave evidence as PW2, PW3 and PW4 respectively. They were the only witnesses who testified about what was allegedly said by the accused at KaLanga on the 27th September 2008 during the funeral of one Musa Dlamini, commonly referred to as MJ.

[8] As already stated above, the testimony of the investigating officer, PW5, related or pertained to, bar the arrest and detention of the accused, matters not relevant to the present indictment against the accused.

[9] PW1, Sithembiso Shongwe, testified that he was in 2005 a member of the SFTU and was recruited to join PUDEMO in 2006.

(These abbreviations were thrown at the Court with no one bothering to explain what they stand for). As a member of PUDEMO he was responsible for mobilizing or recruiting people and setting up new branches for the organisation. He was later sent for training on a whole gamut of things, such as intelligence, explosives and fire arms - subjects that were deemed relevant for and in his new found home or organisation. His activities in the organisation, especially a rally held at Msunduza location in Mbabane in 2006 forced him to surreptitiously leave the country. He, however, continued to work for the organisation from outside the country.

[10] As can be seen from the preceding paragraph, the evidence of PW1 was totally irrelevant to the events that are the subject of the indictment herein. I accordingly ruled that his evidence was inadmissible because it was irrelevant to the issues at hand.

[11] I return to the indictment. It is, unfortunately, not a model of clarity. It offends against one of the primary rules of English grammar. It uses the pronoun "they" without any first reference to the object to which it refers. In short, it does not explain who is referred to as 'they' - the persons who will continue with the bombing of the government vital structures and installations.

[12] The three crown witnesses I have referred to above did not only repeat what is alleged in the indictment. They added the flesh to the bare bones of the indictment. All three told the court that in his speech or address to the mourners, the accused said that the deceased, Musa Dlamini, had died before he had accomplished what he had set out to do. The Accused further stated that because of this premature death, ten more Musas would be born to complete the unfinished task that Musa had started. Significantly though, PW2 and PW3 conceded under cross examination that in saying this, the accused was merely predicting or, as defence Counsel put it, "prophesying" that, other people, even unknown to the accused would come to the fore and continue that which Musa had started - the bombing of vital government installations and structures. The Accused did not say that he was one of these new Musas or that he supported what Musa or Musa's followers did or advocated. PW4 said the speech by the accused was a long one and he could not remember most of it or say what the accused said about the predicted ten or more Musas that would come about as a result of the death of the deceased. PW4 did say in his testimony in reexamination that the accused used the words "We shall continue the bombing" of Government structures. This was, however, clearly an afterthought and a desperate attempt to mitigate or ameliorate the hopelessness of the evidence by the crown. All three crown witnesses testified that the Accused called the deceased a hero. His heroics or heroic deeds were not spelt out or stated. The matter would certainly have been much different had the accused said he was a hero for bombing government structures. There is no evidence that he said so.

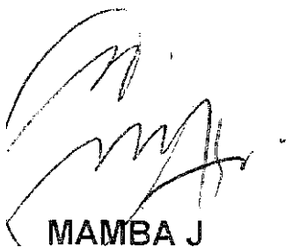
[13] The criticism the accused had on the governance of this country in general and the National General Elections held within the

> Tinkhundla Centres last year, did not include a threat or support to "continue with the bombing of vital installations and structures of the Government."

[14] What is meant by giving support to the commission of terrorist acts, is not defined in the Act. It connotes in the main, an act of commission, or even perhaps wilful blindness, rather than acts of omission. Such acts of commission include acts of backing up,

aiding, helping, lending assistance or countenance to, advocating, promoting, encouraging or approval of terrorist acts as defined or laid down in the Act. The words uttered by the Accused regarding those persons whom he predicted would follow or emulate the deceased, do not in my judgement lend assistance or countenance to what the deceased did or to terrorist acts. Where for instance at the end of a year-long-drought, X tells the community that because of this drought, the community will, after a period of twelve months suffer a period of 10 years of drought, X would hardly be said to be supporting such eventuality or mishap or to have said it with a seditious intent.

[15] The application was therefore allowed and the accused was acquitted and discharged.



MAMBA J