IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO.20/93

In the matter between:-

THE KING Appellant

And

SIPHO DAVID MABUZA Respondent

CORAM : MELAMET JP,

KOTZE, JA,

SCHREINER, JA

MR A. DONKOH FOR THE APPELLANT

MR C. NTIWANE FOR THE RESPONDENT

JUDGMENT 17 JUNE 1994

MELAMET, JP.

This is an application by the Acting Director of Public Prosecutions for leave to appeal against the decision of the Judge in the High Court of Swaziland on 9th July, 1993 in terms whereof the Respondent was found not guilty and discharged on a charge of defeating or obstructing or attempting to defeat or obstruct the course of justice.

The application, which is dated 15th October, 1993 more than three months after the judgment, is based on the following questions of law in respect of which it is claimed the learned judge erred in reaching his decision:-

1. The learned trial Judge erred by ordering the Crown in the middle of its case to present argument and submissions on the evidential value of a potential Crown witness, Johannes Dlamini, yet to give evidence in the trial.



2. The learned Judge erred by relying substantially on evidence attributed to the same Johannes Dlamini, who was not called as a witness to adduce evidence in the trial.

3. The learned Judge erred in ruling that it was the duty of a Magistrate to ' warn the suspect of the adverse or dire consequences of making a confession or confirming a statement made prior to the Police and it was even more desirable if the said warning dissuaded the person from making a confession or confirming it'.
4. The learned Judge erred in ruling that it was the duty of a Magistrate 'to point out to the suspect the possible dire, if not fatal results of his making a statement and enquiring whether the suspect appreciated what he is about to do, if he is still desirous of so doing, and if so why' .
5. The learned Judge erred in his judgment by equating the duties of a Magistrate in

regard to recording of confessions to that of a defence Attorney.

6. The learned Judge erred by ruling that a Magistrate has no duty to keep a record of what transpired between him and a person brought by the Police for the purpose of recording a judicial statement or confirming one made prior to the Police in writing.



7. The learned Judge erred in conferring powers on a Magistrate to whom a suspect has been brought under S226(l) of the Criminal Procedure and Evidence Act, No. 67 of 1938 which amount to usurping the functions and power of a trial court in determining whether an alleged confession has been made freely and voluntarily".

On 16th March, 1994, the Acting Director of Public Prosecutions sought to amend this petition for leave to appeal by the inclusion or addition of the following questions of law:-

1. ". The learned trial Judge erred in ruling that the particulars of the indictment served and put to the Respondent did not disclose any offence cognisable by the Court.
2. The procedure followed by the Court a quo was a gross misdirection in that it was in total . conflict with Section 152 and 153 of the Criminal Procedure and Evidence Act, No.67/1939".

The right of appeal to this Court by the Attorney General from a judgment of the High Court is circumscribed and set out in Section 6 of the Court of Appeal Act No. 74/1954 as follows:-

"6(1) The Attorney General or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal, against any judgment of the High Court or made in its



criminal, original or appellate jurisdiction, with leave of the Court of Appeal or upon a certificate of the Judge who gave the judgment appealed against, on any ground of appeal which involves a question of law but not a question of fact, nor against severity of sentence.

(2) For the purposes of this Section, the question as to whether there was any evidence upon which the Court could have come to the conclusion to which it did come shall be deemed to be a question of fact and not one of law".

In as much as a certificate was not sought from the Judge who gave the judgment in the High Court, it was necessary to seek the leave of this Court to proceed with the appeal and the provisions in this connection are set out in Rule 9(1) of the rules of this Court and are as follows:-

"9(1) An application for leave to appeal shall be filed within 6 weeks of the date of the judgment which it is sought to appeal against and shall be made by way of petition in criminal matters or motion in civil matters to the Court of appeal stating shortly the reasons upon which the application is based, and where the facts are alleged they shall be verified by affidavit".

It is clear that the application for leave to appeal was out of time to an extent of approximately 8 weeks and to this end, with the petition for leave to appeal dated 15th October, 1983, there was filed an application for an extension of time within which to file such petition



supported by an affidavit from the Acting Director of Public Prosecutions setting out certain facts in justification of the delay in filing the petition.

Rule 9 of the rules of this Court makes no provision for the granting of condonation by this Court for the late filing of a petition for leave to appeal where this is a prerequisite to the hearing of an appeal. Rule 8(2) of the Rules of Court, however, provides for the Court condoning the late filing of a notice of appeal, and we approached the application herein on the basis that the Court either in terms of Rule 8(2) or in its inherent jurisdiction has the power to grant condonation for the late filing of a petition for leave to appeal in appropriate circumstances.

The affidavit repeats the questions of law contained in the petition for leave to appeal and which are set out above and tersely sets out the facts which it claims justify the delay in filing the petition. These are that from 9th July, 1993 the deponent was precluded by order of Court from appearing before the Chief Justice for an indefinite period. This it is claimed caused a period of tension and acrimony between the office of the Director of Public Prosecutions and the Judiciary. There is no explanation as to how or why this prevented the filing of a petition for leave to appeal to this Court either by the deponent or members of his staff and there appears to be no acceptable explanation for the delay in filing of the petition for leave to appeal.

There would appear to be merit in the contention, in the affidavit of the Respondent, opposing the grant of condonation of the late filing of the petition for leave to appeal, that the applicant had abandoned the matter and that



the filing of the petition was activated by a letter of demand, for damages for malicious prosecution, despatched by the Respondent's Attorneys, on his behalf, on 20th September, 1993

The attitude of a Court of Appeal in an application for condonation for the late filing of a notice of appeal where there is no acceptable explanation for the breach of the rules has been restated as follows by the Appellate Division in the Republic of South Africa in the recent case of BLUMENTHAL and ANOTHER v THOMSON NO AND ANOTHER 1994 (2) SA 118(a) at 121I-122A.

"This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are: this applies even where the blame lies solely with the Attorney (TSHIVHASE ROYAL COUNCIL and ANOTHER v TSHIVHASE and ANOTHER: TSHIVHASE AND ANOTHER v TSHIVHASE and ANOTHER 1992 (4) SA 852 (A) at 859E-F). As I have said, the facts in casu show that the Rules were flagrantly breached: nor is there any acceptable explanation for such breaches. In these circumstances it is unnecessary to make an assessment of the prospects of success".

I am of the opinion that there is no acceptable explanation for the breach of the rules in the present instance and it is unnecessary therefore to consider the prospects of success in the appeal were it to be allowed to proceed to that stage.



Without entering into the merits of the application I wish to make a few remarks about the duties of a Magistrate when an accused is brought to him to record a confession. I repeat, first, what was said in the unreported judgment of this Court in JOHANNES NDLOVU and ANOTHER v THE KING CRIMINAL APPEAL NO. 10/91 (delivered on 2.10.1992) that-

"The only recognised procedure is that laid down in Section 226 of the Criminal Law and Procedure Act 67 of 1938 to be read with the authoritative decisions in the Courts of the Republic of South Africa. There has to be no variation of the procedure laid down as a foresaid which was designed to ensure that such statements are freely and voluntarily made

without any pressure having been applied"

The provisions of Section 226 are not identical with those of Section 217 of the Criminal Procedure Act 51 of 1977 of the Republic of South Africa but the principles and requirements involved in the taking of the confessions by Magistrates are the same. The primary and essential requisite for the admissibility of a confession is that it must have been freely and voluntarily made by a person in his sound and sober senses without his having been unduly influenced so to do. A Magistrate is not expected to conduct a wide ranging investigation as to the possibility of undue influence but on the other hand he must not take a passive attitude and confine himself to questions in the standard form used for this purpose. When the accused gives answers which arouse the suspicion that pressure has been exercised the Magistrate must investigate the matter to convince himself that the confession was being made freely and voluntarily.

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Hiemstra, SUID AFRIKAANSE STRAFPROSES 5 Edn p.544 S.v MALUMA and OTHERS 1990 (1) SACR 65 (T) at 72 S v KEKANE and OTHERS 1986 (4) SA 466 (W) at 474 S v JIKA and OTHERS 1991 (2) SACR 489 (E) at 500

In the case of an illiterate undefended accused the following dicta of De Villiers JP, as he then was, in R v NDONGANA and ANOTHER 1958 (2) 562 (E) at 563 are apposite

"It must be carefully explained to an accused person, especially where he is an illiterate native, that he is in the presence of a Magistrate or justice of the peace, who has no connection with the Police and that he has nothing to fear and can speak freely.

He should be questioned whether he has made any similar statement before, and why he wished to make the present statement. He should be told that there is no obligation on him to make any statement at all and if he does that it will be used in evidence and he should be specially asked whether he has been assaulted or threatened to induce him to make the statement, or been advised to make the statement or whether any promise or inducement has been made to him".

The above passage was approved and applied in:-

S v MBANANE 1979 (3) SA 182 (T) at 186 D-F S v DHLAMINI and OTHERS 1981 (3) SA 1105 (W) at 115 S v MPUTHA 1982 (2) SA 466 (C) at 412/413.

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Once the Magistrate, after investigation, is satisfied that the accused wishes to make the confession of his own free will and that he has not been influenced so to do by either threats or, promises, he should record the actual confession reflecting the ipsissima verba of the accused and not act as an editor. In this connection I would refer to the commentary in:-

Du Toit, De Jager, Paizes, Skeen and Van Der Merve COMMENTARY ON THE CRIMINAL PROCEDURE ACT as at pages 24-64 and 24-65 on the procedure to be followed by a Magistrate in recording a confession. It is, however, not the function of a Magistrate recording a confession to enter into a debate with an accused on the strength or otherwise of the Crown case against him and in the light thereof or otherwise to dissuade or attempt to dissuade him from making the confession if convinced that it is freely and voluntarily being made.

I would therefore dismiss the application for condonation for the late filing of the petition for leave to appeal.

Section 7(2) of the Court of Appeal Act provides:-

"7(2) If an appeal brought by the Attorney General or other prosecutor is disallowed, the Court of Appeal may order that the appellant pay to the respondent costs, if any, to which the respondent was put in opposing the appeal and such costs may be taxed according to the scale of Civil Appeals to the Court of Appeal".

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Although there is no specific provision for an order for costs to be made against the Attorney General in the event of an unsuccessful application for condonation for the late filing of a notice of appeal or a petition for leave to appeal, I am of the opinion that these are procedural steps in the prosecuting of an appeal and that this Court in the event of these being unsuccessful is empowered to order the Attorney General to pay the costs of the Respondent in such unsuccessful application.

In the result the application for the late filing of the petition for leave to appeal is dismissed and the applicant is ordered to pay the costs of the application.

D.A. MELAMET (SGD)

JUDGE PRESIDENT

G.P.C. KOTZE (SGD)

JUDGE OF APPEAL

V.H.R. SCHREINER (SGD)

JUDGE OF APPEAL