Count 'C'

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CR.APPEAL CASE NO.50/93

In the matter between:

KISLON SHONGWE AND 61 OTHERS APPELLANTS

AND

THE KING RESPONDENT

CORAM: DUNN J.

FOR THE APPELLANTS : MR D. MNGOMEZULU
FOR THE RESPONDENT : MR KILUKUMI

JUDGMENT
27 MAY 1994

The appellants were charged before the Senior Magistrate, Mr Annandale, in the following terms-

Count 1

The accused are guilty of the crime of contravening Decree No. 13 of the King's Proclamation of 12th April 1973 (unlawful demonstration).
In that upon or about 21st March 1993 and at or near Motshane Market, a public place, in the Hhohho District the accused each or all of them did unlawfully hold a demonstration without the prior written consent to do so of the Commissioner of Police.

Count 2

The accused are guilty of the crime of contravening Decree No. 12 as read with Decree No. 13 of the King's Proclamation of 12th April, 1973 (unlawful demonstration).
In that upon or about the 21st March, 1993 and at or near Cooper Motors, Mbabane a public place in the Hhohho District the accused each or all of them did unlawfully hold a demonstration without the prior written consent to do so of the Commissioner of Police.

The appellants who were represented by one of their number, Dominic Mngomezulu, an attorney of this Court pleaded not guilty to both counts. They were convicted as charged. The two counts were taken as one for purposes of sentence and the appellants were sentenced to 2 months imprisonment. The whole of the sentence was conditionally suspended for a period of three years. The appellants noted an appeal against the conviction and the sentence on the following grounds-

AD Conviction

1. The learned Magistrate erred in law and in fact in finding that a demonstration in terms of the Proclamation had taken place at both Motshane and Cooper Motors in as much as Police versions are contradictory in material respects.

2. The learned Magistrate erred in law and in fact in inferring from a reading of the Proclamation that it (Proclamation) excluded mens rea as a requirement for criminal liability.

3. The learned Magistrate misdirected himself in ruling that it was competent for him to take judicial notice of the fact that Motshane and Cooper Motors were public places in as much as evidence to prove such allegations is a requirement of the law.

AD Sentence

The learned Magistrate misdirected himself in not appreciating the fact that provision of the Proclamation is offensive to the spirit of the ongoing process of seeking to accommodate basic civil liberties in keeping with international conventions on human rights to which Swaziland is a signatory and that the appropriate sentence ought to have been a caution and discharge.

It will be convenient to set out the provisions of Decree numbers 12 and 13 at this stage. Decree number 12 reads as follows-

No meetings of a political nature and no processions or demonstrations shall be held or take place in any public place unless with the prior written consent of the Commissioner of Police; and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration, is directly or indirectly related to political movements or other riotous assemblies which may disturb the peace or otherwise disturb the maintenance of law and order.

Decree number 13 provides-

> Any person who forms or attempts or conspires to form a political party or who organises or participates in any way in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding six months.

The crown led the evidence of seven witnesses who are members of the Royal Swaziland Police Force. The evidence given by these witnesses was fairly simple and straight forward. Sometime prior to the 21st March 1993 the Police received information of a meeting which members of the People's United Democratic Movement (PUDEMO) and the Swaziland Youth Congress (SWAYOCO) intended holding at Nkhaba which lies between Mbabane and Pigg's Peak. Enquiries were made by the Police from officials of Pudemo as to whether the consent of the Commissioner of Police had been obtained as it was believed that the meeting would be of a political nature. It was indicated to the Police that a letter had been addressed to the Prime Minister regarding the meeting but that no reply had been received from his office. The officials were warned of the illegality of a meeting of the nature they intended holding.

On the morning of the 21st March the Police learnt that a bus carrying members of Pudemo and Swayoco had left Mbabane, heading for Nkhaba. The Police mounted a road block at the Pigg's Peak turn off along the Mbabane/Ngwenya main road. The bus was stopped and the Police spoke to the first appellant who appeared to be the leader of the persons in the bus. During the conversation the people in the bus alighted and began toyi- toying; shouting "Viva Pudemo"; chanting political slogans and singing political songs. A green, black yellow and red flag was unfurled. The flag had "Pudemo" written across it.

This performance took place on the main road close to the bus which had parked just off the road. The Police indicated that they would arrest all those taking part in the illegal demonstration. The people concerned entered the bus and the bus returned to Mbabane. The bus stopped opposite Cooper Motors, a garage situated along the Mbabane by-pass. The garage is a short distance from a four-way controlled intersection. The people alighted from the bus unfurled the flag earlier described and went through the same performance which they had put up at Motshane. They marched, toyi-toying and singing towards the intersection. They were all arrested and taken to the Mbabane Police Station. It is common cause that the persons arrested on that day for the incidents at Motshane and opposite Cooper Motors along the Mbabane by-pass were the appellants.

A Police officer recorded the incidents at Motshane and along the Mbabane by-pass on a video cassette. An unedited version of the recording was tendered, without objection by the defence, as part of the evidence of what transpired.

The cross-examination of the police officers was brief and did not, on the whole, place the evidence of what had transpired at the two locations in issue. The evidence clearly established that both locations were public places. The incidents took place on sections of public roads. The witnesses sufficiently identified the locations as public places without naming them as such. The defence case was closed without any of the appellants giving evidence.

The Senior Magistrate filed reasons for the conviction and sentence of the appellants. He responded fully to the grounds of appeal by the appellants. I can find no reason for interfering with the findings of fact made by the Senior Magistrate. The requirement of the written consent of the Commissioner of Police was specifically put to the appellants at both locations.

The appellants persisted in their conduct which the Senior Magistrate quite correctly, on the evidence, found to be a demonstration of a political nature. The contradictions in the Police evidence referred to under the first ground of appeal do not touch on material aspects of the charges against the appellants. A considerable number of people were involved in both incidents. The Senior Police Officers who gave evidence were engaged in attempts to stop the demonstration by the appellants. They were at different vantage points and it was only to be expected that there would be differences in their evidence. The Senior Magistrate was alive to this and his conclusion that a demonstration had taken place at each location was based on the totality of the evidence.

There is no merit in the second ground of appeal. The appellants were engaged in a demonstration of a political nature. The Police informed them of this at both locations. The fact that the appellants had not obtained the prior written consent of the Commissioner of Police was raised during both incidents. A loudhailer was used by the Police in warning the appellants of the illegality of the demonstration. None of the appellants can now be heard to say that they were unaware that the demonstration they were engaged in was contrary to the Kings Proclamation.

The third ground of appeal is equally without merit. Clear evidence was led establishing the two locations as public places. The Mbabane/Ngwenya road and the Mbabane by-pass are public roads to which the public has access. They are public places. It was averred in the charge sheet that both places were public places. The failure by the prosecution to put the specific question to the witnesses as to whether the two locations were public places was sufficiently cured by the evidence given by the witnesses.

The witnesses were not challenged on this aspect of their evidence under cross-examination and the appellants did not give evidence suggesting that the demonstrations took place anywhere other than in public places. The court of Appeal decision in the unreported case of **DOMINIC MNGOMEZULU & OTHERS v THE KING** Appeal Case No. 19/1990 which was relied upon by the appellants is clearly distinguishable from the present case. There, in a charge of a contravention of Decree number 12, the prosecution failed to allege that the meeting complained of had taken place in a public place. Melamet J.P. in dealing with the omission by the prosecution stated-

> The indictment did not make this essential averment nor was there any direct evidence to this effect which could have cured such defect.

In so far as the sentence is concerned the approach by the Senior Magistrate was that the legislature has seen it fit to leave the Proclamation in place in our statute book and that it is not for the Courts to go behind the Proclamation and take into account the matters set out under the ground of appeal against sentence.

The question of sentence is pre-eminently a matter for the discretion of the trial Court. This Court, sitting as a Court of Appeal will not interfere with the sentence of a subordinate Court unless such discretion has not been judicially and properly exercised. See **THWALA v R 1970-1976 SLR 363.** The Senior Magistrate took the two counts as one for purposes of sentence and imposed a sentence of two months which was conditionally suspended for 3 years. This sentence was imposed after a consideration by the Senior Magistrate of the effect of a sentence of a caution and discharge.

I can find no reason for interfering with the Senior Magistrate's approach to the question of sentence and the actual sentence imposed.

The appeal against conviction and sentence is dismissed.

B. DUNN

JUDGE