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Committee on the Human Rights of Parliamentarians

SWZ-02 – Mduduzi Bacede Mabuza
SWZ-03 – Mthandeni Dube

Trial observation report on the Eswatini cases
20 February 2024

Report by Mr. Abdool Rahim Khan (Botswana) on the trial proceedings of Mr. Mduduzi Bacede Mabuza and Mr. Mthandeni Dube in the High Court of the Kingdom of Eswatini Case No. 213/2021

1. The trial continued on Tuesday, 20 February 2024 before Judge Dlamini, with arguments in mitigation of sentence, bearing in mind that the accused had been found guilty on all counts except on count 4, where the Accused No. 1 (Mr. Mabuza) was found not guilty.

2. However, counsel for Mr. Mabuza indicated that his client wished to make a statement before the court, which statement had to be vetted by the defence. At this stage, they had only seen a draft outline of the statement and they wished to edit and proofread the document. The matter was accordingly, by consent, postponed to Wednesday, 21 February, for continuation.

- **Wednesday, 21 February 2024**

3. The Accused No. 1 (Mr. Mabuza) elected not to give evidence under oath. He elected to make a statement from the dock. He was aware of the consequences. He would not be subjected to cross-examination and its evidential value would be considered of lesser value by the court.

4. Mr. Mabuza read out his statement (which he had prepared), which was translated into English from Siswati. A copy of his statement is annexed hereto and marked “A”.

5. In brief, he examined his response to the failed resolution proposed by parliamentarians. He further explains his constant interactions with the government on various issues to no avail.

6. The issue of the submissions of the petitions is what caused the constituency concern, as they considered it important in a democratic society.

7. As his statement was made from the dock, he could not be cross-examined on the contents.

8. The matter continued on 22 February 2024 with a statement under oath by the Accused No. 2 (Mr. Dube).

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9. He gave a statement on his background, upbringing, schooling, married life, his three children and wife, and on taking care of his late brother's five children. He also looked after his mother who was 75 years and taking TB medication. He paid for two of his nephews out of his own pocket, one of whom is in primary school. He states his businesses are not doing too well because of his incarceration.

10. His view is that he is not guilty, and he urged the court to consider this. He has children who are finding it very difficult, and he pleaded with the court to consider his mother's state of health. It pained him that during the unrest there were many people killed and property damaged. But, importantly, he had played no role in preparing and instigating unrest.

11. He is 45 years old. He has a diploma in accounting and finance, and has always had a financial interest in the state of the economy and the GDP of the country. He went into public life to serve his country and people. He was elected to parliament in 2019. When arrested, he was a member of parliament. Prison life has been devastating economically and personally it has been extremely difficult, as prison conditions are dreadful.

12. He accepts the court's verdict but believes that during his appeal he will succeed, as he has never considered himself as having committed a crime.

- **Cross-examination**

13. He was asked whether he had any regrets about the loss of life and property and he replied that he felt remorse for those who had suffered but that he had played no part in the unrest that occurred.

14. We now turn to an examination of the judgment delivered by Judge Dlamini on 3 June 2023 convicting the accused on various counts. These are detailed below.

15. The first charges were described as follows:

> *The two accused persons served before their arrest as members of the House of Assembly. They stand arraigned in the main charge for the contravention of section 5(1), read in conjunction with section (2)(2)(a)-(d) and (i) of the Suppression of Terrorism Act 2008 (as amended), two alternative counts under the Sedition and Subversive Activities Act of 1938, and two counts of murder. The Accused No. 1 is, in addition, charged with contravention of regulation 4(3)(b), read in conjunction with regulation 4(8) of the Disaster Management Act, No. 1 of 2006. They each entered a plea of not guilty in respect of all charges.*

16. The details of the charge are as follows:

- **First alternative to count 1**

  That the Accused No. 1 and Accused No. 2 are guilty of **CONTRAVENING SECTION 4(a), READ IN CONJUNCTION WITH SECTION 3(1)(a)-(e) of the Sedition and Subversive Activities Act, 1938**.

17. There is an alternative to count 1 which provides the following:

- **Second alternative to count 1**

  That the Accused No. 1 and Accused No. 2 are guilty of CONTRAVENING SECTION 4(b), READ IN CONJUNCTION WITH SECTION 3(1)(a) –(e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938

18. The evidence of the accused is reflected in the first pages of the judgment. It commences on page 9 of the record until page 21 and then continues from page 27 to page 48.

19. The Accused No. 2 spoke next, and his evidence commences from page 65. This is reported in the judgment.

20. The Crown relies on the principle of common purpose in seeking to convict the two accused. This principle was enunciated in the leading South African case of **Sandile Matsa Mavuso & Another v Rex**.[1]

> *In the aforementioned Mavuso[2] case, the court stated that the definition embodies two elements or stages. The first stage refers to the conditions that must be fulfilled before the principle of imputation of conduct can operate; and the second stage refers to the scope and extent of imputing the conduct of one party to the others. The second stage, to repeat, only comes into operation when the conditions of the first stage are fulfilled and it involves active association with the conduct that actually caused the death of the deceased.*

21. This principle applies where two parties commit a crime jointly and each individual's responsibility is not adjudged on its own but rather as if both has committed the same crime as if it were a joint enterprise. The court in this instance took the statements made by each accused and examined the possible effect of their statements on the crowds that had committed various crimes and determined whether these people had been directly influenced by the spoken words, instigating the crimes.

22. If we examine what the accused said, then, with respect, we are taken aback by the conclusions of the judge. There is absolutely no evidence to implicate the accused in this conduct, so that the application of the common purpose principle has no bearing whatsoever on the guilt of the accused.

23. His evidence continues from page 65 to page 77, including verbatim by the learned judge.

Conclusions of the observer

24. In examining the guilt of the accused beyond reasonable doubt, there are a number of fundamental principles that must be applied.

25. The first principle is that it is the duty of the Crown to prove the guilt of the accused beyond reasonable doubt. This is captured in the famous dictum of the presiding judge in the leading case of **Woolmington v Director of Public Prosecutions**.[3]

26. ONUS OF PROOF

Onus of proof refers to the obligation of a party to persuade the trier of fact by the end of the case of the truth of certain proportions. It can be described as an obligation to persuade the court of the facts so that it may judge in the favour of the party who bears the onus.[4] The subsequent paragraph was cited with authority from the case.

27. Sir Fitzjames Stephen in **"A History of the Criminal Law of England"**,[5] page 354, underlines the significance of the presumption of innocence in the following words:

> "In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts everything in issue, and the Prosecutor has to prove everything that he/she alleges from the very beginning".

28. It is the duty of the Crown to prove the guilt of the accused beyond reasonable doubt. This is captured in the famous dictum of the presiding judge, Viscount Sankey, LC, in the leading case of **Woolmington v Director of Public Prosecutions**,[6] wherein it was held that "throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception".

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1 (8 of 2015) [2016] SZSC 52
2 Supra
3 [1935] AC 462
4 State v Oduetse Mompoloki 2017 BLR 412 (HC)
5 Sir Fitzjames Stephen, *A History of The Criminal Law of England* (Cambridge University Press, 1883 Vol. 1), p.354
6 Supra

29. The House of Lords held that the trial judge had misdirected the jury on the issue of the burden of proof. The court ruled that, in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defendant is presumed innocent until proven guilty, and it is not for the defendant to prove his innocence.

30. In the case of **Mabaso v Felix**,[7] it was stated that, when an accused pleads not guilty, he raises the general issue of whether or not he is guilty or innocent of the offence charged. The burden of proving his guilt then rests throughout on the prosecution, and it is not for the accused to prove his innocence by, for example, proving self-defence or some other excuse or justification, although, of course, he must raise it as a defence in the course of the proceedings. This onus rests throughout on the State.

31. In **Viveiros v S**,[8] the court held that there is no obligation on an accused to convince the court, as the burden of proof rests squarely with the State. It emphasizes the enduring onus on the State that, with the evidence they have, they have to satisfy the court and discharge the onus.

32. The principle of onus of proof in criminal cases is fundamental to the administration of justice. As reiterated in various legal precedents, including the landmark case of **Woolmington v Director of Public Prosecutions**,[9] the burden of proving guilt beyond a reasonable doubt lies solely with the prosecution. The accused is presumed innocent until proven guilty, and it is not incumbent upon them to prove their innocence. In **Kamogelo Kgokilwe and Another v State**,[10] it was held that the legal burden is on the prosecution, whereas the evidential burden requiring an accused to adduce evidence that raises a reasonable doubt as to whether he or she is guilty rests on the accused person. There are statutes that merely impose an evidential burden and those that place a legal burden on the accused.

33. In **S v Singo**,[11] the court stated that a legal burden requires an accused to disprove on a balance of probabilities an essential element of an offence and not merely to raise a reasonable doubt. It is by now axiomatic that a provision in a statute that imposes a legal burden upon the accused limits the right to be presumed innocent and to remain silent.

34. *MENS REA* AND *ACTUS REUS*

In order to prove the commission of an offence, two issues must be established, that is, an outward conduct and a guilty state of mind commonly known as the *actus reus* and the *mens rea* respectively. In **State v Motimedi Lekolori**,[12] the case of the **State v Otloleng**[13] was cited with authority wherein the court held that the *actus reus* of the offence of attempt is the overt act adopted to fulfil the intention to commit a specific crime falling short of committing the offence. And the *mens rea* is the intention to commit the specific offence of which an attempt is alleged.

35. In the case of the **State v Gogannekgosi**,[14] the court held that there is a clear distinction between motive and intention, and that motive usually does not affect criminal liability. And what the prosecution had to prove in the case in question was intention, namely *mens rea*.

In **S v Erasmus**,[15] the court held that when *mens rea* is held to be an element in a statutory crime, what is normally required is *dolus directus* or *dolus eventualis* on the part of the accused. Ordinarily, it is for the State to prove, directly or by necessary inference, that the accused had one of those states of mind when he or she acted or failed to act in breach of the statute. In the case of **Hyam v DPP**,[16] the court held that a person had the requisite *mens rea*

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7 [1981] 2 SA 306 (A)
8 [2000] 2 SA 86 (A)
9 Supra
10 2014 BLR 416 (CA)
11 2002 (4) SA 858 CC
12 2010 BLR 64 (HC)
13 [1989] BLR 40
14 1989 BLR 133
15 [1973] 4 SA 499 (T)
16 [1975] AC 55 at 79

for murder if they knowingly committed an act that was aimed at someone and that was committed with the intention of causing death or serious injury. Lord Hailsham also held that intention could also exist where the defendant "knew there was a serious risk that death or serious bodily harm will ensure from his acts and he commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences or not".

36. In **Fagan v Metropolitan Police Commissioner**,[17] a leading case that confirms the need for concurrence (or coincidence) of *actus reus*, the guilty act, and *mens rea*, the guilty mind. The divisional court agreed that assault cannot be committed by an omission. However, in this case, the crime was not an omission to move the car; rather, it constituted a continual act of battery. The offence was not complete until the moment Fagan realized that he had driven onto the foot of the officer and, in deciding not to cease this continuous act, formed an intent amounting to the *mens rea* for common assault. Since both *mens rea* and *actus reus* were present, an assault had been committed.

37. In **Kaitamaki v R**,[18] the defendant was charged with rape. His defence was that when he penetrated the woman he thought she was consenting. When he realized that she objected he did not withdraw. The Privy Council held that the *actus reus* of rape was a continuing act, and when he realized that she did not consent (and he therefore formed the *mens rea*), the *actus reus* was still in progress and there could therefore be coincidence. If D causes an *actus reus* and *mens rea*, he is guilty of the crime and it is entirely irrelevant to his guilt that he had good motive.[19]

38. In the case mentioned earlier of the **State v Mompoloki**,[20] it was stated that there must be a confluence between the *mens rea* and the *actus rea*. As was put in the *locus classicus* **R v Eagleton**,[21] the court held that the mere intention to commit a misdemeanour is not criminal; some act is required. The concept of *actus reus* and *mens rea* forms the foundation of criminal liability. As established above, the *actus reus* pertains to the guilty conduct, while the *mens rea* concerns the guilty state of mind or intention behind the act. It is crucial for both elements to coincide for an individual to be held criminally liable.

39. CAUSATION

In the **State v Reetsang**,[22] the court held that there are two approaches by the law to the problem of causation. The first approach is based on the direct consequences theory. The test is whether death is a consequence that flows directly from the acts of the accused. The second approach is the *conditio sine qua non* and foreseeable result theory. In terms of this approach, every act or omission of the accused, but for the existence of which death would not have resulted, is regarded as a cause of death, but the liability of the accused is excluded as a matter of policy if the accused could not reasonably have foreseen that his or her particular act would have that result.

40. In **R v White**,[23] the court established the "but for" test of causation, according to which the defendant could not be convicted unless it could be shown that "but for" his actions the victim would not have died. On the facts of this case, the test was not met; therefore, the defendant could not be convicted of murder. In the case of **R v Motomane**,[24] it was held that the burden of proof, on the authorities, is upon the accused to show on the probabilities that there was an interruption of the causal chain.

41. In **Minister of Police v Skosana**,[25] the court held that causation in the law of delict gives rise to two rather distinct problems. Firstly, we ask whether factually the negligent act or

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17 [1969] 1 QB 439
18 [1985] AC 147
19 Smith and Hogan, Criminal Law (4th ed.) p. 63
20 2017 BLR 412 (HC)
21 1855 Dears CC 515 at 538
22 1979-80 BLR 48
23 [1910] 2 K.B. 124
24 1961 (4) SA, 569 at 572
25 1977 (1) SA 31 (A)

omission caused or materially contributed to the harm giving rise to the claim. If it did, then the second problem becomes relevant, *viz.* whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote.

42. In **R v Roberts**,[26] the court held that the test for whether a victim's own acts were not to be considered capable of breaking the chain of causation was whether the act was a natural consequence or a result of what the assailant did or said. If the victim's act was so unexpected that it could not be foreseen by a reasonable person, then the act would be a remote and unreal consequence of the assault and as such would then break the chain of causation.

43. In **R v Blaeu**,[27] it was stated that he [or she] who inflicts a wound or injury that results in death could not excuse himself [or herself] by pleading that his [or her] victim could have avoided death by taking better care of himself/herself. In common law, a person who carried out a wrongful act was deemed morally responsible for the natural and probable consequences of that act. It has long been the policy of the law that those who use violence on other people must take their victims as they find them.

44. In **R v Smith**,[28] as per Lord Parker, as he then was: "It seems to the court if at the time of death the original wound is still an operating cause and substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death did not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound".

45. In the **Oropesa** case,[29] Lord Wright held that to break the chain of causation it must be shown that there is something which I will call ultroneous, something "unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic". In conclusion, causation in law involves determining whether the defendant's actions were a substantial factor in causing the harm suffered by the victim. Courts employ different approaches such as the direct consequences theory, the *conditio sine qua non* and foreseeable result theory, and the "but for" test of causation. The burden of proof typically rests on the accused to show that there was an interruption of the causal chain, which would relieve them of liability.

46. Ultimately, the determination of causation is highly fact-specific and depends on the circumstances of each case. The overarching principle is that those who use violence on others must take their victims as they find them, and they may be held morally responsible for the natural and probable consequences of their actions.

47. COMMON PURPOSE

Jonathan Burchell in his book, **Principles of Criminal Law**,[30] page 574, defines common purpose in the following terms:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design".

In the case of **Sandile Matsa Mavuso & Another v Rex**,[31] the court stated that the definition embodies two elements or stages. The first stage refers to the conditions which must be fulfilled before the principle of imputation of conduct can operate; and the second stage refers to the scope and extent of imputing the conduct of one party to the others. The second stage, to repeat, only comes into operation when the conditions of the first stage are fulfilled and it involves active association with the conduct that actually caused the death of the deceased.

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26 (1971) 56 CR APP R 95
27 [1975] 1 WLR 1411
28 [1959] 2 QB 35
29 1943 1 ALL ER 211
30 (Juta, 2005)
31 (08/2015) [2016] SZSC 52

48. In the **State v Majeremane and Others**,[32] the court stated that mere presence at the time of the commission of a crime will not make a person a party without participation in some way. In such cases, it is essential that there should be some participation in the crime either by actual assistance or by countenancing or encouraging it. The case of **R v Bergstedt**[33] was cited with authority in which the court held that for common purpose to create liability in such cases there must have been actual knowledge that there was some probability that, in circumstances that might well arise, the further criminal act would be committed. The knowledge may, of course, be established by inference, so that it would be proper to tell the jury that they should apply common purpose if satisfied that the accused, whose responsibility for the act of another is under inquiry, "must have known" of the probability. In the case of **Oitatotse and others v State**,[34] the court held that the principle is that the act of one participant is imputed to the others as a matter of law so long as *mens rea* is established. This means there is no need to prove causation on the part of each participant.

49. In cases where there is no proof of an antecedent agreement, malice aforethought may be inferred from one's active association with the commission of the offence by participating in such no matter to what extent. Judge Moseneke, in the case of **S v Thebus and Another**,[35] said the following:

> "In our law, or ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequences is a prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequences, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalize collective criminal conduct and thus to satisfy the social "need to control crime committed in the joint enterprises". The phenomenon of serious crimes committed by collective individuals acting in concert remains a significant societal scourge".

50. The doctrine of common purpose calls for a restrictive meaning of "active association" and this is evidenced by the four requirements for liability under common purpose as formulated in the **Mgedezi** case.[36] The requirements are the following: In the first place, he must have been present at the scene where the violence was being committed. Second, he must have been aware of the assault on the inmates of room 12. Third, he must have intended to make common cause with those who were actually perpetrating the assault. Fourth, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifth, he must have had the requisite *mens rea*. So, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

51. The doctrine of common purpose holds individuals accountable for the criminal acts committed by a group with whom they have actively associated, even if they did not directly commit the specific criminal act themselves. This principle is based on the idea that those who participate in a joint unlawful enterprise share responsibility for the actions of their co-conspirators.

52. To establish liability under common purpose, certain requirements must be met. These include being present at the scene of the crime, being aware of the criminal activity taking place, intending to make common cause with the perpetrators, manifesting this intention through some act of association, and possessing the requisite *mens rea*, such as intent or recklessness regarding the consequences of the crime. Courts have emphasized that mere presence at the scene of the crime is insufficient to establish liability under common purpose. Active participation or assistance in the commission of the crime, either through direct involvement or encouragement, is necessary. We will now apply the legal principles to the judgment penned by the learned judge.

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32 1997 BLR 630
33 1955 (4) SA
34 2016 BLR 195 (CA)
35 2003 (2) SA 319 (CC)
36 S v Mgedezi & Others 1989 (1) SA 687 (AD)

53. The principle that the learned judge should have applied is wherein lies the aspect of criminal intent in the conduct of the accused to qualify as a violation of the Terrorism Act, as well as the Sedition Act and the common law. Did the accused have the criminal intent to commit these crimes and did he envisage that the uprising and consequential damages would result in the damages alleged by the Crown? The issue of legal causation is fundamental in the commission of these crimes and this is defined in criminal law as the following:

54. There must be a direct link between the words uttered by the accused and the conduct that ensues subsequent to their statements. The words uttered must have influenced those who have heard it being uttered by the accused that induced them to act upon it. Therefore, this issue of guilt is so fundamental to the Crown's case that, if the learned judge had applied these principles, she may have arrived at a different conclusion. If the judgment by the learned judge is examined, the following objectives are pertinent.

55. If we examine the statements attributed to them by the learned judge, a careful analysis in fact does not reflect criminal intent. Throughout the evidence as appears in the record, there is no exhortation on the Swazi public to rise up in insurrection, overthrow the Monarchy and establish a government of the people. In fact, the accused are very deferential towards the Monarchy, almost religiously so. There is no fiery expression of people's power so prevalent in other jurisdictions and countries where popular discontent is exploited by political parties. The entire case rests on the response by the accused to the declaration by the government that it was banning the production of petitions and for the appointment of the Prime Minister by election.

56. The incidents of civil unrest occurred on 24 June 2021. It is abundantly clear from the gravamen of the charges, that the accused were no way near the scene of the crime. It is the effect of what they stated that reflects what the State says is the foundation of their criminal conduct: that they encouraged people in their public statements to disobey the lawful appointment of the Prime Minister and in the process encouraged civil disobedience. But, with respect, how can civil disobedience be equated with terrorism and sedition? There was no armed insurrection, no taking up of arms with revolutionary slogans against the State, no intentional destruction of the most visible manifestations of state power. How encouraging people to disobey the government on the issue of denying the filing of petitions automatically led to arrests for terrorism without showing a direct link between rhetoric and causation is difficult to appreciate.

57. Take the example of the Accused No 1's statement at S and B restaurant (page 9 of the record), with the following statement: *Those who are in authority should allow the Swazis to exercise their right to democracy to elect a person who will lead their country. What is seditious about this statement?* Further, on page 1 he states: *"We do not want war. We don't want bloodshed or anything".* And, further, on page 13: *"We are not saying Swazis should elect us. We are saying the Swazis should get freedom"*.

58. Their remarks are consistent with a yearning for the right to make democratic choices that are guaranteed in the Constitution and under no circumstances are they indicative of insurrectionary pronouncements. Through the statements by the accused reflected in the judgment, it is difficult to advance the argument that what the accused are agitating is wholesale undermining of the Crown. It is a particularly sad day for the advent of democracy for these statements to be construed as inflammatory and aimed at undermining the State and its organs.

59. This trial has everything to do with freedom of expression and why any State should tolerate and encourage the free flow of ideas by its citizens as an example of participatory democracy rather that seek to curtail freedom of speech on these flimsy grounds. Law is being used to weaponize freedom of expression.

Gaborone, 15 March 2024