C OF A (CRI) NO. 9/2008

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

And

BILLY MACAEFA **RESPONDENT**

CORAM:

Smalberger, JA
Melunsky, JA
Peete, JA

Heard : 7th October 2008
Delivered : 17th October 2008

SUMMARY

Respondent (accused) charged in High Court with a contravention of section 4 of the Sedition Proclation 44 of 1938 – accused discharged at the end of the Crown case – misdirections by the trial court – evidence on which a reasonable court might convict – appeal upheld – matter remitted to the trial court.

JUDGMENT

[1] The respondent was charged in the High Court with contravening section 4 (1) of the Sedition Proclamation 44 of 1938 ("the

Proclamation"), alternatively with contravening section 7 (d) of the Internal Security (General) Act 24 of 1984 ("the Act"). He pleaded not guilty to both the main and alternative counts. Various witnesses were called to testify on behalf of the Crown. At the conclusion of the Crown case application was made for the respondent's discharge. The learned trial judge (Nomngcongo J) granted the application, and the respondent was discharged on both counts. The present appeal by the Director of Public Prosecutions is directed against such discharge. For the sake of convenience the respondent will be referred to as the accused.

[2] The judge *a quo* appears to have granted the application for discharge on three main grounds. They were the following:

(1) That sections 3 (1) and 4 (1) of the Proclamation comprised more than one offence and that it was improper "to charge them as one and not in the alternative or of having committed one or other or all of them."

(2) That while the accused had been charged in the main count with unlawfully and with seditious intent uttering words with "intent

to unlawfully defy and subvert" the authority of the government of Lesotho, the words in parenthesis do not form part of the definition of "seditious intention" in the Proclamation.

(3) That at the conclusion of the Crown case there was no admissible evidence on which a reasonable court might convict the accused of the charges against him.

I shall deal with each of these grounds in turn.

[3] Section 4 (1) of the Proclamation creates four separate and distinct offences which are set out in sub-paragraphs (a) to (d). It was competent for the Crown to charge the accused with any one or more of those offences, whether separately or in the alternative. Section 3 (1) does not create any offence, either in express terms or by necessary implication. The trial judge clearly erred in finding to the contrary. Section 3 (1) has an evidentiary and defining purpose. In particular it defines what is meant by "seditious intention" – seditious intention being a necessary prerequisite for all the offences created by section 4 (1). (See in this regard the definition of "seditious publication" and "seditious words" in section 2 of the Proclamation.)

As appears more fully below, what the accused was effectively charged with was a contravention of section 4 (1) (b) of the Proclamation, and the trial was conducted on that basis. It follows that what purported to be the first ground for upholding the application for discharge was without foundation or substance.

[4] The charge as formulated was one of "contravening section 4 (1) (a) (b) read with section 3 (1) (i) (ii) (iv)" of the Proclamation. It is inelegantly drafted and conflates the separate offences created by section 4 (1) (a) and (b) – the one relating to the performance of acts with a seditious intention (section 4 (1) (a)) and the other to the uttering of seditious words (section 4 (1) (b)). The two offences could not properly have been charged as one. It is correct that the Crown should have selected the offence with which it sought to charge the accused, or should have charged the offences separately or in the alternative. The charge as formulated was clearly open to objection in terms of section 152 of the Criminal Procedure and Evidence Act, 1981 but no objection was raised by the defence as to its form, nor were any further particulars sought in terms of section 157 (1). The reason for that is obvious – the wording of the main charge coupled

with the annexed transcript (and the translation later provided) made it abundantly clear that the offence with which the accused was being charged was a contravention of section 4 (1) (b), and it must have been apparent to the defence from its inception that the trial was being conducted on that basis. It is not open to the accused to complain about deficiencies in the indictment at the appeal stage in the absence of an earlier challenge. As stated by Gauntlett JA in *Jurgen Fath and Another v The Minister of Justice of the Kingdom of Lesotho and Another* C of A (CIV) No. 15/2005 (unreported) at para 36:

> "The Code (as it commonly is known) is aptly named; save where other statutes may make explicit separate provision, it is Lesotho's encompassing regulation of criminal trials. It does not contemplate an elective opt-out when a criminal litigant considers that beneficial. The Code provides, in particular, quite specifically for preliminary challenges in relation to indictments, jurisdiction and the like."

The accused was accordingly not prejudiced in his defence – and in fact never claimed at the trial to have been prejudiced.

[5] It is advisable, if not imperative, when charging a contravention of a statutory offence to follow the wording of the relevant statutory provisions as closely as possible. This was not done in the present instance. The offence created by section 4 (1) (b) relates to the uttering of any seditious words, which in terms of section 2 of the

Proclamation means "words having a seditious intention." In terms of section 3 (1) (i) a seditious intention is an intention, inter alia, "to bring into hatred or contempt or to excite disaffection against ….. the Government of [Lesotho]…." (The references to section 3 (ii) and (iv) in the indictment would seem to be unnecessary.) What was alleged in the main charge was the intention to "defy and subvert the authority of the Government of Lesotho", which is what sedition would amount to under the common law. In terms of the Concise Oxford English Dictionary, "defy" means to "openly resist and refuse to obey", and "subvert" to "undermine the power and authority of (an established system or institution)". The somewhat archaic word "disaffection" means "dissatisfaction with those in authority and no longer willing to support them." There is therefore a strong correlation as to meaning between defying and subverting the authority of the government (as charged) and exciting disaffection against the government within the meaning of section 3 (1) (i). In substance, the body of the charge accords with the statutory provisions the accused is charged with contravening. It follows that the second ground on which the application for discharge was granted was also without foundation.

[6] In the light of what has been set out above, all that fell to be determined by the trial judge when the application for the accused's discharge was made, was whether there was evidence on which a reasonable court might, as opposed to ought to, convict the accused of a contravention of section 4 (1) (b) of the Proclamation read with the relevant provisions of section 3 (1), this being the accepted test to apply. It is trite law that at that stage of the proceedings issues of credibility do not arise, save perhaps in exceptional circumstances.

[7] The evidence of Sgt. Mohlomi ("P.W.1") was to the effect that on 8 April 2007 he was present at a political rally of the ABC party which was attended by an estimated 300-500 people and was addressed by the accused. He made a video recording of the proceedings on a DV cam recorder which he subsequently dubbed onto a VHS video tape which was handed in as Exhibit 1. He confirmed that Exhibit 1 correctly reflected the events he had witnessed and the speech made by the accused. There was no suggestion made by the defence that Exhibit 1 had been tampered with or that the recording did not represent what the accused had said. The exhibit was viewed by the court and admitted in evidence but was subsequently, in his judgment

on the application for the accused's discharge, ruled inadmissible by the trial judge on the ground that it constituted secondary evidence as the original tape had been available for viewing. This finding is contrary to the evidence of P.W.1 that the original was no longer available. Exhibit I was therefore the best evidence available. In any event the trial judge erred in holding exhibit 1 to be inadmissible at that stage. P.W.1's confirmation of the fact that Exhibit 1 reflected the events that had occurred, and correctly recorded what the accused had said on the occasion at which he was present, incorporated Exhibit 1 into his evidence and rendered it admissible as its authenticity had *prima facie* been established. Whether P.W.1's evidence as to Exhibit 1's authenticity is ultimately accepted is a different matter.

[8] Mr Sesioana ("P.W.2") testified to the transcription and translation of the speech by the accused as recorded on Exhibit 1, these being handed in as Exhibits A and B. His evidence regarding their accuracy was not challenged. Furthermore, at the discharge stage it was not in dispute that the accused uttered the words complained of during a political rally of the ABC party shortly after the 2007 elections

attended by some 300-500 people – those being the background circumstances. In this respect the court *a quo* erred in holding that there was an absence of relevant background circumstances.

[9] In summary, when the application for discharge was made, the trial court had before it:

(1) The evidence of P.W.1.

(2) The video Exhibit 1 which it had viewed and which constituted at that stage admissible evidence.

(3) The unchallenged transcription and translation of Exhibit 1

(4) The circumstances in which the accused's speech was made.

All that remained was for the trial court to determine whether there was evidence on which a reasonable court might convict the accused. In arriving at its conclusion that there was no such evidence the trial court, as I have indicated, misdirected itself in a number of material respects, leaving us free to consider the matter afresh.

[10] It is unnecessary at this stage to analyse in detail the import of the words alleged by the Crown to have been uttered by the accused viewed in their proper contextual setting to determine whether they

constitute a contravention of section 4 (1) (b) of the Proclamation. That is the ultimate function of the trial court after hearing all the evidence. Suffice it to say that viewed holistically the content of the speech is such that a reasonable court might conclude at this stage, on the evidence as it stands, that it constitutes an exhortation to those present to depose the Prime Minister and Government of Lesotho by inciting public unrest and disorder, thereby defying and subverting their authority or, in the words of section 3 (1) (i) of the Proclamation, "excit[ing] disaffection." In arriving at such conclusion regard may be had to section 3 (2) of the Proclamation which provides:

> "in determining whether the intention with which …. any words were spoken ….. was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

[11] Mr Phoofolo contended that there should have been evidence that the accused's words evoked a response from members of the crowd and moved them to action before it could be said that the Crown had established a *prima facie* case against the accused. The offence charged is one of uttering seditious words with seditious intent in contravention of section 4 (1) (b) of the Proclamation. The commission of the offence is not dependent upon the words

generating a response from those present. The offence charged is analogous to incitement in this regard. In incitement the purpose is to influence others to commit crimes; seditious words uttered with seditious intent are meant to move people to defy or subvert authority (the words of the indictment) or excite disaffection (the words of section 3 (1) (i) of the Proclamation). In this regard the dictum of *Holmes JA in S v Nkosiyana and Another* 1996 (4) SA 655 (A) at 659 A-B is apposite:

> "[T]he purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes. Hence, depending on the circumstances, there may be an incitement irrespective of the responsiveness, real or feigned, or the unresponsiveness, of the person sought to be so influenced."

[12] As far as the alternative count is concerned it may similarly be said that a reasonable court might have came to the conclusion at the discharge stage that the accused had contravened section 7 (d) of the Act.

[13] In the result it follows that the court *a quo* erred in granting the accused's discharge at the end of the Crown case. The appeal accordingly succeeds and the matter falls to be remitted to the court *a quo.*

[14] The following order is made

(1) The appeal is upheld.

(2) The Order of the court *a quo* granting the application for the discharge of the respondent (Mr Macaefa) at the end of the Crown case is set aside and is replaced by the following order:

"The application for the discharge of the accused is refused."

(4) The matter is remitted to the court *a quo* for the trial to proceed in the ordinary course.

_____
J.W. SMALBERGER
JUSTICE OF APPEAL

I agree

_____
L.S. MELUNSKY
JUSTICE OF APPEAL

I agree

_____
S.N. PEETE
JUSTICE OF APPEAL

FOR APPELLANT : ADV. R.A. SUHR
FOR RESPONDENT : ADV. E.H. PHOOFOLO