IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) 10 OF 2011

In the matter between:

M. LESUPI	FIRST APPELLANT
I. LETSIKA	SECOND APPELLANT
and	
THE CROWN	RESPONDENT

CORAM: SMALBERGER, J A
SCOTT, J A
HOWIE, J A

HEARD: 10 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Defeating or obstructing the ends of justice – magistrate inserting false entry in remand record in criminal case – whether done with criminal intent – sentence – need for deterrence.

JUDGMENT

HOWIE, J A

[1] Having each made a false entry in the pre-trial remand record of a pending criminal case, the two appellants,

serving magistrates on the staff of the Magistrate's Court, Maseru, were charged on two counts of defeating or obstructing the course of justice. There were two counts on the basis that they had acted with common purpose when each's entry was made.

[2] Each was convicted on both counts and sentenced to a fine of M10 000 on each count, the sentences to run concurrently.

[3] The appellants have appealed against their convictions. The Crown has cross-appealed against the sentences, contending that unsuspended imprisonment should have been imposed.

[4] During 2005 two criminal cases, in which one Tseliso Steven Dlamini (Dlamini) was one of the three accused

involved in each case, were brought before various of the Maseru magistrates including the appellants for remand from time to time. In case 764/05 (764) Dlamini was accused number three. In case 765/05 (765) he was the last in time to be joined as a co-accused, and was possibly accused number three there as well but the evidence is not conclusive in that respect. At all times relevant to this matter Dlamini was released on bail.

[5] Dlamini and one Peggy Thakeli were the only accused common to both cases. Each case involved a charge of fraud and was one of a series of so-called anti-corruption cases, for the prosecution of which a special administrative and prosecuting staff had been assembled. The case files were in the custody of the senior clerk of the court and kept apart from other case records.

[6] The magistrates' remand orders were handwritten on pages attached to the respective charge sheets and sought to record, *inter alia*, which accused were before the court (court being a term also used when the remand in fact took place in a magistrate's chambers), the date of remand and the date to which the matter was postponed. Clearly, the remand entries were part of the official record of each case.

[7] On occasions cases 764 and 765 were remanded by the same magistrate on the same day. One of those occasions was 25 August 2005 when Magistrate Ralebese officiated. In case 764 she merely recorded that all the accused were before court and that the case was remanded to 27 September 2005 pending further investigation. In case 765 what she recorded was this –

> "On 25/8/05 all accused are before court. Mr. Kotele appears for Crown and he applies for the withdrawal of the charges against A3 Liteboho Pulumo Sesoane at (sic) the instructions of the DPP.

> Crt: Charges against A3 are accordingly withdrawn. Rem to 27/9/05."

Mrs. Ralebese signed both entries.

[8] The only later remand notation, identical in each case, which is of any relevance reads:

> "On the 27/10/05 all (accused) not (before) Crt. Rem to 29/11/05 pending set down."

Consequently, in neither case were the remaining accused brought before court, specifically for remand, between 25 August 2005 and the indictment in the High Court in February 2006 of Dlamini and Thakeli in both cases.

[9] In that intervening period the events crucial to the Crown case in the present matter occurred. Firstly, the first appellant inscribed the following insertion between Mrs. Ralebese's notation and signature of 25 August 2005

in case 764 – "But charges withdrawn vs A3 only." Crown evidence referred to these words as having been "squeezed in" and that description is not inappropriate. In the context of case 764 "A3" was an unmistakable reference to Dlamini. That inscription was false and was apparently intentionally made.

[10] Subsequently Dlamini came to the Maseru Magistrate's Court and requested refund of the bail money in both cases. The Crown evidence in this regard was given by Mrs. Mantsebo Abia, a clerk of the court employed in the criminal registry. Mrs. Abia required him to put his request in each instance in writing. He did so. The relevant documentation shows that he inscribed the date of 10 January 2006 on his written requests.

[11] Mrs. Abia then drew the record in each case and took the documents to the accounts office. The clerks there were not prepared to act on what they apparently regarded as the unconvincing appearance of the first appellant's inscription. They wanted the entry to be written more clearly. Mrs. Abia said she observed that the last entry in the remand record of case 764 was one dated 27 September 2005 made by the second appellant (the details of which I shall mention in due course). She therefore sought the second appellant as the magistrate who should make the required re-recording of the alleged withdrawal.

[12] The appellants shared an office. Initially Mrs. Abia found only the first appellant present who, when told of the accounts clerks' requirement, said that her entry was clear enough. However, when eventually the second appellant came to the office Abia told her of the situation. The

second appellant then wrote "Charges withdrawn against A3" and signed her name below that. As in the case of the first appellant's inscription this inscription was false. Neither inscription was made on the strength of information emanating from the special prosecutor and in neither case was the appellant acting as the remand magistrate. The upshot, according to the Crown case, was that Dlamini's bail money was wrongly refunded and he evaded his High Court prosecution for some considerable time. Hence the present charges.

[13] It will be recalled that 25 August 2005 was the last occasion on which the two cases were remanded, that the date to which they were postponed was 27 September 2005 and that none of the accused were in fact brought up for remand on the latter date.

[14] What did occur on 27 September – and this was only in respect of case 764 – was that the first accused (one Pakiso Mpeta) was alone brought to court and applied to be excused from attending remands. The prosecutor was Mojabeng Ntabe (then Ms Binns) and the magistrate was the second appellant. The application was dismissed. Having recorded that, the second appellant remanded the accused to 27 October 2005 and signed this entry. This was the last entry which Mrs. Abia claimed to have seen on the record of case 764 when Dlamini came for his bail refund.

[15] During the pre-trial investigation of the present matter the appellants were warned of the possible charges against them and informed of their rights to silence. The occasion was a meeting on 23 October 2006 between them, the Resident Magistrate (Mr. Mothebe) and the Director

General of the Directorate of Corruption and Economic Offences, Borotho Matsoso. The second appellant elected to remain silent. The first appellant provided answers to Matsoso's questions. The admissibility of those answers has never been in issue.

[16] The record of the first appellant's answers, Exhibit F, reads as follows (the references to Letsika being to the second appellant):

> "With regard to the entry made by Letsika I was with her, I and Letsika checked the record and found that charges were withdrawn against A3 in another record which was always paired together with this one on which I wrote. I made this entry on the 27/09/05 after realizing that Mr. Kotele had applied for withdrawal of charges against A 3.
>
> Question: Were you in Court when this was done?
>
> Answer: Yes but it was Magistrate Letsika who was presiding, I repeat that the withdrawal was made on the 27/09 and would like to stress that it is proper and normal that a magistrate can correct another magistrate's record and this does not matter whether one is sitting or not. There is no need to explain to the sitting magistrate, when this is made I did this change in the Court of Law and the accused and the Lawyers were there.
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> Question: What actually happened on this day?

Answer: After an application, by the first accused in that case for recusal from remands was rejected by Magistrate Letsika, she asked if the accused were all in attendance, one of the accused said that Accused No.3 was not properly before the court because charges have been withdrawn against him. Magistrate Letsika noted then that charges have been withdrawn against Accused 3. It was then that I took the record and made an entry against Magistrate Ralebese's signature that the charges have been withdrawn against Accused No. 3. What I did was just a reflection of what Letsika had already made in her record of that day's proceedings. I did this just to correct Magistrate Ralebese's omission.

Question: What do you know of the entry made in the record that A3 in that record is Liteboho Pulumo and for that matter is clearly spelled out in the record?

Answer: To my understanding, Accused 3 was Stephen Dlamini, the Pulumo mentioned there could have been the prosecutor to my judgment not the accused, above all, the records have been mutilated and I want to see my entries or these entries that I made in these records. All of them should be here so that things could be clear."

[17] In so far as the first appellant required to see all her entries, the remand records form part of the trial record. It has not been contended on her behalf that there was any other entry by her, or any other entry for that matter, which has a bearing on the outcome of the appeal.

[18] Mrs. Ntabe gave evidence for the Crown. She said that on 27 September 2005 she was the prosecutor, standing in for Mr. Kotele, the official anti-corruption prosecutor who was unavailable. She said that it was only the first accused in case 764, a woman, that was before the second appellant that day and the matter was dealt with in chambers. Moreover case 764 was the only case involved on that occasion.

[19] Under cross-examination she said that the second appellant did enquire as to the whereabouts of the other accused but that the accused concerned said she did not know where they were. Mrs. Ntabe said that the accused did not say that one of her co-accused had been discharged and that the second appellant did not record that charges against accused number three were withdrawn. It was then put to her that having been informed by the single

accused present that the charges against another accused in the case had been withdrawn, the second appellant could find nothing to that effect in the record and that this prompted another magistrate in the office (obviously a reference to the first appellant) to reach for another record that was on the table, in which it was found that there was indeed a minute indicating that charges had been withdrawn, in counsel's words, "against an accused 3 in that record". The witness' emphatic reply was that nothing of the sort happened.

[20] Cross-examination of Mrs. Ntabe went on to include the proposition that having found this reference to the withdrawal in the other case the first appellant then made the insertion which is the subject of the case against her. Mrs. Ntabe denied that this had happened in court. She said that all that was referred to that day was case 764 and

only the application for excusal from remands was under consideration. The witness also denied that the first appellant was in any way involved in these proceedings.

[21] Neither appellant testified.

[22] It is plain from a study of the evidence of Abia and Ntabe that the account which the first appellant gave to Matsoso in Exhibit F was false in several important respects.

[23] First, she did not inscribe her entry after the second appellant had already made hers. Clearly, the first appellant's false entry was already on the record of case 764 before Dlamini approached Abia for his bail money. It therefore preceded the second appellant's entry.

[24] Second, the latter entry was made not on 27 September 2005 at all but at some later stage. Mrs. Abia says she took the record of case 764 to the second appellant because her minute of 27 September was the latest entry. It follows that it was already on record some time before the second appellant's entry was effected.

[25] Third, that entry was made in the absence of the first appellant.

[26] Fourth, on 27 September only the first accused in case 764 was present and she said nothing about the withdrawal of charges against a co-accused.

[27] Fifth, on Mrs. Abia's evidence no reference was made by either appellant to the record in case 765. Nor was it put to her that either appellant referred to it as containing

the source of their assertion (or impression) that the charges against Dlamini had been withdrawn. Given the tenor of their respective counsel's cross-examination of Mrs. Abia and Mrs. Ntabe, one might have expected that line of questioning.

[28] Sixth and in any event, the allegation by the first appellant in Exhibit F that she checked the record in case 765 and found that the charges were withdrawn against A3 in that case is not credible. Had she been as intent on being careful as she conveyed, she would surely have seen that the person whose charges were withdrawn was not merely referred to by number but actually named. And that person was not Dlamini. It would be ludicrous to suggest that an entry declaring the withdrawal of charges against Sesoane could warrant the conclusion that they

had, in another case entirely, been withdrawn against Dlamini.

[29] Finally, the entry by the second appellant was made not in court but in chambers. Although "court" did on occasion mean chambers the question put to her by Matsoso was very specific: "Were you in court when this was done?" and unmistakably she answered that both their entries were made "in the Court of Law and the accused and the Lawyers were there."

[30] An uncertainty that the evidence fails completely to resolve is whether the second appellant's entry (and thus the anterior request for his bail money by Dlamini) occurred some time between her entry in case 764 dated 27 September 2005 and the next entry, dated 27 October 2005, or on 10 January 2006, being the date on Dlamini's

written repayment requests. Mrs. Abia seems to have had a convincing reason to approach the second appellant as the author of the minute dated 27 September 2005 because hers was then the last entry on the page. In other words the October entry was not yet there. On the other hand if Dlamini's request was months earlier than January 2006 there seems no reason why he would have post-dated his request. It would only have attracted, for him, inconvenient enquiry. However, the uncertainty in this regard adds nought to the defence case and detracts in no measure from the Crown case.

[31] There can be no question but that the first appellant gave Matsoso a deliberately false account of the making of her false entry in the record of case 764.

[32] That she made that entry on her own initiative and that it was coincidentally discovered when Dlamini came to reclaim his bail money is unsupported by any evidence and is improbable.

[33] The most probable inference is that Dlamini, having heard on 25 August 2005 that the charges in case 765 were withdrawn against A3 (or accused three, depending on what words Mrs. Ralebese used), sought to take advantage of possible uncertainty under which the relevant officials might labour in this regard as to the position in case 764 and that it was he who made an approach to the first appellant to corrupt the record, which she then did.

[34] She was, of course, entitled to remain silent but in exercising that right she ran the risk that a possible innocent explanation by her would be left untendered. In

other words one is justified in inferring that had there been an innocent explanation she would have given it. The result must be that the most probable inference just mentioned becomes the only reasonable inference.

[35] The first appellant was accordingly correctly convicted on the first count.

[36] There is no evidence that it was at any time the common purpose of the appellants that the second appellant should make any false entry on either case record. The first appellant was therefore wrongly convicted on count two.

[37] Turning to the case against the second appellant, Mrs. Abia's evidence shows that the accounts office clerks wanted a magistrate to re-write the withdrawal inscription

clearly. Undoubtedly the second appellant was most unwise to comply. She should have required that the special prosecutor provided the necessary assurance that the charges were withdrawn, as was done in case 765. Indeed, it is suspicious that she complied so readily. However, there is no evidence that she knew why the first appellant's entry had been made and therefore nothing to link her, even by inference, to Dlamini. There is thus insufficient to show that in the circumstances in which she made her false entry, even if she made it grossly negligently and irregularly, she was aware of the falsity or foresaw the real possibility of its falsity. *A fortiori* it was not shown that her inscription was made with the intention alleged in the indictment.

[38] It follows that the second appellant ought not to have been convicted on count two. Furthermore, as the evidence

fails to establish a common purpose to make the false entry which was effected by the first appellant, the second appellant ought to have been acquitted on count one.

[39] There remains the matter of sentence as regards the first appellant.

[40] Defeating or attempting to defeat the course of justice involves an attack on the structures of law and order. It is a form of corruption. Impairing the proper course of a criminal trial can have grave consequences if a guilty person were thereby to escape just punishment. The resultant adverse impact on society would be self-evident. Where the offender is herself a member of the magistracy the gravity of the situation is aggravated. When a person who is meant to uphold the law cannot be trusted to do so the safety and security of the community is endangered

and confidence in the justice system corrodes. In this matter Dlamini was not accused of violent crime and he was, we know, eventually brought to book. Nevertheless the case calls for a sentence which marks the disquiet with which this Court, on behalf of society, views the offence of which the first appellant has been convicted. That sentence must needs include unsuspended imprisonment so that others who might be inclined to follow the first appellant's example, and she herself, must be appropriately deterred.

[41] We have not been referred to relevant Lesotho case law and are not aware of any. South African cases in recent years reflect a judicial attitude suitably condemnatory of those in official positions who obstruct the due course of criminal justice. They show unsuspended imprisonment to be wholly fitting. In S v W 1995 (1) SACR 606 (A) (a public

prosecutor) five years was imposed, two suspended; in S v Newyear 1995 (1) SACR 626 (A) (a police constable) four years, two suspended; and in S v Van Dyk 1998 (2) SACR 363 (W), three years imprisonment. Here, of course, the office held by the offender was one of greater responsibility than those involved in the cases cited.

[42] In the circumstances it seems to me that there is that degree of disparity between the sentence imposed on the first appellant and the sentence which this Court would have imposed which warrants the categorisation of the imposed sentence as unreasonably lenient. Appellate interference is therefore required.

[43] Having regard to all the circumstances of the matter the cross-appeal must succeed in the case of the first appellant.

[44] This Court's order is as follows:

1. The appeal of the first appellant is dismissed in respect of count 1 and allowed in respect of count 2.

2. The appeal of the second appellant is allowed and her convictions and sentences are set aside.

3. The cross-appeal in the case of the first appellant succeeds. The sentence imposed on the first appellant on count one is set aside. In its stead there is substituted the following:

> "Six (6) years imprisonment of which three (3) years is suspended for 5 years on condition that the accused is not convicted of defeating or attempting to defeat the ends of justice committed during the period of suspension."

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C.T. HOWIE
JUSTICE OF APPEAL

I agree:

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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D.G. SCOTT
JUSTICE OF APPEAL

For the first appellant : Adv M.E. Teele KC
For the second appellant: Adv K.K. Mohau KC

For the Crown: Adv H.H.T. Woker