IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CRIM APPEAL NO.**

In the matter between

THULANI MASEKO **1ST APPELLANT**

THE NATION MAGAZINE **2ND APPELLANT**

BHEKI MAKHUBU **3RD APPELLANT**

SWAZILAND INDEPENDENT PUBLISHERS (PTY) LTD **4TH APPELLANT**

AND

THE KING **RESPONDENT**

APPELLANTS' SUBMISSIONS

INTRODUCTION

1. The Nation Magazine (the Second Appellant), Bheki Makhubu, the editor of The Nation (the Third Appellant), and Swaziland Independent Publishers (Pty) Ltd (the Fourth Appellant) were charged, alongside the First Appellant, with two counts of contempt of court.

2. The charges emanate from two separate articles published in The Nation in February and March 2014. One article was written by Thulani Maseko, and was titled "Where the law has no place," and the other was an editorial written by the Second Appellant titled "Speaking my mind". Both articles related to the arrest of government vehicle inspector, Bhantshana Gwebu (the defence witness number 1 –DW1), in January and criticised the conduct of the judiciary in arresting Gwebu and remanding him into custody in the Chief Justice's chambers without Gwebu's legal representative being present.

3. The Second Appellant was arrested on 18 March 2014 and, together with Thulani Maseko, was brought before the Chief Justice in chambers that day.

4. The criminal trial commenced on 22 April 2014 after the presiding judge in the High Court, Mpendulo Simelane refused an application brought by the Second Appellant and Thulani Maseko for his recusal.

5. On 17 July 2014, the High Court convicted all four Appellants on both counts. On 25 July 2014, the High Court sentenced the First and Third Appellants to a two year jail term without the option of a fine, and the Second and Fourth Appellants to fines of E50 000 on each count.

6. This appeal is against the conviction and sentence.

7. These submissions will deal with the following aspects:

    a. The examples of judicial hostility and indications of partiality in favour of the prosecution;
    b. That the conviction was so out of kilter with the evidence provided by the prosecution that the judge's finding is explicable only on the grounds of bias;
    c. The nature of the contempt of court offence;
    d. The elements of the contempt of court offence in respect of commentary on pending judicial proceedings;
    e. The lack of legal personality of the Second Appellant;
    f. Errors made by the High Court, including impermissibly taking judicial notice of certain facts and according incorrect weight to various pieces of evidence; and
    g. The reasons why the sentences imposed on the Appellants induces a sense of shock.

JUDICIAL HOSTILITY AND PARTIALITY IN FAVOUR OF THE PROSECUTION

8. Throughout the trial in the High Court the presiding judge demonstrated hostility toward the Appellants, and partiality in favour of the prosecution.

9. The South African Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1] discussed the importance of an impartial judiciary in any legal system.

> "*Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.*"[2]

10. The Constitutional Court set out the test to determine whether a Court has acted partially.

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel*."[3]

11. The Court confirmed that the "*reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.*"[4]

12. In the present case the conviction was so out of kilter with the evidence adduced by the prosecution that the High Court's conviction is explicable only on the ground of bias. The elements of the crime of contempt of court were not proven, and the judicial decision was based on flawed evidence and reasoning. These aspects will be examined in more detail later in these submissions.

13. The Swazi Constitution protects the right of all persons to a fair and impartial hearing.

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[1] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU).
[2] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU), at para 35.
[3] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU), at para 48.
[4] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU), at para 48.

a. Section 21(1) states that "*In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and* ***impartial*** *court or adjudicating authority established by law*."
b. Section 21(10) states that "*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent* ***and impartial;*** *and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*"
a. Section 62(2) states that "*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*"
b. Section 138 states that "*Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution*."

14. In addition, the High Court judge demonstrated hostility towards the Appellants throughout the trial:

a. The Judge ordered the Third Appellant's wife out of the court after accusing her of sleeping.[5] Furthermore, the Judge's conduct prevented people from coming to court.[6]

b. The Judge also refused to address the Appellants' arguments that the matter was *lis pendens*. Despite the Appellants issuing a plea of *lis pendens* (in addition to their plea of not guilty) when the charges were put to them, the Court ordered that the matter proceed.[7]

c. The Appellants had sought the Judge's recusal from the criminal trial on the grounds that the judge was personally involved in the matter. The Judge refused the recusal application, and did not provide reasons for that decision. When counsel for the

[5] See Court record page 206.
[6] See Court record page 785.
[7] See Court record page 138.

Appellants requested that he provide the reasons (partly to allow the Appellants to note an appeal) the Judge refused to engage with counsel.[8] He maintained that as there had been no notice of appeal filed against his refusal to recusal himself he would continue with the criminal trial, and did not acknowledge the Appellants' argument that they had been unable to file such a notice of appeal because the Judge had not provided reasons for his decision.

CONTEMPT OF COURT OFFENCE

15. Contempt of court is a common law criminal offence, and manifests itself in a variety of ways. The offence criminalises conduct such as disrupting a court proceeding, disobeying a court order, interfering with witnesses, anticipating the finding of a court in pending proceedings and scandalising the court. The list of prohibited conduct is not exhaustive.[9] The wide variety of different offences has resulted in contempt of court being referred to as "*the Proteus of the legal world*".[10]

16. However, there are some common elements to all categories of the contempt of court offences.

17. The South African criminal law author, CR Snyman, sets out the basic elements of the offence:
    (a) a violation of the dignity of the court OR publication of information concerning a pending proceeding;
    (b) the administration of justice by the courts;
    (c) unlawfulness; and
    (d) intention.[11]

18. However, as there are various different categories, it is important to note that each different form of contempt of court may have a different set of requirements. Snyman provides the

[8] See Court record page 132.
[9] See Milton *South African Criminal Law and Procedure* Vol II (3rd ed) at 171-189.
[10] S v Mamabolo (e-tv and others intervening) 2001 (3) SA 409 (CC) at para 13.
[11] Snyman, CR *Criminal Law* (4th ed), Butterworths, Pietermaritzburg (2002), page 323.

example of the additional requirement that there must be a pending proceeding in cases involving commentary on pending proceedings.[12]

19. That different forms of contempt fall to be treated differently was underscored by Hayne J in *In re Colina and Others; ex parte Tormey*:[13]

> "*What must be proved before a court punishes for contempt will vary from case to case. In particular, what must be shown about the alleged contemnor's intention can vary greatly. Although it may be that all forms of contempt are rooted in the need to protect the due administration of justice, some forms of contempt (like wilful disobedience of an order) are concerned more with the administration of justice in a particular case than other forms of contempts (like scandalising the court) which may be seen as more concerned with the general administration of justice. .... [t]he kinds of conduct constituting contempt are many and varied and ... the elements to be established to prove an alleged contempt differ according to the nature of the allegation.*"[14]

20. There are two broad categories: contempt in court (*in facie curiae*) and contempt out of court (*ex facie curiae*). This case relates to the second broad category and Snyman provides a useful diagram in his textbook which clearly shows the distinct forms of contempt of court *ex facie curiae*. On the one side, under the subheading, "referring to a pending case", Snyman puts "commentary on pending case", "interference with witnesses or court", and "failing to appear in court." On the other side, under the subheading "not referring to a pending case", Snyman puts "scandalising the court", "failure to comply with order of court", "obstructing court officials", and "simulating court processes".

21. In the present matter, the Appellants were charged with two counts of contempt of court.

> *"Accused 1, 2 and 3 are guilty of the crime of CONTEMPT OF COURT in that upon or about the month of February 2014 and at or near Mbabane area in the Hhohho Region, the said accused each or all of them acting jointly in furtherance of a common purpose, did write and publish an article entitled "Speaking my mind" about the case which was*

[12] Snyman, CR *Criminal Law* (4th ed), Butterworths, Pietermaritzburg (2002), page 323.
[13] *In re Colina and Others; ex parte Tormey* (1999) 166 ALR 545 (HCA).
[14] *In re Colina and Others; ex parte Tormey* (1999) 166 ALR 545 (HCA) at 579 para 110.

first dealt with before the Chief Justice His Lordship Justice Ramodibedi of THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014, a criminal matter currently pending before the High Court of Swaziland and therefore sub judice, which article's passages are quoted:-

(a) 'Like Caiaphus, Ntate Justice Ramodibedi seems to have chosen to use his higher station in life to bully those in a weaker position as a means to consolidate his power. Like Caiaphus, Ntate Justice Ramodibedi seems to be in a path to create his legacy by pushing the small man so that he can sleep easy at night well knowing that he has sent a message to all who dare cross him that they will be put in their right place. Let us not forget that Caiaphus was not only the high priest of Judea. He was the chief justice of all Jewish law and had only the immense power to pass judgment on anyone among his people who transgressed the law. Ditto Ntate Justice Ramodibedi in Swaziland.'

(b) 'When this lowly public servant from Bulunga appeared before him on Monday after a warrant for his arrest had been issued, Gwebu was denied the right to legal representation because, Ntate Justice Ramodibedi is reported to have said, the lawyer was not there when the car was impounded at the weekend.'

(c) 'Like Caiaphus, our Chief Justice "massaged" the law to suit his own agenda.'

(d) 'What is incredible about the similarities between Caiaphus and Ntate Justice Ramodibedi is that both men had willing servants to help them break the law.'

and did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of CONTEMPT OF COURT.

COUNT TWO

Accused 1, 2, 3 and 4 are guilty of the crime of CONTEMPT OF COURT in that upon or about the month of March 2014 and at or near Mbabane area in the Hhohho Region, the said accused each or all of them acting jointly and in furtherance of a common purpose, did write and publish an article entitled "Where the law has no place" about the case which was first dealt with before the Chief Justice His Lordship Justice Ramodibedi of THE KING VERSUS BHANTSHANA VINCENT GWEBU HIGH COURT CASE NO. 25/2014, a criminal matter currently pending before the High Court of Swaziland and therefore sub judice, which article's passages are quoted:-

(a) 'The arrest of Bhantshana Gwebu early in the year is a demonstration of how corrupt the power system has become in this country.'

(b) 'We should be deeply concerned about such conduct displayed by the head of the judiciary in the country. Such conduct deprives the court of its moral authority; it is a demonstration of moral bankruptcy. A judiciary that is morally bankrupt cannot dispense justice without fear or favour as the oath of the office dictates.'

(c) 'Many will say that what we saw is nothing but a travesty of justice in its highest form.'

(d) 'In more ways than one, this was a repeat of the Justice Thomas Masuku kangaroo process where the Chief Justice was prosecutor, witness and judge in his own cause.'

(e) 'It would appear as some suggest, that Gwebu had to be "dealt with" for sins he committed in the past, confiscating cars belonging to the powerful, including the Chief Justice himself. It is such perceptions that make people lose faith in institutions of power, when it appears that such institutions are used to settle personal scores at the expense of justice and fairness.'

and did thereby unlawfully and intentionally violate the dignity, repute or authority of the said Court before which the matter is pending, and thereby commit the crime of CONTEMPT OF COURT."

22. However, despite the charge being in connection with a pending proceeding, that of the contempt of court case against Bhantshana Gwebu, the indictment and the judgment on conviction uses language suggestive of contempt of court in the form of scandalising the court.

"*It is a clear interference with that case in an attempt that denigrates the dignity of the courts which founds the offence of contempt of court.*"[15]

23. In fact, the Judge in the High Court used the word "scandalized".

"[t]*he Accused persons scandalized, insulted and brought to disrepute the dignity and authority of the Chief Justice in the execution of his official duties in connection with Bhantshana Gwebu's case which is still* sub judice."[16]

24. This confusion led to the Second Appellant seeking clarity from the court on the nature of the offence he was charged with.

"*My Lord I have a slight problem. I had indicated this problem to my lawyer and he had tried to explain it to you. But I really seek guidance from the court. Like I said earlier on that I was getting confused whether we were charged* in facie *or* ex facie. *The other problem I have is, are we being charged with scandalising the court or contempt on the* sub judice *nature of the Bhantshana matter? Because from what I've heard they seem to interchange depending on who's answering questions. I seek clarity for purposes of what exactly am I defending?*"[17]

[15] High Court Judgment at para 42.
[16] High Court Judgment at para 46.
[17] Court record page 807.

25. The Judge in the High Court did not provide the clarity the Second Appellant was seeking, as he did not explain whether the charge the Appellants faced was in respect of pending proceedings or scandalising the court. The judge repeatedly stated that the Third Appellant was facing the charge that had initially been put to him – without explaining exactly what that charge was.

> "*The charge was put to you Mr Makhubu*."[18]

> "*The very same one you pleaded on Mr Makhubu. It's the one you pleaded on. That is the charge before court as we speak.*"[19]

26. In his judgment, the High Court judge addressed the Appellants' contention that they should have been charged with scandalising the court rather than contempt of court in respect of a pending matter. The Judge indicated that the facts in the present case differed from a previous case involving the Second to Fourth Appellants, *Swaziland Independent Publishers and another v R,*[20] because in the present matter "*the whole attack on the Chief Justice and the Judiciary is predicated on the Bhantshana Gwebu case which is* sub judice."[21]

27. Based on this finding, these submissions proceed on the assumption that the charge the Appellants were faced with was one of commenting on a pending judicial proceeding. We submit that, by focusing on the potential of denigrating the judiciary's dignity rather than the risk of prejudicing the case against Gwebu, the Court applied the wrong standard in ascertaining whether the Crown had proved the case beyond a reasonable doubt.

28. The distinction between the two categories of contempt of court is therefore important for the following reasons:

[18] Court record page 809.
[19] Court record page 810.
[20] *Swaziland Independent Publishers and another v R* [2014] SZSC 25.
[21] High Court Judgment at para 58.

a. There appears to have been a conflation of the two different forms of contempt, which resulted in confusion over what case the defence had to answer as well as over what aspects had to be proved in order to found a conviction;
b. Despite the charge being in relation to a pending case, the High Court did not undertake an examination of how the commentary on that pending case could influence that case, and focused rather on whether that commentary could prejudice the dignity of the court and the judiciary (which is a requirement of the scandalising the court offence); and
c. The High Court placed reliance on the South African case of *S v Mamabolo* which relates to scandalising the court, even though the High Court found the Appellants guilty of commentary related to a pending proceeding.

Contempt of Court: Commentary on Pending Proceedings

29. Snyman has highlighted that the contempt of court offence cannot completely criminalise all forms of reporting on court proceedings.

> "*The courts emphasise, however, that every citizen and every news medium such as a newspaper are at liberty to discuss the proceedings in a court, or the general administration of justice by the court, freely and openly … The criticism or debate must, however, be conducted in a fair and moderate manner, and the right to free discussion must not be abused.*"[22]

30. It is because of this need for free discussion about court proceedings – an exercise of the right to freedom of expression – that courts around the world have sought to interpret the offence in such a way so as to protect the administration of justice in those ongoing proceedings while still not unjustifiably limiting the right to freedom of expression. The way in which they have done this is to examine the relationship between the statement about the pending proceedings and those proceedings themselves, and assess the potential of prejudice to the judicial proceeding.

[22] Snyman, CR *Criminal Law* (4th ed), Butterworths, Pietermaritzburg (2002), page 332.

31. It is important to note that in the jurisdictions surveyed in these submissions, the potential of prejudice resulting from the alleged contemptuous statement is prejudice to the trial itself, and not prejudice to the judiciary in more general terms. This is directly at odds with the approach of the High Court in the present matter.

32. Snyman explains that the South African law will only find a statement about a pending proceeding to be contemptuous if it "*tends to prejudice the outcome of the case*."[23]

33. The South African Supreme Court of Appeal case of *Midi Television v Director of Public Prosecutions (Western Cape)* [24] provided a useful analysis of when comment will be unlawful.

> "*In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place.*"[25]

34. It is clear from the above quote that South African law requires substantial prejudice to the legal proceedings as well as a real risk of that prejudice occurring.

35. In Lesotho, the High Court has also found that contempt of court requires that a statement has a "tendency" to prejudice proceedings before court.

> "*the test is not one of actual prejudice. The true test is whether the publication 'tends to prejudice or interfere with the administration of justice in a pending proceedings'."*[26]

[23] Snyman, CR *Criminal Law* (4th ed), Butterworths, Pietermaritzburg (2002), page 328.
[24] *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA).
[25] *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA), at para 19.
[26] Attorney General v Basotho National Party [1999] JOL 5253 (LesH), 27.

36. The Zimbabwean Supreme Court has also adopted the "real risk" test; that "*it must be examined objectively to determine whether there can be said to be a real risk that it was likely to prejudice the fair trial of the action discussed.*"[27]

37. The Nigerian courts have focused more on the intention of the accused person, and required that there must have been a calculation to interfere with justice.

> "*Mere publication will not amount to a contemptuous act unless it is calculated to bring a court of a Judge of the court into contempt or to lower his authority or to interfere with the course of justice*."[28]

38. The Australian test is whether there was a "*substantial risk of serious interference with the trial*."[29]

39. The English courts require a "*real and substantial danger of prejudice to the trial of the action*."[30]

40. Therefore, throughout the world, courts have stipulated that in order to found a conviction of contempt of court offence in respect of ongoing proceedings there must be a relationship between the conduct alleged to be contemptuous and the proceedings themselves. Court have adopted various different tests in order to determine this, but they have all required some element of risk of prejudice to the proceedings.

41. In the present case the High Court did not examine any of the foreign jurisprudence on the tests adopted in determining whether a statement in relation to a pending proceeding is contemptuous, and did not assess whether the statements made by the Second Appellant (in the First Appellant's publication, published by the Third Appellant) had any risk of prejudicing the criminal proceedings against Bhantshana Gwebu. Judge Simelane found only that the

[27] *S v Hartmann and another* 1984 (3) SA 236 (ZS), 243.
[28] *Daniel v Federal Republic of Nigeria* (2014) 8 N.W.L.R 570, 608.
[29] *Hinch and Macquire Broadcasting Holdings Ltd v Attorney General for the State of Victoria* (1987) 164 CLR 15.
[30] *Attorney General v Times Newspaper Ltd* [1973] 1 All ER 815, 821.

statements made in connection with Gwebu's case had a likelihood of impacting on the public's perception of the judiciary.

> "*Their conduct has the potential of bringing the administration of justice into disrepute among right thinking members of the society. This is decried by law as contempt of court.*"[31]

42. The Court agreed with the Crown's submissions that the allegations made against the Chief Justice by the Appellants were made "*in circumstances which were caluclated to undermine the public confidence in the courts*."[32]

43. This finding is irrelevant in a case in which the Appellants were charged with contempt of court in respect of pending proceedings. The question the Court should have answered was whether the articles had the potential of prejudicing the proceedings against Bhantshana Gwebu.

44. Another significant error on the part of the High Court was its failure to examine whether the Appellants had any intention to act unlawfully. It is clear from the definitions of contempt of court given above, as well as the various quotes from foreign jurisprudence, that the offence includes intention as an element of the crime. This intention is to influence the proceedings before court.

45. There is no evidence that the Appellants had any intention of disrupting or influencing the proceedings against Gwebu, and the Court did not assess any evidence to support such a finding.

46. The intention of the Third Appellant was to share information about the case against Gwebu and to comment on the way in which the judiciary's handling of the case indicated a dangerous lack of independence and high level of incompetence. The Third Appellant's intention could

[31] High Court Judgment at para 52.
[32] High Court Judgment at para 48.

therefore only have been to contribute to a public discussion about matters that had already occurred, and not to influence the decision of any judicial officer hearing the Gwebu matter.

> "*The intention of the article was to raise a flag on what I believed was a blatantly illegal act on the part of the Chief Justice.*"[33]

47. In fact, the Third Appellant argued that when he sought to publish the articles in question there was no charge sheet in Gwebu's case,[34] and so as there was no formal case against Gwebu, the Third Appellant could not have intended to interfere with the proceedings.

48. The Third Appellant maintained that he had not acted unlawfully as he maintained that the articles constituted "*fair comment on a matter of huge public interest at the time*."[35]

49. Another example of how the High Court conflated the two forms of contempt was in its reliance on the South African case of *S v Mamabolo*.[36]

> "*The fact remains that the offence of Contempt of Court which is a Common Law offence still forms part and parcel of the Laws of Swaziland. In my view it is good law as clearly recognized by the South African Constitutional Court in the case of S v Mamabolo, in order to protect the dignity and authority of the Courts in upholding the rule of law.*"[37]

50. In *S v Mamabolo*, the majority of the South African Constitutional Court held that the two primary issues were: (1) whether the crime of "scandalizing the court" constituted an unjustifiable limitation of the right to freedom of expression; and (2) whether the summary procedure used in these matter constituted an unjustifiable limitation of an accused person's fair trial rights.

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[33] Court record page 869.
[34] Court record page 875.
[35] Court record page 810.
[36] *S v Mamabolo* 2001 (3) SA 409 (CC).
[37] High Court Judgment at para 54.

51. In its reasoning, the Court emphasised the public nature of the injury involved in the crime of scandalising the court.[38] In the light of the protection of freedom of speech, the Court advanced a narrow interpretation of the crime's application. It reasoned that the very reason for court proceedings being open to the public is to inform public knowledge, which further serves to enable people to discuss, endorse, criticise, applaud or castigate the conduct of the courts.[39] It held that free and frank debate promotes instead of restricts the impartiality, accessibility and effectiveness of the judiciary,[40] acts as a democratic check on the judiciary,[41] and promotes peace and stability.[42] The Court held that the scope for conviction of the crime of scandalising the Court must therefore be narrow if freedom of expression is to be protected.[43] What is expected, the Court held, is honesty.[44] The test to determine whether conduct scandalizes the court is whether, viewed contextually, the conduct "really was likely to damage the administration of justice".[45]

52. *S v Mamabolo* relates to scandalising the court, and not the distinct offence of commentary on pending proceedings, and so, given that the High Court held that the Appellants had not been charged with scandalising the court, this case should not have been relevant to his determination.

53. In fact, although not in a court judgment, the South African Deputy Chief Justice, Dikgang Moseneke commented on the near-extinction of the offence of contempt in respect of *sub judice* matters. He explained that this was partly because South Africa does not have a jury system.

> "*But how, you might ask, can a statement outside of court affect the outcome of a case in South Africa, where we have no jury system? The answer must surely be that it rarely could,*

[38] At paras 25 and 29.
[39] At para 29.
[40] At para 29.
[41] At para 30.
[42] At para 31.
[43] At para 45
[44] At para 33.
[45] At para 50.

and that the sub judice rule, and its relevance in South Africa, is, at the very least, on the verge of extinction."[46]

54. Judge Moseneke went on to explain that this extinction was based on the need for open justice.

"*The principle of open justice is, after all, a core part of the notion of participatory democracy, particularly one whose Constitution begins with the very words 'democratic and open society'. It is not a principle that should be defined in haste. The public is entitled to have access to courts, and to obtain information about them*."[47]

55. The High Court also dismissed the applicability of the American case, *Bridges v California*, to the present matter.

"*Reference was made by the defence to the famous case of* ***Bridges Vs California 314 U.S. 252 (1941).*** *May I hasten to state that that case is distinguishable from the instant matter in that Contempt of Court is no longer an offence in the United States of America but it is an offence in Swaziland. Both countries have different laws on this issue. The United States of America cannot be used as a bench mark in this circumstance. That country's case law as cited is clearly inapplicable in casu. I reject it.*"[48]

56. The Third Appellant made reference to this case as a way to explain why he believed that his commentary on the Gwebu matter was permissible.[49]

LEGAL PERSONALITY

57. The Second Appellant was charged with the crime of contempt as a legal person. Throughout the criminal trial in the High Court the First Appellant and counsel for the Second to Fourth

[46] http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf.
[47] http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf.
[48] High Court Judgment at para 53.
[49] Court record, page 823.

Appellants had argued that the Second Appellant does not have legal personality. The Appellants maintain that only the Fourth Appellant, and not the Second Appellant, has legal personality.

58. In the High Court, the Prosecution called a witness, Msebe Malinga (PW1) who is employed at the Ministry of Commerce, Industry and Trade. PW1 confirmed that the Fourth Appellant is a registered and incorporated private company.[50] There were no questions put to this witness from the prosecution in respect of the commercial status of the Second Appellant.

59. Legal personality – that is the capacity to, *inter* alia, incur criminal liability – is conferred on natural persons as well as juristic persons. The definition of a juristic person is "*a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties.*"[51]

60. In order to incur criminal liability, and therefore to face criminal charges, an entity must constitute a juristic person.

61. In Swaziland, the Interpretation Act, 21 of 1970 defines a "person" in section 2(C), and includes "*any body of persons corporate or unincorporated*".

62. In the Third Appellant's testimony he explained that the Second Appellant is a "*by product*"[52] of the Fourth Appellant.

> "*Swaziland Independent Publishers is the actual company and if the court will recall when the Registrar of companies was here he actually articulated the purpose of the company which is to publish various products … One of its by products is the Nation Magazine. So the juristic person would be Swaziland Independent Publishers.*"[53]

[50] Court Record, 148.
[51] Merriam-Webster Online Dictionary.
[52] Court record page 799.
[53] Court record page 799.

63. This evidence from the Third Appellant was never challenged in the High Court and so it should stand.

64. In addition, in the previous case involving charges against the Third and Fourth Appellants, *R v Swaziland Independent Publishers and another*, [54]the Second Appellant was not charged with the offences. The facts in that case were similar to those in the present case as the contempt of court charges arose out of articles published in the Second Appellant. The fact that the charges were brought only against the Third and Fourth Appellant in that previous case illustrates that it was incorrect to charge the Second Appellant with contempt of court in the present matter.

65. The effect of charging both the Second and Fourth Appellant is that, given that the Second Appellant is merely a subsidiary of the Fourth Appellant, the charges were in effect brought against the same juristic person twice.

JUDICIAL NOTICE

66. In the present matter, the judge presiding over the criminal trial in the High Court was previously the Registrar of the High Court. In his capacity as Registrar the judge was personally involved in the Gwebu matter and stated in his judgment that he had been present when Gwebu was remanded.[55] The Judge then stated that he took "*judicial notice that the contention by the Accused that Bhantshana was denied his right to legal representation is far-fetched,*"[56] and that he had "*a right to take judicial notice of what transpired in that court.*"[57]

67. The High Court judge dismissed the evidence of the Appellants that Gwebu was not given access to his legal representative – an aspect that they had criticised in the impugned articles – on the basis of this "judicial notice".

[54] *R v Swaziland Independent Publishers and another* (53/2010) [2013] SZHC 88.
[55] High Court Judgment at para 23.
[56] High Court Judgment at para 23.
[57] High Court Judgment at para 23.

68. The Appellants submit that this application of judicial notice was a distortion of the doctrine, and that he was not permitted to make take judicial notice of this fact as it was within his peculiar personal knowledge.

69. The doctrine of judicial notice was set out in the seminal case of *R v Tager*[58] in South Africa.

> "*The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted, e.g. Wigmore (secs. 2565-2570); Phipson (7th ed., pp. 19 et seq.); Taylor (12th ed., secs. 4-21); Best (10th ed., paras. 253 and 254); still today rightly confined within very narrow limits. Thus Phipson says that Judges and juries can only take notice of matters "so notoriously or clearly established that evidence of their existence is unnecessary. Although, however, Judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess . . . they may not . . .act on their own private knowledge or belief regarding the facts of the particular case*."[59]

70. Chief Justice Watermeyer referred to the author Wigmore in his judgment in finding that judges are entitled to take judicial notice of facts that are commonly known as a result of notoriety, and not of facts that are known to the judge only through personal observation.

> "*'It is therefore plainly accepted that the Judge is not to use on the Bench, under the guise of judicial knowledge, that which he knows as an individual observer. The former is in truth 'known' to him merely in the peculiar sense that it is known and notorious to all men, and the dilemma is only the result of using the term knowledge in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain.' I cannot help thinking that any knowledge used by the learned Judges in this case was knowledge which they possessed as the result of personal observation and not of notoriety*."[60]

[58] *R v Tager* 1944 AD 339.
[59] *R v Tager* 1944 AD 339, 343.
[60] *R v Tager* 1944 AD 339, 343-344.

71. In that case, the Appellate Division ruled that the Court *a quo* was incorrect in taking judicial notice of the composition of a milkshake.

72. The facts that the High Court took judicial notice of in the present matter are clearly within the personal knowledge of the judge, as they relate directly to an event that he personally witnessed. Consequently, they cannot be considered to be known by him as a result of their notoriety and so he was not entitled to take judicial notice of them.

EVIDENCE

73. The Appellants submit that the High Court's conviction and sentence was based on insufficient evidence, and that the totality of evidence before the Court does not show that the Crown proved its case beyond all reasonable doubt.

74. It is trite law that the prosecution bears the onus of proving a case beyond a reasonable doubt. This onus applies to proof of all elements of the offence.

> "*In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from the beginning to the end on the prosecution.*"[61]

75. In the South African Appellate Division case *R v Mlambo* Malan JA discussed the standard of the onus of "beyond reasonable doubt".

> "*In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no*

[61] *Mwewa Murono v The People*, SCZ Judgment No. 23 of 2004.

reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."[62]

76. The corollary to this is that an accused is entitled to an acquittal if his or her version is "reasonably possible true."

"*It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.*"[63]

77. There are a number of errors made by the High Court that contributed to this overall lack of evidentiary backing of the conviction:

a. The High Court erred in rejecting the Appellants' sworn evidence on his mistaken view that the articles had alleged that the Chief Justice had locked out Bhantshana Gwebu's (DW1) when he appeared in the Chief Justice's chambers;
b. The High Court erred in ruling that Quinton Dlamini's (DW2) evidence was hearsay, when it had, in fact, been corroborated by Bhantshana Gwebu (DW1);
c. The High Court placed too much reliance on whether or not there was a connection between Bhantshana Gwebu (DW1) and the trade union, NAPSAWU; a matter which is irrelevant to the charges;
d. The High Court erred in ignoring the Appellants' sworn version in as much at it could reasonably possibly be true;

[62] *R v Mlambo* 1957 (4) 727 (A) at 738A.
[63] S *v V* 2000 (1) SACR 453 (SCA) at para 3(i).

e. The High Court convicted the Appellants despite there being no evidence that the Appellants had intended to act unlawfully;
f. The High Court convicted the Appellants despite there being no evidence relating to the articles' potential of influencing the pending criminal trial against Bhantshana Gwebu.

78. Much of the discussion in respect of the evidence centred around the evidence that Bhantshana Gwebu's lawyer had not been present when Gwebu first appeared before the Chief Justice after his arrest. This was a central issue because it was the event that was most severely criticised in the articles that were alleged to be contemptuous.

79. The evidence led by Bhantshana Gwebu was that his lawyer was not present in the Chief Justice's chambers because he had first gone to the Magistrates Court, and then was not with Gwebu when he was called into chambers. Gwebu did not use the words "*locked out*" in his testimony.

80. The High Court rejected Gwebu's evidence that his lawyer was "*locked out*" of the Chief Justice's chambers on the grounds that Gwebu's lawyer, Macawe Sithole, had contradicted this.[64]

81. Sithole testified that he had arrived at the High Court after being informed that Gwebu had been taken to the High Court rather than the Magistrate's Court, and was waiting at reception to be called to the Chief Justice's chambers.[65] In cross-examination he did state that "*No one locked me out*", but given that there is no evidence on the record that Gwebu or Quinton Dlamini said that Sithole had been locked out of the Chief Justice's chambers this is not important.

[64] High Court judgment at para 21.
[65] Court record, page 675.

82. The High Court erred in rejecting Gwebu's evidence on the basis that it had been contradicted by Sithole's testimony. The substance of their evidence was the same: Sithole was not present when Gwebu was first remanded into custody by the Chief Justice in chambers.

83. The difference between Gwebu and Sithole's testimony is mere semantics, and should not have been dismissed. Gwebu and Dlamini's testimony corroborated each other in all material respects and the Court erred in rejecting the evidence.

84. The evidence relating to the question of whether Gwebu's lawyer was present at his first appearance before the Chief Justice was also discussed in relation to another witness, Quinton Dlamini.

85. Dlamini was present when Bhantshana Gwebu was first brought to court. Dlamini had enlisted the support of Gwebu's lawyer in his capacity as chairperson of the trade union NAPSAWU, of which Gwebu is also a member.

86. During Dlamini's cross-examination the prosecutor questioned him at length about Gwebu's membership of NAPSAWU[66] and the benefits that accrue to members of the union.[67] Dlamini said that NAPSAWU's constitution set out the membership benefits – which included the provision of legal counsel – and, on request, advised the court that he was able to provide a copy of that constitution.

87. In the High Court judgment, the Judge held that Dlamini had been unable to provide the constitution.

88. It appears that the High Court made an adverse finding against Dlamini as a result of his failure to produce the NAPSAWU constitution. However, the Court did not address the Third Appellant's evidence that the constitution that was provided by Dlamini, that of SNACS, was, in fact, the NAPSAWU constitution.

[66] Court record page 632-633.
[67] Court record page 633-634.

"*DC2: Earlier on the court has been told about a union called NAPSAWU and a constitution of that union. Can you relate to the court if you know the relationship between SNACS and NAPSAWU?*

DW3 [Third Appellant]: It's the same think my Lord the words are used interchangeably my Lord."[68]

89. Additionally, the evidence relating to Bhantshana Gwebu's membership of NAPSAWU and his entitlement to legal counsel provided by the union is irrelevant to the present matter. There was no need to ascertain the relationship between Gwebu and his union in order to determine whether the Appellants were guilty of contempt of court. Although the articles that were alleged to be contemptuous discussed the fact that Gwebu's lawyer was not present at his first appearance at court, the nature of the relationship between Gwebu and his lawyer is not relevant to the issue at hand.

90. The High Court erred to the extent that it took into consideration the relationship between Gwebu, Dlamini, and the union.

91. The High Court also erred in respect of the substantive aspects of Dlamini testimony.

92. Dlamini testified that Gwebu was called into an office by the Registrar and was accompanied by the police officer and the prosecutor.[69] It transpired that Gwebu later informed Dlamini that he had been remanded into custody for seven days. Dlamini's evidence was that it was only after this meeting that Gwebu met with his lawyer.[70]

93. Dlamini's evidence was that Gwebu had been remanded into custody by the Chief Justice without the presence of his lawyer, and that the Registrar had not asked Gwebu whether he was legally represented before leading him to meet the Chief Justice.

[68] Court record page 722.
[69] Court record page 626.
[70] Court record page 627.

"*My lord what I can add is that as a person who is familiar with the court proceedings I noted that Bhantshana was not taken to the magistrates court as we were told and that he did not attend, the matter was not proceeding at the normal court rooms, he went upstairs, he was not given a right to legal representative before he went into the Chief Justice's chambers. He also told me that he mentioned the Chief Jutsice that he has a lawyer, another thing is that his lawyer is around the court premises*."[71]

94. In rejecting Dlamini's evidence, the High Court dismissed Dlamini's account of what transpired in the Chief Justice's chambers as hearsay.

"*Futhermore, I consider DW2 [Dlamini]'s evidence as to what transpired in the Chief Justice's Chambers hearsay evidence. He was merely telling the Court about what he heard from Bhantshana to have been what transpired in the Chief Justice's Chambers, otherwise, he admitted that he was not in Court when the matter was dealt with*."[72]

95. However, the substance of Dlamini's evidence was corroborated by Gwebu – who was present in the Chief Justice's chambers.

"*We did not go to court but we went to an office and it was specifically said that I should go in myself, a police officer and the prosecutor … This was where I was informed that I was facing charges of contempt of court and the first thing that I said was that I had a lawyer. And by then it was the Chief Justice himself and there was someone who was interpreting and he was the Registrar at that time*."[73]

96. Gwebu confirmed that his lawyer was not present when he first appeared before the Chief Justice[74].

[71] Court record page 629.
[72] High Court Judgment at para 26.
[73] Court record page 591.
[74] Court record page 592.

97. The High Court framed Gwebu's evidence as being that "*his lawyer was locked out of the Chief Justice's Chambers*,"[75] but, as mentioned above, these words were not used by either Gwebu or Dlamini in their testimony.

98. As we have discussed elsewhere in these submissions, the Third Appellant did not intend to attack any person by writing his article,[76] and that the article was merely a commentary on the arrest of Bhantshana Gwebu and was not intended as a discussion over the guilt or innocence of Gwebu.

99. There was no evidence submitted that the Third Appellant did have such an intention, and so his testimony was unchallenged. The Court therefore erred in convicting the Appellants when there was no evidence of intention, one of the elements of the offence.

100. There was also no evidence submitted in respect of the prejudice the articles could cause to the ongoing proceedings against Gwebu. We have discussed this aspect elsewhere in the submissions. The Court therefore erred in convicting the Appellants when there was no evidence of the link between the articles and the proceedings they referred to.

SENTENCE

101. The Second and Fourth Appellants were sentenced to a fine of E50 000 on each count (which results in a total of E100 000 for each Appellant, and therefore E200 000 as a combined total).

102. The Third Appellant was sentenced to two years imprisonment without the option of a fine.

103. It is trite law that a court of appeal is entitled to vary the sentence imposed by a trial court if that court was misdirected or if the sentence is grossly disproportionate.

[75] High Court Judgment at para 20.
[76] Court record page 820.

"*It is trite that an appeal court will only interfere with the sentence imposed by the trial court where such sentence is vitiated by some irregularity or misdirection or, having regard to the circumstances, if it is disturbingly inappropriate*."[77]

"*This Court will not readily differ from the Court a quo in its assessment either of the factors to be had regard to or as to the value to be attached to them. Where, however, the dictates of justice are such as clearly to make it appear to this Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh*."[78]

104. The Appellants submit that in the circumstances the sentences imposed by the High Court in the present matter were "*disturbingly inappropriate*" and that the "*dictates of justice*" require that the Court should have assessed the various factors provided by the Appellants in a different manner.

105. The Third Appellant submitted a number of mitigating factors. These included that he had financial responsibilities towards his family, as well as towards employees of the First Appellant.[79]

106. In argument for mitigation of sentence, counsel for the First Appellant made reference to *Swaziland Independent Publishers and another v R*, and urged the High Court to use that judgment as a guide in sentencing.[80]

107. This Court, in the previous case against the Third and Fourth Appellants[81] took those same mitigating factors into account when varying the sentence imposed by the trial court. These factors included that the corporate entity was a small business, with a minimal profit, and which

[77] *Mandla v S* [2014] JOL 31350 (ECG), at para 5.
[78] *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A–C.
[79] Court record page 1388-9.
[80] Court record page 1390.
[81] *Swaziland Independent Publishers and another v R* [2014] SZSC 25.

employed six people; that the fines imposed by the trial court could result in the closure of the company; that the editor of the magazine (the Third Appellant in this matter) was a family man with commitments and that imprisonment would have an adverse impact on him and his business; and that the articles were written with a view to contributing to constitutional advancement in the country.[82]

108. In the present case, the Appellants submit that the sentences that were imposed were so grossly disproportionate to the offence so as to induce a sense of shock.

109. In the 2014 appeal brought by the Third and Fourth Appellants in this case to a conviction for scandalising the court in 2013, the Court varied the sentences, of E100 000 on both counts, to a fine of E30 000 for the publisher (the Fourth Appellant in this matter), and a three month suspended jail sentence for the editor (the Third Appellant in this matter).

110. Although the 2014 appeal dealt with scandalising the court, and this matter deals with contempt of court in respect of a pending proceeding, both cases deal with offences under the broad category of contempt of court, and both emanated from the publication of magazine articles. The vast differences in the sentences handed down by the court in the 2014 appeal, and the sentences imposed by the High Court in the present matter cannot but induce a sense of shock.

111. The Appellants further submit that these harsh sentences have the effect of discouraging critical and vibrant journalism.

112. The Second Appellant is one of the few independent publications in Swaziland. Although it has a relatively small readership, it discusses topics that are controversial and which are often avoided by the mainstream press. As such it plays an important role in Swaziland's democracy.

113. Many courts around the world have recognised the importance of a vibrant independent media in a democracy, and have explained the role such a media plays in enhancing democracy.

[82] *Swaziland Independent Publishers and another v R* [2014] SZSC 25 at para 84.

114. In South Africa, Judge Cameron (then in the Johannesburg High Court) emphasized the links between freedom to criticize those in power and the success of a constitutional democracy.

> *"The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens."*[83]

115. In India, the Supreme Court in *Ghandi v Union of India*,[84] provided a concise summary of the inter-relationship between freedom of expression and democracy.

> "*Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."*[85]

116. Judicial officers are public officials, and public criticism of judicial conduct is a way in which information about their performance can be made publically available. This creates the opportunity to hold those in power to account.

117. The Appellants argued in the High Court that when there is demonstrable proof that the judiciary is acting unlawfully or that its independence is compromised there is little justification for the limitation on free expression that the contempt of court offence constitutes. Counsel for the Appellants made this point in his closing statement.

[83] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 609.
[84] *Ghandi v Union of India* [1978] 2 SCR 621.
[85] *Ghandi v Union of India* [1978] 2 SCR 621.

"*My Lord in my submission, in order for one to demonstrate that in fact the limitation of the enjoyment of the right of freedom of expression is justified one has to show first of all that our judiciary is independent.*"[86]

118. Counsel for the Appellants went on to quote the former South African Chief Justice Ismail Mohammed.

"*The real and ultimate power of the judiciary must lie in its independence and integrity and the esteem which this generates within the minds and hearts of the people affected by its judgments*."[87]

119. The Appellants' argument was that accepted facts, within the common knowledge of Swazis, indicated that the judiciary was not independent. These included the appointment of judges to the bench and non-compliance with judgments issued in the Macetjeni and kaMkhweli cases.[88]

120. The argument continued that the right to freedom of expression could be justifiably limited in order to protect the authority and independence of the courts, but that there is "*no evidence that in fact the courts of this country do have authority and independence*."[89]

121. This Court, in a case involving the Third and Fourth Appellants in 2014, recognised the role the Second Appellant had to play in this country.

"*All lovers of freedom and democracy would want to see [The Nation] continue to comment vigorously upon matters of public interest and concern. But it must do so on the right side of the laws relating to scandalizing the court. The penalties which this court is obliged to award are designed to encourage all members of the press to enjoy their freedoms within*

[86] Court record page 1019.
[87] Court Record page 1020.
[88] Court record page 1033.
[89] Court record page 1035.

the law. Hopefully it has struck the correct balance: consistent with what is fair and just to the appellants, and to the public in whose name these prosecutions were brought."[90]

122. In the present case it is simply not the case that an appropriate balance has been met: the harm done to the Appellants themselves as well as the free press in Swaziland far outweighs the benefit of these sentences to the administration of justice.

123. The High Court in the present matter also stated that the Second, Third, and Fourth Appellants were repeat offenders, and took this into account when imposing a sentence.

124. The Second Appellant simply cannot be a repeat offender as it has never before been charged with any offence. The Third and Fourth Appellants did face similar charges in a 2013 criminal trial. However, the judge did not take into account that the offences listed in the present criminal proceedings were committed before the appeal had been heard in the previous case.

125. In addition, the Appellants submit that the harsh sentences were motivated by anger and emotion.

126. Despite his statement that he had not approached the question in "*a spirit of anger*",[91] the High Court judgment on sentencing the judge used disturbing phrases which indicate that he did not approach the question of sentencing objectively.

"*The Courts hence have to use the very ammunition of Contempt of Court in self-protection from journalists like the Accused persons. There should be accurate, factual, unbiased and responsible reporting by journalists and not mischevious inaccurate sensationalism which the Accused embarked upon*."[92]

[90] *Swaziland Independent Publishers (Pty) Ltd & The Editor of The Nation v R* [2014] SZSC 25 (30 May 2014) at para 87.
[91] High Court Judgment on sentencing at para 4.
[92] High Court Judgment on sentencing at para 15.

127. In respect of the Third Appellant, the Judge appeared to use the sentence as a way to punish the Third Appellant for an outburst during the trial that the judge deemed insulting.

> "*Accused 2 for his part also disrespected the Court by calling the presiding Judge by name. He said in open Court, "why should my wife be punished because of Mpendulo's poor eye sight." This was captured by the Times of Swaziland and the Swazi Observer on the 26th April 2014. This was after I had expelled a certain woman who was sleeping in my Court. This woman according to Accused 2 was his wife. Indeed I expelled her because as a Judge I have a right to summarily punish anyone for any misconduct committed in my presence. Accused 2 rather than respect the Court's order charged towards the bench, walked out of the Accused dock in anger and attacked the Judge*"[93]

CONCLUSION

128. The prosecution had failed to prove the case beyond reasonable doubt, and the Appellants should therefore not have been convicted.

129. In addition, the sentences that were imposed on the Appellants were so disproportionate to the offence that they induced a sense of shock, and should therefore be set aside.

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23 June 2015

[93] High Court Judgment on sentencing at para 14.