IN THE SUPREME COURT OF TRANSKEI

(APPELLATE DIVISION) CASE NO. 264/92

In the matter between:

NOMAHLUBI SONDIYAZI	1st Appellant
NTUTHUZELO SOYIZWAPHI	2nd Appellant
MALIBONGWE DORAN TUSWA	3rd Appellant
MICHAEL ABRAHAMS	4th Appellant
HLOKOMILE DYANTYI	5th Appellant

and

CHERYL BIRCH	Respondent

JUDGMENT

GOLDIN, J.A. On the 23rd February 1992 Cheryl Christine Birch (respondent) was admitted to bail (by a Judge of the General Division, Hancke, J) in the sum of R500. An attorney acting for her took the order to Ngangelizwe Police Station where Lieutenant Sondiyazi (First Appellant) was in charge. She did not release respondent at once but said that she first required to obtain authority from the investigating officer to do so. The other appellants were also approached to release respondent but for various reasons declined to do so. It was only some hours later, at 4 p.m., that the First Appellant complied with the order. In the course of the efforts to obtain her release, an employee of respondent's attorneys, Mr Nlugisi July, sought the assistance of the Attorney General with the result that Hancke, J was informed of the situation and "he instructed us (Mr July and the Deputy Attorney General) to tell the police to release the accused and to appear before him at 10am on the 24th February 1992".

On the 24th February 1992 respondent applied on Notice of Motion "that (appellants) should show cause why they should not be convicted for

contempt of Court for failing to comply with the order of Court". At the time when the application was made, respondent had been released as aforesaid and moreover the appellants had been ordered to appear before Hancke, J concerning the alleged failure to release respondent. It is not clear why these proceedings were embarked upon in the circumstances. However the first three appellants were found guilty of contempt of court and a fine or a period of imprisonment in default of payment was imposed on each of them. The fourth and fifth appellants were found not guilty, but all five appellants were ordered to pay the costs of the application jointly and severally, the one paying, the others to be absolved. The first three appellants appealed against their convictions and sentences and all five appellants appeal against the order that mulcted them in costs.

It appears from the affidavits filed in support of the application that appellants made disrespectful remarks about the respondent, about the order for bail and about a senior police officer who attempted to intervene on behalf of respondent. There is however no basis upon which their alleged remarks and attitude, which they do not admit, can constitute contempt of court. They can be, and apparently have been, the subject of a disciplinary inquiry by the Police authorities. The question is whether the failure to release her upon request and the delay in releasing her constituted contempt of court.

Contempt of court has been defined (Hunt, South African Criminal Law and Procedure Vol 2, Second Edition at 185) as follows:

> "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it".

Mens rea is an essential element. The disobedience must be male fide. (See S v Beyers 1968 (3) SA 70 (AD); S v Fanti and Others 1991 (2) SACR 650 (CKA) at 651 F - H). The onus to establish absence of mala fides rests upon

the appellants (See Putco Ltd v T V And Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (AD) at 836 D - F).

In my view, the facts do not establish contempt of court as defined above. First Appellant believed that she had no authority to release the respondent notwithstanding the order granting bail. She took an official vehicle with members of her section and went to look for the investigating officer whom she believed to be the only person entitled to give effect to the order. She could not find him and she then telephoned General Mankahla, Head of the Criminal Investigation Department, to be told what she should do. He advised her that she had to release the respondent if there was a Court Order. When she returned to the charge office she was informed that respondent's attorneys had left with Brigadier Mlilwana who had come to facilitate the release of respondent. She states in her affidavit that "at all times (she) was keen to honour the terms of the Court order". She went to look for but could not find respondent's attorneys or Brigadier Mlilwana. Upon her return she "went to the charge office to wait for them to come back" so that she could effect respondent's release. She denied that she had been served with the order and asserts that Mr July did not serve it on her and that a copy was first seen by her when the attorneys returned at about 4 pm, when the respondent was released. It was established that she believed that she required advice and authority to release the respondent and that she in fact sought such advice and when told what to do she at one released the respondent. She furnished a reasonable explanation for her conduct which supports her contention that she did not act male fide but took all steps which she considered necessary to enable her to comply with the Order of Court.

In Reed v Reed 1911 EDL 157 Sheil, J said at 159 "the question is whether there has been wilful contempt of court in the shape of a wilful failure to comply with the order of Court ... nothing of that kind is disclosed by this Affidavit". Failure to realise that his conduct is unlawful negatives mens

rea. There is no wilful insult if through ignorance there is a failure to comply with an Order of Court. Failure, by reason of mistake (of law) does not establish the presence of mens rea. (The South African Criminal Law and Procedure by Hunt (supra) at 188 and at 193).

It follows that First Appellant's appeal succeeds. I will deal with the question of costs later.

Second Appellant told respondent's attorney that "he was not going to release her unless he could get instructions from Sgt Sibaldi (the investigating policeman)". He also believed that in terms of standing orders of the Police Force, the officer who releases a detained person was required to complete necessary forms. Second Appellant took out a pen and asked Brigadier Mlilwana to complete the forms on behalf of the investigating officer who was not present but the Brigadier did not do so. He also appealed to his senior, Warrant Office M Pondomtini, "for advice" and was told "to use his own discretion". It was the first time he was in a situation involving the release of an arrested person on bail before being charged. He was first informed about the release of respondent when he reported for duty on the day in question. First Appellant had told him she could not "understand the (Court) order" and that she had phoned General Mankahla to enquire about the matter but could not find him. It appears that First Appellant, who was senior to Second Appellant, was in charge of the station and it is not clear whether Second Appellant could release respondent without her approval. He said in his statement that he was "totally against the fact that the police who were on duty that day were defying the order or did not care. The matter was receiving attention by (First Appellant)".

On all the evidence the Second Appellant discharged the onus of proving absence of mala fides on his part. It has not been shown that he intentionally refused to comply with the order in defiance or in violation of

judicial authority. He was guided or at least influenced by First Appellant who was senior to him and who was seeking information concerning the proper discharge of her duties. He also explained that he unsuccessfully sought assistance and advice from other persons senior to him. Ignorance on his part does not establish mala fides.

For these reasons his appeal should be allowed.

Third Appellant was junior to the others concerned. It is not at all clear that he actually had the power to release. Failure or refusal to release respondent does not necessarily render any policeman on duty guilty of contempt unless he had authority to comply with the Court order. Third Appellant says that "nothing was demanded of me" by Mr July. Mr July, was asked by Third Appellant whether "he had at any time refused to release the accused person", and he replied "No, not with me".

It is therefore not clear that this junior policeman was in a position to release respondent. In short whether he had the key to the door. It is not even clear whether he refused to do so. There is no basis to justify his conviction which should be set aside.

I turn to the question of costs. The Court a quo ordered all five appellants to pay costs. This order has to be set aside. Respondent has not opposed the appeal. In all the circumstances I am of the view that there should be no order as to the costs of appeal.

Accordingly

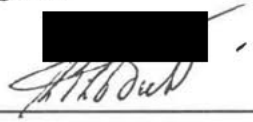
1. The appeal of each appellant is allowed and the convictions of and sentences on the first three appellants are set aside.

2. The Order of the Court a quo obliging appellants to pay respondent's costs is set aside.

3. There will be no order as to the costs of the appeal.

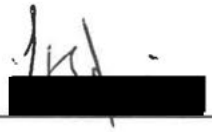
GOLDIN, J.A.

I agree.



BECK, C.J.

I agree.



DAVIES, A.J.A.

Appellants' Counsel	:	T L Skweyiya, SC with him N K Dukada
Appellants' Attorney	:	Government Attorney

No appearance for Respondent

Judgment delivered on : 22/2/94