IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CR. CASE NO.69/93**

In the matter of:

DUMSANE DLAMINI	1st Appellant
ENOCK MDLULI	2nd Appellant
and	
THE KING	Respondent

C O R A M : DUNN J.
FOR THE APPELLANTS : MR MLANGENI
FOR THE RESPONDENTS : MR SIGWANE

JUDGMENT

4th June 1993

The two appellants to whom I shall continue to refer as the accused appeared before the senior magistrate, Manzini on a charge of robbery involving a sum of E45,000.00. The accused who were unrepresented, moved an application to be released on bail before the senior magistrate. The senior magistrate fixed bail at E22,500.00 in respect of each accused with further conditions as to surrender of the accuseds' passports to the police; non-interference with potential crown witnesses and confinement of the accused to the Manzini Region pending their trial.

The accused filed a joint application to this court for "free bail or a reduction of the bail amount of E22,000.00." This application was not proceeded with but was followed by a formal Notice of Appeal in terms of Section 104 of the Criminal Procedure and Evidence Act No.67 of 1938 (the Act) against the senior magistrate's order. This Notice of Appeal was filed on behalf of the accused by Mr Mlangeni. The Notice reads -

/2 ... ...

On the 19th February 1993 the above Honourable Court made an order granting bail to each of the accused in the sum of E22,500.00.

Be pleased to take notice that the two accused hereby note an appeal to the High Court on the following ground:

1. That the amount of bail is excessive in the circumstances of the case and must be reduced.

Heads of Argument were filed with the Notice of Appeal and the arguments put forward are as follows -

1. The effect of Section 102 as read with Section 103 of the Criminal Procedure and Evidence Act is that courts still do have a discretion in deciding the amount of bail. In the present case it is the failure to exercise this discretion that made the magistrate to grant excessive bail.

2. It is injustice to require an accused person to pay bail that he obviously cannot afford, in that the whole purpose of bail is defeated.

3. The new section 102(A) introduces the concept of "value" of the goods in question. In cases involving money, the equivalent would be "amount".

The procedural effect of this is that the crown must lead at least prima facie evidence to establish the "value" or "amount" as the case may be, otherwise bail would be decided on speculative grounds.

The matter was set down for hearing in the motion court and not on an appeal day. I directed that the Notice of Appeal be served on the Senior magistrate to enable him to file his reasons in the normal way. The Senior Magistrate duly filed his reasons but for some reason the matter was not immediately returned to me for further action.

The Senior Magistrate sets out in his reasons that bail was fixed in terms of Section 102 A(1)(b) of the Act as amended by Act No.14 of 1991 which came into effect on the 20th November 1991. The amending Act introduced a subpart B(2) to Part VIII of the Act dealing with bail in the Magistrates' courts. The new subpart B(2) which is headed Bail in Respect Of Theft And Kindred Offences provides -

> 102 A(1)
>
> Notwithstanding the provisions of subparts A and B(1) of this Part the amount of bail to be given by a magistrate in respect of theft or any kindred offence shall be -
>
> (a) E500 if the value of the property in respect of which the offence is committed is E2,000; or
>
> (b) one half of the value of the property in respect of which the offence is committed if the value of the property exceeds E2,000.

Robbery falls within the definition of theft and kindred offences (Section 102 (A)(3)).

Section 103 of the Act which was headed "Excessive bail not required" was replaced with the following -

> Subject to section 102(A), the amount of bail to be taken in any case shall be in the discretion of the court or judicial officer to whom the application to be admitted to bail is made:
>
> Provided that no person shall be required to give excessive bail.

The first two points argued on behalf of the accused do not call for consideration. Magistrates are obliged, subject to the requirements of the section being satisfied, to apply the section. They have no discretion in the matter. The prohibition against excessive bail has to be read subject to section 102(A). The section, it must be pointed out, is confined to the Magistrate's courts and different considerations apply in cases where application for release on bail is made directly to the High Court or the High Court acts in terms of section 105 of the Act.

In fixing bail under section 102(A)(1) a Magistrate is obliged to take into account "the value of the property in respect of which the offence is committed" (my underlining). This the magistrate can only do upon production by the prosecution, of the relevant evidence. This means that it is incumbent upon the crown to adduce evidence of -

(i) the value of the property in question; and

(ii) the commission of the offence.

See, in this respect the judgment of Rooney J in **MARY DLAMINI v. THE KING, REVIEW ORDER NO. 126/91** where, in dealing with an almost identically worded section (18(1)) under the Theft Of Motor Vehicles Act No.16 of 1991 the learned judge stated -

> Before the section can be applied to an application for bail, it must first be established that the terms of the section are met. A charge sheet proves nothing. If the crown wishes to rely upon section 18 it must establish by evidence and beyond reasonable doubt that the motor vehicle is stolen and that its value can be determined. This involves the calling of witnesses. An accused person must be given an opportunity of challenging such evidence in the ordinary way.

I agree fully with the statement of the learned judge and endorse his statement as being equally applicable to applications for bail under section 102 (A)(1) of the Act. I should point out that following that judgment the Theft of Motor Vehicles Act 1991 was amended to make provision that "where there is a dispute as regards the value of a stolen motor vehicle the book value of the motor vehicle at the time of the theft as ascertained by the court from a motor vehicle dealer shall be taken to be the value of the motor vehicle." It will be noted, however, that nothing was done in the amending Act regarding the second requirement namely that the prosecution should establish the commission of the offence. The position in the present case is that the prosecution had to lead evidence to satisfy the two requirements.

Turning to the record kept by the senior magistrate, there is no indication of any evidence having been led. The obvious person to have been called would have been the complainant. All that the record contains are entries relating to the remand in custody of the accused between the 5th February 1993 and the 19th February 1993. On the latter date an entry appears that the accused were granted bail in the sum and on the conditions set out earlier in this judgment.

There was in the circumstances no compliance with the requirements of section 102(A)(1). The order fixing the amount of bail and the conditions thereto is hereby set aside. If the accused have not as yet been tried they are at liberty to renew their applications either in the Magistrates Court or in the High Court.

In conclusion it is necessary to point out that the duty of this court has been to interpret the relevant section as drafted. For very obvious reasons the section has to be given a strict construction. it is open to the Legislature as in the case of the Theft of Motor Vehicles Act to attend to the wording of the section. As matters stand, Magistrates are obliged to proceed in terms of this judgment whenever the prosecution seeks to invoke the provisions of section 102 (A)(1). I do appreciate the fact that the procedure to be followed will result in further congestion of cases and possible duplication of evidence (proof of the commission of the offence at the bail application and subsequently at the trial) in the subordinate courts but that is a matter for the Legislature to deal with.

Copies of this judgment are to be furnished to the Director of Public Prosecutions and the Attorney-General.

B. DUNN

JUDGE