IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 78/97

IN THE MATTER BETWEEN:

SIMON NHLENGETFWA APPLICANT

VS

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

CORAM S.B. MAPHALALA - A J

FOR APPLICANT: MR MNISI

FOR RESPONDENT: MR NGARUA

RULING ON BAIL APPLICATION

(31/10/97)

The applicant in this matter was convicted in the Mananga Swazi National Court and sentenced to twelve months imprisonment without the option of a fine on a charge of theft. He has since filed papers before this court to review the proceedings of the Swazi National Court and wished to be admitted to bail pending the outcome of the review.

Notice of the application was given to the office of the Director of Public Prosecutions.

The crown opposes this application. The thrust of the crown's opposition is that the appellant has not exhausted the remedies open to him by taking the matter for review before the judicial Commissioner in terms of Section 30 (1) of the Swazi Court Act No. 80 of 1950 which reads in extenso thus:

"The Judicial Commissioner and every District Officer in his capacity as a holder of a subordinate court shall at all times have access to records of all Swazi Courts within his jurisdiction, other than the higher Swazi Court of Appeal, and on Application of the Swazi Court or any person concerned or on his own motion may, after consultation with the court concerned, for reasons which he shall record in writing:

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a) revise any criminal proceedings of the Swazi Court, other that the higher Swazi Court of Appeal, and make such orders or pass sentence therein as The Swazi Court could itself have made or passed.

Provided that should the Judicial Commissioner or District Officer be of The opinion that an acquittal should be altered to a conviction or any sentence in criminal proceeding should be increased, he shall cause the case To be retired by the court to which an appeal would ordinarily lie under Section 33...".

Mr Ngarua for the respondent contends that the appellant has not taken a proper step in the circumstances of this case and thus the application before court is misconceived. He argued that in

the event the court grants the order being sought it would be setting a bad precedent by opening floodgates for potential litigants in the Swazi National Court system to by-pass the Judicial Commissioner. The High Court might find itself flooded by an avalanche of such cases. That it will not be able to cope with such a volume of cases. He argued further that the appellant should at least, if he so desperate seek for a writ of mandamus. The essence of which is to seek for a mandatory order requiring the Judicial Commissioner to perform his statutory duty in terms of section 30 (1) as a matter of urgency. (See Minister of Finance vs Barberton Municipal Council 1914 AD. 355 -6V
On the other hand Mr Mnisi for the appellant is of the view that this court is perfectly entitled to grant bail under these circumstances. He fortifies his view by directing the court to section 4(1) of the Hight Court Act No. 20 of 1954 which reads thus:

"The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinated court of justice within Swaziland, and if necessary To set aside or correct the same".

He further directed the court's attention to the decision of this court by Nathan C J (as he then was) in the case of Fix Gama vs R. 1970 - 76 SIR. 462 where the learned Chief Justice held that the grant of bail pending appeal from the Swazi National Court falls within the high Court's revisional jurisdiction as provided for in section 4 (1) of the High Court Act No. 20 of 1954 and section 104 (1) © of the Constitution Act No. 50 of 1968 as re-introduced by section 7 of the King's Proclamation of 12 April 1973.

He furthermore argued that section 30(1) of the Swazi Court Act has no relevancy in this matter as section 4 (1) of the High Court Act gives the High Court inherent jurisdiction in such matters.

These are the issues for consideration. It appears to me, that the crown's difficulty in the granting of this application is based on practical considerations rather than on questions of law.

The crown is apprehensive of the volume of such cases which might come to this court in the event bail is granted in the present case.

The fact of the matter is that an application for review has been filed before this court on the decision of the Mananga Swazi National Court. The efficacy or otherwise of such a step is a

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matter to be determined by the reviewing judge when the matter comes before him. In the event it is decided that the case was properly before court an appropriate order will be made. On the other hand if the court finds that the applicant ought to have exhausted the procedure prescribed by section 30 (1) of the Swazi Court Act the matter will be dismissed and proper directions made as to how the matter should proceed thereafter.

On the question of bail pending review I do not see any legal impediment which may prevent this court in granting this application. I have arrived at this conclusion by being guided by the dicta in Fix Gama vs R (supra) and that of the case of Mokoena and others vs President of Public Prosecutions 1982- 1986 SIR. 116. In the latter case an application was brought to this court by thirteen people against the President of the Swazi National Court and the Director of Public Prosecutions in which the applicants were seeking an order reviewing the proceedings in a criminal trial in the National Court and set aside their conviction. The court allowed to entertain their application on the strength of section 4 (1) of the High Court Act.

Section 4(1) of the High Court Act is couched in clear terms - that the High Court shall have full power,

jurisdiction and authority to review the proceedings of all subordinate court of justice within Swaziland, and if necessary to set aside or correct the same.

For reasons I have advanced I am inclined to grant the applicant bail pending review of the proceedings of the Mananga Swazi National Court.

S. B MAPHALALA

ACTING JUDGE