IN THE HIGH COURT OF SWAZILAND

MANDLENKOSI NCONGWANE
Applicant

v

REX
Respondent

Civ. Case No. 36/99

Coram S.B. Maphalala – J

For the Applicant Mr. Malinga
For the Respondent Miss. M. Dlamini

JUDGMENT

(06/08/99)

Maphalala J:

This is an application for bail pending appeal. The applicant was convicted and sentenced by Sapire CJ on various charges of theft, fraud, uttering of a forged document. An appeal has been lodged to the Court of Appeal directed at the sentence meted out by the learned Chief Justice. The sentence imposed which is challenged is ***ipsissima verba*** worded as follows:

> "On count 1, that is the count on theft, you will be imprisoned for 2 years.
>
> On count 2, the count of fraud involving the cheque which you presented to the firm of attorneys, you will be sentenced to 7 years of which 2 years will be suspended for a period of 3 years on condition that you will not hereafter be found guilty of any offence involving fraud or theft committed during the period of suspension.
>
> On count 4, which is the uttering of the forged document, you will be sentenced to 2 years.
>
> On count 5, which that (sic) of fraud in respect of the cheque which you deposited with the Swaziland Building Society, you will be sentenced to 7 years for which 2 years will be suspended under the same conditions as applying on count 2.
>
> On count 7, uttering a forged document, once again you will be sentenced to 2 years imprisonment. All these sentences of imprisonment will run concurrently" Effectively the applicant is to serve a term of imprisonment of five years.

The applicant in his notice of appeal against sentence is premised as follows:

1. The learned Chief Justice erred in taking into account the appellant's previous convictions when passing sentence on the appellant and should have treated him as a first offender.

2. The learned Chief Justice erred in imposing a custodial sentence on the appellant without the option of a fine.

3. The learned Chief Justice erred in failing to take into (sic) sufficient consideration the appellant's personal circumstances including the fact the he was remorseful and intended repaying the Swaziland Building Society for the loss suffered.

4. The learned Chief Justice erred in passing a harsh sentence which causes a sense of shock.

The application is supported by the affidavits of the applicant, that of one Johnson Ncongwane, Nomonde Ncongwane, Thabani Ncongwane and Majahonkhe Ncongwane.

The application is opposed by the respondent which in turn filed an opposing affidavit of Mumsy Dlamini who is a Crown Counsel in the Director of Public Prosecutions chambers and was the one who argued the matter on behalf of the respondent. The respondent filed a further supplementary affidavit deposed by the aforementioned officer.

A point ***in limine*** was raised by the respondent to the effect that the applicant's papers are not in order in as much as a transcript of the record of proceedings before the court ***a quo*** was not attached. That this court needed to have recourse to such transcript in considering the application.

On this point the applicant argued ***in contra*** that was not necessary as the judgement by the learned Chief Justice will suffice.

The court reserved its ruling on this aspect to study the said judgement and on the return date ruled that the point ***in limine*** could not stand in view of the clear judgement by the learned Chief Justice which outlined a lucid exposition of the facts of the matter culminating to conclusions thereon.

The court then heard submissions on the merits.

It was contended on behalf of the applicant that the first principle the court is to consider in cases of this nature is whether there is any likely-hood that the applicant may abscond from the jurisdiction of this court. That in the present case the applicant was granted bail of E3, 000-00 which is still with the respondent and applicant complied with all the condition attached. He attended his trial to its final conclusion. The respondent took away his travel document and same has not been returned to him. There is no likely-hood that the applicant will skip the border in the circumstances.

Mr. Malinga for the applicant made an undertaking that in the event applicant is granted bail he will not apply for a new travel document and will also abide by any conditions the court may impose. Mr. Malinga also submitted that the sentence imposed on the applicant is no so severe as to tempt the applicant to abscond the jurisdiction of this court.

The second principle the court is to consider is whether there are reasonable success in the appeal. Mr. Malinga argued that the judge in the court ***a quo*** failed to exercise his discretion judicially in imposing the sentence. The trial court was too harsh in that the applicant was not granted an option of a fine as the learned Chief Justice conceded that applicant was a first offender. The court was referred to a number of decided cases to support this view. These are:

- ***S vs William 1981 (1) S.A. 1170***
- ***S vs Boya 1952 (3) S.A. 574***
- ***S vs Khuzwayo 1949 (3) S.A. 761***

The view taken by the respondent is that applicant must prove that he has not only chances of success in his appeal but that such chances are high. He can do this in two ways as follows:

1. That the court ***a quo*** grossly misdirected itself.

2. That the sentence is so harsh that no court could have issued it.

That these are the fundamental principles which operates it such applications. Mrs. Dlamini for the respondent submitted that on the first principle the applicant in his papers does not show that. She submitted that the learned judge in the court ***a quo*** considered a number of points, viz that the applicant had minor children to support, that was highly unlikely that the applicant will be in a position to repay the bank and that all the factors were considered by the judge based on the evidence led.

On the second point, it is contended on behalf of the respondent that the sentence meted was harsh. The applicant falls short in proving this element in his papers.

These therefore, are the issues before me. I have studied the papers before me and considered the submissions by both counsel. I have also availed myself to the decided cases cited by counsel for the applicant. It appears to me that the only gripe the applicant has on the sentence is that he was not given an option of a fine as he is a first offender. However, my view of this is that the question of sentence is one which is in the discretion of the trial judge. I agree ***in toto*** with the respondent that the applicant had dismally failed in his papers to show that the court ***a quo*** grossly misdirected itself in sentencing him. Secondly, that the sentence is so harsh that no court could have issued it. It appears to me that from the judgement of the learned Chief Justice the principle propounded in ***S vs Zinn 1969 (2) S.A. 537 (A)*** was followed, which at page 540 states thus:

> "What has to be considered is the triad consisting of the crime, the offender and the interest of society".

For the aforegoing reasons I come to the conclusion that the applicant has no prospect of success in his appeal and I consequently refuse the application for bail pending appeal.

S. B. Maphalala

Judge