IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.38/99

IN THE MATTER BETWEEN:

1. MAHLASELA NKAMBULE	1st APPLICANT
2. PAT LUKHELE	2nd APPLICANT
3. SABATHA KHUMALO	3rd APPLICANT
VS	
REX	RESPONDENT
CORAM :	MASUKU A J
FOR THE APPLICANTS :	ADVOCATE E.V. TWALA
FOR THE RESPONDENT :	MR. D.G. WACHIRA

JUDGEMENT

05/05/99

This is an application that was initially brought under a certificate of urgency and in which the following relief was sought: -

(a) that the matter be heard as one of urgency;
(b) that the Court release from custody, the 1st and 2nd Applicants;
(c) that the Royal Swaziland Police be ordered to produce for inspection the alleged stolen vehicle and furnish the Applicants with all the necessary particulars of the stolen vehicle.

It transpired during the hearing that the Crown had amended the charge sheet and the doubt that apparently existed in the minds of the Applicants regarding the existence of the alleged stolen motor vehicle was addressed. As a result, the only issue for determination was whether the Applicants are entitled to be admitted to bail.

The Applicants were charged with the contravention of Section 3(1) of the THEFT OF

MOTOR VEHICLES (AMENDMENT) ACT 1992 in that it is alleged that on or about the 6th day of May 1998 and at or near Mbabane, in the District of Hhohho, they, acting in common purpose did wrongfully and unlawfully steal one motor vehicle bearing registration number SD152WM, a Toyota, valued at El6, 000.00, the property of or in the lawful possession of Simon Ngwenya.

It is common cause that the offence in respect of which the Applicants have been charged falls under the NON-BAILABLE OFFENCES ORDER 1993 as amended. The question for determination is whether this Court is at large to admit the Applicants to bail notwithstanding the provisions of the Order, which declare the offence non-bailable.

Section 3(1) of the NON-BAILABLE OFFENCES ORDER 1993 reads as follows:

"Notwithstanding any provision in any other law, a Court shall refuse to grant bail in any case involving any of the offences in the Schedule hereto."

The contravention of Section 3(1) of the THEFT OF MOTOR VEHICLE ACT is one of the offences reflected in the amended schedule. The basis for the application by Mr. Twala was that the Director of

Public Prosecutions was abusing the powers conferred upon his office by the provisions of Section 6 of the CRIMINAL PROCEDURE AND EVIDENCE ACT 1938 relating to the power of the Director of Public Prosecutions to stop prosecutions.

2

In their affidavits in support of the application, the Applicants allege that the trial was set for the 27th August 1998 at the Magistrate's Court but the trial did not commence on account of the Prosecutor withdrawing the charges. Pursuant to the withdrawal of charges the Applicants allege that they were liberated, only to enjoy their freedom for a short while as they were re-arrested and charged with the same offence.

It is further alleged that the trial was then set down for January 1999 and on the date of trial, the matter was transferred to the Principal Magistrate's Court where the trial was scheduled for 10th, 11th and 12th February 1999. On the date of the trial, it is alleged that the Prosecutor informed the Court that the matter was being transferred to the High Court for hearing.

The Crown has chosen not to file any answering affidavits in this matter and in the circumstances, the Court has no alternative but to accept the uncontroverted allegations of fact contained in the Applicant's affidavits as true. See EBRAHIM V GEORGOULAS 1992(2) SA 151 and PHILLUP DLAMINI VS CHAIRMAN, ROAD TRANSPORTATION BOARD & ANOTHER APPEAL CASE NO.29/97. The reasons for the matter being transferred from the Magistrate's Court to the Principal Magistrate's Court have not been disclosed due to affidavits not being filed. Mr. Wachira attempted to advance these reasons from the bar but I will not lend any credence to them as these should have been clearly set out in the answering affidavits. Counsel must not be allowed to give evidence from the bar.

3

I have some measure of sympathy for the accused regard being had to manner in which the matter has been handled by the Directorate of Public Prosecutions, namely the forum shopping, resulting in the matter being transferred from one Court to another. This is undesirable, particularly where trial dates for hearing the matter had been set. This results in the liberty of individuals being infringed and this practice must stop. I say so in view of the fact that no explanations have been forthcoming from the Crown and I am constrained to rely on the Applicants' version.

There is however no evidence or allegation in the papers before me, save the heads of argument and argument by Mr. Twala, that the Crown ever acted or purported to act in terms of Section 6 of the CRIMINAL PROCEDURE AND EVIDENCE ACT 1938. Likewise, I will not use Mr. Twala's submissions from the bar as a basis for deciding this matter in the absence of relevant allegations in the affidavits filed. I am not therfor in a position to delineate the extent of the powers conferred on the Directorate of Public Prosecutions by Section 6 of the CRIMINAL PROCEDURE AND EVIDENCE ACT 1938, save to state that the provisions of Section 6 in our CRIMINAL PROCEDURE AND EVIDENCE ACT 1938 differ in material respects from those in the Republic of South Africa, although Mr. Twala wanted the Court to proceed on the basis that they are in pari materia.

Although this issue was not pursued during the hearing, the 1st Applicant challenges the legality or correctness of his re-arrest after he was charged again for the same offence pursuant to the withdrawal of the charges.

4

I can find no merit in this because although there is no express power conferred on the Director of Public Prosecutions to withdraw charges in terms of the provisions of CRIMINAL PROCEDURE AND EVIDENCE ACT 1938, there is an implied power to withdraw the charges, with the liberty to reinstate them at a later stage. Once the charges are reinstated there is no reason why the accused should not be re-arrested in my view.

Reference was made to the case of R V SENZO NXUMALO, without a full citation. This was said to have been reported in the Swazi Observer dated 3rd January 1999, a copy of which was not

enclosed. I need not mention that newspaper reports have never been the source of law and no guidance on issues of law may be obtained from a newspaper report.

I must state my disapproval of this kind of behaviour, which is deplorable. Never again must Courts be referred to newspaper reports for propositions of law as newspapers are there to inform the public inter alia of proceedings in Courts. They should never be used as a source of law. This is unheard of in any other jurisdiction I have heard of and Swaziland must not chart that course.

On the whole, I find that a perfectly valid charge has been preferred against the Applicants and in terms of the provisions of the NON-BAILABLE OFFENCES ORDER 1993, the charge faced by the Applicants is not one in respect of which this Court or any other is empowered by the Legislature to grant bail. I am constrained to give effect to the letter and spirit of the Legislative solicitudes.

5

I say this with some sympathy for the accused considering the allegations of the matter being transferred from one Court to another to which I have referred earlier in this judgement. I urge the Crown, in consultation with the office of the Registrar, to obtain the earliest possible date for the trial of the Applicants in this matter.

The application in terms of prayer 2, which was only in respect of the 1st and 2nd Applicants is accordingly refused.

T. S. MASUKU ACTING

JUDGE