THE HIGH COURT OF SWAZILAND

CRIM.APP.NO.14/2000

In the matter between:

EPHRAEM PHINEAS KAUNDA **Appellant**

Vs

REX **Respondent**

CORAM : **MAPHALALA J.**
MASUKU J.

For the Appellant : **In person**
For the Respondent : **Ms LaNgwenya**

JUDGEMENT
14/05/02

Masuku J.

This is an application for leave to appeal to the Court of Appeal from a judgement of this Court in its appellate capacity. The Applicant was convicted and sentenced by the Senior Magistrate, Mbabane, His Worship Mr S. Mngomezulu, as he then was to eighteen years imprisonment on a charge of rape with aggravating factors. He appealed to this Court on both conviction and sentence but later abandoned the appeal against conviction. The matter therefor proceeded only on the question of sentence.

This appeal was successful in part, in that the sentence of 18 (eighteen) years was set aside and substituted for one of fifteen (15) years and full reasons for this decision were handed down on the 8th February, 2001.

The Applicant is now desirous of appealing to the Court of Appeal for a possible reduction of the sentence but there are certain insuperable difficulties standing in his way. Chief amongst these is the fact that the judgement appealed against was handed down on the 8th February, as aforesaid but the letter seeking leave to appeal is dated 12th December, 2001 and bears the Registrar's stamp acknowledging receipt, dated 15th January, 2002. Ms LaNgwenya for the Crown took issue with this inordinate delay, particularly because the Applicant did not file any application for condonation in this regard.

In terms of the provisions of Rule 49 (1) read together with Rule 52, of the High Court Rules, as amended, application for leave to appeal to the Court of Appeal shall be made fourteen days after the judgement sought to be appealed against. This the Applicant failed to do and did not apply for condonation as aforesaid. When required by the Court to state the reasons for the delay in his address, he failed to advance any, save stating that there was a delay in the typing of the letter by the department of Correctional Services. Whilst there may be an element of truth in this, it does not account fully for the 10-month delay. We did not understand the Applicant at all to say he was unaware of his rights to file an application for leave to appeal nor that he did not understand them. He was fully advised thereof after dismissal of the appeal by this Court.

In the absence of any application for condonation and in view of his failure to advance a cogent explanation for such a lengthy delay, I have no option but rule that his application for leave to appeal be dismissed for failure to comply with the time periods set out in the aforesaid Rules.

Ms LaNgwenya, in her forceful argument, also submitted that the Notice of Appeal was itself filed six months after the period set out in Rule 8 (1) of the Court of Appeal Rules, namely within four weeks of the judgement appealed against. This however is in my view a matter that would have to be dealt with by the Appeal Court in terms of the provisions of Rule 16 of the Court of Appeal Rules. I therefor will not entertain this aspect of the matter, save to state that there appears to be a trend of unexplained dilatoriness on the Applicant's

part, which may be perceived as an initial acceptance of the judgement of this Court. The application for leave to appeal and the notice of appeal appear to have been the result of an afterthought.

The Rules of Court have been designed for smooth functioning of litigation and it is important in this regard to religiously comply with time limits therein set out failing which an attitude of abandonment of certain procedures may be inferred from prolonged periods of inaction. Once there is a failure to comply with the time periods therein set out, it is incumbent upon the applicant to apply for condonation setting out fully the reasons occasioning the delay. The provisions of the Rules of Court will not lightly be jettisoned in the absence of a full and cogent explanation. See **ANDRIES STEPHANUS VAN WYK AND ANOTHER VS BRL** a division of **BARLOWS CENTRAL FINANCE CORPORATION Appeal Case No. 44/2000** (per Tebbutt J.A.) at page 6 unreported;

In **MLOTSHWA v R 1979 – 1981 SLR 55 at 56 D – F,** Cohen A.C.J. as he then was stated as follows:-

> *"Moreover, I think the court should be more generous in granting relief in criminal cases, where the liberty of a person is at stake than in civil cases; and that it should be strongly influenced by the fact that its failure to come to the appellant's relief may result in more dire consequences than the mere loss of money or the payment of a fine. Although the Court will not in the case of a breach of its Rules regard itself as a mere rubber stamp where the Director of Public Prosecutions does not oppose the application, as is the position in the present matter, nevertheless, his attitude to it cannot be entirely overlooked."*

We have, in reaching the above decision on the delay anxiously considered the above excerpt, particularly the first portion thereof. The following issue, namely prospects of success only served to buttress the decision to refuse leave in the instant case.

The responsibility of an applicant for leave to appeal has been authoritatively stated by *Du Toit et al,* "Commentary on the Criminal Procedure Act", Juta, 1995 at 31 – 9 in the following terms:-

> *"The person who applies for leave to appeal must satisfy the court that he has reasonable prospects of success on appeal. The test of a reasonable prospect has the effect that the court will refuse an application for leave in those cases where absolutely no chance of a successful appeal exists, or where the court is certain beyond reasonable doubt that the appeal will fail...on the other hand, the trial court need not be certain that the Appellate Division would come to another view. All that is necessary is that there should be a reasonable prospect that the appeal may succeed..."*

In an attempt to address the above requirements, the Applicant in his letter applying for leave to appeal, stated that he was still young at the time he committed the offence and that he is rehabilitated and very remorseful for his conduct. He states that he will no longer pose a threat to society as he has become a born-again Christian.

Ms LaNgwenya in her blistering address submitted that the accused was not immature when he committed the offence. That is common cause regard had to his age then. She further stated that the Court duly considered and evenly weighed the competing interests, hence it reduced the sentence, recording though that the crime was very heinous. In sum, she submitted that prospects of success on appeal were non-existent.

In his reply, the Applicant conceded that the desert before him was just, viewed against the atrocious and merciless manner in which he executed this dastardly act. I am of the view that the Applicant has totally failed to demonstrate in anyway, given the entire attendant circumstances that this Court erred or misdirected itself grossly in imposing the sentence that it did.

Whereas the Applicant will spend long time in prison, which will be reduced by good behaviour, he can be able to pull himself up with his own bootstraps as it were, and can do something meaningful after his release. The victim on the other hand has to deal with this trauma for the rest of her life and this may affect her marriage prospects or even her relationship with other men. The sentence eventually imposed by this Court can be attacked in other quarters as erring on the side of leniency.

On the whole, and for the above reasons, the application for leave to appeal is dismissed. The Applicant has in my view failed to demonstrate that he has reasonable prospects of success as heretofore described. The Appellant may however petition the Court of Appeal within six (6) weeks of this judgement to hear the appeal.

T.S. MASUKU
JUDGE

I agree

S.B. MAPHALALA
JUDGE