

THE HIGH COURT OF SWAZILAND

CAIPHUS NTSHALINTSHALI

Applicant

And

THE KING

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Civil Case No. 2204/2003

CORAM : S. B. MAPHALALA - J

For the Applicant : Mr P. Gwebu

For the Respondent : Mr S. Khuluse ( attached to the  
Attorney General Chambers)

JUDGEMENT

(0512/2003)

The Applicant has instituted motion proceedings for a refund of the sum of E15,000.00 which he paid as bail in respect of Case No. 133/94. The criminal case was tried at the Magistrates Court

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Manzini after which the Applicant was found guilty of fraud and sentenced to six years imprisonment. The Applicant appealed against conviction and sentence and he applied for bail pending appeal to this court which admitted him to bail on the 12th August 1997.

The appeal was argued on 13th December 1995, 14th December 1995 and 15th May 1997 respectively after which judgement was reserved. The matter appeared before former Chief Justice Sapire and the late Mr Justice Dunn but judgement was never delivered.

The Applicant avers that it will be impossible for judgement to be delivered because both Judges are no longer available, the one having died and the other having resigned. He avers that in the circumstances he is entitled to demand that he be acquitted of the charges against him because the appeal is in effect a continuation of trial; and since the Judges who heard the appeal are no longer available the proceedings have become abortive and have lapsed.

The defence put forth by the Respondent is that it is possible for judgement to be delivered in this matter regard being had to the provisions of section 291 (1) bis of the Criminal Procedure and

Evidence (Amendment) Act No.3 of 2000. The argument in this regard is that the matter may be referred to a Judge of this court and/or full bench of the court for a direction as to what should happen to the matter. Alternatively, a judgment may be handed down by the present Judges of the Court after the consideration of the record on appeal in line with the provision of Section 291 (1) bis (b) (ii) of the Act.

When the matter came for argument two points were made in support of this application on behalf of the Applicant. Firstly, it was contended that the Act relied upon by the Respondent does not apply because it does not appear that this law is now in operation as the section thereof provides that it will only come in force once the date of its commencement has been published in the Government Gazette. Secondly, it was argued that the Act only applies in a situation where a trial has been held but sentence cannot be passed by the judicial officer who returned the verdict. To this end the court was referred to the textbook by CAMPBELL AND LANSLOWNE, SOUTH AFRICAN CRIMINAL PROCEDURE at page 622.

Mr Khutuse argued *au contraire* on behalf of the Respondents and without further ado I agree in toto with his submissions in this case. I say so for two reasons. Firstly, the matter is still pending

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before court and unless and until a verdict either way has been given or sentence passed, Applicant is not entitled to the refund of R 5,000.00 he paid as bail.

Secondly, Applicant must first seek for his discharge in terms of Section 155 (5) of the Criminal Procedure And Evidence Act 67/1938 before he can launch the present application. I agree with Mr Khutuse's very incisive observation that in casu what the Applicant has sought to do herein is to place the can before the horse.

Section 155(5) of the Act provides as follows:-

"Any person who has once been called upon to plead to any indictment or summons shall, save as is specially provided in this Act or in any other law, be entitled to demand that he be either acquitted or found guilty. "

It appears to me that for the applicant to approach this Court for a refund he must have been discharged in terms of Section 155 (5) of the Act. This is his first hurdle. In my mind, it appears that the question of whether or not Section 291 (1) bis (b) applies would be addressed by the presiding officer seized with a proper application in terms of Section 155 (5) of the Act. It would be premature for this Court to determine the applicability or otherwise of Section 291 (1) bis (b) outside the realm of Section 155 (5) of the Act.

For the foregoing reasons I find that the Applicant has failed to prove a case for the relief sought. In the result the Application is dismissed with costs.

S.B. MAPHALALA

JUDGE