THE HIGH COURT OF SWAZILAND AUSTIN HLATSHWAYO

Vs

REX Criminal Case No. 33/2003

Coram S.B. MAPHALALA – J

For the Applicant MR. O. NDZIMA

For the Respondent MISS N. LUKHELE

RULING

(On application for reduction of bail) (17/09/2004)

Before court is an application for the reduction of bail. The Applicant is charged with the offence of theft before the Manzini Magistrate Court under Case No 317/2003. He was granted bail of E5000-00 by that court.

He now seeks to have the amount fixed by the Magistrate Court reduced on the basis that he cannot afford to raise the amount of bail posted by the Magistrate Court. An affidavit to this effect is filed of record.

The Crown opposes the application and has raised a point of law in limine that the application is improperly before court. This is an application for bail reduction which, therefore, questions a judicial decision of the court a quo. Hence same should be brought under review.

When the matter came for arguments Mr. Ndzima who appeared for the Applicant contended that the application is brought in terms of Section 104 of the Criminal Procedure and Evidence Act, (as amended). The Section provides as follows:

Appeal to High Court against refusal of or excessive bail.

"If an accused person considers himself aggrieved by the refusal of any Magistrate or Magistrate's Court to admit him to bail, or by such Magistrate or Court having required excessive bail, he may apply in writing to a Judge who shall make such order thereon as to him in the circumstances of the case seems just"

The argument appears to be that the court a quo required excessive bail. However there are no averments in the Applicant's affidavit in support of this argument as it was merely raised from the bar by counsel.

According to Swift"s Law of Criminal Procedure, 2nd ED at 164 on a discussion of a similar provision in the South African Criminal Procedure Act of 1955 state that where a court is asked under this Section to reconsidered a refusal by a Magistrate to grant bail, one of the documents which should be before the court showing the reasons of the Magistrate for refusing bail, because whenever a court is asked to reconsider the decision given by some other body, the reasons which actuated that other body are obviously of importance, even though further facts may be presented to the court in asking it to reconsider the matter, (see also R vs Mclnnes 1946 W.L.D. 386; Fry and others vs Attorney General, Transvaal 1954 (3) S.A. 794 (w) and R vs Deetlefs, 1960 (1) S.A. 388 (GW)).

It appears to me on the facts of this case that Applicant cannot succeed. I say so because the Applicant has not advanced a sufficient case in terms of Section 104 in his affidavit. Secondly, the Applicant was granted bail in terms of the Theft and Kindred Offences Act and the Magistrate a quo

was bound by this statutory provision,

hence the amount of bail granted. If I may say so, the Magistrate a quo operated outside the statute in granting the Applicant the bail of E5, 000-00. The Magistrate had no discretion at all under the Act. Following what was held in the South African case of Mazibuko vs Attorney General, Transvaal 1963 (2) S.A. 118 (T) in an appeal (or application) under this Section the court is not entitled to make any order which the Magistrate was not competent to make.

For the afore-going reasons the application for bail reduction is refused. I make no order as to costs.

S.B .MAPHALALA

JUDGE