

THE HIGH COURT OF SWAZILAND

MFANIMPELA DLAMINI

Applicant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Crim. Case No. 521/2004

Coram

S.B. MAPHALALA – J

For the Applicant

MR. B. S. DLAMINI

For the Respondent

MRS. S.N. WAMALA

JUDGMENT (18/03/2004)

The Applicant seeks an order to be discharged from custody in accordance with the provisions of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938.

Applicant was arrested at Nhlngano on the 2nd April 2002, on a charge of rape and was kept at Nhlngano remand facility from date of arrest.

According to averments in his founding affidavit he was committed to the High Court for trial as per the direction of the Chief Justice in terms of Section 88 bis of the Act on the 8th August, 2002. On the 1st June 2003, almost ten (10) months after being

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committed to this court and whilst awaiting to be allocated a trial date, Applicant was taken back to the Nhlngano remand facility where he commenced remind appearances afresh.

The application is opposed by the offices of the Director of Public Prosecutions and the answering affidavit of the Acting Director of Public Prosecutions herself is filed thereto. The opposition is two fold.

The first ground of opposition is found in paragraph 3.1 of the answering affidavit and reads as follows:

"3.1 Congestion as Sidvashini Remand Centre.

- a) It is common cause that every accused person committal (sic) at the High Court for trial has to be conveyed to the Sidvashini Remand centre to await his trial date with the high rate of committal owing to the escalating crime rate on one hand and on the other hand with cases proceeding below the rate of committal at the High Court, 2nd Respondent had to take steps to ease the congestion".

Then follows the second ground for opposition in paragraph 3.2 of the said affidavit, thus:

"3.2 Speedy trial

"The step to remove Applicant and others to the Magistrate court was an attempt to afford Applicant a speedy trial.

This is because the High Court was pregnant with murder accused awaiting trial allocation of dates, as there was another court with jurisdiction, over Applicant's

matter, it was decided that such matters be removed from the High Court jurisdiction".

Further on in paragraph 4 of the said affidavit the following appears:

"Applicant was allocated a trial date by the Principal Magistrate prior to moving this application. I humbly submit therefore that:

a) Releasing Applicant would interfere with his trial, as it has already been set.

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b) Applicant's application is not bona fide as he has a trial date.

c) The Principal Magistrate is now seized with the matter as it is enrolled in his court for trial. It is now the Principal Magistrate who has jurisdiction to decide on the discharge of the Applicant".

For consideration in casu are two issues viz i) whether the Applicant has satisfied the requirements of Section 136 (2) of the above-cited legislation and ii) whether the removal of accused persons for trial elsewhere was in terms of the Act. I must hasten to state that when the matter came for arguments before me last Friday Mrs. Wamala for the Respondent conceded that the Applicant in the present case satisfies the requirements of Section 136 of the Act and further that the Applicant has not been removed in terms of Section 137 (1) of the Act This judgment therefore is merely to complete the record. I shall proceed to address these two points ad seriatum, thus;

i) Application in terms of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938.

The relevant piece of legislation which forms the basis of Applicant's relief provides as follows:

"If such person is not brought to trial at the first session of such court held after the expiry of six months from the date of his commitment and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed".

It is common cause that Applicant having been committed to this court on the 8th August 2002, the first session in which the Applicant should have been brought to trial commenced on October 2002 and ended in December 2002. The period of six (6) calendar months lapsed in June 2003. Applicant therefore is clearly entitled to approach the court on the basis of Section 136 (2) of the above-cited legislation and this is conceded by the Crown.

It is further common cause that on the 16th February 2004, the Applicant applied to be released on bail at the Nhlanguano Magistrates Court where he was granted bail of

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E500-00. However, having paid the bail deposit he was not released following the stand taken by Government in such matters.

ii) Removal of Applicant for trial elsewhere.

The Section in the Act that deals with the removal of accused persons for trial elsewhere is Section 137 (1) which provides as follows:

"If an indictment has been presented against an accused person in the High Court, the Judge may, upon application by or on behalf of the accused, order that the trial shall be held at some place other than that specified in such indictment".

Subsection (2) of the same Act provides that:

"If any order is made under this Section, the consequences shall be the same in all respects and with regard to all persons as if the Attorney General had decided to prosecute the accused at the place named in the order and at the time specified therein, and if he has been admitted to bail, the recognizance's of such bail are to be deemed to be extended to such time and place accordingly".

On the facts of the present case and this has been conceded by the Respondent's representative when the matter was argued that no application was made by the office of the Director of Public Prosecutions nor did the Applicant approach this court to have his matter tried in another forum. No order was ever issued by this court authorising the removal of the Applicant to be tried in another forum.

According to Swift's Law of Criminal Procedure, 2nd ED at page 235 on a discussion of a similar section in South Africa being Section 151 (1) an application under this Section should be on notice of motion supported by an affidavit as to the facts upon which relief is sought (Rule 6 of the rules of court).

The learned author further states the following:

"Our courts have adopted the English practice in regard to applications for change of venue, and the general rule is that the affidavit must show adequate grounds for removal, such as that it is not likely that a fair and impartial trial could be obtained at the place from which it is

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desired to remove the trial (R vs Malherbe 1921 OPD 142), and in the absence of cogent reasons to the contrary the trial should take place as near as possible to the place of the alleged.. offence..."

In the present case this has not been done more so as the Applicant has been committed to the High Court for trial in terms of Section 88 bis of the Act.

The reasons advanced by the Respondent in the answering affidavit viz congestion at Sidwashini Remand centre and that the step to remove Applicant and others to the Magistrate Court was an attempt to afford Applicant a speedy trial have no effect and lack legal support when viewed against the backdrop of Section 137 (2) of the Act.

In the premise, I have no alternative but to order the discharge of the accused in terms of Section 136 of the Act having found that his removal from the High Court to the Principal Magistrate court was tainted with illegality.

To comment en passant, it is imperative that the office of the Director of Public Prosecutions should follow the full strictures of the law to avoid incidences like the present one. It is appreciated by this court that the Director of Public Prosecutions exercises a wide discretion in such matters but in exercise of this discretion the Director is not permitted in law to run roughshod over accused persons' rights by moving them wily nily from one court to another contrary to what I would call good practice.

In the result, the Applicant is discharged in terms of Section 136 (2) of the Act and that the Applicant abide by the conditions of bail imposed by the Nhlango Magistrate on the 16th February 2004.

S.B. MAPHALALA

JUDGE