THE HIGH COURT OF SWAZILAND DUMSANI PHENYANE

Vs

REX

Criminal Case No. 126/1997

Coram	S.B. MAPHALALA – J
For the Applicant	MR. J. MASEKO
For the Respondent	MRS S WAMALWA

JUDGMENT

(07/04/2004)

The Applicant has made an application before court in terms of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938.

The Applicant avers in his founding affidavit that he is a Swazi male adult of Piggs Peak within the district of Hhohho. On the 14th July 1997, he was arrested by the police from Piggs Peak Police station and charged with the crime of rape.

On the 13th March 1998, he was committed to this court for trial. However, he has not been allocated a date of hearing and has been in custody for over three years. He

also avers that since his committal he has not been transferred to any other court of - appropriate jurisdiction.

In paragraph 9 of his founding affidavit he states that this application is urgent in that he has been kept in custody for an unreasonably long time and that he is suffering irreparably in terms of time lost whilst in prison. Further that he has no other remedy other than the one sought in the notice of motion.

The Respondent as represented by the Director of Public Prosecutions opposes the granting of this application and a notice to that effect is filed of record. However, no opposing affidavit has been filed.

The matter appeared before me on the 25th March 2004, where arguments were advanced by counsel.

The argument advanced for the Respondent from that bar is that since the Applicant has not been granted bail in this matter he is not entitled to be discharged in terms of the Section. The point is premised on the dicta by Masuku J in the case of Celani Maponi Ngubane vs The Director of Public Prosecutions, Civil Case No. 11/04 (unreported) where the learned Judge held as follows at page 6-1 of the judgment; and I quote:

"There is yet another issue which was not raised in court but which exercised my mind as I wrote the judgment. This relates to the purpose of this Section. According to Didcott J. in the Lulane case (supra), the purpose of the Act, with which I am in full agreement, is stated at page 208, by the learned Judge as the following:

"The object of this subsection is plain i.e. subsection (1). It is devised to meet the situation in which an accused person is detained while he awaits trial and unable to get bail in the ordinary way; and its aim is to limit the period during which someone in the situation must remain in custody", (my emphasis is

mine),

It is my considered view that before a person can move an application in terms of sub-section (2), as the Applicant has done, he must have satisfied the requirements of sub-section (1) and must not have been afforded any relief thereunder, In particular, it must be clear that the

Applicant has been unable to obtain bail in the ordinary way and that the time limits in subsection (2) have been fully met.

I posed a question to Mr. Dlamini regarding the status of the Applicant's bail application and the answer, which is confirmed by the file is that the bail hearing awaits determination. This to my mind is an inducium that the Applicant has not shown that he cannot be granted bail in the ordinary way and cannot before that is done approach the court for the relief he seeks. The bail application whether in terms of the provisions of Section 95 or 136 (1) is in my view a condictio sine qua non for being granted relief in terms of Section 136 (2)

I am in respectful agreement with the above cited ratio decidendi and would hold the view that the Applicant in casu has not satisfied the requirements of the Section as he has not shown that he was unable to obtain bail in the ordinary way.

For the above reasons therefore the application ought to fail, I must however, implore the office of the Director of Public Prosecutions to urgently speed up the hearing of this case. The Applicant first appeared before this court 7 years ago making his first appearance on the 19th December 1997. He has made a total of 8 court appearances. This delay in having this matter tried is highly undesirable, as justice delayed is justice denied.

S.B. MAPHALA

JUDGE