

IN THE HIGH COURT OF SWAZILAND

REX

Vs

SITHEMBISO SIMELANE

KHEHLA DLAMINI MLUNGISIMONDLANE

Criminal Case No. 23/2006

Coram: S.B. MAPHALALA - J

For the Crown: MR. MAGAGULA

For the Defence: IN PERSON

JUDGMENT

31st August 2007

[1] Accused no. 1 and 2 made an application before court in terms of the provisions of Section 136 of the Criminal Procedure and Evidence Act of 1938 which provides as follows:

136. (1) Subject to the provision of this Act as to the adjournment of a court, every person committed for trial or sentence whom the Attorney General has decided to prosecute before the High Court shall be brought to trial at the first session of such court of criminal cases held after the date of commitment, or else shall be admitted to bail, if thirty-one days has elapsed between such date of commitment and the time of holding such session, unless:

(a) the court is satisfied that, in consequence of the absence of material evidence or for some other sufficient cause, such trial cannot then be proceeded with or without defeating the ends of justice; or

(b) before the close of such first session an order has been obtained from the court under Section 137 for his removal for trial elsewhere.

(2) 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.

(3) For the purposes of this section a person shall not be deemed to have been committed for trial in any case in which the Attorney General has, under section 86, ordered a further examination to be taken, until such further examination has been completed.

(4) The accused, with his own consent in writing and with the consent of the Attorney general, may be brought to trial at any time after his commitment notwithstanding that such period of thirty-one days has not expired.

[2] The two accused persons are charged with one Mlungisi Mondlane on 13 counts of robbery in various places in the country and accused no.1 of contravening the provisions of the Arms and Ammunition Act No. 24 of 1964. Their trial was to commence on the 13 August 2007, and in view of the fact that the court was only allocated 2 days for this matter Counsel for the Crown applied that the matter be postponed and be referred to the Registrar of the court for allocation of 12 days in the next session of the court. This request by the Crown is supported by the fact that at a pre-trial conference of this matter, it was agreed that the matter needed 12 days for trial. However, in view of this state of affairs accused no. 1 and 2 applied to be discharged under the above-cited section in paragraph [1] of this judgment.

[3] Accused no. 3 who was also present did not make an application under the Section as it appears that he was released on bail by this court on certain conditions but failed to follow one of the conditions and his bail was forfeited by the Crown and has been kept in custody with the other co-accused. I must also mention that accused no. 1 and 2 were also granted bail by this court on similar terms and conditions as accused no. 3 but they cannot afford the amounts and thus their present application before court.

[4] Counsel for the Crown opposed the applications by the two accused persons and contended that it would be a failure of justice to release the two accused persons in view of the fact that they have been granted bail by the court but have failed to come up with the required bail deposits.

[5] The question that arises in this matter is whether an accused person can be released under Section 136 when he had already been granted bail by the court but failed to pay the said bail deposit.

[6] The general principles that govern this matter are discussed by the learned author *Swift's Law of Criminal Procedure 2nd Edition* at page 233 where a discussion is made on a similarly worded section in the old South African criminal code.

[7] It would appear to me that on a simple reading of Section 136 cited above in paragraph [1] of this judgment the two accused persons would not be entitled to a discharge under the Section. The reason being that they have already been granted bail by the court on their applications. They cannot therefore have it both ways to be granted bail under the Act and when the shoe pinches and they cannot raise the amount to resort to the section.

[8] In the result, for the afore-going reasons the application by the two accused persons in terms of Section 136 of the Criminal Procedure and Evidence Act is refused. Accused persons to be kept in custody until their trial in the next session of the court.

S.B. MAPHALALA

JUDGE