

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 15/11

In the matter between:

WANDILE THWALA

VS

REX

CORAM

FOR CROWN

FOR DEFENCE

MCB MAPHALALA, J

L. HLOPHE

S. HLOPHE

**JUDGMENT
29th MARCH 2011**

[1] An urgent bail application was lodged pending appeal. The applicant was convicted on a charge of theft by the Manzini Magistrate Court on the 28th February 2011 and sentenced to two years imprisonment without an option of a fine.

[2] The applicant filed a Notice of Appeal on the 3rd March 2011, and, the grounds of appeal are as follows:

2.1. The learned Magistrate erred in law and in fact by failing to take into account the appellant's personal circumstances.

2.2. The learned magistrate erred in law and in fact in failing to take into consideration that the Appellant is a first offender and that all the stolen items were recovered.

2.3. The sentence imposed by the learned magistrate induces a sense of shock as much as the Appellant was not afforded an option of a fine.

[3] The application is opposed by the Crown and it has filed opposing papers in that regard; it has filed a Notice to Raise Points of Law. It argues that in terms of Section 326 (b) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended, an application for bail pending appeal is made before the court which convicted and sentenced the applicant; and, that this court does not have jurisdiction to entertain this application.

[4] The Applicant concedes that he was convicted and sentenced by the Manzini Magistrate Court; however, he submits that this court has

no jurisdiction to entertain this matter. He cites Section 2 of the High Court Act No. 20 of 1954 which provides the following:

"The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all jurisdiction, power and authority vested in the Supreme Court of South Africa."

[5] The Applicant further cites Harms in his book, the Civil Procedure in the Supreme Court, 1993 edition where he states the following:

"...a Supreme Court can entertain any claim or give any order which at Common Law it would be entitled to entertain or give. It is this reservoir of power which is referred to when one speaks of the inherent jurisdiction of the Supreme Court and which distinguishes the Supreme Court from inferior courts."

[6] Section 2 of the High Court Act as well as "The Civil Procedure in the Supreme Court" by Harms cited above deal with the Civil Jurisdiction of the High Court, and it is not applicable in the present case which deals with the Criminal Procedure.

[7] The Applicant further referred the court to Section 95 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938, as amended, which provides that the High Court may at any stage of any proceeding taken in any court or before any Magistrate in respect of any offence,

admit the accused to bail, notwithstanding any other law but subject to Section 96. However, the two sections deal with bail pending trial and not bail pending appeal.

[8] Section 326 (b) of the Criminal Procedure and Evidence Act No. 67 of 1938, as amended, provides that "the execution of the sentence of a magistrate's court shall not be suspended by reason of any appeal against a conviction unless the court from which the appeal is made thinks fit to order that the accused be admitted to bail, or if he is sentenced to any punishment other than simple imprisonment that he be treated as an unconvicted prisoner until such appeal has been heard and decided". The Respondent further submits that the Applicant has chosen the wrong forum; and, that the proper forum to hear the matter is the magistrate's court which convicted and sentenced him. The crown submits correctly that the exception is Section 293 (4) of the Criminal Procedure and Evidence Act where a person convicted by a magistrate's court is committed by the said court to the High Court for Sentencing. If the High Court passes any sentence, he is deemed to have been tried and convicted for the offence before the High Court.

[9] The Committal Procedure is provided by Section 292 of the Criminal Procedure and Evidence Act which states that where the Magistrate's court which tried and convicted an accused obtains information about his character and antecedents, is of opinion that they are such that a greater punishment should be inflicted for the offence than it has the power to inflict, such court may for reasons to be recorded in writing on the record of the case, commit him in

custody to the High Court for sentence. If the High Court passes any sentence, he is deemed to have been tried and convicted for the offence before the High Court.

[10] Sections 326 (b) and 293 (4) of the Criminal Procedure and Evidence Act deal specifically with bail pending appeal as opposed to Sections 95-113 which deal with bail pending trial. In the circumstances the application is dismissed and, the applicant is directed to institute the bail application pending appeal in terms of Section 326 (b) of the Criminal Procedure and Evidence Act No. 67 of 1938.

M. C. B. MAPHALALA
JUDGE OF THE HIGH COURT