IN THE COURT OF APPEAL OF SWAZILAND

Mkhize Bhembe

Appellant

REX

Cri. Appeal No. 27/1996

Coram:

Kotze JP

Tebbutt JA
Browde JA

J U D G M E N T

(07/04/97)

KOTZE JP

This is an appeal by the appellant against the refusal in the High Court by the Acting Chief Justice to release him on bail. The Appellant and eleven others were arrested and formally charged in a Subordinate Court with the murder of five persons. Bail was refused by virtue of the provisions of Section 3(I) of the Non-Bailable Offences Order No. 14 of 1993 (the Order) which enjoins the High Court or a Magistrate's Court to refuse to grant bail in any case involving inter alia the offence of murder.

The crisp issue raised on behalf of the appellant is that the order is invalid since it is inconsistent with the Proclamation by His Majesty King Sobhuza II dated 12th April, 1973 as amended by the further Royal Proclamations of 1982

and 1987.

In developing his argument on behalf of the appellant, Mr. Maziya referred at the outset to section 3a of the April 1973 Proclamation which repealed the Constitution of the Kingdom which commenced on 6th September 1968. His Majesty at the same time decreed in Section 7 that Parts 1 and 2 of Chapter IX and Sections 138, 139, 140 and 141 of Chapter XIII of the repealed Constitution would again operate with full force and effect "and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees".

Section 104 of the Constitution, which forms portion of Part 1 of Chapter IX and which, as appears from the preceding paragraph, is reintroduced with full legal force into the statutory law of the Kingdom of Swaziland, invests the High Court with "unlimited original jurisdiction in civil and criminal matters".

King's Proclamation (Amendment Decree) No. 1 of 1982 adds the undermentioned important new paragraph to the April 1973 Proclamation with retrospective effect to 12th April, 1973:

> *"This Proclamation is the Supreme law of Swaziland and if any other law is inconsistent with this Proclamation, that other law shall, to the extent of the inconsistency, be null and void".*

Finally reference has to be made to Proclamation (Amendment) Decree No. 1 by His Majesty King Mswati III dated 15th September 1987 which restates that the Proclamation of 12th April, 1973 is the Supreme law of Swaziland.

The effect of the Royal Proclamations abovementioned is thus inter alia to vest the High Court with unlimited criminal jurisdiction and to nullify legislation inconsistent with the April 1973 Proclamation. In enjoining the High Court to refuse bail in a case involving murder is, so contends Mr. Maziya, to "tamper" with its jurisdiction to the extent of limiting it.

Mr. Maziya addressed an argument to us which warrants careful consideration. He submitted that one of the basic rights is the right to personal freedom and as there is no Bill of Rights in Swaziland entrenching that right the Courts, as the watchdogs of human rights, must be particularly zealous in safeguarding such rights. We strongly support that view. It follows, so the argument went, that since everyone is presumed to be innocent until found guilty, that right to personal freedom involves the right to be released on bail of anyone detained on a criminal charge. That is the foundation for the further submission by Mr. Maziya that since the High Court has "unlimited jurisdiction" in criminal matters

there can be no valid curtailment of its jurisdiction to grant bail. Although this is an attractive argument it looses sight of the fact that when an application for bail is made there are criteria which must be considered by the Court when it exercises its discretion whether or not to grant bail and on what conditions. These criteria are designed to balance the right of the individual against the interests of society since the "right" to bail is not absolute but must always be regarded in the light of what is in the interests of justice. It is perhaps not without interest that section 35(1) of the South African Constitution and Bill of Rights provides that "Everyone who is arrested for the alleged commission of an offence has the right to be released from detention if the interests of justice permit subject to reasonable conditions" (emphasis added). In this context the interests of justice seems to us to be co-extensive with the interests of society since the administration of justice is one of the pillars on which the security and safety of the community rests. It is Parliament in Swaziland which effectively decides what legislation is required to best serve the interests of society and there seems to be no reason in law or in fact why, as far as bail is concerned, it should not decide that it is not in the interests of society to permit of bail in respect of any particular offence. As we have already indicated this does not contradict the provision that the jurisdiction of the High Court is unlimited in Criminal matters. It merely makes a law which the High Court has unlimited jurisdiction to enforce. We therefore agree with Mr. Ngarua's submission that the non-Bailable Offence's Order No. 14 of 1993 as amended limits judicial discretion but not its jurisdiction.

Mr. Maziya raised an alternative argument viz: that the learned Acting Chief Justice erred in law in holding that the appellant was "charged" with murder for purposes of the Non-Bailable Offences Order at the moment of his arrest by the Police. This view of the factual situation is incorrect since it is clear from the record of proceedings that the appellant and his eleven co-accused were charged with the offence of murder in the subordinate court that on 16th February 1996 they wrongfully and intentionally killed five male adults by shooting at or near Kontshingila area. Mr. Maziya contended that this was a mere "holding charge" which should be disregarded. We disagree: the charge was regularly preferred in a Court of law before the Magistrate, Mr. Magagula. No clear indication has been furnished to us as to the meaning and import of the term "holding charge".

It follows from the aforegoing that the appeal is dismissed.

G.P.C. Kotze
PRESIDENT

I AGREE

J. BROWDE
JUDGE OF APPEAL

I ALSO AGREE

P.M. TEBBUTT
JUDGE OF APPEAL