IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 2472/99

In the matter between

ROBERT MAGONGO Appellant

Vs

THE KING Respondent

Coram Leon, JP

Tebbutt, J A

Shearer, J A

For Appellant Mr. C.S. Ntiwane

For Respondent Mrs. M. Dlamini

JUDGMENT

13/ 12/ 2000

TEBBUTT, J A

Can a court grant bail to an accused person after his or her conviction and pending an appeal against such conviction of an offence for which no bail may be granted prior to such conviction? That is the issue in this appeal before this Court.

The appellant was charged before Sapire, C.J. in the High Court with theft of fifteen bags of dagga and with two charges under the Pharmacy Act No. 38 of 1929, as amended by Act 11 of 1983, (the Act) viz of contravening Section 12(1) (b) i.e. of conveying dagga and of contravening Section 12(2) i.e. of dealing by way of sale in dagga. He was convicted of all three charges and sentenced on the theft charge to three years imprisonment without the option of a fine plus a fine of E15 000.00 or two years imprisonment. On the contraventions of the Pharmacy Act, he was, on each count, sentenced to a fine of E15 000.00 or two years imprisonment, each sentence to run concurrently with the sentence on the theft charge. The appellant has noted an appeal against his convictions and sentences.

On 12 October 2000 the appellant applied to the High Court to admit him to bail pending the outcome of his appeal.

The application came before Sapire, CJ who on 16 October 2000 in a written judgment refused the appellant bail on the basis that there were no reasonable prospects of success in the appeal against the appellant's convictions and sentences. He adverted to, but did not decide, what is the main issue before this Court viz the question of admitting to bail, after conviction, of an accused who was charged with a non-bailable offence. The matter comes before this Court on an appeal from the refusal of the learned Chief Justice to grant the appellant bail.

The Non-Bailable Offences Order No. 14 of 1993 (the principal Order), which came into effect on 24 August 1993, defines "Non-Bailable Offences" as "any offence listed in the Schedule to this Order" (Section 2) and

provides in Section 3(i) as follows:-

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"3(i) Notwithstanding any provision in any other laws, a Court shall refuse to grant bail in any case involving any of the offences in the Schedule hereto " (emphasis added).

On 8 June 1994 an amendment to the said Order 14 of 1993 was assented to by the King in the Non-Bailable Offences (Amendment) Act No. 4 of 1994 in which the aforesaid Section 3(1) was replaced with the following:

"Bail to be refused in certain offences 3(1) Notwithstanding any provision in any other law, a Court shall refuse to grant bail to a person charged with any of the offences in the schedule hereto " (emphasis again added).

Subsequently a further legislative enactment was added to the aforegoing by the Non-Bailable Offences Order Legal Notice No. 93 of 1997 which reads:-

"the Schedule to the Non-Bailable Offences Order is hereby amended after paragraph 11 by adding the following paragraph - (b) Any offence under the Pharmacy Act 1929 relating to the possession, dealing, sale or conveyance of any quantity of poison or potentially harmful drug."

It is common cause that dagga is such a drug.

It is clear therefore that once an accused person, as was the appellant, is charged with the conveyance or sale of dagga he cannot be admitted to bail. It was, however, the submission of Mr. Ntiwane, who

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appeared for the appellant that once an accused person is convicted of such conveyance or sale, the picture changes and if he or she intends to pursue an appeal against such conviction, such person may be admitted to bail as he or she is no longer "charged" with the offences in question. In elaboration of his submission Mr. Ntiwane referred to the well-known principle that where a statute interferes with an individual's elementary human rights including the right to liberty, a strict construction must be placed on such statutory provision. (see Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 A.D. 530 at 552). He also referred to a decision of the South African Appellate Division in which it was held, with reference to Section 34(1) of the South African Act 25 of 1913, that the words "is being charged with any crime or offence" in that section were equivalent to "is being tried for any crime or offence" (see Attorney General Transvaal v Additional Magistrate Johannesburg 1924 AD 426).

He submitted that if the legislature wished to deprive a person of his or her liberty in respect of the offences in question it should have stated clearly that the non-bailability provisions also apply after conviction. Its failure to do so was an indication that it did not intend to do so.

It is, of course, obvious that by the amendment to Section 3(1) of the principal Order the scope of the Order was narrowed, the words "any case involving" being of wider ambit than "any person charged with". This said, however, the fact remains that the legislature intended to deny the granting of bail to persons facing charges of contravention of non-bailable offences. Those charges do not disappear but remain in esse both at conviction and thereafter. The conviction is a conviction of the

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accused person of the offence on which he was charged. Even on the interpretation of the words "being charged with" being equivalent to "being tried for" (which I do not necessarily agree is the meaning of "charged", the case cited by Mr. Ntiwane being one in reference to a particular Section of the South African Children's Protection Act 25 of 1913 which is not in pari materia with what is concerned here) the conviction is part of the trial. It follows that any appeal against such conviction is an appeal against the conviction of the accused person of the offence on which he was charged. His appeal is concerned with no other charge.

A further - and to my mind - highly pertinent consideration is one advanced by Mrs. Dlamini in her argument on behalf of the Crown. It is this. It is a well-known canon of construction in the interpretation of statutes that -

"that construction should be adopted which is more consonant with and better calculated to give effect to the intention of the enactment".

(see e.g. per Hoexter J A in South African Transport Services v Olga and Another 1986 (2) SA 684(A) at 697) It is an equally well-known principle that in interpreting a statute the Court will avoid an interpretation which would result in an absurdity (see Venter vs Rex 1907 T.S. 910 at 919; Shenker vs The Master and Another 1936 AD 136). As Mrs. Dlamini submitted, to say that a person should be a bonded man or woman where prior to conviction such person is in law presumed innocent but can be a free man once found not innocent would be a manifest absurdity and result in a mockery of the criminal justice system.

The legislature, in my view, intended to deprive persons who commit non-bailable offences of access to bail. To so deprive such persons both prior to and, also, pending appeal after conviction, would result in an interpretation of the Non-Bailable Offences Order which would be more consonant with and better calculated to give effect to the enactment and would also avoid an obvious absurdity.

It follows that the appellant is not entitled to bail pending his appeal. It is accordingly not necessary to consider whether the Court a quo was correct or not in holding that the appellant had no reasonable prospects of success on appeal.

The appeal against the refusal by the Court a quo to grant bail to the appellant pending his appeal is accordingly dismissed.

P.H. TEBBUTT, J A

I AGREE

R.N. LEON, J P

I AGREE

D.L. SHEARER, J A