COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.2/04

In the matter between:

CAIPHUS NTSHALINTSHALI APPELLANT

VS

THE KING RESPONDENT

ATTORNEY GENERAL

CORAM

BROWDE JA

TEBBUTT JA

BECK JA

FOR APPELLANT:MR. SHILUBANE

FOR RESPONDENTS MR. KHULUSE

JUDGMENT

Tebbutt JA

The circumstances in this appeal are most unusual.

The appellant was charged in the Magistrate's Court of Manzini with the theft of E720 674.66 or, alternatively, fraud. On 19th July 1944 he was convicted of theft and sentenced to six years imprisonment. He appealed to the High Court against both the conviction and sentence. On 12th August 1994 that court admitted him to bail in the sum of El5 000 pending the outcome of the appeal. The appeal was argued before a court consisting of the late Mr. Justice Dunn and the former Chief Justice, Mr. Justice Sapire. Argument was heard on 13 and 14th December 1995 and on 15th May 1997, when judgment was reserved. Judgment has, however, never been delivered because, before it could be, Mr. Justice Dunn died and Mr. Justice Sapire has now resigned.

The appellant's attorney on 22nd March 2000 wrote to the Clerk of the Manzini Magistrate's Court setting out the above facts and applying, in the light of them, for a refund of his bail money of El5, 000. There was no response to this letter and so, on 4th September 2003, the appellant brought by way of notice of motion an application in the High Court for the payment to him of the El5, 000, with costs in the event of the respondent's' opposing the application.

In the supporting affidavit by his attorney, Mr. Shilubane, the latter said:

"In view of the fact that it is now impossible to deliver judgment, I submit that applicant is entitled to demand that he be acquitted of the charges against him because the appeal is in effect a continuation of the trial and since the judges who heard the appeal are no longer available the proceedings have become abortive and have lapsed". The respondents opposed the application.

On 5th December 2003 Maphalala J dismissed the application with costs. It is against that decision chat the appellant now comes on appeal to this Court.

Maphalala J considered that the provisions of Section 291 (bis) of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.3 of 2000 may apply to the situation, and, furthermore, that the appellant would not be entitled to a refund of bail money until he had been discharged in terms of Section 155(5) of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 OF 1938, That Section provides that -

"any person who has once been called upon to plead to any indictment or summons shall ... be entitled to demand that he be either acquitted or discharged."

The appellant had, so the learned Judge found, not received such a discharge.

Without deciding the correctness or otherwise of the learned Judge's judgment, it seems to me that the correct course to follow in the circumstances of this matter is that the uncompleted appeal in the High Court should be referred back to the High Court to be considered afresh by two other Judges of that court. Mr. Shilubane, for the -.appellant, did not disagree with that view. It is - also consonant with Section 291 (bis)(a) of the latest amendment to the CRIMINAL PROCEDURE AND EVIDENCE ACT which provides that where a presiding officer dies, resigns, his services are terminated or for a just reason is unable to continue with proceedings before him, another judicial officer may assume and continue the proceedings. By parity of reasoning, this Court can refer the uncompleted appeal back to the High Court for it to be considered again by another Bench there.

I can, however, foresee that this may give rise to certain practical difficulties to which I feel I should advert.

The first of these is the possibility - a very distinct possibility in my view - that the record of the proceedings in the Magistrate's Court upon which the appeal would have to be considered, has, after the lapse of time of eight years from 1997 to the present, either been lost, mislaid or even destroyed. In such event it would be futile, indeed probably impossible, to attempt to reconstruct it after such a lapse of time. It has been held in South Africa and Botswana, that where it is impossible to have the record in the lower court available for the Court of Appeal, the appeal should be allowed and the conviction and sentence set aside (see e.g. S V COLLIER 1976(2) SA 378(C) at 379; S V PHUKUNGWANA 1981(4) SA 209 (B); SIPHO COMPUTER DLAMINI V REX CRIMINAL APPEAL 20/2000) should this circumstance arise in this case, it is an issue which should be considered by the High Court.

Even if the record is still available a second difficulty may be this. The appellant has had the expense of one appeal - an appeal which has proved to be abortive through no fault of his. He may not wish to incur those costs again. He should therefore, I feel, be given a choice as to whether he would agree to the new court considering the appeal on the record alone without hearing argument again or whether he would wish it to be re-argued. If he should choose the latter, it seems to be only fair that he should be offered the services of counsel prodec to argue it on his behalf, unless, of course, he wishes to employ his own counsel to do so. These are matters to which the High Court should, in my view, also advert its mind before dealing with the appeal. There may be other difficulties that I have not envisaged that would require equal consideration by the Court to which the appeal is referred back.

But what of the appellant's bail? The fact that his appeal from the Magistrate's Court will go back to the High Court does not, in my view, preclude this Court from looking afresh at his bail.

The decision on questions regarding bail is essentially a function of the judiciary which, of course, includes the Court of Appeal. (See SOUTH AFRICAN LAW AND PROCEDURE VOL.IV (by J. Dugard) at page 22.) In

exercising that function courts should balance the reasonable requirements of the State with the interests of the liberty of the individual in the light of the circumstances of the case in question (see Dugard loc. tit). Unlike the corresponding Act in South Africa, however, there would appear not to be a section in the Swaziland CRIMINAL PROCEDURE AND EVIDENCE ACT allowing for an accused person, pending the outcome of criminal proceedings against him, to be released on his own recognisances or responsibility, although this is frequently done in practice. It would seem, therefore, that while this Court cannot order that appellant be released on his own responsibility pending the outcome of his appeal to the High Court - or any subsequent appeal to this Court - so as to allow him to get back his E15,000 bail money, this Court can substantially reduce the amount of bail and order a refund of the balance. This, in my view, would only be fair and just. The chronology in this matter deserves to be repeated. The appellant was charged in December 1990 with a crime allegedly committed between May and July 1989 i.e. almost 16 years ago. He was convicted in July 1994 and admitted to bail in August 1994, some ten and half years ago. He has at no time tried to abscond or breach any of his bail conditions. In these circumstances this Court will reduce his bail to E100, pending the outcome of his appeal and order the refund of the balance of E14,900.

I would also wish to make one further comment. From the chronology set out above it is clear that the appellant has had this matter hanging over his head since December 1990 - i.e. for over 14 years. He had the spectre of a six-year prison term haunting him since his conviction in July 1994 i.e. for almost 11 years. It is a well established maxim of our law that "justice delayed is justice denied". The constitutions of this country's neighbours viz South Africa, Botswana and Lesotho all have entrenched as one of the fundamental rights of their citizens that any person who is charged with any crime must have a fair and speedy trial.

It seems to me that this has not occurred in this case, through no fault of the appellant. Should, therefore, his fresh appeal in the High Court against his conviction not succeed, the Court hearing that appeal should, in my view, give serious consideration, when dealing with the appellant's sentence, as to whether it would be fair and equitable and in the interest of justice that the appellant should, after this considerable lapse of time, have to undergo any period of incarceration or whether justice, both to the appellant and to society, would not be

achieved by the imposition of some alternative form of punishment. In so considering, the Court should ascertain whether the appellant was in custody or on bail during the period of his trial from December 1990 to August 1994, a factor that was not made known to this Court.

The following order is therefore made:

1,.... The appeal of the appellant in..... Case No. 133/94 is referred

back to the High Court to be reconsidered by two Judges of that Court;

2. Pending the outcome of the said appeal - and any possible further appeal to this Court - the appellant is admitted to bail in the sum of E100, with no further conditions in respect thereof;

3. The said sum of E100 is to be deducted from the sum of E l 5,000 deposited with and presently held by the Clerk of the Mbabane Magistrate's Court and the balance of E14 900,00 is to be refunded forthwith to the appellant by the said Clerk;

4. The costs of this appeal are to stand over for determination by the High Court hearing the appeal as aforesaid.

P.H. TEBBUTT

Judge of Appeal

J. BROWDE

JUDGE OF APPEAL

I agree

C.E.L. BECK

Judge of Appeal

Delivered in open Court on this day of 17 March, 2005.