



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.332/15

In the matter between:

SIZWE DLAMINI

Applicant

and

REX

Respondent

Neutral citation: *Sizwe Simelane vs Rex (332/15) [2016] [SZHC 95]*

(16th June 2016)

Coram: Hlophe J.

For Applicant: Mr. B. Dlamini

For Respondent: Miss. B. Ndlela

Summary

Criminal Law – Application for Bail Pending Appeal – Accused convicted by the Magistrate’s Court sitting at Simunye and filing an appeal to this court – Whether High Court has jurisdiction to hear such an application – Section 326 (b) requires such application to be made to the court from which appeal is made – High Court not such a court – High Court has no jurisdiction to hear such an application except if it was an appeal – Application dismissed.

JUDGMENT

- [1] The Applicant instituted application proceedings asking for an order of this court admitting him to bail pending appeal.
- [2] It is not in dispute that the Applicant was convicted by the Simunye Magistrates Court on three counts of theft after he allegedly stole money from his employer, known as Jereh Financial Services, on several occasions. The various incidents of theft are said to have occurred on the 21st November 2013, the 30th November 2013 and 13th December 2013. These alleged incidents of theft formed the basis of counts 1, 2 and 3 respectively. The amounts stolen on the respective dates were E10, 000.00, E5, 000.00 and E10, 000.00 respectively.

[3] There is no dispute that during the trial that followed, the accused person was convicted of theft on all the three counts and sentenced respectively to three years imprisonment without an option of a fine on count 1, two years imprisonment without the option of a fine on count 2 and to three years imprisonment without an option of a fine on count 3. The sentences were ordered to run consecutively which in effect meant that he was to serve a total of 8 years in prison.

[4] It is common cause that the Applicant noted an appeal to this court, contending among other things, misdirections by the Magistrate's Court as well as certain alleged irregularities on its part. The appeal noted by the Applicant was against both the merits of the Magistrate's Judgment and the sentence imposed. I can only mention in passing that although several contentions were made as grounds for the appeal, its thrust was shown to be that some evidence with regards the bank account printouts, had been wrongly admitted by the trial court. The sentence on the other hand was appealed against on the grounds that same was too harsh and induced a sense of shock, not only individually but also when considering the totality of the sentences and their cumulative effect.

- [5] Contending that he had good prospects of success on the pending appeal the Applicant instituted these proceedings, seeking as stated above, an admission to bail pending appeal.
- [6] The Respondent did not file fully fledged opposition papers but merely filed a notice in terms of which two points of law were raised. The first point was in summary that whereas the Applicant had been convicted and sentenced by the Simunye Magistrate's Court, the application for bail pending appeal was moved before this court (the High Court). In terms of Section 326 (b) of the Criminal Procedure And Evidence Act of 1938, an application for bail pending appeal is a matter reserved for the court from which the appeal is made, namely the Simunye Magistrates Court. In other words the High Court has no jurisdiction to hear the application in question as it is not the one that convicted the Applicant.
- [7] The other point was that the appeal noted by the Applicant had no prospects of success given that there was full compliance by the Magistrate concerned with Section 238 (1) (b) of the Criminal Procedure And Evidence Act of 1938 as well as that the imposition of the sentence in the manner done by the learned Magistrate was appropriate and was founded on Section 313 of the Criminal Procedure And Evidence Act of 1938.

[8] Based on the foregoing points the Respondent prayed that the said points be upheld and that the application be dismissed.

[9] Given that there is no record of proceedings from the Court *a quo* filed with this court, it seems to me that it would be difficult for this court, in the context of this application to assess the correctness or the strength of the second point raised. Firstly it is difficult on the application as presented for one to understand the relevance of Section 238 (1) (b) of the Criminal Procedure And Evidence Act. Secondly this court cannot ascertain the appropriateness of the sentence without all the circumstances of the matter being placed before it. Thirdly the mitigation or aggravation of sentence as argued before the Court *a quo* have also not been placed before this Court. Whatever views this court may have on the sentence as revealed, it would be premature to conclude its propriety fully in the absence of the record.

[10] Section 326 (b) of the Criminal Procedure And Evidence Act provides as follows:-

“326. The execution of the sentence of a Magistrate’s Court shall not be suspended by reason of any appeal against a conviction unless the –

(a)...

(b) 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 un-convicted prisoner until such appeal has been heard and decided”.

[11] The language used in the section concerned is in my view peremptory when one considers the words used including the word “shall”. The effect of this is that the only court that has jurisdiction to determine whether or not to allow bail pending appeal in a criminal matter heard and determined by the Magistrate’s Court is that court. It is only the decision of the Magistrate refusing bail pending appeal that this court may hear the matter on an appellate basis. I therefore agree with the Respondent that this court has no jurisdiction to determine, as a court of first instance, the question of bail pending appeal where this question has not yet been determined by the court that heard the matter, which is the one that has the benefit of all the facts of the matter as recorded.

[12] The question whether or not there are any prospects of success in the matter entitling the Applicant to bail pending appeal, I am convinced is

not for determination by this court as a court of first instance and Section 326 (b) of the Criminal And Evidence Act addresses that question. Instead it is for determination by the relevant Magistrate's Court. Because of the view I have taken of this matter it is unnecessary for me to comment at this stage on what the fate of the admission of the evidence of the bank electronic printouts as well as the propriety or otherwise of the sentence imposed on the Applicant. These are questions for answer by the Appel Court after all the facts of the matter as contained in the record shall have been placed before it.

[13] That being the case, I have come to the conclusion that Applicant's application cannot succeed and I hereby make the following order:-

13.1 The Applicant's application be and is hereby dismissed.

13.2 It is open to the Applicant to institute similar proceedings before the relevant Magistrate's Court for consideration should he be so advised.

N. J. HLOPHE
HIGH COURT JUDGE