SWAZILAND HIGH COURT

Rex

vs

Robert Magongo

Cri. Trial No. 19/2000

Coram	SAPIRE, CJ
For Crown	Mrs. M. Dlamini
For Defence	Mr. C. Ntiwane

JUDGMENT
(16/10/2000)

The accused in this matter has been found guilty on three counts. The first related to the theft of 15 bags of dagga from police cells at Malkers. The 2nd count, which is count 3, contravention of Section 12(1)(b) of the Pharmacy Act of 1929 as amended by Pharmacy Amendment Act no. 11 of 1983 and the 3rd count was a contravention of Section 12(2) of the Pharmacy Act 1929 as amended.

The sentences which have been imposed are set out in the Notice of Appeal which has now been filed.

On count 1, three (3) years imprisonment without the option of a fine and a further fine of E15 000.00 in default of payment of which a further 2 years imprisonment.

Count 3 is E15 000.00 in default of payment thereof imprisonment for 2 years, a sentence to run concurrently with the one on count 1 and

Count 4 a fine of E15.000.00 in default of payment of which imprisonment for 2 years.

I see in the Notice of appeal that it is said the sentence on count 4 is to run concurrently with the one in count 3. I do not think that is correct. I believe that as was my intention the sentence imposed in respect of count 4 was to be consecutive. In any event the record will speak for itself.

This application for bail pending appeal is opposed. The offences of which the accused has been found guilty do not involve violence and I accept that his release from custody would not pose a threat to the physical well being of anyone. If it were possible to allow him bail this consideration would weigh heavily in his favour.

The first question which has to be asked is whether, as 2nd and 3rd counts, that is the contraventions of the Pharmacy Act are offences which are mentioned in the schedule of the Non-Bailable Offences Order, bail is possible. This legislation provides that if an accused is charged with these offences, the court is not permitted to admit him to bail. There is no specific indication in the Order whether it is bail pending the trial of a matter or whether it includes bail after conviction pending appeal.. The order reads that if the applicant is charged with the offence described in the schedule bail may not be granted. Originally the order referred to a charge involving those referred to in the schedule but this has now been amended to refer to an applicant for bail who is "charged" with those offences.

It has been argued that once the accused has been convicted he is no longer charged and the order does not apply. It all turns under the meaning of the word "charged" There has been judicial interpretation of this word. In the headnote to *Sanderson v Attorney-General, Eastern Cape* [1] the following appears

> *"The word `charge' was ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against the accused, as it is defined in s 1 of the Criminal Procedure Act 51 of 1977. As a verb, `charge' bears no defined or precise meaning. There are two possible interpretations. It could be interpreted very narrowly to mean the formal arraignment or something tantamount thereto or, broadly, to mean no more than an intimation to the accused of the crime alleged to have been committed.*

[1] *1998 (2) SA 38 (CC)*

The Court declined to decide where `charged', as used in s 25(3)(a), fell as it made no significant difference to the matter in casu"

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The word may be read as referring to the form of charge itself but more logically to the whole procedure of bringing an accused person before court and the levelling of accusations against him involving particular offences.

There is considerable force to the argument that in interpreting the words of the order in the sense that once the applicant is a convict he is no longer charged. On the other hand there is perhaps more force to the argument that if it was the intention of the legislature that the applicant for bail was to be refused bail before and pending trial then this intention would be frustrated by granting bail pending appeal against a conviction.

However, I find that I do not have to decide this point. In relation to the two convictions under the Pharmacy act, the applicant has been given a sentence, which allows him to pay a fine. He has said in his affidavit that he is a registered owner of a certain property described as Lot No. 20 remainder situate Mvulo Road Pigg's Peak. That property is presently leased out and his family receives E850.00 in respect of rentals to subsidise his wife's salary. He says in the event that the Honourable court is inclined to admit him to bail such property can be used as security. If that is so, there is no reason why the property could not be used to raise the money to pay the fines, which have been imposed. There is no reason why there should be security rather than the payment of the fines.

What remains is what I consider the most serious of the three convictions, and that is the theft. The primary question to which I have to put my mind is whether there is any prospect of success on appeal., and secondly whether there is some real prospect that the applicant will not present himself for interment should he fail in his appeal against the conviction on this count.

I have considered this again ever since the application was argued. There is judicial appreciation that it is difficult for a judge who has found the accused to be guilty beyond any reasonable doubt, to have to make the intellectual exercise of considering whether another court could come to a different conclusion. It is an exercise, which I have had to carry out and the evidence in this case is such that in my view there is insignificant prospect of success

on appeal. I cannot say that the appeal is a foregone conclusion but I do not see any prospect of the appeal court coming to a different conclusion to that to which I have come.

The evidence against the accused person is strong. There is, as I said in my judgment on the issue, the evidence of Mavuso whose evidence was credible and who was strongly corroborated as to his account of what happened after the dagga had been removed from the cell. He is corroborated by independent circumstances linking the accused with the presence of dagga at the house at Motjane and in my view there can be little prospect of success in regard to this conviction. The accused's version, necessarily involving a conspiracy to which all the witnesses was party is fatuous.

That being so I do not have to speculate on the prospects of the applicant absconding

Accordingly the application for bail is dismissed.

S.W. SAPIRE, CJ