THE HIGH COURT OF SWAZILAND

CYRIL DLAMINI

VS

REX

Criminal Case No. 196/2002

Coram	S.B. MAPHALALA – J
For the Applicant	MR. J. MASEKO
For the Defence	Mr. N. MASEKO

JUDGMENT

(05/02/2003)

This is an application for an order discharging the Applicant from custody in terms of Section 136 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended).

The application is founded on the affidavit of the Applicant himself relating the substantial facts in support thereto. The Respondent has not filed any opposing papers despite clear directives at to time limits reflected in the Applicant's notice of motion. The Respondent was to file its notice to oppose on or before the 14th day of January 2003, and thereafter and to file its answering affidavit, if any, on or before 12.00noon on the 16th day of January 2003. The Respondent received the said papers on the 13th January 2003.

Mr. Maseko took issue of this and applied for an order in terms of the notice of application there and there, as the Respondent had not filed the required papers in opposition. When the matter came before me on the 24th January 2003, I however allowed *Mr. Maseko* for the Crown to argue the point of law in opposition from the bar. This indulgence given to the Respondent should not be viewed as laxity on the part of the court to enforce the rules of court but was actuated by the prescribes of justice. This position, I adopted to avoid the ugly spectacle of law triumphing over justice.

The crisp point of law raised by the Respondent was that the Applicant has not fulfilled the requirements of Section 136 (2) in so far the periods envisaged in the said Section.

The founding affidavit of the Applicant reveals that on the 22nd January 2002, he was arrested by the Royal Swaziland Police from Tshaneni police station and charged with the crime of murder. On the 8th July 2002, he was committed to the High Court for trial and transferred to Sidvwashini prison on the 13th July 2002 from Big Bend prison and have been detained there to date. He deposed that on the 4th September 2002, he was called to the High Court for purposes of holding a pre-trial conference which was conducted by the Registrar of this court. He avers further that he is now desirous of being released and/or discharged from custody in terms of the Section 136 (2) of the Act as his continued detention is now in contravention of the said Act. He has not been allocated a date of hearing since his committal and it is now over six months since he was committed to this court for trial. He avers that he was supposed to have been allocated a date of hearing within the session commencing on 15th September 2002, neither has he been allocated a date within the first session of this court, which commenced 20th January 2003, nor has his trial been transferred to some other court with appropriate jurisdiction.

The above are the facts in support of this application. *Mr. Maseko* for the Respondent strenuously resisted this application from the bar. The gravamen of the Respondent's resistance is as follows: According to the Applicant's founding affidavit he was arrested on the 22nd January 2002, and was thereafter committed for trial before the High Court on the 8th July 2002. Therefore in terms of the Section an Applicant can only be discharged after he has been in custody for 6 months from the date of committal and the first session after the 6 (six) months has elapsed. The Crown is of the view that when one counts from the 8th July 2002, the six months ended on the 8th January 2003. In addition to that the first session thereafter must elapse.

These are the issues before me. It is common cause that the Applicant was arrested on the 22nd January 2002, and that he was committed for trial before the High Court on the 8th July 2002. it is also common cause that the 6 (six) months would ran up to the 8th January 2003. *Mr. Maseko* for the Applicant contends that his trial date

should have been included in the current session of the court which ends in May 2003. *Mr. Maseko* for the Crown argues *au contraire* that he can only be discharged after the expiry of said session.

Section 136 (2) reads:

> "If such person is not brought to trial at the first session of such court held after the expiry date of six months from the date of his commitment and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed".

It appears to me that *Mr. Maseko* for the Crown is correct in his submission. On a proper interpretation of the said Section the present application has been brought prematurely. Section 136 (1) states that an Applicant should have been brought to trial at the first session of the High Court for trial. Such session as envisaged by the Section has not come and gone.

As for the concern raised by *Mr. Maseko* for the Applicant that the Applicant's case has not been included in the roll for this session and the practical difficulties in including the Applicant's case in the present roll I find the words of my Brother Masuku J in the case of ***Sean Blignaut vs The King (Case No. 130/2002) (unreported)*** apposite where the learned Judge stated the following at page 7, and I quote:

> "Reverting to the question for determination, I state the following. Admittedly, the roll for this session has been published and does not include the Applicant's trial. It is my view however that whilst the published roll indicates the matters listed, it is not a final document cast in stone. That much is explicit from the wording contained in paragraph 5 of the roll for the current session, which unfortunately is undated. Paragraph 5 thereof reads as follows:
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> **"5. Additional cases may be added to the roll (sic) without publication of a supplementary roll".**
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> That being the case, there still are possibilities, remote as they presently may seem, that the Applicant can still be brought to trial in the remaining time before the close of this session. Indeed there are many instances in which notwithstanding the publication of the roll by the end of the particular session, additional matters are included. I have in mind the following cases which I recall before this court. ***R vs Gurtram Alberecht Criminal. Case No. 14/98; R vs Peter Lauer Criminal. Case No. 7/99 and R vs Robert Magongo Criminal. Case No. 19/2000".***

It is my view, regard to what I have said above and being conforted by the sentiments expressed by Masuku J in ***Sean Blignaut*** (*supra*) that the moving of this application

at this time has been premature and I cannot therefore determine the issue before close of the session.

In the result, the application is dismissed. I am not going to make any order as to the costs.

S.B. MAPHALALA

JUDGE