THE HIGH COURT OF SWAZILAND

MZWANDILE MAXWELL SIMELANE
SAMKELISO MKHABELO

VS

REX

Criminal Case No. 297/2002

Coram	S.B. MAPHALALA – J
For the 1st Applicant	MR. MABILA
For the 2nd Applicant	MR. L. GAMA
For the Respondent	MRS. WAMALA

JUDGEMENT ON BAIL APPLICATION
(14/03/2003)

Before me are two bail applications in respect of one Mzwandile Maxwell Simelane and one Samkelo Mkhabela who are represented by *Mr. Mabila* and *Mr. L. Gama,* respectively. The applications were argued at the same time although the Applicants have filed different applications and supporting papers thereto.

The Crown is represented by *Mrs. Wamala*. The Crown opposes the granting of bail in respect of the Applicants and the opposing affidavit of 3234 Detective Constable Solomon Mavuso is filed in opposition thereto.

The 1st Applicant has filed a founding affidavit where he outlined the material facts in support of his application. The 2nd Applicant has also filed a similar affidavit in support of his application.

The 1st Applicant avers that on the 14th November 2002, he was arrested by members of the Royal Swaziland Police at his parental home in Manzini and was subsequently charged *inter alia* with robbery and attempted murder. The 2nd Applicant was arrested on the 11th November 2002, on a charge of attempted murder and robbery and has been in custody since. The 1st Applicant further contends that he was innocent of the charges against him and at the trial he will plead not guilty as at the time the offence allegedly took place he was at school (at the University of Swaziland, Mbabane campus) and has witnesses to prove this contention. The 2nd Applicant also avers that he has a *bona fide* valid defence to the charge in that he did not commit the offence as he was not at the scene of its commission nor did her render any assistance to its commission.

Both Applicants stated that they will not abscond nor interfere with the due process of the law.

The opposition by the Crown as gleaned from the opposing affidavit of Constable Mavuso is that there is sufficient evidence linking both to the offences charged. In respect of the 1st Applicant it is alleged that there is evidence that the Applicant used to reside in the Republic of South Africa and in light of the seriousness of the charges, he is likely to commit offences if released. The Applicant is likely to interfere with crown witnesses especially the accomplice witness. As for the 2nd Applicant it was further deposed by the police officer that it was very difficulty to arrest him and that he is a holder of two different Swazi travel documents.

Both Applicants then filed replying affidavits to Respondent's opposing affidavits where a number of points were put in issue.

I heard submissions on the merits of the bail applications in the contested motion of the 21st February 2003, where I reserved my ruling.

The arguments advanced by counsel for the Applicants were substantially the same and for the sake of brevity I would briefly outline those by *Mr. Mabila* in his Heads of Argument. *Mr. Mabila* took the court through the texts ***Lawsa Vol. 5 part II (First Re-issue) para 211*** and ***J Van Der Berg – Bail (a Practitioner's Guide) Juta*** as to the general principles to be applied in such cases. That in dealing with bail applications three main factors are taken into account:

a) The risk that the accused might not stand his trial;
b) The chances that he might commit another offence before his trial;
c) The possibility that he might interfere with the course of justice (see **Lawsa** *(supra)*).

In *casu* the Applicant has demonstrated that he will not in any way affect the requirements as outlined above.

Further that the opposing affidavit filed on behalf of the Respondent does not set out sufficient grounds for the refusal of bail. According to our law an opposing affidavit must clearly set out the Respondent's defence (see ***Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South Africa 4th ED*** page ***480***). Furthermore, it was contended on behalf of the Applicants that paragraph 2.2 of the opposing affidavit ought to be struck out in that it contains hearsay evidence (see ***Herbstein and Van Winsen ibid page 368 – 369***).

Mr. Gama for the 2nd Applicant made submissions similar to those advanced by *Mr. Mabila* for the 1st Applicant.

Mrs. Wamala in her brief address argued *per contra* that the procedure in bail applications is to call *viva voce* evidence of the police officer to supplement what was stated in opposing affidavit that such applications cannot be decided only on the papers filed of record. The Crown urged the court to allow the calling of *viva voce* evidence in

the interest of justice for the court to be able to exercise its discretion based on balanced evidence.

I have considered all the points raised in this matter and I am of the considered view that the calling of *viva voce* evidence would be necessary in this case for the court to make a fair assessment as to whether to grant or refuse bail. I would give the Crown the benefit of the doubt that it was of the view that as a matter of procedure *viva voce* evidence is allowed to supplement an opposing affidavit. In my view, the dictates of justice would require that we hear the evidence of the police officer in this case or any other relevant witnesses who might assist the court in arriving at a just decision.

It would also appear to me that prior to the demise of preparatory examination, Section 96 of the Criminal Procedure and Evidence Act (as amended) 67/1938 required that such application were to be brought in the form of a petition. ***Swift's Law of Criminal Procedure (2nd ED) 1969 Butterworths*** at page ***155*** on a discussion of a similar Section in South Africa stated the following:

> "It seems that in a proper case, the court desiring to protect the liberty of the subject, it will condone the omission to proceed by way of petition and hear application by affidavit (*ex parte* Duze, 1946 (1) P.H. H71 (N), but the applicant must show exceptional circumstances for the departure in procedure (S vs Ngcobo and others, 1966 (3) S.A, 744 (N)".

With the introduction of Section 88 Bis of the Act the preparatory examination procedure having been was abolished, however, in my view no procedure was put in place in such cases. It appears to me that if the court feels that the calling of oral evidence would serve the interests of justice despite a full set of affidavits having been filed that court would be perfectly entitled to proceed in that direction.

Lastly, although this is not a criminal matter in the strict sense of the word, however, in my view, I find the words by Curlewis J in ***R vs Hepworth 1928 AD 265*** at *277* apposite. The learned Judge stated the following, and I quote:

> "A criminal trial is not a game where one is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both side, a Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control proceedings according to recognized rules of procedure, but to see that justice is done".

It is for the above mentioned reasons therefore that I rule that oral evidence be led in this matter.

S.B. MAPHALALA

JUDGE