THE HIGH COURT OF SWAZILAND

NHLOKO JOHN ZWANE

Applicant

And

THE KING

Respondent

Case No. 36/2003

Coram S.B. MAPHALALA - J

For the Applicant MR. C. NTIWANE

For the Respondent MR. N. MASEKO

JUDGMENT

(On bail application)

(16/05/2003) Relief sought

On the 28th February 2003, the Applicant filed an application for bail in the following terms:

a) Admitting Applicant to bail upon such terms and conditions as the above Honourable court deems fit to impose.

b) Further and/or alternative relief.

The Applicant has filed a founding affidavit in support thereto.

The Crown opposes the application and the opposing affidavit of 2063 Detective Superintendent Aaron T. Mavuso is filed thereto. Supporting affidavits of Superintendent Ndwandwe 1757 Sergeant Margaret Makhanya are also filed in opposition. The Crown was then granted leave to file a supplementary affidavit such affidavit was presented for filing on the 24th March 2003. This affidavit was deposed to by 2063 Detective Superintendent Aaron Thabo Mavuso who also deposed to the main opposing affidavit. Various annexures are filed in support thereto viz annexure "ATM3" being a statement to the police by Jabulane James Mashaba and annexure "ATM4" by one Celumusa Mbhekeni Mafu. These two persons are co-charged with the Applicant in the murder charge.

On the 12th March 2003, the Applicant filed a replying affidavit to the main opposing affidavit. The said affidavit is deposed by the Applicant himself.

On the 20th March 2003, the Applicant filed a replying affidavit to the supplementary affidavit which was also deposed to by the Applicant himself.

I must say that this matter first appeared before court on the 7th March 2003, and has been postponed on a number of times for various reasons until it finally appeared before me on the 5th May 2003.

The Applicant's case

The Applicant is a 70 years old man with a sickly disposition suffering from sugar diabetes. He is the Court President of the Bhunya National Court and also a Chief of the area. He also serves in the King's advisory body, the Swazi National Council Standing Committee (SNC).

He was arrested by members of the Royal Swaziland Police force led by Jomo Mavuso on the 19th February 2003, on a charge of the murder of one Taba Dlamini and he is presently an awaiting trial prisoner at Mdutshane Correctional facility.

He is desirous of being admitted to bail pending his trial on the murder charge. He avers that he cannot carry out his responsibilities at the Bhunya National Court and being Chief of his area because of his continued detention pending his trial. He cannot also perform his duties in the King's advisory body.

The Applicant is married to eight (8) wives in terms of Swazi law and custom and has many children the number of which he cannot readily remember. He is the sole breadwinner of his huge family and given his incarceration his family is prejudiced. As earlier stated he suffers from sugar diabetes and he fears that he will die in prison while awaiting his trial as he does not have access to his medication and the right type of diet he is supposed to have.

The Applicant further, avers that he has a good defence to the charge of murder in that he did not kill the deceased in as much as he is involved in any conspiracy to have killed him. That in the event he is admitted to bail he will reside either at Bhunya where he was allocated a house by Government or at Mlindazwe where his main home is. If the court were to admit him to bail he undertakes not to demean himself in any manner prejudicial to the interest of justice. He undertakes not to interfere with Crown witnesses and will appear in court when his matter is tried. He can report at Bhunya Police station.

The Crown's opposition.

The Crown's opposition as gleaned from the opposing affidavit of Superintendent Mavuso and others can be summarised as follows: It is the Crown's case that there is overwhelming evidence against the Applicant that he conspired in the murder of the deceased. Applicant and deceased were involved in a chieftancy dispute. The firearm that was used to kill the deceased belonged to the Applicant and is legally registered in

his name. This firearm was recovered after a pointing out by accused no. 1 Celumusa Mbhekeni Western Mafu after he had been duly warned and cautioned in terms of the Judges Rules. It is contended that the Crown will lead evidence to prove that the Applicant gave the firearm to 1st accused sometime in 2002.

Further, the Crown will prove that notwithstanding that Applicant knew that he had given his firearm to accused no. 1 he then in January 2003 went to Bhunya Police station and falsely reported that he had lost his firearm. According to the Crown, that was a deliberate ploy to frustrate and/or obstruct the course of justice, even before the murder was committed.

The second ground for the Crown's opposition which at first blush appears to have substance is that some Crown witnesses are his subjects therefore there is high likelihood that Applicant will interfere with such witnesses. It is contended in this connection that even though in custody Applicant has passed threatening remarks concerning this case to the 1st accused and the 1st accused had made a report to the officer - in - charge, Zakhele Remand Centre about these threats. As a result thereof the investigating officer, Jomo Mavuso was called by the said officer - in - charge at the instance of accused no. 1 to attend to these threats. This, according to the Crown was interference by the Applicant with investigations and the course of justice. Further, accused no. 1 stayed together in one house with Applicant. Accuse no. 1 was the driver of the Applicant and that they are related.

Superintendent Aaron Mavuso in his supplementary affidavit deposed further that the Applicant has interfered with one witness Khabonina Shabangu whose evidence is crucial to the Crown's case.
The leading of viva voce evidence

After Mr. Ntiwane had made his submissions and during the course of the Crown's submissions a need arose for the calling of viva voce evidence. The evidence was sought

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to clarify whether accused no. 1 made a report of the threat by the Applicant to the officer - in - charge, Zakhele Remand Centre, Manzini and the nature of the threat itself. The court then adjourned to another date to enable the Crown to call witnesses. Two witnesses were called in this regard. Officer Ndwandwe aka Nxumalo testified that accused no. 1 made a "report" to him but the officer could not assist the court as to the nature of threat except to say that when Applicant was being remanded at the Manzini Magistrate Court with the other accused persons he talked "badly at him" "(wamkhulumisa kabi)". This witness was cross-examined at some length by Mr. Ntiwane for the Applicant where certain inaccuracies emerged from his evidence more importantly that his supporting affidavit was not sworn in terms of the law. I shall advert to this aspect of the matter later in the course of this judgement as I feel it needs proper attention. The Crown then called one Makhanya who is also a co-charged with accused in this matter.

He testified that as he had been shot by the police when they arrested him he was taken to Mbabane Government Hospital for treatment where he met the Applicant. The Applicant told him that accused no. 1 Mafu has fabricated evidence against him and he (applicant) requested Makhanya to go and tell Mafu who was also kept at the Zakhele Remand Centre that certain people would come to collect his personal clothing's. This witness could not help the court as to why these items were to be collected. But in the affidavits by the Crown it is alleged that the purpose of collecting Mafu's clothing was that they were to be treated by some supernatural means so that Mafu would escape from custody mysteriously. The grand plan was that if Mafu escaped that would be the end of the matter as the main perpetrator in the commission of the offence would have disappeared and the Applicant would go scot-free. This according to the Crown was further proof that the Applicant was hell bent in interfering with Crown witnesses and tampering with the evidence in this case.

The court has heard submissions by both counsel in this matter.

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The applicable law

The locus classicus in matters of bail in this jurisdiction is the case of Jeremiah Dube vs R (1) 1979 - 1981 S. L. R. 187 (per Cohen J (as he then was) where the learned judge, inter alia held that "it is established in our law that the onus is on the accused to show on a balance of probabilities that the granting of bail will not prejudice the interests of justice" (see, for example, S vs Nichas and another 1977 (1) S.A. 257 (c) and Rex vs Mtatsala and another 1948 (2) S.A. 585 (E) where it was stated that if the crown opposed the application the onus is on the accused to satisfy the court that he will not abscond or tamper with Crown witnesses and if there are substantial grounds for the opposition bail will be refused. It is necessary to strike a balance as far as it can be done between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. (see, for example R vs Essack 1965 (2) S.A. 161 (D) and S vs Mhlawli and others 1963 (3) S.A. 795 (c).
In Nagel (ed) Rights of the Accused (1972) 177-8 the following valid remarks are also made:

"The basic purpose of bail, from society's point of view, has always been and still is to ensure the accused's reappearance for trial. But pretrial release serves other purposes as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceedings. Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship

and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defence (sic) with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble ... In the past decade, studies shown that those on pretrial release plead guilty less often, are convicted less often, go to prison less often following conviction than those detained before trial. This is true even when the study controls for factors such as employment at the time of arrest, retained or assigned counsel, family ties, past record and present charge. The factor of pretrial release alone shows up as a vitally controlling factor in the outcome of the trial and sentencing..."

In S vs Acheson 1991 (2) S.A. 805 (Nm) Mohamed J remarked as follows (at 822 A - B).

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice".

Swift's Law of Criminal Procedure (2nd ED), 1969 at page 150 states that bail will not be granted if the interest of justice will be prejudiced, as follows:

i) It is likely that the accused will abscond or there is a reasonably founded apprehension that the accused will avoid standing trial, as by committing suicide (C v R 1955 (1) P.H. H93 C). In applying this "the court will not look at the character or the behaviour of the prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment which may be imposed and the probability of a conviction per Tatham J. in Kok vs R 1927 NPD 267, at page 269, 270.

ii) Is likely that the accused will hamper the investigation of the police in any way Cheller and another vs Attorney General 1932 CPD 102. In R vs Mbalele 1946 (1) P.H. H63 E Pittman JP. refused bail where if released the accused might have brought or attempted to bring grossly improper influences to bear with the object and effect of disturbing the due course of justice. But this decision on the potential acts of the accused should, with respect be followed with caution.

iii) There is a reasonable possibility that the accused will tamper with state witnesses thus bail was refused in ex parte Nkete, 1937 EDL 231, where it was shown that the lives of two principal witnesses had been threatened and they were in terror of the accused. In R vs Phasoane, 1933 T .P. D. 405, where it was shown that pressure had been brought to bear on a native woman to induce her to lay the blame on a person other than the

accused who was a deposed headman and a tyrannical person possessing considerable authority over his own people.

The above therefore are the legal principles on which the instant case ought to be decided. I shall proceed therefore to determine the issues under two heads; viz i) and ii) enunciated by Swift (supra) above. As these appears to me to be the two grounds of opposition advanced by the Crown in casu.

i) It is likely that the accused will abscond or there is a reasonably founded apprehension that accused will avoid standing trial.

The Crown is of the view that there is likelihood that accused will abscond or there is a reasonable founded apprehension that accused will avoid standing trial. The Crown's apprehension in this regard is premised on the fact that the Applicant is facing a crime which carries capital punishment if he were to be convicted at the conclusion of his trial. In this connection I find it apt to cite the case of Jeremiah Dube (supra) at page 189 paragraph C fin F where the learned Judge Cohen J cited the judgment of Innes CJ in the case of McCarthy vs Rex 1906 T.S. 657 at 659, that:

"In cases of murder, however, great caution is always exercised upon an application for bail".
Millin J in the case of Leibman vs Attorney General 1950 (1) S.A. 607 (W) at 609 had
this to say on the subject, and I quote:

"The meaning of this last sentence, as appears from subsequent cases, is that the very fact that a person is charged with a crime which entail the death penalty is in itself a motive to abscond. But that fact is not enough. If it were otherwise - if that fact were regarded as enough - no person charged with a capital offence would hope for bail, and yet bail has in many cases been granted to persons charged with capital offences. The court looks at the circumstances of the case to see whether the person concerned expects, or ought to expect conviction. If it is found on circumstances disclosed to the court that the likelihood of conviction is substantial, that the person ought reasonable to expect conviction, then the likelihood of his absconding is greatly increased thus the court goes into the circumstances of the case, that is, the evidence at the

disposal of the court where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been held the court has to consider such material as is furnished to it by the accused himself (Applicant) or by the Attorney General or his representative" (my emphasis). I interpose at this stage that in the instant application the Director of Public Prosecutions takes the place of Attorney General in this jurisdiction.

In casu there is no material allegation in the Respondents papers which supports this ground of opposition. In this connection the only paragraph which touches on this aspect of the matter is paragraph 4.1.2 of officer Mavuso's supplementary affidavit as follows:

"I humbly state further that the custodial sentence to be meted out to Applicant if convicted of murder, is a factor which can make him abscond his trial if he is admitted to bail".
I have assessed the facts presented before me in toto and it would appear to me that the Applicant has very deep emotional, occupational and family roots with the country. It has been stated and it is common cause that the Applicant is a man advanced in age, married to eight wives with many children. It has also been revealed that he is a Chief of his area and is also a member of the highly regarded King's Advisory Council commonly known as "SNC". He is also a judicial officer of note in the Swazi National Court hierarchy. His roots in this country indeed run very deep for him to abscond and become a fugitive from justice.

Following what was said by Millin J in Leibman (supra) on my assessment of the case against the Applicant on the facts presented on the affidavits the Applicant was not the one who shot the deceased as that role is ascribed to his co-accused. The case for the Crown, it would appear from the facts is that the Applicant conspired with the others in the commission of the murder. However, that is still to be the subject of the main trial.

The apprehension that the applicant on being granted bail may flee the country maybe allayed by fixing the amount of bail which would make him think twice in taking that

option (see S vs Acheson (supra) at 822 - 823 (c) where Mohamed J (as he then discusses sub-issue 1 (c) viz how much can he afford to the forfeiture of the bail money).
Another factor to be taken into account in this regard is what travelling documents he has to enable him to leave the country. Following that would be what arrangements exist or may later exist to extradict him if he flees to another country. Swaziland has extradiction treaties with its neighbouring countries.

All in all, under this ground of opposition my considered view is that stringent conditions of his bail may be imposed that would make it difficult for him to evade policing movements (see Mohamed J in S vs

Acheson (supra) at item 1 (j).

ii) There is a reasonable possibility that the accused will tamper with state witnesses.

The second question which needs to be considered is whether there is a reasonable likelihood that, if the Applicant is released on bail, he may tamper with the relevant evidence or cause such evidence to be suppressed or distorted. Again according to Mohamed J in S vs Acheson (supra) this issue involves an examination of other factors such as:

"a) Whether or not he is aware of the identity of such witnesses or the nature of their evidence;

b) Whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;

c) What the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;

d) Whether or not any conditions preventing communication between such witnesses and the accused can effectively be policed".

In casu we have the evidence of Superintendent Mavuso on affidavits in the main Opposing Affidavit and the Supplementary Affidavits that the Applicant has made "threats" to his co-accused Mafu and as such will be disposed to tamper with crown witnesses when released on bail. We have also the evidence of Makhanya who is the Applicant's co-accused in the murder charge, who testified under oath here in court that the Applicant approached him at the Mbabane Government Hospital with a message for Mafu. The message was that Mafu should not be surprised if people come to collect his personal clothing. When cross-examined by Mr. Ntiwane as to the reason for this, the witness did not come out with an answer as to why these clothes were to be taken from Mafu. It is stated though by Mafu in his statement that the message from the Applicant was sympathetic to his plight where he stated inter alia the following:

"He delivered the message to me as follows:

He said to me that he had been sent by Nhloko saying that first of all he had not disregarded me in
jail or remand centre. He was still with me. Even now he was still with me where I am ...".

The tenor of the whole statement by Mafu is inconsistent with the "threats" the Applicant is alleged to have made towards Mafu in one of the remand hearings. The "threats" which were later communicated to officer Ndwandwe and subsequently related to the investigating officer Mavuso. In any event it is common cause that Mafu and Makhanya are in custody at Zakhele Remand Centre and the Applicant is kept in another facility. Neither Mafu in his statement nor Makhanya in his viva voce evidence ever mentioned that the items from Mafu were to be taken to a traditional healer to facilitate Mafu's escape. It appears to me that this piece of evidence by the Crown is based on conjecture. It appears to me further that the fears expressed by the Crown as regards Mafu and Makhanya are baseless on the face of the facts presented before me.

Before proceeding to the other witnesses I wish to revisit the issue of the affidavit by officer Ndwandwe and its effect on these proceedings. The officer told the court that he did not appear before a Commissioner of Oaths when he made his Supporting Affidavit. He was never in Mbabane on the 7th March 2003, and he never appeared before the Crown Counsel Khumbulani P. Msibi who purported to have signed as a solemnizing

officer. In terms of Section 2 of the Interpretation Act No. 21 of 1976, an affidavit is defined as follows:

"Affidavit means a document duly attested and sworn to under oath".

Erasmus. Superior Court Practice, 1995 at page Bl-37, defines an affidavit in the following terms:
"An affidavit is a statement in writing sworn before someone who has authority to administer an oath; it is a solemnly assurance of fact known to the person who states it, and sworn to as his statement before some person in authority such as a judge, magistrate, justice of the peace, commissioner of the court or commissioner of oath".

In the present case the supporting affidavit by officer Ndwandwe does not fulfil the requirements of Section 2 of the Interpretation Act and the comments by the learned author, Erasmus (supra).

In my view, the supporting affidavit is a fraud. A criminal offence has been committed in this instance, more particularly by the Commissioner of Oaths who purported to have solemnized the same. I will direct that a copy of this judgment and the transcripts of the court record in this case be transmitted forthwith to the office of the Director of Public Prosecution for his scrutiny and possible action. I must further add, on this point that this state of affairs cast doubt as to the authenticity of the other affidavits including the main affidavit opposing the bail application which were all solemnized by the same Commissioner of Oaths purportedly on the same day the 7th March 2003. If that was the case then the Crown case in opposition of the bail application would crumble like the proverbial house of cards. Mr. Maseko saw this difficulty and readily conceded that the affidavit by Ndwandwe is not worth the paper it is written on, however, he urged the court to consider his viva voce evidence.

Reverting to the other witnesses. According to paragraph 2 of the Supplementary Affidavit deposed to by Detective Sergeant Mavuso the investigations are not complete

and he avers that he is yet to record a statement from a potential witness who is currently in a neighbouring state. The difficulty with this paragraph is that the Applicant is not aware of the identity of this witness or the nature of his/her evidence. He cannot interfere with a witness who is not known to him (see S vs Acheson (supra). Further, the bail application served before the court as far back as the 7th March 2003. Two months have elapsed since the affidavit was filed on 23rd March 2003. At the time of argument the court was not appraised on how far the investigations have gone in so far as this unknown witness is concerned. It would appear to me on the facts that the opposition advanced in this regard is without merit.

Now I come to the witness called Khabonina Shabangu. When the matter was before court the Crown intimated that it was to call her. However, Mr. Ntiwane objected to the calling of this witness on the ground that she was a wife of one of the accused persons. Mr. Maseko for the Crown applied for a short adjournment to consult with this witness. This witness features prominently in this case and is described by officer Mavuso as "very crucial witness". Her evidence as related by Officer Mavuso at paragraph 3.1.5 tends to show that the Applicant when released on bail will put pressure to bear on her. The said paragraph reads as follows:

"Having arrested accused no. 1 and no. 2 (Moses Shabangu) it transpired that Khabonina Shabangu be re-interviewed for the second time. During the second interview she revealed that immediately after the first interview with the police on the 13th February 2003, she then collected by (sic) accused no. 1 and taken to accused no. 3's wife (LaMlawusa) at Bhunya village, where she met accused no. 3, applicant before court. During this meeting Khabonina Shabangu was interrogated by accused no. 1 and accused no. 3 (Chief Nhloko Zwane) about what she had said to the police on the 13th February 2003, which pertains to the events of the events (sic) of the 29th January 2003".

The Applicant in his replying affidavit to the above mentioned paragraph countered as follows:) at paragraph 4.5):

"I deny the allegation that Khabonina was collected and taken to my wife as alleged where I interrogated her. The truth of the matter is that Mafu came with Khabonina to our house where I thought they had paid me a visit. I deny that I interrogated her in the manner alleged or at all".

I must say on the evidence a golden opportunity for the Crown was lost in not calling her to clarify this apparent dispute of fact. Paragraph 3.1.5 is denied by the Applicant and I cannot gainsay his version in the replying affidavit to the supplementary affidavit.

On assessing the evidence presented before me in connection with this witness I have come to the conclusion that the Applicant's version has not been dislodged. It would also appear to me that conditions may be imposed preventing communication between the Applicant and the witness which can effectively be policed. Furthermore, it would appear to me statements have been taken from this witness and she has committed herself to give evidence in the trial of this matter. (see S vs Acheson (supra)).

Finally, Mohamed J in S vs Acheson (supra) stated that a third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail.

The learned Judge stated the following pertinent words:
"This would involve again an examination of other issues such as for example;

a) The duration of the period for which he is or has already been incarcerated, if any;

b) The duration of the period during which he will have to be in custody before his trial is completed;

c) The cause of the delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such delay;

d) The extent to which she might be prejudiced in engaging legal assistance for his defence and in effectively preparing his defence if he remains in custody;

e) The health of the accused (my emphasis).
In casu issue (e) stated above is relevant in this case.

In sum, I have come to a considered finding on a fair assessment of the facts presented before me that the Applicant has discharged his onus and has proved on a balance of probabilities that he is entitled to be released on bail.

I can only rule that the Applicant be granted to bail to an amount to be fixed thereafter and also to enter into recognizances as will be agreed upon by both the Crown and the Applicant's counsel.

S.B. MAPHALALA

JUDGE