

THE HIGH COURT OF SWAZILAND

Case No.15/03

In the matter between:

SABELO DALTON NDLANGAMANDLA Applicant

VS

REX

CORAM : MASUKU J.

For Applicant : Mr C.S. Ntiwane

For Respondent : Mrs S. Wamala

JUDGEMENT

1st April 2003

This is an application in which the Applicant seeks to be admitted to bail on such terms as this Court may deem fit to impose. The Crown, in opposition, has filed a terse affidavit attested to by 3141 Constable Teddy Mamba.

The Applicant, in his affidavit states that he was indicted for having murdered one Themba Ginindza and is presently awaiting trial at Nhlanganano Correctional Services Institution. He states further that before he was arrested he was in the employ of Usuthu Pulp Limited at Bhunya and fears that his continued detention will result in him losing his employment. He further undertakes if admitted to bail, not demean himself in any way prejudicial to the interests of justice, nor to interfere with Crown witnesses.

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The main thrust of the opposition revolves around the following: -

(a) Applicant is ordinarily resident in Witbank in the Republic of South Africa and that he does not use a travelling document to travel to the Republic of South Africa. Should the Applicant be admitted to bail, he can still abscond, by employing other means of exit;

(b) The community of Lulakeni where the deceased lives is up in arms and is threatening his life should he be admitted to bail;

(c) There is fear that the Applicant will interfere with Crown witnesses as they are resident in the same area.

The Law Applicable.

In NDLOVU VS REX 1982 - 86 SLR 51 at 52 E - F, Nathan C.J. stated the applicable principles as follows: -

"The two main criteria in deciding bail applications are indeed the likelihood of the applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria tend to coalesce because if the applicant is a person who would attempt to influence Crown witnesses it may readily be inferred that he might be tempted to abscond and not stand, his trial. There is a subsidiary factor also to be considered, namely, the prospects of success in the trial. "

In the case of SEAN BLIGNAUT VS REX CASE NO. 1549/2001, I cited with approval the judgement Mahomed J. (as he then was) in S VS ACHESON 1991 (2) SA 805 (Nm Sc) 822 - 823 C, where the factors applicable were lucidly enumerated. The factors are the following: -

"1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves

3 a consideration of other sub-issues such as.

(a) how deep are his emotional, occupational and family roots with the country where he is to stand trial;

(b) what are his assets in that country;

(c) what are the means that he has to flee from that country;

(d) how much can he afford the forfeiture of the bail money;

(e) what travel documents he has to enable him to leave the country;

(f) what arrangements exist or may later exist to extradite him if he flees to another country;

(g) how inherently serious is the offence in respect of which he is charged;

(h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;

(i) how severe is the punishment likely to be if he is found guilty;

(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing movements.

2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again 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 condition preventing communication between such witnesses and the accused can effectively be policed.

3. 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.

4. 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 he 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."

It remains for me to now consider the issues raised by the Respondent to determine the Applicant's fate in this matter.

- (a) Applicant resident in Witbank.

This allegation by the Crown has not been controverted as the Applicant has not filed any Replying Affidavit, to place this allegation in issue. Uncontroverted as it remains, it must in my view stand. The question then becomes whether if standing on its own, the Crown's allegation is enough to deny the Applicant bail. It is common cause that the R. S. A. and Swaziland enjoy an extradition treaty and if the Applicant estreats his bail and goes to the R. S. A., with which he enjoys links according to the uncontroverted allegations by the Crown, he could be extradited back to Swaziland.

In Joubert "Laws of South Africa" First Re Issue Vol.10 Part 1 page 251 at paragraph 299, it is recorded as follows :-

"States which have abolished the death penalty often, either in their extradition legislation or by treaty, reserve the right to refuse extradition to a country where the offence for which extradition is sought could attract the death penalty. "

It is clear that the R. S. A. has abolished the death penalty and would therefore be unlikely to extradite the Applicant to this country that is if he took flight. For this reason it could be

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held that the Applicant should fail. This is however subject to the consideration that the Crown must place evidence which indicates that the prospects of conviction are overwhelming and which would therefore precipitate the accused to estreat his bail.

In support of this latter proposition, I quote with approval from the remarks of Millin J. in LEIBMAN VS ATTORNEY-GENERAL 1950 (1) SA 607 (W), where the following appears at page 609.

"The Court is always desirous that an accused person should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby, more particularly if it thinks upon the facts before it that he will appear to stand his trial in due course. In cases of murder, however, great caution is always exercised in deciding upon an application for bail. The meaning of this last sentence from subsequent cases, is that the very fact that a person is charged with a crime which may 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 could ever 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 the circumstances disclosed to the Court that the likelihood of conviction is substantial that the person ought reasonably to expect conviction, then the likelihood of his absconding is greatly increased. Thus the Court goes into the circumstances of the case i.e. the evidence at the disposal of the Crown. Where there has been a preparatory examination that is the material 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 (the applicant) or by the Attorney-General as his representative. "

In casu, there has been no effort by the Crown to show the strength of its case and therefore the likelihood

of a conviction which would suffice to induce the Applicant to estreat his bail. Scanty affidavits without any useful information are unhelpful to assist the Court in satisfactorily addressing this question which can at times be vexing indeed. No summary of evidence has been furnished to indicate the evidence against the accused in casu. In the

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absence of this, there is no indication in my view that the accused would be impelled to escape resulting in a failure of justice.

(b) Applicant's safety.

It is the Respondent's contention in this regard that the people in the accused's area would resort to taking the law into their own hands were the accused to be admitted to bail and in which case, they may even harm him. This is an allegation which the Applicant as aforesaid, has not controverted. The answer would to my mind seem to lie in the third consideration made by Mahomed J. (supra) i.e. how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. Mr Ntiwane urged the Court not to consider this ground for the reason that it would mean that it gives regard to people who take the law into their own hands.

The Court cannot however take lightly allegations that the Applicant's safety cannot be guaranteed. It would be wrong to wait and see whether the threat to the Applicant's life materialises. It would not serve anyone's purposes or the interests of justice if the Applicant cannot be able to stand trial because he is injured or killed at home.

The Applicant, who is in custody, is in my view not well placed to gauge the mood of the people in his home area. In the light of the above, it is my view that the likely reaction of the people who may well feel highly aggrieved by the conduct attributed to the accused as it is feared by the Respondents that he may be harmed or even killed. In this regard and for his safety, it is in my view preferable that he is denied bail. Unfortunately, in the absence of a replying affidavit, no other area is suggested where the accused could be liberated to and stay safely.

Regarding the last issue i.e. interfering with Crown's witnesses, the relevant factors are listed in the second consideration by Mahomed J. (supra). It is clear that some poignant issues must be addressed and placed in evidence before Court. An affidavit which only alleged that the Applicant is likely to interfere with witnesses without specifically addressing the issues set out by Mahomed J. is clearly not useful to the Court. The Respondent must place sufficient evidence before Court that will demonstrate that tampering with witnesses is highly likely.

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In the premises and for the aforementioned reason, bail be and is hereby refused. The accused does not appear to have spent an unconscionably long time in custody.

T.S. Masuku

Judge