

THE HIGH COURT OF SWAZILAND

Criminal Case No.43/04

In the matter between;

BRIAN MDUDUZI QWABE Applicant

And

REX

Respondent

CORAM : MASUKU J.

For the Applicant : Mr Z.Magagula

For the Respondent : Mrs S. Warnala

JUDGEMENT

20th April, 2004

This is an opposed bail hearing. The Applicant, a Swazi male adult who describes himself as a resident of Mbagweni, Hhohho District, was arrested on the 17th March 2004, by Police Officers from the Mbabane Police Station.

He was charged with stock theft, a charge to which he protests his innocence as he denies any involvement in theft of any cattle. Regarding his personal circumstances, he states that he is 29 years old and is married to a woman, whom the Court was told at the hearing had a newly born baby. He states further that he runs a shop, which due to his incarceration, has no one to take care of and that it constitutes the main means of his livelihood. He further undertakes, in his Founding Affidavit, to abide by all the conditions that this Court could be minded to impose, in admitting him to bail.

2

The basis of the opposition is tersely put in an affidavit. This was either supplemented or embellished in evidence by the Investigating Officer 3475 Detective Inspector Clement Sihlongonyane,

From the evidence adduced by Detective Inspector Sihlongonyane, the following appear to be the major grounds of opposition: -

- (a) that the investigations are not yet complete as some of the accused persons known to the Applicant have not yet been arrested;
- (b) that the accused is likely to abscond as he fraudulently prepared a travel document in order to facilitate the encashment of a cheque, which was used in the purchase and sale of the stock in question.
- (c) There is another matter involving a beast allegedly sold by the Applicant and in respect of which investigations are yet to be completed;
- (d) That the accused is likely to meet and influence his co-accused in order for them to evade arrest. Furthermore, he is likely to meet with and to influence some Crown witnesses, particularly one Sikhumbuzo Hleta, who is the Applicant's friend.

The Law Applicable

It is clear that in matters of bail, the onus lies with the accused and it is to be discharged on a preponderance of probability. He must show that he will not abscond or interfere with Crown witnesses. The principles applicable were stated by Nathan C.J. in NDLOVU VS REX 1982 - 86 SLR 51 at 52 E-F as the following; -

"The two main criteria in deciding bail applications are indeed the likelihood of the applicant not standing trial and the likelihood of his interfering with the 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

3

and not stand trial. There is a subsidiary factor also to be considered, namely, the prospects of success in the trial."

On the other hand, J. van der Berg, "Bail (A Practitioner's Guide) Juta, states the following principles as being applicable: -

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

It must be remembered that in granting or refusing bail as the case may be, the Court does not approach the matter on the basis of mere possibility but from the viewpoint of likelihood. These are different tests. See R VS MARK M. SHONGWE 1982-86 SLR 193 at 194H (per Nathan C J.)

Regarding the risk that he might not stand his trial, issues that require consideration are the following:

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- (i) how deep his emotional, occupational and family roots with this country are;
- (ii) his assets in the country;
- (iii) means he has to flee;
- (iv) his ability to forfeit his bail deposit.
- (v) travel documents at his disposal to enable him to flee;
- (vi) extradition arrangements in case he flees;
- (vii) inherent seriousness of the offence with which he is charged
- (viii) strength of case against him and the inducement offered thereby for him to abscond;
- (ix) severity of sentence likely to be visited on him; -see S VS ACHESON 1991 (2) SA 805 (NmHC).

There is nothing to gainsay that the Applicant is a Swazi and that he has deep, emotional and family roots in this country. Furthermore, his allegation under oath that he runs a business

4

has not been effectively challenged and it therefor stands. Whereas he can easily skip the border, particularly to the Republic of South Africa, as some people do (not only accused persons) without using the designated entry and exit points, an extradition treaty, should such eventuate, exists between this country and the Republic.

Furthermore, the charge in relation to which he has been indicted is extraditable. The offence, in the hierarchy of serious offences is not regarded as inherently serious and the sentence likely to be meted out on conviction, is in my view not likely to induce the Applicant to flee. The strength of the Crown's case was not sufficiently demonstrated as the officer called to testify, in large measure, relied on hearsay evidence which is inadmissible, even in bail hearings.

I am, in view of the foregoing, of the view that the Applicant has demonstrated on a balance of probability that he is likely to stand trial. The aggregate of factors in his favour, in this regard, outweigh those working against him.

Regarding the Applicant tampering with relevant evidence or witnesses if admitted to bail, factors to

be considered include the following: -

- (i) the identity of and nature of the evidence of the witnesses;
- (ii) whether the witnesses have already made their statements and committed themselves to testify or whether it is still the subject of continuing investigations;
- (iii) the relationship between the accused and such witnesses and the likelihood that the witnesses may be influenced or intimidated by him; and
- (iv) whether conditions imposed regarding communication can be policed effectively. See *S vs ACHESON* (supra)

According to the Investigating Officer, the Crown witnesses have made their statements and which have been recorded. There is no indication that the accused, if ordered not to do so, can intimidate or influence these witnesses, neither is it shown that the relationship between them is such that they are likely to be influenced or intimidated by him.

5

The one issue that deserves mention is that the Investigating Officer stated that the investigations are not complete because some of the Applicant's co-accused are still at large. This in my view is not synonymous with saying that investigation are in complete. If there are suspects still at large, I am of the view that this cannot be equated with investigations being incomplete. This would mean that if the said suspects are not apprehended, the Applicant would be held in custody ad infinitum, a proposition that offends against my sense of justice and fairness.

Regarding the other matter allegedly pending and in respect of which investigations are still continuing, no sufficient information was disclosed. It is not clear what is outstanding and whether or not the accused has been charged, neither has the Court been told of the nature of these continuing investigations. This allegation was not included in the Opposing Affidavit, to enable the Applicant to respond to it. It was only revealed in oral evidence when the Applicant could not be given a sufficient opportunity to respond to it.

I am of the view that the Crown has failed, on the evidence presented from shaving that there is a reasonable fear that the Applicant may interfere with witnesses and evidence. It cannot, on the evidence be judged that the fear is reasonably founded.

The last factor to be considered is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. Issues that come to the fore include the following: -

- (i) the period already spent by the accused in custody;
- (ii) the period he is likely to spend in custody before trial;
- (iii) the cause of the delay in completion of his trial and his contribution, if any, to the delay;
- (iv) 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;
- (v) the health of the accused. See *S v ACHESON* (supra)

The period already spent by the accused in casu is relatively short, but in view of the charge he faces there is no reason why there should be any further length of time the accused, who it

6

must be remembered is innocent until he is proved otherwise, should continue to spend in custody. '

The accused, from present indications is likely to spend some time in custody before completion of his trial. I say this with some element of diffidence, because Ms Wamala submitted that new Magistrates have been appointed and this case will serve before them in the not too distant future. I, in the circumstances, am unable to answer this question with any degree of certainty. The accused, it must be recalled runs a business and it was submitted on his behalf that he will be prejudiced in engaging legal assistance for his defence if he is not admitted to bail. It is also undeniably correct that his wife

has given birth to a new baby and needs his assistance in this post-natal period. This, in my view indicates that given the entire circumstances of this case, that it would be more prejudicial for the accused to be kept in custody, considering also, that he accounts for no part in the delay for the trial to commence.

In R VS MARK M. SHONGWE (supra) at page 194 F-G, Nathan C. J. cited with approval the remarks of Miller J. in S VS FOURE 1973 (1) SA 100 (D) at 101G and 103 H, which had the following rendering: -

"It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognisable indication that he will not stand trial if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence ...But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is prima facie entitled to and will normally be granted bail. As I have already mentioned, the likelihood of conduct which may endanger the security of the State, or public safety, has been held to constitute an exception to the general principle that an accused person should not be denied bail unless the administration of justice would be prejudiced by granting it."

7

With the above sentiments in mind, I am of the view that there is not indication that he will not stand trial nor that he is likely to interfere with the course of justice or endanger State security and public safety.

The Applicant be and is hereby admitted to bail on the followings terms; -

1. To deposit with the Treasury Department the sum of E1 500.00 (One thousand five hundred Emalangeni).
2. To surrender his passport or other valid international travel document to the investigating officer herein at the MBABANE Police Station and not to apply for a new passport/travel document,
3. To report fortnightly following his release on bail in person at the charge office Mbabane Police Station between the hours of 0800hours and 1600hours. The first such report shall be the first Friday after his release thereafter, every last Friday of the fortnight.
4. To refrain from speaking to or communicating with or otherwise contacting or interfering with any prosecution witnesses in the case against him. In the event he does not know their identity, they be ascertained by him from the investigating officer.
5. To remain within Swaziland.
6. To provide the investigating officer with his residential address forthwith on release, for interalia, purposes of domicilium citandi.
7. To attend Court wherever and whenever directed so to do, pending finalisation of the case against him.

8

8. Non-compliance with any of the above conditions shall effect an estreatment of bail forthwith.

T.S. MASUKU

JUDGE