

THE HIGH COURT OF SWAZILAND

ALFRED GINA AND OTHERS

Vs

REX

Criminal Case No. 164/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. T. MLANGENI

For the Respondent: MR. MAKHANYA

RULING

(On application for bail under Section 95 of the Criminal Procedure and Evidence Act No. 67 of 1938)

(22nd September 2005)

[1] The four Applicants have made an application to be admitted to bail on such terms as this court may deem fit. They have each filed Founding affidavits in support thereto. Various averments are made

pertinent to their respective applications. They have also filed Supplementary affidavits where attempts are made to satisfy the requirements of Section 95 (as amended) of the Act. These affidavits seek to establish the substantial and compelling circumstances as envisaged by the said section.

[2] Section 95 (4) thereof provides that where the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15, 000-00, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount.

[3] The Crown does not per se oppose bail but that it ought to be granted following the full strictures of the Act. That in the present case no substantial and compelling circumstances exist.

[4] The facts relied upon to satisfy the sections are that all the Applicants are indigent. The gravamen of the argument therefore is that indigency constitutes the said substantial and compelling circumstances as required by the section. This is the nub of the matter.

[5] Unfortunately the amended Act does not define what constitutes "substantial and compelling circumstances". Mr. Mlangeni contended that the fact that such circumstances are not defined in the Act has left what he called "a window" for the court to apply a certain discretion, though limited in saying what those circumstances are. He contended that the general principle is that no person shall be required to give excessive bail, and that doing so will be tantamount to a refusal of bail, moreso, if that person is indigent and a man of straw. He further argued that a person should not be deprived of his liberty by virtue of being a pauper. This is indeed a vexed issue.

[6] Prior to the promulgation of the amended Section the general rule, which operated was that a right to be released on bail, will, become meaningless where an excessive bail is fixed. In the case of S vs Stanfield 1997 (1) S.A. CR (c) 234 F it was held, inter alia, that the court is entitled to fix a high amount of bail where the accused is clearly a man of vast financial resources. The courts consistently adhered to the approach that bail should not be fixed in an amount so large as to amount indirectly to a refusal of bail (see S v Ho 1979 (3) S.A. 734 (W) 739 D as read with R vs McCarthy 1906 T.S 657, S vs Mohammed 1977 (2) S.A. 531 (A) 544 H). The need for careful consideration of the accused's ability to pay the amount of bail is well illustrated by Steytler 1982 S.A.C.C. 3 at 15 - 17.

[7] However, the above mentioned common law position has been expressly altered by statute where in Section 103 of the Act thereof it provides as follows:

"Excessive bail not required.

Subject to Section 102 A, the amount of bail to be taken in any case shall be in the discretion of the court or judicial officer to whom the application to be admitted to bail is made; Provided that no person shall be required to give excessive bail and the amounts specified under Section 95 shall not be construed as excessive" (added, A. 4/2004).

[8] It is clear from the above therefore that the court is obliged to follow the full strictures of Section 95 as amended and the amount of E 15, 000-00 fixed by the legislature shall not be construed as excessive.

[9] Having considered all the arguments advanced in this case I am unable to say that a state of poverty of a person is a substantial and compelling circumstances as envisaged by the Section. To hold

otherwise would render the section meaningless and would open the floodgates to almost all people arrested for similar offences in the Kingdom.

[10] In the result, for the afore-going reasons I find that the Applicants have not proved the substantial and compelling circumstances as required by Section 95 of the Act.

S.B. MAPHALALA

JUDGE