

THE HIGH COURT OF SWAZILAND

RAPHAEL GUDLU MAVUSO

Vs

REX

Criminal Case No. 12/2005

Coram:S.B. MAPHALALA - J

For the Applicant: MR. B. MAPHALALA

For the Respondent: MR. P. DLAMINI

RULING

(On application for reduction of bail) (24/02/2005)

[1] Before court is an application for bail where the Crown docs not oppose the granting of bail per se but that bail should be set at E1 5, 000-00 as provided for by the amendment to the Criminal Procedure and Evidence Act.

[2] Mr. Maphalala who appears for the Applicant applied that bail in casu should be granted in terms of the law prior to the promulgation of the amended Act. He challenged the validity of the said amendment on two fronts. First, that prior to the amendment Section 103 of the Criminal Procedure and Evidence Act gave the court a total discretion to decide an amount of bail yet Section 95 of the

Amendments punitive and has a tendency to deny accused persons bail. There is a contradiction between Section 103 and the new Section 95 such that the latter should not be in the light of Section 103. Therefore, so the argument goes, should be declared invalid as it deprives an accused person a right not to be granted excessive bail.

[3] The second prong of the attack is that Section 103 of the amendment is vague and ambiguous and as a consequence should be struck down. In this regard the court was referred to Du Toit et al, Commentary on the Criminal Procedure Act, Juta pages 9 to 11 and the cases cited thereat.

[4] Mr. Maphalala further advanced two alternative arguments in the event [rule] against him in the main argument. Firstly, that the absence of direct evidence of commission of the offence provides for the existence of "substantial and compelling circumstances". Therefore that the amount of bail should be reduced to an amount below E15, 000-00. However, this argument was later abandoned by Mr. Maphalala and therefore no further mention will be made thereto. The second alternative submission is that in the event the court grants bail under Section 95 (4) that such should be granted as provided for by Section 96 (16) (b) that Applicant furnishes "a guarantee with or without sureties, that he or she will pay and forfeit it (to the state the amount that has been set as bail, or that which has been increased or reduced in terms of Subsection (19) in the circumstances in which the amount, had it been deposited, have been forfeited to the state".

[5] The Crown as represented by Mr. Dlamini has advanced per contra arguments on all fronts. The first defence is that the said Section is not contradictory in that according to the Schedule to the Act there are offences where the discretion of the court has not been interfered with viz Section 95 (4), (5) and 6 of the Act.

[6] The second defence advanced by the Crown is that there is neither vagueness nor ambiguity in the amendment. To this end Mr. Dlamini submitted that the court should look at the mischief the Act was supposed to cure. The court was further referred to the South African case of *Hleka vs Johannesburg City Council* 1949 (1) S.A. "842 at 852 where Van Den Heever J A cited with approval what was stated by Lord Coke (Heydon's case 3 Co. Rep 7B) on the proper approach in arriving at a real meaning of a statute as follows:

"To consider, (1) what was the law before the measure was passed; (2) what was the mischief or defect which the law had not provided; (3) what remedy the legislator had appointed and (4) the reason of the remedy (see *Olley vs Maasdorp* 1948 (4) S.A.L.R 657 at 666)

[7] Mr. Dlamini contended further on the issue of sureties that this is a case to invoke Section 96 (16) (b) as the Applicant himself is a man of means and it will be unfair to burden his father for a guarantee.

[8] In order to do justice to this case a brief review of the pertinent provisions of the Act is imperative; thusly:

[9] The old Section 103 of the Criminal Procedure and Evidence Act provides as follows;

"excessive bail not required.

"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".

[10] Section 103 of the Amended Act thereof 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**".

[9] The old Section 103 of the Criminal Procedure and Evidence Act provides as follows;

"excessive bail not required.

"The amount of bail to be taken in any case shall be in the discretion of the court judicial officer to whom the application to be admitted to be bail is made: provided that no person shall be required to give excessive bail".

[10] Section 103 of the Amended Act thereof 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| of the court or judicial officer whom the application to be admitted to bail is mad Provided that no person shall be required to give excessive bail and the amounts specified under Section 95 shall not be construed as excessive".

[11] Section 95 (4) of the Amended Act reads as follows:

(4) 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 HI 5 000-00, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount."

[12] The thrust of Mr. Maphalala's argument therefore is that the proviso to the amended Section 103 viz that no person shall be required to give excessive bail and the amount specified under Section 95 shall not be construed as excessive is vague and ambiguous in that on one hand the section gives the

court a carte blanche discretion and in the same token takes that discretion away by inserting the underlined proviso. This therefore is the crux of the matter.

[13] On reading the relevant sections it appears to me that the old Section 103 was replaced by the new Section 103. The former gave the court an open discretion on bail matters yet the latter gives the court a discretion subject to Section 102 A of the Act thereof. Section 102 A provides for conditions of bail for Theft and Kindred Offences. Even the proviso to the new section further narrows the court's powers in determining what is excessive bail in that amounts specified under Section 95 shall not be construed as excessive.

[14] Rooney J in the case of *Mary Dlamini vs The King - Review Case No. 126/91* described the old Section 103 of the Act in the following language; and I quote:

"Section 103 of the Criminal Law and Procedure Act slates that (he 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. This is well established right based upon the presumption of innocence. It is derived from the Bill of Rights (1688) and has found its way into our law as part of our criminal procedure which was derive from the law of England. It is designed to secure the liberty of the person against oppression. As the preamble in the Bill of Rights complains "and excessive bail hath liccn rquin-u of persons committed in criminal cases to elude the benefit of the Laws made for the liberty of the subjects".

A statute which takes away an existing right requires express language, in *Looker v Halcomb* (1927 *Bing. 183*) at 188 Best C.J said "an Act which takes away the right of trial by jury ... ought to receive.

[15] Following what is said by the learned Judge in *Mary Dlamini* (supra) the court in *casu* ought to adopt a strict construction of the said amended Section. On reading the entire Section vis a vis other pieces of legislation pertaining to the issue of bail in this country it became abundantly clear to me that the intention of the legislature was to restrict the court's discretion on certain classes of offences. Therefore the argument advanced by the Crown has merit that the said Section is not contradictory in that according to the Schedule to the Act there are offences where the discretion of the court has not been interfered with viz Section 95 (4), (5) and (6) of the Act. It is also clear to me that the amended Section 103 should not be read in isolation but should be read with the other Sections of the Act. I also agree with Mr. Dlamini on the mischief rule and the dicta in *Hleka vs Johannesburg C\ty Council* (supra) and that it applies in the present case.

[16] Having found therefore that Section 103 is not vague and ambiguous I now proceed to consider Mr. **Maphalala's** alternative argument which is whether or not there are "substantial and compelling circumstances" in terms of Section 95 (4) thereof. **Mr. Maphalala** abandoned his argument that because in *casu* there is no direct evidence that Applicant committed the rape that this constitutes "substantial and compelling circumstances". What remains therefore is whether on the Founding affidavit there is any evidence which constitutes such circumstances.

[17] The amended Section does not define what constitutes "substantial and compelling circumstances". **Mr. Maphalala** submitted that the state of health of the Applicant as reflected in the Founding affidavit constitutes substantial and compelling circumstances under the Section. Having perused through the affidavit and also having considered the arguments advanced for and against this point, I find that on the facts there are substantial and compelling circumstances which justify that the amount of bail be fixed in an amount less than E15, 000-00 and would set the amount at E5, 000-00.

[18] " Having disposed of the above point I proceed to determine whether or not sureties should be put in place in terms of Section 96 (16) (b) thereof. The court under the said Section has a discretion to order either (a) or (b) depending on the circumstances. In *casu* I agree with the Crown that on the circumstances of this case (a) is applicable.

[19] In the result, for the afore-going reasons the Applicant is granted |bail of E5, 000-00 in terms of Section 96 (16) (a) of the Criminal Procedure and Evidence Act (as amended) No. 4 of 2004.

S.B. MAPHALALA

JUDGE