IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 09/2009

SENZO MENZI MOTSA Applicant

Vs

Respondent

REX

Coram S.B. MAPHALALA - J MR. M. MABILA

For the Applicant For MRS.M.DLAMINI (Acting Director of

the Respondent Public Prosecutions)

JUDGMENT 31st

March 2009

[1] Serving before court is an application for bail brought under a Certificate of Urgency. That the Applicant be admitted to bail upon such terms and conditions this court may deem fit.

[2] The Founding Affidavit of the Applicant is filed in support thereto. In the said affidavit the Applicant related at some length all the material facts relied upon. A number of annexures are attached thereto.

[3] The Respondent opposes the application and has filed the Answering Affidavit of Superintendent Sonyezane Dlamini who relates at some length the defence advanced by the Crown. A number of annexures are also filed in support of the averments in the Answering Affidavit. A supplementary affidavit of one Sikhumbuzo Fakudze is also filed.

[4] In turn the Applicant filed a Replying Affidavit to the Respondent's Answering Affidavit. In the said affidavit a point *in limine* is raised in the following terms:

In limine

2. The opposing affidavit should be set aside because it is annexed an inadmissible statement which was allegedly made by myself to the police. Though I deny that I made the same, the fact that it is alleged that it was made by me suffices that it be declared inadmissible and consequently the affidavit set aside.

3. I am advised and verily believe that a statement allegedly made by an accused person to the police is inadmissible unless it is exculpatory and/or it is recorded before a magistrate upon proof that same was done freely and voluntarily. Full argument will be made at the hearing of the matter.

4. The opposing affidavit contains a lot of hearsay allegations which have neither been substantiated nor sources thereof disclosed. 4.1 As shall more fully appear hereunder the deponent to the

Respondent's opposing affidavit at no stage dealt with the matter leading to my surrender as Mr. Mashwama Shabangu was the one who dealt with my attorney and is the one who knows the true facts thereof.

5. The Respondent's supplementary affidavit should be set aside in that same has been filed without leave of court and neither has same been sought.

[5] At the commencement of arguments the Crown raise a preliminary objection that in terms of legal ethics Counsel for the Applicant should not represent him because he features prominently in this case and might be called as a witness in the case. Counsel for the Applicant advanced a contrary view that it is not so.

[6] Having considered this point at this stage that it would be highly technical to rule in favour of the point in that substantive justice in this case will be prejudiced. I rule that the point fails and would proceed to determine the application as advanced by the Applicant.

[7] Coming to the main arguments of the parties I intend to first deal with the preliminary objections raised by the Applicant in his Replying Affidavit as outlined above at [4] of this judgment.

[8] The gravamen of the argument *in limine* is that the opposing affidavit should be set aside because it is annexed to an inadmissible statement which was allegedly made by him to the police. The Applicant denies that he made the statement.

[9] Furthermore, a contention is made that the opposing affidavit contains hearsay allegations which have neither been substantiated nor sources thereof disclosed.

[10] In arguments before me Counsel for the Applicant cited Section 226 (1) of the Criminal Procedure and Evidence Act No. 67/1938 (as amended) to the proposition that the Section is peremptory and leaves the court with no discretion at all. Actually, the wording of the section enjoins the court not to admit in evidence a statement made by an accused person to a police officer. The said Section reads as follows:

> "Provided further that if such confession is shown to have been made to a police officer, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a Magistrate or any justice who is not a police officer".

[11] The Applicant contends that *in casu* it is common cause that annexure "SD2" is a statement allegedly made by the Applicant to the

police *ex facie* annexure "SD2", the same was never reduced to writing in the presence of a Magistrate or any justice who is a police officer, hence it is inadmissible as per the proviso to Section 226 (1) of the Criminal Procedure and Evidence Act. In the circumstances, annexure "SD2" should be declared inadmissible. For these arguments the court was referred to the High Court judgment in the matter of *Brian Mduduzi Qwahe vs Rex - Criminal Case No. 43/2004 (unreported) (per* Masuku J).

[12] On the second argument *in limine* the Applicant contends that the supplementary affidavit and further (unknown) affidavit should be struck out. For this proposition the court was referred to *Herhstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *359* and in the local decision in the case of *Swaziland Industrial Development Company Limited vs Paul Friedlander and 7 others - Civil Case No. 108/2007.* Applicant further cited the case of *Nhloko John Zwane vs The King - Criminal Case No. 36/2003.*

[13] On the other hand it was argued for the Crown that this aspect of the matter is governed by the *dictum* in the *locus classicus* in the case of *Jeremiah Dube vs R 1979 - 81 S.L.R.* page *187* where Cohen J (as he then was) stated as follows at para 5 page *188:*

> " ... it should be stated that it is the duty of the Crown in its opposing to an application for bail to present at least the basic facts on which it relies to the court by affidavit even where such evidence may be of a hearsay or general character for security reasons or if direct testimony may be prejudicial to the due administration of justice".

[14] On the basis of the above *ratio decidendi* which is distinguishable from the *obiter* by Masuku J in the case of *Brian Qwabe vs Rex (supra).* There is no portion of evidence in the opposing papers which is hearsay because the deponent therein is the main investigating officer in this matter supported by other officers including Mashwama Shabangu. They all report to him as RCBO for the District of Hhohho. He is duly authorized to depose to the affidavit.

[15] It would appear to me after assessing the averments of the parties and the legal authorities cited that the objection raised by the Applicant cannot succeed. The *dictum* in *Jeremiah Duhe (supra)* answers the preliminary objection fully. Furthermore in the case of S *vs Maharaj and Another 1976 (3) S.A. 205 (D)* Milne J had this to say:

> "... in an application for bail, in a proper case, court may place reliance upon hearsay evidence to determine whether there is a reason to believe that if the accused were admitted to bail they would or might interfere with witnesses whom the State probably intends to call".

[16] On the other points *in limine* raised in reply I agree with the arguments of the Crown in all respects.

[17] Before dealing with the merit I wish to digress a bit to consider a preliminary point raised by the Respondent that Applicant's Replying Affidavit has alleged new facts. The parties advanced arguments for against this contention and I am inclined to agree with the Respondent's arguments. These new facts should be struck off. These

are paragraphs 10.1, 10.2, 10.3, 10.4, 10.6, 10.7, 12 and 13 of the Replying Affidavit.

[18] A further contention by the Respondent is that there are serious disputes of fact which can only be clarified through *viva voce* evidence. These are outlined as follows:

(a) The allegation that the Applicant was smuggled by the police into Swaziland as such appears in paragraph 9.9 and 9.10 of the Replying Affidavit together with paragraph 2.14 of Mr. Mabila's Confirmatory Affidavit to Applicant's Replying Affidavit.

(b) The allegation that the office of the Director of Public Prosecutions interfered with the travelling document in order to buttress their case against Applicant. These are serious allegations and viva voce evidence should be led in order to establish the true position of the matter and for the court to inspect the travelling document

[19] Having considered the arguments of the parties I have come to the considered view that this whole case will be decided on the point of whether there are exceptional circumstances as envisaged by the bail legislation. In my considered view this is the crux of the whole application. These other issues are rather peripheral to the main determination by the court.

[20] The Applicant contends that he has adduced evidence in his Founding Affidavit that there are exceptional circumstances in his case as provided by the provisions of the Criminal Procedure and Evidence Act (as amended). The Crown on the other hand contends that it is not

so on the *dictum* in the Appeal Court case of *Bheki Shongwe vs Rex* ***criminal*** *Appeal Case No. 11/2008* at page 5. It appears to me that the proof of the pudding is in the eating. One has to examine these averments to determine whether they satisfy the rigours of the section.

[21] In arguments when Counsel for the Applicant was pressed on this point he directed the court to various paragraphs in the Founding Affidavit that allege special circumstances. For the sake of completeness I shall reproduce *in extenso* these paragraphs being para 5 to 5.5. of the Applicant's Founding Affidavit:

> 5. I then telephoned my attorney Mduduzi Mabila and informed him about what my mother had told me. Mr. Mabila informed me that in actual fact the police had asked him about my whereabouts and he had told them that he was not aware.
>
> 5.1 The police were aware that Mr. Mabila is my attorney and further informed me that upon inquiry, the police told him that they were looking for me in connection with a robbery involving the sum of E6, 2M which had taken place at Piggs
>
> Peak.
>
> 5.1.1 Mr. Mabila further told me that in actual fact the newspapers had ran a story to that effect.
>
> 5.2 I then solicited advise from Mr. Mabila on what to do in the circumstances as I was not aware of the robbery and I was never involved in the commission thereof, my attorney advised me to go to the police and plead my innocence to them because in terms of the law a citizen must heed any call by the police.
>
> 5.3 I had difficulties with the advise given since there are a lot of reports about police assaulting innocent people forcing them to admit

crimes they have not committed and Mr. Mabila advised me that the choice to go to the police rested solely with me, and he highlighted that in other instances the stories of people being assaulted by the police are exaggerated.

5.4 I then requested Mr. Mabila that he assists me go the police and he informed me that his offices were closed for Christmas and will only open on the 12th January 2009 and he can only take me to the police on that date and we then settled for the said date.

5.5 Indeed on the 12th January 2009 Mr. Mabila took me to the police and handed me to Mr. Shabangu whom I am advised is the Head of Serious Crimes Unit for Hhohho, and Mr. Shabangu was in the company of five (5) other officers.

[22] The Crown contends that it is trite law that the Applicant stands and fails by his Founding Affidavit. There are no exceptional circumstances alleged on the Founding Affidavit nor in the Replying Affidavit. The Crown has premised its stance on the *dictum* in *Bheki Shongwe (supra).*

[23] I think it is important to outline briefly the facts in *Bheki Shongwe (supra)* and the reasoning of the Appellate Court on the issue of exceptional circumstances. In that case the Appellant was in custody awaiting trial on a charge of armed robbery of an amount in excess of two million Emalangeni. Together with others who were in custody awaiting trial on the same charge he applied to the High Court to be released on bail. Each one of the Applicants was denied bail by the High Court and the Appellant filed an appeal against the denial by the court *a quo* of his application.

[24] The Appellate Court cited the South African case of *Vermaas 1996 (1) S.A. C.R. 528 (T)* of what Van Ditjhorst J had to say about Section 60 (11) (a) of the South African Procedure and Evidence Act, which Section is in similar terms to Section 96 (12) of the Swaziland Act:

> "It is expressly worded as an exception by the use of 'notwithstanding any provision of the Act'. It is limited to only a number of crimes stated in Schedule 5 ... It is imperative, 'the court shall order the accused to be detained'. The accused is called upon to satisfy the court that the interests of justice do not require his detention in custody ... The Applicant therefore bears the onus to satisfy me on a balance of probabilities that the interest of justice do not require his detention".

[25] The learned Judges of the Appellate Court in the judgment written by Beck JA further cited what was stated by an imminent Judge of the South African Constitutional Court in S *vs Dlamini et al 1999 (2) S.A.C.R. at 90 para 78* where the following was stated:

> "Then there is the question of the onus under Section 11 (a). It was not suggested that the imposition of an onus on an Applicant for bail is in itself constitutionally objectionable, nor could such a submission have been sustained. This court has in the past unhesitatingly struck down provisions that created a reverse onus carrying the risk of conviction, despite the existence of a reasonable doubt; but what we have here is not a reverse onus of that kind. Here there is no risk of a wrong conviction, the objection that lies at the root of the unacceptability of reverse onuses. All that the section does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses".

[26] After assessing the evidence of the Appellant in the Founding Affidavit *vis-a-vis* the test enunciated on the above-cited cases the learned Judge stated the following:

"I turn therefore to consider whether the Appellant has adduced evidence to satisfy the court that exceptional circumstances exist which in the interest of justice permit his release. As pointed out by Kriegler J in the above quoted passage, the relevant factors lie within the knowledge of the accused person and he must adduce evidence of them.

No oral evidence was given in the court *a quo.* The only information before the court was contained in affidavits made by the Appellant, and by the investigating officer on behalf of the Crown.

The assertions made by the investigating officer are that there are eyewitnesses to prove that the Appellant was involved in planning the armed robbery; in surveying the premises to be robbed at Siteki; and in keeping a lookout while the robbery was in progress. He further asserts that some of the witnesses are relatives of the Appellant to whom the Appellant would have easy access if he were out on bail. He also says that the bulk of the stolen amount of Two Million Emalangeni has not been recovered and that the Appellant is a young man who would have nothing to lose by absconding, especially to neighbouring Mozambique with which country Swaziland has no extradition agreement. Finally the investigating officer says that the Appellant's safety would be in

jeopardy if he were to be released from custody because the Siteki community, to whom the Appellant is well known, are outraged by this serious robbery.

The Appellant's affidavits contain the barest minimum of information about himself and his circumstances. He has said no more than that he is a resident of Siteki and that at the time of his arrest he was working in Matsapha at a firm called Fletchers Electric Contractors. He has not said what family - if any - he may have, nor what property - if any - he may possess. Neither has he said what the nature of his employment was with Fletchers Electric Contractors, nor whether he would still be employed by them if he were to be released. He has said that he has no family and no business outside Swaziland, and that he has no previous convictions.

> There is absolutely nothing in this scanty evidence that could remotely be considered sufficient to satisfy the court that exceptional circumstances exist which in the interest of justice permit his release".

[27] It remains to be seen *in casu* whether the Applicant has satisfied this firm test found in these legal authorities. Do the facts outlined above in para [21] satisfy this test?

[28] I think not. In my assessment of these paragraphs I cannot say that exceptional circumstances have been proved to meet the requirement of the Section. These paragraphs merely relate as to how the Applicant was arrested by the police. There is nothing untowards about these events. Even if one looks at the Founding Affidavit in its entirety there is

r

nothing which can be classified as exceptional circumstances for purposes of the section.

[29] In the result, for these reasons the application for bail is refused with costs. I further urge the Crown to expedite the Appellant trial in order that justice is served.

S.B. MAPHALALA

PRINCIPAL JUDGE