



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 199/13

SANELE DLUDLU

APPLICANT

And

THE KING

RESPONDENT

Neutral citation: *Sanele Dlodlu v The King (199/13) [2013] SZHC 132*

Coram: **OTA J.**

Heard: **28 June 2013**

Delivered: **9 July 2013**

Summary: **Charge: Armed robbery; Offence under the Fifth Schedule of the Criminal Procedure and Evidence Act as amended (CP&E); application for bail; Exceptional circumstances exist warranting bail in terms of section 96 (12) (a) of the Criminal Procedure and Evidence Act; Application granted.**

OTA J.

[1] The applicant herein contends for the following reliefs:-

1. Admitting the Applicant to bail upon such terms and conditions that the above Honourable Court may deem fit to impose;
2. Pending finalization of this matter the Applicant be removed from Big Bend Remand Centre and be kept in Zakhele Remand Centre in Manzini;
3. Granting the Applicant such further and / or alternative relief that this Court may deem fit;

[2] It is common cause that prayer [2] above has been duly granted as a interim measure, rendering any further inquiry in relation thereto otiose.

[3] The only question left for determination is whether the Applicant is entitled to the bail he contends for in prayer [1].

[4] It is common cause that the Applicant was arrested and charged with the crime of armed robbery. This offence falls within the purview of offences under the Fifth Schedule of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E). A person charged with an offence under the Fifth Schedule has a formal onus to prove that exceptional circumstances exist warranting such bail, in terms of section 96 (12) (a) of the CP&E which provides as follows:-

“96 (12) Notwithstanding any provision of this Act where an Accused is charged with an offence referred to:-

(a) In the Fifth Schedule the Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfied the Court that exceptional circumstances exist which in the interest of justice permit his or her release”

[5] The purpose is to make bail for these very serious and violent offences, which include murder, rape, armed robbery etc, difficult to obtain in the interest of justice. The inquiry therefore is whether the Applicant has shown on a balance of probabilities that exceptional circumstances exist that entitle him to the relief sought.

[6] The term exceptional circumstance in this context has defied any precise judicial articulation. In the case of **Senzo Menzi Motsa v Rex, Appeal Case No. 15/2009**, which was followed by the Supreme Court in its recent decision in the case of **Wonder Dlamini and Another v Rex, Appeal Case No. 01/2013**, **Magid A JA** defined the word “exceptional” as follows:-

“In my judgment the word exceptional in relation to bail must mean something more than merely ‘unusual’ but rather less than unique which means in effect ‘one of kind’”.

[7] In testing the factors urged in **Wonder Dlamini and Another v Rex (Supra)**, against the rigours of the foregoing principle, the Supreme Court considered what may constitute such exceptional circumstances at paragraph [15] of its decision as follows:-

“At page 678 of his judgment Horn JA in dealing with section 60(11)(a) of the Act stated the following:-

-----The term exceptional circumstances is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such

exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g he has a cast iron *alibi*, this would likewise constitute an exceptional circumstance”

- [8] The South African Court made the foregoing pronouncement when considering section 60 (11) (a) of that country’s penal statute, which is in *pari materia* with our section 96 (12) (a), in its decision in the case of **S v Jonas 1998 (12) SA SALR 667 (South Eastern Cape Local Division)**.
- [9] It appears to me therefore from the totality of the foregoing, that what would constitute exceptional circumstances warranting bail turns on the peculiar facts of each case.
- [10] What then is the evidence adduced by the Applicant *in casu*, in discharging the formal onus of proof?

[11] The Applicant relied on a series of factors in his founding affidavit, which include that:-

- (a) He has fully co-operated with the investigating officers since his arrest.
- (b) He did not commit the armed robbery alleged and will plead not guilty.
- (c) He has a very good defence to the charges preferred which are merely speculative.
- (d) He will abide by all bail conditions imposed and will present himself in Court to stand trial.
- (e) He will not interfere with crown witnesses.
- (f) He has been diagnosed with Tuberculosis and also tested HIV positive.

[12] I am however more persuaded by the factors urged in paragraphs [11] and [11.1] of the founding affidavit which are as follows:-

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..... Further, I submit that I sustained a critical injury on my left leg wherein I underwent an operation to have a support replacement hip consequent to the injury. Exposure to harsh weather conditions makes my medical condition worse.

11.2

I state that I have metal inserted on my left leg and it needs regular check ups by specialists which the remand centre does not have. I cannot walk properly and during cold weather I cannot even make a move. I therefore at all times have to be in warm temperatures which thing is impossible when in custody as no person is given special treatment there. I state that at the remand centre I sleep on a mat which can not protect me from attracting further illness and / or renders myself susceptible to attract cold which same has adverse effects on my health. Annex (sic) hereto is a medical certificate confirming my condition and marked “A”

[13] In annexure A, one Dr J.J. Vilakati of Thembumenzi Clinic, confirmed that the Applicant has a pin on (L) femur, which may cause pain on cold conditions.

[14] I notice that in the opposing affidavit, the Respondents have not disputed that the Applicant is plagued by the alleged medical conditions. They have not disputed that he sleeps on a mat at the remand wing. All they say is that His Majesty's Correctional Services is now modernized to address these issues and the Applicant has failed to report these conditions to the Social Welfare officers present therein, who will address same. These averments by the Respondents well not suffice. Their failure to controvert these allegations of fact, in law means that they are deemed admitted and established.

[15] I thus find that the Applicants medical situation of having an iron fitted in his leg which may be more painful in cold conditions as confirmed by annexure A, and the very unfortunate situation where the Applicant sleeps on a mat on cold cement floor at the remand wing, which situation in the pervading cold winter, aggravates the precarious condition of the Applicant's health, are very unique and unusual, indeed one of a kind. These factors in my view, constitute exceptional circumstances warranting Applicant's release on bail, in the interest of justice. See **Wonder Dlamini and Another v Rex (Supra) paras [24] and [25]**.

[16] The result is that this application succeeds. I make the following orders:-

- (a) Bail is set at E50,000=00 (Fifty Thousand Emalangi). The Applicant shall pay cash of E10,000=00 (Ten Thousand Emalangi) and provide surety worth E40,000=00 (Forty Thousand Emalangi)
- (b) The Applicant shall not interfere with crown witnesses, the process of investigation and trial.
- (c) The Applicant shall attend his trial.
- (d) The Applicant shall surrender his passports and other travel documents and shall not apply for new ones pending the finalization of his trial.
- (e) The Applicant shall report at the Manzini police station on the last day of each month between the hours of 8 a.m. and 4 p.m. pending finalization of his trial.

DELIVERED IN OPEN COURT IN MBABANE ON THIS
THEDAY OF2013

OTA. J

JUDGE OF THE HIGH COURT

For Applicant:

M.S. Dlamini

For Respondents:

M.D. Nxumalo

(Senior Crown Counsel)