IN THE HIGH COURT OF SWAZILAND

Criminal case No: 380/2012

In the matter between:

THAMBO DOGGY MNGOMETULU **PLAINTIFF**

AND

REX **DEFENDANT**

Neutral citation: *Thambo Doggy Mngometulu v Rex* (*380/2012) [2013] SZHC29 (2013)*

Coram: **MAPHALALA M.C.B. J,**

For Applicant Attorney B. Xaba
For Respondent Senior Crown Counsel B. Magagula

Summary

Criminal Law – bail application – application opposed by the Crown in terms of section 96 (4) (b) and (6) of the Criminal Procedure and Evidence Act of 1938 – applicant fails to discharge onus on a balance of probabilities that the interests of justice will not be prejudiced by his release on bail – application dismissed.

JUDGMENT
06th MARCH 2013

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[1] This is an urgent bail application lodged on the 19th December 2012; the applicant was arrested by the police at Nsubane area on the 27th September 2012 at the homestead of her aunt.

[2] The applicant alleged that on the 25th September 2012, he set out to hunt game at another farm together with Kwakhe Mavimbela and Zwela Hlanze. They had been advised by a security guard who knew the patrolling times of the farm to arrive in the afternoon when the game rangers were relaxed. They arrived at 4 pm on the farm and saw three game rangers; and the deceased was carrying a rifle.

[3] They tried to hide from them but the game rangers were able to trace them using their footprints. The applicant alleged that the deceased had pointed the firearm and ordered them to lie on the ground. The applicant shot at the deceased and he died.

[4] The deceased was known to the applicant; and, the deceased had trained him as a security guard in 2008 under a security company known as Fecela. The applicant alleged that the deceased had taught him that when they came across a trespasser, they must shoot and kill him; hence, he feared that the deceased would shoot him. He further contradicted himself and alleged that he shot the deceased in an attempt to disarm him of the firearm.

[5] The applicant further alleged that on the 26th September 2012, his companions phoned and advised him that they should surrender themselves to the police; at the time he was already at his aunt's place at Nsubane area. He had undertaken to surrender himself to the police on the following day; however, the police arrested him on the following day at 6.15 am whilst he was still asleep.

[6] The applicant disclosed that he was thirty-two years of age, single with three minor children; and, that if granted bail he would reside at his homestead at Ngonini area and report periodically at Lubulini Police Station. He further undertook to attend trial.

[7] The application is opposed by the respondent. The principal investigator D/Sgt Vincent Mdlovu has deposed to an affidavit in which he disclosed that the applicant had shot down a wild animal with an unlicenced firearm in his possession; rangers heard the gunshot and proceeded towards the applicant and his companions. When the applicant saw the game rangers, he shot at the deceased. He further disclosed that prior to this incident, the applicant had made threats to the deceased accusing him of being responsible for his dismissal at his former place of employment.

[8] The principal investigator further conceded that applicant's co-accused had surrendered themselves to the Big Bend Police Station with the help of a community police of Ngonini area Mr. Mavimbela. He further alleged that the

applicant was also advised to surrender himself to the police but he had refused to do so. He further disclosed that police investigations also established that the applicant wanted to escape to South Africa; and, that he was preparing to leave at the time of arrest. They found him at the homestead of David Myeni in the early hours of the morning; he was hiding behind a bed covered with a mattress and a number of blankets. The homestead is next to the borderline with the Republic of South Africa, and, there is no fence separating the two countries.

[9] In his replying affidavit the applicant vehemently denied that he was preparing to escape to South Africa or that he was found hiding at the homestead of David Myeni; he insisted that at the time of his arrest, he was making preparations to surrender himself to the police with the help of David Myeni. However, no confirmatory or supporting affidavit has been filed by David Myeni to dispute the evidence of the Crown. Similarly, Mr. Mavimbela has not filed a confirmatory or supporting affidavit to support the applicant's version that they were to meet on the 27th September 2012 and then proceed to Big Bend Police Station where he would surrender himself to the police. He denied as well that the police found him hiding behind a bed covered with a mattress and a number of blankets. He argued that D/Sgt Vincent Mdlovu found him seated on a bed, and, that he did not resist arrest.

[10] The Crown relies on sections 96 (4) (b) and (6) which provide the following:

"96. (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(6) In considering whether the ground in subsection (4) (b) has been established, the Court may, where applicable take into account the following factors, namely-

(a) The emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;
(b) The assets held by the accused and where such assets are situated;
(c) The means and travel documents held by the accused, which may enable the accused to leave the country;
(d) The extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) The question whether the extradition of the accused could readily be affected should the accused flee across the borders of the Kingdom in an attempt to evade trial;
(f) The nature and the gravity of the charge on which the accused shall be tried;
(g) The strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;
(h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) The binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) Any other factor which in the opinion of the court should be taken into account."

[11] The applicant does not deny that the homestead of David Myeni where he was found is situated next to the borderline with South Africa or that there is no fence separating the two countries. Similarly, it is true that the offence of murder for which the applicant has been charged is serious and accompanied by a harsh penalty in the event of conviction. At the same time it is true that an extradition treaty exists between South Africa and this country in the event the applicant escapes to that country; however, it could not be said that this could be readily effected in light of the long and cumbersome procedure employed in extradition cases. *Prima facie* the Crown's case against the applicant appears to be strong since the applicant does not deny shooting at the deceased during the course of the poaching; the issue for the court to decide appears to be the determination of self-defence.

[12] *Nathan CJ* in the case of *Ndlovu v. Rex* 1982 -1986 SLR 51 at 52 E-F stated the law relating to bail applications as follows:

"... In a bail application the onus is on the accused to satisfy the Court that he will not abscond or tamper with the Crown witnesses, and if there are substantial grounds for the opposition, bail will be refused. The two main criteria in deciding bail applications are

indeed the likelihood of the applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case.... there is a subsidiary factor also to be considered, namely the prospects of success in the trial."

[13] *Nathan CJ* in *R v. Mark Shongwe* 1982-1986 SLR 193 at 194 stated the law as follows:

"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.... the likelihood of conduct by the accused 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."

[14] Applicant's Counsel further referred me to section 16 (7) of the Constitution as being authority for the proposition that bail is a constitutional right of an accused person, and, that the court has no discretion to refuse bail. He argued that a court faced with a bail application has one of two choices, either to release the accused unconditionally or upon reasonable conditions. Such reasoning is not only misconceived but fallacious.

[15] Section 16 (7) of the Constitution provides the following:

> **"16. (7) If a person is arrested or detained as mentioned in subsection (3) (b) then without prejudice to any further proceedings that may be brought against that person that person shall be released either in unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that person appears at a later date for trial or for proceedings preliminary to trial."**

[16] Section 16 (3) (b) referred to in section 16 (7) of the Constitution provides the following:

> **"16 (3) (A) person who is arrested or detained-**
>
> **....**
>
> **(b) Upon reasonable suspicion of that person having committed or being about to commit, a criminal offence, shall, unless sooner released, be brought without undue delay before a court."**

[17] Section 16 (7) of the Constitution endorses the general principle that bail is a discretionary remedy; in determining bail, the overriding factor is the interest of justice, and in particular whether there is a likelihood that the accused if released on bail may evade trial, interfere with Crown witnesses, conceal or destroy the evidence.

[18] It has also been argued that in view of the presumption of innocence in section 21 (2) (a) bail is mandatory. This argument overlooks section 21 (13) (a) of the Constitution which provides the following:

"21. (13) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of-

(a) Subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."

[19] It is worth mentioning that section 38 of the Constitution does not include the Right to personal liberty when dealing with derogations in the enjoyment of rights and freedoms. This emphasises the discretionary nature of the remedy and the fact that it is subject to derogations and limitations; it is not absolute. It provides the following:

"38. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(a) life, equality before the law and security of person;
(b) the right to fair hearing;
(c) freedom from slavery or servitude;
(d) the right to an order in terms of section 35 (1) (i.e. enforcement of protective provisions); and
(e) freedom from torture, cruel, inhuman or degrading treatment or punishment."

[20] In the case of *Maxwell Dlamini and Emmanuel Ngubeni v Manzini Senior Magistrate and Four Others* Criminal case No. 1526/2011 at paragraph 13, I had occasion to state the following:

"13. Dealing with the grounds of review, the applicants correctly argued that the overriding issue is whether or not the interests of justice will be prejudiced by the release on bail. One of the cases they quoted is *Rex v. Pinero* 1992 (1) SACR 577 (NW) at 580 c-d where *Frank J* said the following:

"In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all embracing issue: will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with state witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the state? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail."

[21] I am satisfied on the evidence adduced that the applicant has failed to discharge the onus on a balance of probabilities that the interest of justice will not be prejudiced if he is granted bail. Accordingly, the application is dismissed.

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M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT