



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.239/2014

In the matter between:

**MNCEDISI DASSA THOBELA**

Applicant

**And**

**REX**

Respondent

**Neutral citation:** *Mncedisi Dassa Thobela and Rex (239/2014) [2014] SZHC*

*195 (08 August 2014)*

**Coram:** Hlophe J

**For the Applicant:** Mr. M. S. Dlamini

**For the Respondents:** Mr. M. Nxumalo

**SUMMARY**

*Bail application – Applicant charged with five counts comprising murder, robbery and three others – Applicant seeking bail – Whether Applicant entitled to bail in the circumstances of the matter – Considerations of the award or refusal of bail – Applicant last seen with the deceased on the day preceding the latter’s being found dead – Accused found in possession of certain items belonging to the deceased – Not clear whether items have any connection with the deceased’s death – Items found hidden together with a fireman forming the basis of one of the charges and allegedly pointed out by the Applicant – Applicant disputing knowledge of items despite contrary allegations by the Respondent – Onus of proof on bail applications on Applicant – Whether onus discharged in the circumstances – Whether grant of bail in the circumstances of the matter is in the interests of justice – Bail application not successful as onus not discharged by the Applicant, and therefore grant of bail will not be in the interests of justice.*

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## **JUDGMENT**

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[1] The Applicant seeks an order of this court admitting him to bail on such terms and conditions as this court may find appropriate. The Applicant further seeks an order compelling the Royal Swaziland Police, to release to his custody a certain motor vehicle a sedan - fully described in the notice of motion.

- [2] The Applicant contended in his application papers that he was arrested by the Mankayane Police on the 29<sup>th</sup> May 2014 and eventually charged with various offences which include murder robbery and the contravention of the Arms and Ammunition Act by unlawfully being found in possession of a fire arm as well as live rounds of ammunition. The Applicant avers that he was eventually produced before court where at he was remanded into custody pending trial.
- [3] Subsequent to the said remand, the Applicant moved the present application and requested to be admitted to bail on such terms and conditions as this court may find to be appropriate. Revealing that he was going to plead not guilty to the charges preferred against him; the Applicant contended that he had a valid defence to the charges and also alleged that he had good prospects of success. This was because, he contended, he did not murder the deceased nor did he rob him of anything.
- [4] He stated that although he was with the deceased on the day preceding his death he eventually parted ways with him when the deceased told him he was to meet a certain South African couple and he did not know what befell him thereafter.

[5] He then made the usual undertakings made in such applications contending inter alia that if released on bail he would abide all the conditions imposed by this court and attaching to his bail release. He undertook to attend trial and not to abscond. He further undertook further not to interfere with the crown witnesses as well as not to hinder the interests of justice. He contended as well that he had a fragile medical condition in the form of TB and had also tested HIV positive. These he alleged necessitated he be released from custody so that he could seek the necessary medication.

[6] In connection with the release of the motor vehicle applied for, the Applicant contended that the police had seized his motor vehicle described as a white Renault Sedan with registration numbers CSD 541 BM together with two cellphones of his as well as three others which had no sim cards. He submitted that owing to the harsh weather conditions his car was exposed to, he was entitled to have it released to him together with the cellphones referred above.

[7] The application was opposed by the Respondent who contended inter alia that it was not likely that the Applicant abides the conditions imposed upon him by this court if released on bail. This he said was because there was a likelihood that he escapes the jurisdiction of this court if released

on bail when considering the seriousness of the charges laid against him as viewed against the likelihood of a lengthy jail sentence against him. This was all the more so when considering that the accused was linked directly to the commission of the offences by certain exhibits belonging to the deceased which included certain sandals or push-ins as well as the deceased's cellphone taken together with its sim-card.

[8] It was further contended on behalf of the Respondent that the Applicant had no fixed place of abode in Swaziland particularly when considering that he is usually in and out of the country and that he owned a home at a place called Krest in Johannesburg, South Africa.

[9] Although the Applicant had contended that he was a sickly person, it was contended, he was not the only person with such health conditions in prison. In fact the said institution allegedly had measures in place to address such situations and it does address them. Consequently, it was contended that the Applicant had failed to establish the exceptional circumstances that entitled him to the relief he sought as envisaged by Section 96 (12) (a) of the Criminal Procedure and Evidence Act 67/1938.

[10] The case was pleaded in the manner set out above when the matter was first mentioned before me in the cause of hearing contested bails in the contested bails roll. In view of the fact that it was insinuated ex facie the papers that the Applicant was actually linked to the charges by certain exhibits or items belonging to the deceased found in his possession without revealing what these were or even how precisely they linked the accused to the offence; and in view of the terse and somewhat bare denial by the Applicant to the effect that no exhibits or items belonging to the deceased were found in his possession, I directed that the matter be referred to oral evidence on this aspect so as to enable this court ascertain what the position was.

[11] The matter was then postponed to a specific date, about a week later, to enable the court ascertain the true position through the hearing of oral evidence. I must confirm I so ordered in an attempt to eliminate the possibility of an innocent person being kept in custody whilst at the same time the court wanted to ensure that a person not deserving of bail is not released on bail with the possibility of such a person absconding and possibly even frustrating the course of justice. I considered this because of the seriousness of the charges faced by the accused; the possibility of a lengthy imprisonment sentences in the event of conviction as well as to

ensure generally that the outcome that suits the furtherance of the interests of justice was attained.

[12] As I postponed the matter I also ordered both parties to ensure that these being application proceedings, the parties supplement their papers as may be necessary to ensure that their cases are set out in the papers to ensure compliance with the rules relating to pleading.

[13] To meet the dictates of this directive, the Respondent on the return date, filed a complete indictment together with a certificate in terms of Section 88 *bis* of the Criminal Procedure and Evidence Act, 1938 confirming that the Chief Justice had already granted the application for a Summary Trial. There was further filed a supplementary answering affidavit which sought to explain how the alleged exhibits were recovered; where they were recovered and why they were so recovered.

[14] In a nutshell the crown's case as revealed in the indictment, was that the deceased was found dead early in the morning lying dead next to the road. This discovery was made by some two people who were on their way to work at Mahlangatsha area.

School children also made the same discovery that morning. Eventually the discovery was reported to the police.

[15] The indictment revealed per the summary of evidence, that on the day preceding the discovery the accused and the deceased were together with one Masotja Shabangu and Phumuza Mzamo Shabangu. Having spent time together, the deceased and the accused left together when they all parted ways. The indictment further alleges that after about a week of the discovery of the deceased person's corpse, the accused was brought to Phumuza Shabangu by the police who went on to show the latter a pair of navy blue push-ins and three cellphones from which he was able to identify one such cellphone, together with the said push-ins as belonging to the deceased. Further allegations in the summary of evidence are to the effect that the exhibits allegedly belonging to the deceased were found in the Applicant's car, hidden in a certain gadget under the back seat, together with the fire arm that was being pointed out by the Applicant at the time.

[16] In a supplementary affidavit deposed to by the investigating officer, one Detective Constable Mduduzi Ndlangamandla, it is alleged that the Applicant led the police to his car to recover a fire arm, the only exhibit he had admitted concerning the matter. The police however are said to



have searched the car where they allegedly discovered in the same gadget in which the fire arm was hidden, which was itself hidden beneath the back seat, the other exhibits referred to above which are the navy blue push-ins together with the deceased's cellphone and its sim card.

[17] The Applicant did not file a supplementary affidavit but sought to rely on the affidavit filed initially in reply to the answering affidavit. In this affidavit the Applicant had dealt generally with the issue of the exhibits or items allegedly belonging to the deceased denying having knowledge of any exhibits belonging to the deceased and retrieved from his car. Other than making the bare denial he had no knowledge of any exhibits belonging to the deceased in his car; the accused gave no explanation and did not deal at all with the contention that the said items or exhibits were produced from a gadget in the Applicant's car.

[18] Although the matter was initially meant to proceed on oral evidence on the subsequent day; both parties agreed that there was now no need for oral evidence to be led. They contended that from the indictment; the summary of evidence thereto annexed as well as from the supplementary affidavit, all the issues that required the leading of oral evidence had been covered.

[19] This position was very crucial in these proceedings as implicit in it was an agreement that all the issues were now common cause. Part of these issues which form part of a further or supplementary affidavit is that certain specific exhibits in the matter, particularly the navy blue push-ins together with the cellphone and sim card were found hidden in a certain gadget together with the fire arm being pointed out, under the back seat of the Applicant's white sedan.

[20] In order to be released on bail in a case like this, it is a settled legal position that an accused person has to establish that exceptional circumstances warranting his release from custody, exist in the matter. This he does by adducing evidence which seeks to show that it would be in the interests of justice to release him on bail. This is provided for in Section 96 (12) (a) of the Criminal procedure and Evidence Act.

[21] What is clear in this regard is that the onus of proving that he is entitled to bail lies with the Applicant himself. I must now consider the circumstances of the matter as stated above to ascertain if as a matter of fact the Applicant had been able to discharge the onus placed on him.

[22] Given the seriousness of the charges faced by the accused particularly the murder, robbery and attempted murder to mention but a few; with the murder having apparently arisen under obviously gruesome circumstances, it became clear that any evidence linking the accused with the charges is very crucial. Of course once such link is established, I have no doubt that owing to the seriousness of the charges, then there would be a very serious tilt towards the bail application not being successful or towards the order sought not being granted.

[23] It is clear that the accused is linked to the charges by his alleged pointing out of the fire arm, which during the course of it there was conducted a search by the police which allegedly resulted in the discovery of the cellphone and its sim card as well as the navy blue push-ins, all identified to be belonging to the deceased.

[24] I note that although these items were identified as belonging to the deceased, there is no evidence directly linking the death of the deceased with them. For example there is no evidence that the said items were with the deceased at the time of his death or even when he was last seen with the deceased so much so that he has to explain. Being that as it nay, it is puzzling to note that indeed the accused gives no explanation how these items, which all belong to the deceased with for instance the

cellphone and sim card having most likely remained with the deceased to the point of his death, not being explained why it ended up being hidden underneath the back seat of his car. Despite it being disclosed by means of the supplementary affidavit what the exhibits earlier on referred to were and how and where they were found, and therefore construed to be in his possession, it shows not to say much or anything in that regard. Why he would not give an explanation on what the deceased's items were doing in his car, defeats logic if he is to avoid an inescapable inference that he knew something about the said items and by extension the deceased's death.

[25] This being the case, can it be said that the applicant adduced evidence establishing exceptional circumstances which shows that it would be in the interests of justice to release him on bail? I think not.

[26] In my view, and owing to the seriousness of the charges faced by the accused, he has not managed to discharge such onus. It was incumbent upon him to explain how and why the accused's aforesaid items, apparently in his possession until his death, were found with him. I am convinced that owing to the possibility or even the likelihood of a lengthy custodial sentence in the event of conviction, it would not be in the interests of justice to release the Applicant on bail

[27] I noted that a full indictment has already been prepared together with the grant of a summary trial of the matter as envisaged by Section 88 *bis* of the Criminal Procedure and Evidence Act of 1938. This means that the matter is ripe for trial. I am convinced it would not be difficult for counsel even right from court today to approach the registrar of this court to conscientise her so that the matter can be placed before an available judge without delay. That way I am sure the spending of an unnecessarily long and undue period in custody would be avoided.

[28] There is also the issue of the release of the accused's motor vehicle from the custody of the police in fear of the fact that the said motor vehicle could be adversely affected by the changing climate conditions to the detriment of the accused.

[29] No sound reason was placed before me why it would be prejudicial to release the motor vehicle to the Applicant other than an insinuation that investigations were still incomplete. In order not to be seen to be adversely interfering with the police investigations, I am sure that this aspect of the matter, requires to be postponed sine die until after all the necessary investigations would have been carried out. It seems to me this would have been done in two months from now.

Should that not be so, that is, in case a further period is required; such would have to be justified in court as at that point for the court to fully consider same.

[30] For the foregoing reasons and considerations I make the following orders which I do for the removal of doubt.

[30.1] The Applicant's application for bail be and is hereby dismissed.

[30.2] The Registrar of this court be and is hereby directed to forthwith allocate the matter to an available Judge who can hear it on account of its being ripe for trial as signified by the finalization of the indictment and the grant of a summary trial in terms of Section 88 *bis* of the Criminal Procedure and Evidence Act of 1938.

[30.3] The prayer for the release of the Applicant's motor vehicle be and is hereby postponed to a date after two months from today's date for an appropriate order. To give effect to this order the following shall have to be done:-

[30.3.1] Anyone of the interested parties shall set the matter down at that stage for an appropriate order.

[30.3.2] Each one of the parties be and is hereby given leave to supplement his papers in support of the result desired by such party as at that time, explaining the circumstances and justifying that a result or desire as would be necessary.

[30.3.3] Should the situation necessitate that the motor vehicle be released sooner, (that is should the investigations be completed sooner than contemplated) the matter may be set down for such an order at the instance of either party.

**Delivered (that is the written reasons) in open court on the 08<sup>th</sup> day of August 2014.**

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**N. J. HLOPHE  
JUDGE - HIGH COURT**