IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 344/09

In the matter between

MANCOBA MUZI NHLABATSI	**APPLICANT**
Versus	
REX	**RESPONDENT**

Neutral citation: *Mancoba Muzi Nhlabatsi v Rex (344/09*) 2014 [SZHC] 222 (12 September 2014)

Coram: **M. S. SIMELANE J**

Heard: **3 September 2014**

Delivered: **12 September 2014**

Summary: **Criminal procedure: post-conviction bail application; exceptional circumstances requisite to warrant bail; no exceptional circumstances shown; application lacking in merits and accordingly dismissed.**

Judgment

SIMELANE J

[1] I convicted and sentenced the Applicant as Accused on 17 July 2014 for the offence of Culpable Homicide. I sentenced him to Eight (8) years imprisonment two (2) years of which was suspended, for a period of two (2) years on condition that he is not convicted of a similar offence during the period of suspension.

[2] The proved facts of the case in summary are as follows: On 27 September 2009 PW1 Msenge Elliot Tsela headed for the Esihlahleni drinking spot and bought himself some home brew. He was invited by one Mjongo who was standing next to a container with home brew. Mjongo told the witness to sit down and drink the brew together with the Applicant and the deceased. The Applicant then called one Mampunzini Mango PW3 to come and drink with them to which the deceased was opposed. The disagreement on sharing the brew then

resulted in the Applicant and the deceased wrestling for the container with the brew. The Applicant then poured the home brew on the deceased's head. A fist fight then ensued between the Applicant and the deceased whereby the Applicant then stabbed the deceased with a knife on the chest which resulted in the deceased's death.

[3] It was based on the totality of the evidence and his plea of guilty that I found the Applicant as Accused person guilty as charged and accordingly convicted him.

[4] In sentencing the Applicant, I considered his personal circumstances which are that he is a first offender which was confirmed by the Crown, he was remorseful throughout the trial; that he is thirty three (33) years old and not employed.

[5] I also considered the interest of the society and the peculiar circumstances of the offence. It was my considered view that the Applicant committed a very serious offence which is very prevalent in Swaziland. I further observed that the youth in particular have this bad tendency of resorting to violence and the usage of lethal weapons in killing other people which is on the increase. I held that the Courts have a constitutional obligation to discourage the unwarranted killing of people by other human beings. Thereafter I imposed the sentence detail in paragraph [1] above.

[6] The Applicant has appealed against only his sentence upon ground which appear in the Notice of Appeal as follows:-

“1. In dealing with the triad, the Court a quo misdirected itself in law by not engaging in an exercise or an inquiry to properly investigate the competing aspects of the triad.

2. The court a quo misdirected itself in law when meting out the sentence by failing to consider that the Appellant committed the offence while under the influence of alcohol.

3. The court misdirected itself in law by failing to consider that the deceased was the first one to strike at the Appellant, and as such the initial aggressor, a fact from which a reasonable inference may be drawn that had it not occurred the Appellant would not have beat him as well.

4. The court a quo misdirected itself in law by failing to consider that though culpable homicide cases are prevalent in the Kingdom the present one stood on a different footing from those flooding the court a quo.

5. The court a quo misdirected itself in law by failing to consider that the Appellant had pleaded guilty to the offence.

6. The court a quo misdirected itself in law by failing to consider that the Appellant had surrendered himself to the police.

7. The court a quo misdirected itself in law by failing to give the Appellant a postponement of the matter so as to secure the attendance of his attorney when the matter was heard.

> **8. The court a quo misdirected itself in law by failing to consider that the Appellant had six minor children and a lengthy custodial sentence would result to the detriment and prejudice of his dependants."**

[7] The Applicant thereafter moved an application under a certificate of urgency contending for bail pending appeal.

[8] The Respondents opposed the application through an opposing affidavit filed by one Elsie Matsebula described therein as Senior Crown Counsel under the Director of Public Prosecutions Chambers.

[9] The parties also filed heads of argument and further made oral arguments based on their respective affidavits for which I am grateful.

[10] The Applicant states in his heads of argument that he is not a flight risk which he demonstrates by submitting as follows:-

> **"(a) I am a born and bred Swazi with no other citizenship and / or foreign passport with my family rooted in the Kingdom of Swaziland.**
>
> **(b) Prior to my conviction I had been admitted to bail and at no stage did I ever violate any of my bail conditions up to the last day.**
>
> **(c) There is nothing suggesting that I will not be able to serve my sentence in the event of my appeal being unsuccessful.**

> **(d) The administration of Justice will not be endangered if I am admitted to bail.**
>
> **(e) The above Honourable Court is at liberty to impose conditions stringent enough to ensure compliance with all directives it may issue in the matter."**

[11] The Applicant further submits that he has prospects of success on appeal which are determined by considering if there is any chance that another Court may find and hold differently from what was found and held by the trial Court as opposed to enquiring whether or not the trial Court found and held correctly as that is the preserve of the Appellate Court. It is the Applicant's contention that he does have prospects of success of the appeal against the sentence imposed by this Court.

[12] It is further Applicant's contention that this Court misdirected itself in law by not engaging in an exercise or an enquiry to properly investigate the competing aspects of the triad.

[13] The Respondent argued *au contraire* that the Applicant's appeal against sentence is not arguable. She submitted that the appeal is manifestly doomed to fail. The Respondent argued that the Court properly considered the *triad* and applied that the application for bail pending appeal should be dismissed.

[14] Having carefully considered the submission advanced before this Court by both parties, I find it paramount to state the position of the law on post-conviction bail applications. In post conviction bail

applications the Applicant must show exceptional circumstances to warrant his admission to bail pending appeal.

[15] In **Salvado V The State (2001) 2 BLR 411 at 413 Nganunu CJ** stated as follows:-

> **"The presumption of innocence on the side of the accused falls by the way side when he is convicted at his trial. It becomes a fact that the law considers him a criminal, until perhaps he succeeds to upset the conviction in any appeal he may make. With the disappears the tilt of the Court towards the liberty of that person in any bail application. The law expects the convict to serve any term of imprisonment decreed by the Court. To me this constitutes the fundamental divide between the approach of our Courts in pre-trial bail applications and those after a conviction and sentence of imprisonment. In my vie, the principle followed by our Courts in pos-conviction bail applications is that the applicant must show the existence of some exceptional circumstances in order to be granted bail, otherwise, he is expected to serve his sentence instead of being on the street as a free man."**

[16] Furthermore, in **S V WILLIAMS 1981 SA 1170**, the Court stated the law as follows:-

> **"Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and**

Erleigh (4) 1950 SA 601 (W) and R V Mthembu 1947 (B) SA 468 (1) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. It is necessary to put in the balance both the likelihood of Applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an Applicant to absond. In every case where bail after conviction is sought the onus is on the Applicant to show why justice requires that he should be granted bail."

[17] I fully align myself with the aforecited cases that an Applicant for bail pending appeal should prove that exceptional circumstances do exist in this case warranting the admission to bail pending his appeal and that he does have prospects of success on appeal.

[18] In my view what will constitute exceptional circumstances warranting the grant of bail pending appeal was exhaustively canvassed by **Ota J** in the case of **Leo Ndvuna Dlamini v The King Criminal Case No 12/13 paragraphs [28] - [32].**

"[28] What will constitute such exceptional circumstances warranting post- conviction bail were espoused by Hannah J in the case of State V Sephiri and Kgoroba 1982 IBLR 211, as follows:-

'The approach of the Court of Appeal in England when dealing with application for bail pending appeal is now clearly set out in R V Walton (supra). In that case the

Court held that exceptional circumstances are the test and the two questions to be considered in determining whether exceptional circumstances exist are (1) whether it appears prima facie that the appeal is likely to be successful or (2) whether there is a risk that the sentence will have been served by the time the appeal is heard.'

[29] Similarly, in R V Mthembu 1960 (3) SA 463 at 471 A-B, the Court declared as follows:-

> **'As I see it, the effect of Section 368 is such that the grant of bail is in the discretion of the Court. I think that the law is that, if justice is not endangered, the Court favours liberty more particularly where there is a reasonable prospect of success.'**

[30] What can be extrapolated from the aforegoing authorities is that such exceptional circumstances are:

(1) whether there is *prima facie* prospects of success of the appeal.

(2) whether there is a risk that the sentence will have been served by the time the appeal is heard.

[31] I am persuaded by the aforegoing decisions. I have no wish or inclination to depart from them, save to add that the Court is still entitled in the judicial and judicious exercise of its discretion to consider other factors such as the likelihood of the Applicant absconding from the jurisdiction, the Applicant's health situation if any, etc, if the circumstances of the case

warrant such a consideration and especially where there are prospects of success of the appeal.

[32] Adumbrating upon this discretion in the case of S V Williams 1981 SA 1170, the Court said the following:

> **'Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and Erleigh (4) 1950 SA 601 (W) and R V Mthembu 1947 (B) SA 468 (I) stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. It is necessary to put in the balance both the likelihood of Applicant absconding and the prospects of success. Clearly the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an Applicant to abscond. In every case where bail after conviction is sought the onus is on the Applicant to show why justice requires that he should be granted bail."**

[19] The poser here is has the Applicant shown such exceptional circumstances?

[20] It is necessary for me at this juncture to state that I have carefully scrutinized the grounds of appeal against the sentence and the established facts of the case, I am convinced that the grounds of appeal do not disclose triable issues to warrant the bail sought. No prospects of success have been proved save for mere allegations that there are prospects of success on appeal. It is pertinent for me to state that the argument by the Applicant that the Court misdirected itself by not conducting an enquiry on the mitigating factors and weighing same against the interest of society is misplaced. The argument by the Applicant being that this Court did not consider the personal circumstances of the Applicant. May I emphatically state that the personal circumstances of the Applicant were considered and weighed heavily in the mind of the Court when passing the sentence. The Applicant has thus woefully failed to disclose *prima facie* prospects of success of this appeal.

[21] Another factor for consideration is whether the Applicant will serve his sentence before the appeal is prosecuted. This factor has to be considered *vis-a-vis* the prospects of success of the appeal. This is so because if the appeal is successful and the sentence imposed is such that he would have served it before the appeal is heard he would have been denied justice if bail is not granted. If he serves the sentence before the appeal is heard the appeal would be academic. There has been no such contention by the Applicant. I do not see any likelihood of the sentence imposed on the Applicant being served before the hearing of the appeal. No evidence to the contrary has been adduced by the Applicant.

[22] I am also of the considered view that the fact that the Applicant is already a convict, serving a term of Eight (8) years imprisonment is the more reason I find that the conviction and sentence by itself inherently makes the Applicant a flight risk. We must not lose sight of the fact that his appeal is against his sentence only. There is no appeal against the conviction.

[23] In the light of the totality of the foregoing I am of the considered view that the Applicant has failed to prove exceptional circumstances to warrant his release on bail. I find that this application is unmeritorious. It fails.

[24] **COURT ORDER**

I hereby order as follows:-

The Applicant's application for bail pending his appeal to the Supreme Court be and is hereby dismissed.

M. S. SIMELANE J.

JUDGE OF THE HIGH COURT

For the Applicant: **Mr. M. Mabila**

For the Respondent: **Mr. S. Dlamini**