IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 240/09

In the matter between

BONGANI DLAMINI **1ST APPLICANT**

VUSI DLAMINI **2ND APPLICANT**

NKOSINATHI MAGAGULA **3RD APPLICANT**

Versus

REX

Neutral citation: *Bongani Dlamini & 2 Others v Rex (240/09*) 2014 [SZHC] 227 (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 Applicants as Accused persons on 17 July 2014 for the offence of Culpable Homicide. I sentenced them to Eight (8) years imprisonment Two (2) years of which was suspended for a period of Three (3) years on condition that they are not convicted of a similar offence during the period of suspension.

[2] The proved facts of the case in summary are as follows: The deceased, one Zwelithini June Dlamini was suspected by the Applicants to have stolen various items from people and items from his brother's house, 1st Applicant and from one Jabulani Sonnyboy Manana (PW3) in the summary of evidence. The deceased was

known amongst his family and community to be in the habit of stealing. On the fateful day of 5 August 2008 around 1900 hours the deceased was searched for by the Applicants, PW3, Bhekisisa Motsa, Sifiso Mabila and other community members who included Ntokozo Shongwe and Lungelo Shongwe in order to question him about the missing items suspected to be stolen by him.

[3] 1st Applicant (the deceased brother) led the group in search for the deceased and he was found sleeping at one Khanyisile's house. He was asked to go outside of the house and then questioned about the stolen items namely; Television set, Hand-gas and five cell phones stolen from 1st Applicant's house and PW3's cell phone stolen from the hot springs. Instead of responding to the allegations the deceased began assaulting them and ran away. The deceased was sought after and when he fell down the group managed to catch up on him.

[4] At this juncture the Applicants took sticks and started beating the deceased and demanded the items. They were joined by Ntokozo Shongwe, Lungelo Shongwe, Wakhe Motsa (community police) Sifiso Simphiwe Magongo, Sifiso Mabila and Mzwandile Mtsetfwa momentarily in the assault. The deceased responded and said he gave the stolen items to one of his friends. The deceased was driven in 1st Applicant's car to the friend's place, but they were not located. The deceased was then driven to the police station where they reported the matter. The deceased succumbed to death due to the injuries inflicted on him by the Applicants.

[5] It was based on the totality of the evidence and their plea of guilty that I found the Applicants guilty as charged.

[6] In sentencing the Applicants, I considered the following mitigating factors as adduced by them. 1st Applicant stated as follows under oath in mitigation, that he is a first offender, he is thirty nine (39) years old, he is married with nine (9) children who are all school going, the offence was committed in his line of duty as a community police, he was expelled from his community pursuant to the commission of the offence, he is remorseful.

[7] 2nd Applicant stated under oath in mitigation of sentence, that he is thirty seven (37) years old, he is a first offender, he has one child who is school going and aged five (5) years old, he earns a living through installing satellite dishes and television sets and is remorseful.

[8] 3rd Applicant stated under oath in mitigation of sentence that he is twenty six (26) years old and is remorseful.

[9] I also considered the interest of the society and the peculiar circumstances of the offence.

[10] It was my considered view after considering the *triad* that the Applicants 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 trend is on the increase. I held that the

Courts have a constitutional obligation to discourage the unwarranted killing of people by other human beings.

[11] The Applicants have appealed against only their sentence upon similar grounds which appear in their respective 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 it did by failing to consider that the Appellant committed the offence while in the process of affecting a citizen's arrest on the deceased who was a notorious criminal in the area**
>
> **3. The court a quo 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 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 was employed and a lengthy custodial**

sentence would result in him losing his job to the detriment and prejudice of his dependants."

[12] The grounds of appeal are substantially the same for all three Applicants. The only difference is paragraph [5] of 1st Applicant's notice of Appeal where the following appears.

"The court a quo misdirected itself in law by falling to consider the youthfulness of the Appellant at the time the offence was committed."

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

[14] The Respondents opposed the application through an affidavit filed by one Qondile Zwane described therein as Senior Crown Counsel under the Director of Public Prosecution's Chambers.

[15] The parties also filed heads of argument and further made oral arguments based on their respective affidavits.

[16] In their respective affidavits the Applicants made similar allegations in support of their application. They contend that they are not a flight risk in the following terms:-

"(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."

[17] 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.

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

[19] Since this is a post conviction bail application pending appeal, a restatement of the cardinal principles that must guide the Court in a proper exercise of this discretion is imperative at this juncture.

[20] 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."**

[21] 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."

[22] I respectfully subscribe to the foregoing propositions. I adopt them as mine.

[23] It cannot therefore be gainsaid for a post-conviction bail application pending appeal to succeed, the Applicant must show exceptional circumstances warranting same.

[24] What will constitute such exceptional circumstances of each case?

[25] Case law has however identified certain factors as a guide. These factors were succinctly illuminated in my decision in **Mancoba Nhlabatsi v Rex Criminal Case No. 344/09** with reference to the decision of her Ladyship **Ota J** in the case of **Leo Ndvuna Dlamini v The King Criminal Case No. 12/13 paragraphs [28] – [32]** as follows:-

"[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. ' "

[26] The question is have the Applicants shown the requisite exceptional circumstances? 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 and 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. The Applicants have thus woefully failed to disclose a *prima facie* prospects of success of this appeal.

[27] Another factor for consideration is whether the Applicants will serve their respective sentences 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 they would have served it before the appeal is heard, then they would have been denied justice if bail is not granted. If they serve the sentence before the appeal is heard the appeal would be academic. There has been no such contention by the Applicants. I do not see any likelihood of the sentence imposed on the Applicants being served before the hearing of the appeal. No evidence to the contrary has been adduced by the Applicants.

[28] Furthermore, the contention by the Applicants that they are not a flight risk holds no water. This is so because, their appeal is solely

against sentence. The fact of their conviction which is not appealed against, inherently makes then a flight risk and this should disable the bail application except other exceptional circumstances are shown, this is not such a case. No exceptional circumstances enure in the Applicants papers filed of record.

[29] In light of the totality of the foregoing, I am of the considered view that the Applicants have failed to prove exceptional circumstances to warrant their release on bail. I find that this application is unmeritorious. It fails.

[30] **COURT ORDER**

I hereby order as follows:-

The Applicants' application for bail pending their appeal to the Supreme Court be and is hereby dismissed.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Applicants: **Mr. M. Mabila**
For the Crown: **Mr. S. Dlamini**