



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 259/2013

In the matter between:

NCAMISO MBUYISA

APPLICANT

VS

REX

RESPONDENT

Neutral citation: *Ncamiso Mbuyisa v. Rex (259/2013) [2014] SZHC71 (2014) 3 April 2014*

Coram:
MAPHALALA, J

M.C.B.

Summary

Criminal Procedure – bail – application for bail opposed – applicant charged with premeditated murder as listed in the Fifth Schedule of the Criminal Procedure and Evidence Act – held that the applicant bears the onus to adduce evidence to the satisfaction of the Court that exceptional circumstances exists which in the interest of justice permit his release as contemplated by section 96 (12) (a) of the Act – held further that the applicant has failed to discharge the said onus – application for bail dismissed.

JUDGMENT

3 APRIL 2014

[1] This is an application for bail, and, the applicant is charged with premeditated

murder under the Fifth Schedule. It is not in dispute that the accused and deceased were in a love relationship at the time of her death. The accused is further charged with Common law Theft, it being alleged by the Crown that after the killing of the deceased, he stole certain items from her including a Nokia Asha cellphone valued at E800.00 (eight hundred emalangeni), a Nokia 1600 cellphone valued at E400.00 (four hundred emalangeni), a skin top T-shirt valued at E120-00, a bundle of keys as well as a Swazi Identity Card for Minnah Mnyakamubi Dvuba.

[2] Section 96 (12) (a) of the Criminal Procedure and Evidence Act deals with bail applications in respect of offences listed in the Fifth Schedule and provides the following:

“96. (12) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-

- **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 satisfies the Court that exceptional circumstances exist which in the interest of justice permit his or her release.”

- [3] Magid AJA, in the case of *Senzo Menzi Motsa v. Rex* Criminal Appeal case No. 15/2009 at para 11 defines the word “exceptional” in relation to section 96 (12) (a) of the Act to mean something more than merely “unusual” but rather less than unique, meaning in effect “one of a kind”. It is well-settled that the offences listed in the Fifth Schedule are very serious and violent and that they are accompanied by severe penalties upon conviction. Section 96 (12) (a) was clearly enacted by Parliament as a means to curb the commission of these offences by placing a heavy onus upon the applicant with a view to making the granting of bail very difficult.

See *Wonder Dlamini and Another v. Rex* Criminal Appeal No. 01/2013; *Senzo Menzi Motsa v. Rex* Criminal Appeal case No. 15/2009; *S v. Dlamini, S. v. Dladla and Others, S.v. Jourbert, S.v. Schietekat* 1999 (2) SACR 51; 1999 (4) SA 623 (CC) at para (4); *Selby Musa Tfwala v. Rex Criminal case No. 383/2012*

- [4] Horn JA in *S. v. Jonas* 1998 (12) SACR 667 had this to say:

“The term ‘exceptional circumstances’ is not defined. There can be as many circumstances which are exceptional as the terms 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.”

- [5] The Legislature placed the onus upon the applicant for bail in respect of offences listed in the Fifth Schedule to be quite onerous; however, it did not deprive the Courts of their discretion to determine in each particular case whether or not exceptional circumstances exist. In determining such circumstances the Court looks at the evidence tendered by the applicant as well as the facts and averments made. From the evidence adduced by the applicant no exceptional circumstances have been disclosed which in the interest of justice could permit his release. As stated in the case of Mbhekeni Sikhulu Mbhamali case No. 277/2013 each case has to be decided upon its own peculiar facts and circumstances, the seriousness of the offence charged, the number of counts charged, the prospects of success in the trial, the severity of the penalties upon conviction and whether his release would not generally undermine the objectives for which section 96 (12) (a) of the Act was enacted, that is curbing the scourge of serious and violent crimes.

[6] The applicant has not disputed the evidence of the Crown that he made certain pointing out of exhibits as an indication of his guilt. It is therefore unlikely in the circumstances that the applicant did not commit the offence as alleged. It is trite law that evidence showing that an accused person did not commit the alleged offence would constitute an exceptional circumstances justifying his release on bail.

See the case of *S. v. Jonas* (supra) at 667.

[7] Accordingly, the application for bail is hereby dismissed.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

For Applicant
For Respondent

In person
Crown Counsel Macebo Nxumalo