



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 264/2013

In the matter between:

MCOLISI SHONGWE

APPLICANT

vs

REX

RESPONDENT

Neutral citation: *Mcolisi Shongwe vs Rex (364/2013)[2014]SZHC 08 (14th February 2014)*

Coram: **MAPHALALA PJ**

Heard: **19th December 2013**

Delivered: **14th February 2014**

For Crown: Mr. B. Magagula

For Accused: Mr. N. Dlamini

Summary: (i) *Before court is an Application to be released on bail.*

- (ii) *The Application is opposed by the Crown contending inter alia that Applicant has not advanced exceptional circumstances in accordance with section 96(12a) of the Criminal Procedure and Evidence Act (as amended).*
- (iii) *In the result, the court finds in favour of the Crown's contention that the Applicant has not advanced exceptional circumstances as provided in the said section of the Criminal Procedure and Evidence Act, as amended. The Application is therefore dismissed forthwith.*

JUDGMENT

- [1] The Applicant has filed before this court an Application to be released on bail on crimes of murder, robbery and assault with intent to grievous bodily harm which falls under the fifth Schedule.
- [2] The Crown on the other hand oppose the Application for bail and has filed an Opposing Affidavit in this regard. In the said Opposing Affidavit the Crown has raised a point *in limine* to the following legal proposition:

“3.1. *The Applicant has failed to discharge the onus which is upon him to adduce evidence showing the existence of exceptional circumstances for him to be granted bail in terms of section 96(12a) of Criminal Procedure and Evidence Act 67 of 1938.*

3.2 *The Applicant together with his co-accused are facing four (4) robbery crimes and such crimes involved the use of a firearm by the Applicant or co-perpetrators. This offence is listed in the Fifth Schedule of the Act and in terms of section 96(12a) of the Act the Applicant is required to adduce evidence to the satisfaction of the court that exceptional circumstances exist which in the interest of justice permit his release.”*

[3] The attorneys of the parties appeared before this court on the 19 December 2013 and filed Heads of Arguments that the court should consider them in making its judgment on the matter. The court was also invited to decide the merits of the case in the event the point *in limine* does not succeed.

[4] The gravamen of the Crown’s argument *in limine* is that the Applicant has failed to comply with the mandatory provisions of section 96(12) (a) of the *Criminal Procedure and Evidence Act of 1938*. This is in light of the counts of robbery, which involve the use of a firearm. That the Applicant is facing as reflected in the indictment annexed in the Respondent’s Opposing Affidavit.

[5] The Crown has cited a *plethora* of decided cases in this court to support its case. These being the case of *Selby Musa Twala vs Rex, Criminal*

Case No.382/2012; Senzo Menzi Motsa vs The King, Criminal Case No.15/2009 and that of Mavimbela vs Rex (unreported), Case No.331/2011.

[6] The Crown further advanced arguments on the merits of the Application and cited the South African case of *S vs Fourie 1973(1) SA 100* at 101.

[7] The Applicant on the other hand contended that section 96(12) (a) of the *Criminal Procedure and Evidence Act of 1938* does not apply. The arguments for the Applicant on the submissions of the Crown as outlined above in paragraph [4] and [5] of this judgment are as follows:

“3. *Absence of exceptional circumstances under section 96(12) (a) of Criminal Procedure and Evidence Act 1938;*

- *Section does not apply*
- *See paragraph 2 above*
- *Note that A2 and A3 were granted bail*
- *Flight risk is preposterous;*
 - * *Applicant has a home in Swaziland;*
 - * *Has a passport which he can surrender;*
 - * *Report to police.*

4. *Constitution Act 2005*

- *Right to liberty entrenched;*
- *No excessive bail*

- *Interests of justice demand that an accused person be treated as innocent until proven guilty beyond reasonable doubt by a court of competent jurisdiction.”*

[8] Having considered the arguments of both attorneys of the parties it is my view that the Crown is correct in its arguments as outlined above. It is abundantly clear to me that the crimes committed by the Applicant fail under section 96(12) (a) of the *Criminal Procedure and Evidence Act*, as amended. The Applicant contends that the section does not apply without furnishing any reasons for saying so. Yet Applicant’s attorney at paragraph 1 of his Heads of Argument states the following:

“Applicant is charged with attempted murder, robbery, assault GBH crimes which fall under the Fifth Schedule.”

[9] In paragraph 3 thereof Applicant states the following:

“3. Absence of exceptional circumstances under section 96(12) (a) of Criminal Procedure and Evidence Act 1938;

- *Section does not apply*
- *See paragraph 2 above*
- *Note that A2 and A3 were granted bail*
- *Flight risk is preposterous;*
 - * *Applicant has a home in Swaziland;*
 - * *Has a passport which he can surrender;*

* *Report to police.*”

[10] It now boogles the mind why the Applicant has made the submission stated above in paragraph 9 of this judgment in light of what is stated in his Heads of Argument at paragraph 1 above.

[11] It is abundantly clear to me that section 96(12) of the *Criminal Procedure and Evidence Act* apply and therefore Applicant ought to adduced evidence to satisfy the court that exceptional circumstances exist which permit his release.

[12] I further agree with the Crown’s contention that this differs from a Fourth Schedule charge when an Applicant only has to satisfy the court that the interests of justice permit his release.

[13] It appears to me on the Founding Affidavit of the Applicant there is nothing that comes close to satisfying this requirement and therefore his Application stand to be dismissed even under this argument.

[14] In the result, for the foregoing reasons the Application for bail is dismissed forthwith.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE