



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 140/15
Consolidated with 309/2014

In the matter between:

MAKHOSATSINI B. SHONGWE

Applicant

THE KING

Respondent

Neutral citation: *Makhosatsini B. Shongwe Vs The King (140/15) 2015*

SZHC 147 (08th September 2015)

Coram: Hlophe J

For Applicant: In Person

For Respondent: Mr. H. L. Magongo

Date Heard: 10th July 2015

Date Handed Down: 8th September 2015

JUDGMENT

- [1] The Applicant is one of three accused persons who were charged with three offences namely, robbery, house breaking with intent to steal and theft. Although all the three of them moved bail applications after their arrest, only that of Applicant's co-accused was finalized, while his remained pending.
- [2] The applications by the Applicant's co-accused were unlike his, not opposed. Owing to this approach, his co-accused were released by the court while his application remained enrolled as it awaited allocation of a hearing date while he remained in custody. It suffices to say all the necessary papers for the bail application he had lodged were filed and remained on record in the said matter to date. The matter had last appeared in court on the 15th August 2014, according to the court file.
- [3] Instead of asking for a hearing date to be allocated by the Registrar, the Applicant filed a new application in July 2015. One cannot tell why the Applicant could not pursue the initial application except that when asked about that in court during the hearing he said he had never made a prior application, which I found to be strange as there was an application

prepared on his behalf by an attorney to which he appears to have signed the founding affidavit if his signature on the two applications is anything to go by. I am convinced no one would have realistically brought an application without him knowing, as it is difficult to understand what such person would have stood to benefit in that regard. I accept he had made the earlier application as well.

[4] Owing to the fact that he was representing himself, it was decided that a big issue be not made of this anomaly but instead his current application and the previous one be consolidated under the new case number and be dealt with as one.

[5] The following facts comprise the background to the matter:-

5.1 The Applicant and his aforesaid co-accused were arrested on the 13th August 2014 for offences allegedly committed on 31st December 2013, 4th March 2014 and 12th August 2014, being house breaking with intent to steal and theft; robbery and unlawful possession of 40 live rounds of ammunition respectively. It merits mention that he was not charged with the latter of the offences.

5.2 Prior to this arrest the Applicant had been released from custody where he had been serving a 10 year 6 months sentence following a conviction for several counts of robbery, on the 1st August 2013.

5.3 When arrested on the current charges the Applicant is alleged to have mentioned different places as his places of aboard.

[6] It was as a result of his current arrest that the Applicant moved the bail applications referred to and prayed that he be admitted to bail upon such terms and conditions as this court would find appropriate.

[7] He says that prior to his arrest he was responsible for five of his siblings and four of his children as the sole breadwinner. He promised to abide by all bail conditions should he be released on bail.

[8] In his previous application he had contended that he was arrested whilst at his home in Manzini and charged with the offences he is currently facing charges on. He had said he was responsible for two children. He had said that he had never been convicted of any offence and that he was not out on bail in relation to any offence at the time of his arrest. He had offered to stay at Lugongolweni in Siteki if released on bail. For what has already been said above, some of these allegations were not correct.

[9] Both applications were opposed by the crown. The grounds for opposition are more or less the same. It is contended that the charges faced by the accused are serious and when coupled with the strength of the case against him, there is a likelihood that he would be convicted and sentenced to a lengthy period of incarceration. This it was argued, made the likelihood of the Applicant absconding and evading trial real.

[10] The strength of the case against the accused, it is alleged, can be seen from the fact that he was identified by a witness at an identification parade and the fact that there is an accomplice witness against him. When considering the fact that he had just been released from serving 10 years 6 months for several counts of robbery when he allegedly committed the offences forming the basis of these charges which also entail robbery among them and the fact there was strong evidence connecting him with these charges; it is apparent that the Applicant has a propensity to commit those type of offences which would make a refusal to grant him bail one that meets the interests of justice in the matter. These facts also support the argument that a strong case exists against the Applicant which makes the likelihood of him absconding in fear of a lengthy sentence real.

[11] It was further contended by the crown that it would not be in the interests of justice to release the Applicant on bail because at the time of his arrest, he allegedly gave the police several places as those of his abode which confirms fears that he does not have a stable place of abode. It was said that whereas he was arrested at Matsapha, Logoba area; he told the police he stayed at Nyakeni at one point and at another at Njojane area. It was to transpire later that he also had lived at places like Tshaneni, Lugongolweni and Magudvulela which are found in different parts of the country.

[12] Prospects of his release from custody on bail were further said to have been diminished by the fact that a trial date had already been set in his matter for the 17th August 2015. It is true that this would mean that as this Judgment is being prepared, his trial has already commenced. If that is the case, it then would mean that it is not proper for this court to release him on bail at this stage given that it is a stage where in terms of Section 145 of the Criminal Procedure and Evidence Act, the extension or otherwise of an accused person's bail is a matter for the discretion of the trial court. Clearly a release on bail at this stage by a different court than the trial one would be more an interference with the trial court's discretion and should always be discouraged.

[13] When the matter was heard before me, the Applicant who represented himself made his submissions which amounted to the giving of evidence in response to what had been attested to against him in the answering affidavit, particularly the one contending he was a flight risk owing to his having no fixed place of abode and the strength of the case as made against him.

[14] He submitted that the many places he was said by the police to have stayed at or he was connected with were either a fabrication by the police or a misunderstanding. He for instance submitted that what he had told the police about Njojane and Nyakeni as well as Matsapha or Mhlaleni was the following, he and his family were residents of Njojane area until 1984, which is where he said he was born. In the said year; 1984, his family moved from Njojane after his parents had khontaed at Nyakeni under Chief Malunge Dlamini. This is where he had remained ever since. The police would have heard him, he says when he told them that story, that they then assumed he had said he was staying at Njojane. This he submitted was not true.

[15] It was also not true, he says, that he also stayed at Tshaneni and Magudvulela areas. These places he says he has never stayed at. While he may have heard about Tshaneni, the same is not true with regards

Magudvulela area. He contends the police are fabricating this to make him look like one who had no fixed place of abode so as to ensure he does not obtain bail.

[16] He does not however deny having been previously arrested and charged with robbery, for which he was convicted and served a 10 years 6 months sentence for various counts of robbery. He says what should be considered in this regard is that he has already served this sentence and he was not on bail when he was arrested in connection with these charges.

[17] On his being identified on a parade, he insinuates that that was not surprising when considering that at the time of his arrest the police had taken his photo using his cell phone with which they disappeared. He wants to insinuate it was this photo which enabled the witness who identified him to do so.

[18] Counsel for the crown in response, reiterated what he had pleaded in his papers as summarized above and urged the court to consider that it would not be in the interests of justice to release the Applicant on bail.

[19] Having considered the submissions by both parties including what has been pleaded above, I am convinced the Applicant is facing serious charges which on the face of them are supported by strong evidence linking him in particular to the offence of robbery. This is confirmed by his allegedly having been identified at an identification parade. I confirm that such is compounded by the allegation that there is an accomplice witness against him. I must however clarify that I am attaching very limited weight if any, on the assertion to the effect that there is an accomplice witness given that such a witness is not disclosed taken together with the fact that that which he will allegedly say is itself not disclosed.

[20] The strength of the case against Applicant taken together with the seriousness of the charges, bring about the possibility or likelihood of a lengthy sentence against the Applicant which confirms the likelihood of him absconding trial in view of the lengthy sentence he likely stands to suffer. The likelihood of the sentence against the Applicant is strengthened as well by the fact that the latter is not a first offender as he has in the past been convicted of several counts of robbery, which had already led to him serving 10 years 6 months in prison.

[21] It would also not be in the interests of justice to release the Applicant from custody on bail taking into account the fact that he has a propensity of committing one type of violent crimes, particularly robberies whilst armed with a firearm. It is not in dispute that from the current robbery charges he is facing, in which there is a strong prima facie case against him, he is shown as having recently been released from custody where he had been kept following a conviction on two counts of robbery, which were considered serious when considering that he had to serve a 10 years six months sentence. It worsens his situation that in all the robberies a firearm had been used.

[22] His situation on violent or potentially violent crimes is compounded by the fact that he is charged with house breaking where a sum of E150,000.00 was stolen which was committed only four months after his release from custody. This confirms not only the propensity but a total lack of respect and/or regard for the law and societal order.

[23] It is unclear why the Applicant has had to now move a fresh application with vigour after his matter had already been allocated a date, which he confirmed was the 17th of August 2015, a date that has already occurred when considering the while it took to prepare this judgment as necessitated by other equally compelling judgments that had to be issued.

It is not advisable for this court to grant bail at this stage considering the fact that once trial commences, an accused person remains on bail at the discretion of the trial court. I have no doubt I would be interfering with the trial court's discretion if I were to release the Applicant at this point. Section 145 of the Criminal Procedure and Evidence is informative in this regard.

[24] In light of the foregoing considerations, I am convinced it would not be in the interests of justice to release the Applicant on bail and I accordingly make the following order:-

1. The Applicant's application for his release on bail, be and is hereby dismissed.

N. J. HLOPHE
JUDGE - HIGH COURT