



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 22/16

In the matter between:

MDUUZI MBATHA

Applicant

And

THE KING

Respondent

Neutral citation: *Mduduzi Mbatha vs The King (22/16) [2016] [SZHC 66]*
8th April 2016

Coram: **MAPHALALA PJ**

Heard: **4th March, 2016**

Delivered: **8th April, 2016**

For the Applicant: **Miss N. Ndlangamandla**
(from Mabila Attorneys)

For the Respondent: **Miss Elsie Matsebula**
(from DPP's Chambers)

Summary *Criminal Procedure - Application for bail pending appeal -
Applicant was convicted and sentenced by the Manzini*

Magistrate Court - Crown contends that Applicant has failed to disclose prospect of success - the court finds in favour of the Crown and dismisses the Application forthwith.

JUDGMENT

The Introduction

- [1] The Applicant was convicted by the Magistrates Court on one count of rape and sentenced to fifteen (15) years imprisonment. Consequently, the Applicant noted an appeal against his conviction and sets out the grounds of such appeal in the said Notice and the appeal is awaiting determination by this court.

The Application

- [2] Pending the hearing of his appeal the Applicant moved the present Application. The said Application was filed with the Registrar of this court on the 4th February, 2016 on Notice of Motion for the following relief:

- 1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.**
- 2. Condoning the Applicant for non-compliance with the said rules of the Court.**
- 3. Pending the hearing of the Applicant's appeal, admitting the Applicant to bail upon such and conditions as the Honourable Court may deem fit.**
- 4. Further and / or alternative relief**

[3] The Founding Affidavit of the Applicant is filed outlining all the material facts in support of the Application. A Notice of Appeal is also filed in support thereto. A record of proceedings in the court **a quo** is also filed.

[4] Finally at paragraph 17 of the Heads of Argument of the attorney for the Applicant it contends that in the circumstances admitting the Applicant to bail pending the hearing of his appeal will not compromise the interest of justice but will only allow him to enjoy liberty while awaiting his appeal and in the event of same being unsuccessful he will accordingly proceed to serve his sentence.

The Opposition

[5] The Crown opposes the above Application and has filed an Answering Affidavit of one Macebo Daniel Nxumalo who is Crown Prosecutor at the Director of Public Prosecution's Chamber, where the opposition to the Application is canvassed.

[6] The Applicant then filed a Replying Affidavit in accordance with the Rules of this court.

The Arguments

[7] On the 4th March, 2016 this court heard arguments of the attorneys of the parties. Both attorneys filed very useful Heads of Argument for which I am grateful. I shall in brief outline the salient features of each party's arguments to assist a better understanding of the issues for decision in the following paragraphs of the judgment.

(i) The Applicant's Arguments

- [8] The attorney for the Applicant Miss Ndlangamandla argued for her client and filed Heads of Arguments framing the arguments of the Applicant. In the said Heads of Arguments cited pertinent cases including the High Court case of **Thembele Andrew Simelane v the King Case No. 234/2002 at page 9, LAWSA Vol. 5 Part 11 First Re-issue paragraph 352**, in case of **Rex v Mline and Erleigh 1950 (4) 601**.
- [8] The arguments for the Applicant are captured in paragraphs 4 to 17 of the said Heads of Arguments.
- [9] In paragraph 17 thereof, that in the circumstances admitting the Applicant to bail pending the hearing of his appeal will not compromise the interest of justice but will only allow him to enjoy liberty while awaiting his appeal and in the event of same being unsuccessful he will accordingly proceed to serve his sentence.

(ii) The Crown's Arguments

- [10] The kernel of the Crown's opposition is founded on the **dictum** in the South African **Case S v William 1981 SA 1170** cited in the case of **Leo Nduna Dlamini** to the following:

"Different considerations do of court arise 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 o an Applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. Such cases as Meline and Eleigh (4) SA 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 interconnected because the less likely the prospects of success are the more inducement there is no Appellant 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”.

[11] It is contended for the Crown that **in casu** the Applicant has failed to disclose in his appeal the prospects of success in this appeal. That Applicant states under paragraph 11 and 12 of his Founding Affidavit that he has prospects of success but need not disclose same that this stage a view that is against the authority cited above.

[12] Further arguments are advanced by the Crown at paragraph 4, 5, 6 to the final submission at paragraph 6 that Respondent apply that the Application be dismissed.

The court’s analysis and conclusions thereon

[13] Having considered all the affidavit filed by the parties and all the arguments by the attorneys of the parties this Application to be released on bail hinges on whether Applicant has shown prospects of success on his appeal.

[14] It is contended for the Applicant that he has show that he has prospects of success as averred in paragraphs 11 to 12 as follows:

11.1 Submit that I do have prospects of success on appeal which prospects are determined by whether is a possibility that another court and find and hold differently from the court a quo.

12.1 I am advised and verily believed that at this stage the said prospects if success need not be proven to be true it suffices that there should be a possibility, not matter how remote.

[15] The Crown on the other hand contends that the Applicant has failed to disclose that he has prospects of success contrary to the **dictum** in the case of **S v William (supra)** cited t paragraph [10] of this judgment.

[16] In this Notice of Appeal attached to his founding affidavit the Applicant states that the court **a quo** in convicting him relied on the uncorroborated evidence of the complainant. However, in my assessment of the Crown's evidence in the court **a quo** the evidence of complainant was corroborated by the evidence of the complainant's mother. In this regard the **ratio** in the High Court case of **Sabelo Nathi Malaza case no. 26/2008 at page 6** is apposite to the principle that **"courts should not act upon any rigid rule that corroboration must always be present before a child's evidence is accepted"**.

[17] The Applicant further complains that the court ignored his version of events. In my assessment of this argument and the facts of the matter Applicant's story is only a bare denial of the evidence of the Crown as reflected in the record. It would appear to me that **in casu** there is sufficient evidence implicating the Applicant to the charge and he was correctly convicted. In sum, Applicant has failed to discharge the **onus** of showing the court that there are prospect of success in his appeal.

[18] Further, I am in agreement with the Crown's contentions that the Applicant is a flight risk. The 15 years sentence on a conviction of an aggravated rape is an appropriate sentence and Applicant has failed to show prospect of having this sentence changed by the appeal court.

[19] In the result, for the foregoing reasons the Application is accordingly dismissed. I make no order as to costs.

STANLEY B. MAPHALALA

PRICIPAL JUDGE