



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No. 11/2016

In the matter between:

SIFISO MATANATANA DLAMINI

Applicant

And

REX

Respondent

Neutral citation: *Sifiso Matanatana Dlamini v Rex* [11/2016] SZHC 49 [2017]
(21 March 2017)

Coram : **T. L. Dlamini J**

Heard : 21 July 2016

Delivered : 21 March 2017

Summary: *Criminal Law and Procedure – Bail application – An offence listed in the Fifth Schedule requires the accused to adduce evidence of exceptional circumstances to the satisfaction of the court that the interest of justice permit his release on bail in terms of section 96 (12) (a) of the Criminal Procedure and Evidence Act as amended – A previous conviction is required to be disclosed in terms of section 96 (14) (a) of the same Act – Bail is a discretionary remedy to be granted by the court.*

Held: *The Applicant failed to comply with both sections 96 (12) (a) and 96 (14) (a) of the Criminal Procedure and Evidence Act as amended. Held further that the release of the Applicant on bail will not be in the interests of justice – Application for bail dismissed.*

JUDGMENT

The Application

[1] The Applicant is charged with committing five (5) Robbery offences, three (3) House Breaking with intent to steal and Theft offences, three (3) Attempted Murder offences and one (1) offence of theft of a motor vehicle.

All these offences were committed within one month, between 30th November 2015 and 28th December 2015.

- [2] The Applicant has applied to be admitted to bail pending his trial for these offences. The bail application was filed in January 2016 through the offices of Mabila Attorneys in Association with N. Ndlangamandla and S. Jele.

- [3] The application is opposed by the Crown. It filed an opposing affidavit on the 30th June 2016 wherein it also raised points *in limine*.

- [4] On the 18th July 2016 the Applicant filed its response to the opposing affidavit but without the assistance of Mabila Attorneys. When the matter was before court for hearing, the Applicant was no longer represented and he appeared in person.

Applicant's contentions

- [5] In summary, the Applicant denied that he committed the offences and pleaded his innocence to all the charges. He then submitted that he will not abscond trial if admitted to bail. He also submitted that he will not interfere

with witnesses of the Crown and that he will not endanger the safety of the public.

[6] He further stated in the application that some of the offences fall under the Fifth Schedule of the Criminal Procedure and Evidence Act No. 38 of 1967 as amended (the Act) and he therefore is enjoined to establish the existence of exceptional circumstances.

[7] In discharging the duty to establish exceptional circumstances, the Applicant submitted the following personal circumstances:

- (i) He is very sickly and suffer from Tuberculosis and the conditions at the remand centre are not conducive for someone who is in his state of health.
- (ii) He is self employed and assist his mother as a debt collector in a money lending business and the money is used as the only source of subsistence and maintenance for himself and the other dependents.

- (iii) He has three minor children who depend on him as their mother is unemployed and two of them are attending primary school.
- (iv) That he has been incarcerated for offences he did not commit.

Respondent's opposition

- [8] In opposition, the Crown submitted that the Applicant failed to comply with section 96 (14) of the Act in that he did not disclose to the court his previous conviction by the Matsapha Circuit Court Magistrate for House Breaking and Theft. The Crown further submitted that the Applicant failed to disclose that he faces a pending charge for Murder under case No. M201/2015.
- [9] The Crown further submitted that the Applicant committed the offences within a short period of time. In space of one (1) month he is implicated in twelve (12) offences. The Crown also submitted that Applicant is likely to continue with his criminal behavior given that he committed these offences soon after his release from custody.

The applicable law

[10] An accused person is entitled to be released on bail unless it is in the interest of justice that such accused person be detained in custody. **Section 96 (1) (a) of the Criminal Procedure and Evidence Act No. 38 of 1967 as amended.**

[11] Personal liberty is a right that is entrenched in the Constitution Act No. 001 of 2005, hence accused persons are entitled to be released on bail unless their release would prejudice the interest of justice. **Maxwell Mancoba Dlamini and Mario Masuku v Rex, Criminal Appeal No. 46/2014, para 14.**

[12] In a judgment that is in line with the above stated legal position, Mahomed J held as follows:

“An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is

*likely to prejudice the ends of justice.” **S v Acheson 1991 (2) SA 805 at 822.***

[13] The authorities referred to above endorse the conclusion that bail is a discretionary remedy that is granted by the court. See also **Wonder Dlamini and Another v Rex, Criminal Appeal No. 1/ 2013 paragraph 18 (unreported).**

[14] The Applicant correctly states in paragraph 16 of the founding affidavit that he also faces offences under the Fifth Schedule of the Act and is therefore enjoined to establish the existence of exceptional circumstances. The establishment of exceptional circumstances is required in terms of section 96 (12) (a) of the Act.

[15] The issues for determination therefore are:

(a) Whether or not the applicant complied with section 96 (12) (a),

(b) Whether or not the applicant complied with section 96 (14) (a),

and

(c) Whether or not it is in the interest of justice that the applicant should be admitted to bail.

[16] I will deal with these issues *seriatim*.

(a) Has Applicant complied with section 96 (12) (a)

[17] Section 96 (12) (a) requires an applicant who faces an offence listed in the Fifth Schedule of the Act to adduce evidence of exceptional circumstances that satisfies the court that it is in the interest of justice to release the applicant on bail. The section provides as follows:

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

(a) 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;”

[18] In respect of counts 1 and 7, the Applicant is charged with the offence of Robbery using a gun. This offence is listed in the Fifth Schedule of the Act. For the Applicant to be released on bail, he must therefore adduce evidence of exceptional circumstances which satisfies the court that the interests of justice permit his release on bail. **Selby Musa Tfwala and Another v Rex, Criminal Case No. 383/2012 (b) (SZHC 34 2013), paragraph 29 (unreported); Shongwe Bheki v R, Criminal Appeal Case NO. 11/2005 (2005-2005 SLR 380 at 381).**

[19] In case of **Senzo Menzi Motsa v Rex, Criminal Appeal Case No. 15/ 2009 (unreported)**, Magid AJA, as he then was, stated the following:

“ In my judgment, the word “exceptional” in relation to bail must mean something more than merely “unusual” but rather less than “unique” which means in effect “one of a kind.” (para 11).

[20] The applicant stated as follows in his bail application affidavit:

“16. I am advised and verily believe that the offence which I am facing falls under the Fifth schedule of the Act and as such I am enjoined to establish the existence of exceptional circumstances.

17. *I am a very sickly person who suffers from Tuberculosis and the conditions at the remand centre are not conducive for someone in my state of health as an inmate is made to sleep on the floor and exposed to dust and health condition will worsen instead of healing due to such conditions.*

18. *I am self employed assisting my mother as a debt collector in her money lending business at the textile industries in Matsapha, which is my only means of subsistence and the income I derive from same is used to cater for myself and dependents.*

19. *I have three minor children and two of them are currently attending primary schools who are all dependent on me as their mother is unemployed.*

20. *I submit further that the fact that I have been incarcerated for an offence which I did not commit is on itself an exceptional circumstance.*

21. *I have not been charged with contravention of the Arms and Ammunition Act and the mention of a firearm in the charge sheet is merely for frustrating my bail application. Moreover, as mentioned earlier I did not commit the offence.”*

[21] There is nothing in my view and finding, in the above stated depositions of the Applicant which may be said to constitute exceptional circumstances as defined by Magid AJA in the case of **Senzo Menzi Motsa v Rex (supra)**.

Applicant has stated factors that are commonly stated by accused persons in their bail applications. They cannot therefore be regarded as “one of a kind”. The applicant has therefore failed to adduce evidence of exceptional circumstances which satisfies this court that the interests of justice permit his release from custody. Consequently, the bail application must fail on this ground alone.

(b) Has Applicant complied with section 96 (14)

[22] Section 96 (14) requires the applicant in a bail application to inform the court whether he has previously been convicted of an offence. It also requires the applicant to inform the court if there are any pending charges against him and whether he is out on bail in respect of those charges. The section provides as follows:

“ 96 (14) Notwithstanding any law to the contrary –

(a) in bail proceedings the accused, or legal representative, is compelled to inform the court whether –

(i) the accused has previously been convicted of any offence; and

(ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges;”

[23] The crown submitted that the Applicant was convicted by the Matsapha Circuit Court Magistrate for House Breaking and Theft in Case No. MP 201/2013. It further submitted that the Applicant failed to disclose to the court that there is a charge of Murder that is pending against him under case No. M 201/2015.

[24] The Applicant denied that there is a Murder charge that is pending against him. No evidence was placed before court to prove this averment and the court will find in favour of the Applicant on this disputed fact.

[25] On the failure to disclose his previous conviction, the Applicant submitted that it was not intentional that he did not disclose this previous conviction. He submitted that he did not know that he is required to disclose this information. His failure to do so was out of ignorance of the law .

[26] A well known principle of law is that ignorance of the law is no excuse. It is expressed in the latin expressions *ignorantia juris non excusat* or *ignorantia juris neminem excusat*. The ignorance that is pleaded by the Applicant is therefore not an acceptable reason. On this basis, the explanation given by the Applicant is not accepted by this court.

[27] For the foregoing, the court finds that the Applicant failed to comply with section 96 (14) (a) (i) of the Act. Consequently, the bail application must fail.

(c) Is it in the interest of justice that the Applicant be released on bail?

[28] The Crown deposed in its opposing affidavit that the Applicant was convicted by the Matsapha Circuit Court Magistrate for House Breaking and Theft offences and was sentenced to four (4) years imprisonment with an option of Four Thousand Emalangi (E4, 000.00) fine. In response to the Crown's opposing affidavit the Applicant stated that he was not sentenced as submitted by the Crown. He submitted that he was sentenced to eight (8) years without any option of a fine and half the sentence was suspended for five (5) years on condition of not committing a similar offence.

[29] It is therefore common cause that Applicant was convicted for House Breaking and Theft offence. He now stands charged for committing five (5) Robbery offences, three (3) House Breaking with Intent to steal and Theft offences, three (3) Attempted Murder offences, and one (1) offence of Theft of a Motor Vehicle.

[30] Robbery and House Breaking with Intent to steal and Theft offences are prevalent offences in this country. The fact that the Applicant is charged with committing eight (8) of these combined two offences is itself evidence of the prevalence of the crimes.

[31] Section 96 (4) (a) of the Act provides that it shall be in the interest of justice to refuse to grant bail where there is a likelihood that the accused may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule. In determining the likelihood referred to in sub-section (4) (a), sub-section (5) (f) provides that the court may take into account, amongst other factors, the prevalence of a particular type of offence.

[32] The section provides as follows:

Bail application of accused in court.

“96 (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-

(a) Where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

(b)

(c)

(d)

(e)

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-

(a)

(b)

(C)

(d)

(e)

(f) *the prevalence of a particular type of offence;*”

[33] Part II of the First Schedule list many offences which include Robbery, Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute, and Theft either at common law or as defined by the statute.

[34] On account of the fact that the offences of Robbery and House Breaking with Intent to steal and Theft are prevalent crimes, and an account of the fact that the Applicant has a previous conviction of House Breaking and Theft, and that he now faces five (5) charges of Robbery and three (3) of House Breaking with Intent to steal and Theft, this court finds that there is a likelihood that the Applicant will commit an offence listed in part II of the First Schedule if he is released on bail.

[35] For the foregoing reasons, it will not be in the interest of justice to release the Applicant on bail.

[36] The bail application is therefore dismissed.

T.L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant: In person

For Respondent: Stanley N. Dlamini