



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 203/2016

In the matter between:

SIPHO SHONGWE

Applicant

And

REX

Respondent

Neutral citation: *Sipho Shongwe v Rex* [203/2016] SZHC 58 [2016] (29 March 2017)

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

Date heard : 21 July 2016

Date of delivery : 29 March 2017

Summary: *Criminal Law and Procedure - Bail application - Granting bail is a discretionary remedy of the court - Mother of complainant is the wife of the Applicant - Applicant is charged with the rape of his step daughter - Mother of complainant refuses to have the complainant placed under the custody of her biological father or paternal grandmother - Crown submits that if Applicant is released on bail, he will return to his home to stay with the wife and complainant, and will interfere with the complainant who is a witness for the Crown.*

Held: *Applicant is likely to interfere with the witness of the crown - Bail application dismissed.*

JUDGMENT

The Application

[1] The Applicant is charged with the offence of Rape which he allegedly committed against a thirteen (13) years old girl who is his step daughter. He was arrested by the Sigodvweni Police Station based officers on the 8th March 2016. He has now applied to be admitted to bail pending his trial for this offence.

- [2] Applicant submitted that he is the father of three (3) children and is a single parent. He also submitted that his arrest has caused him great pain as he is the only parent for the children.
- [3] Applicant further submitted that he is a Swaziland citizen and has no relatives outside the country. He submitted that he therefore will not evade trial by going outside the jurisdiction of this court. He also submitted that he will not interfere with witnesses for the Crown and will attend all remand hearings and abide by all bail conditions which this court will impose.
- [4] The bail application is opposed by the Crown and it submitted that the Applicant is untruthful by stating that the mother of his children died. The Crown submitted that the mother did not die and is alive. The Crown also submitted that after the arrest of the Applicant, an attempt was made, with the assistance of the Social Welfare Office, to have the complainant placed under the custody of her biological father or paternal grandmother but the mother refused. The reason given by the mother for her refusal is that the biological father never bothered to maintain the complainant.

[5] The Crown also submitted that the mother knew about the rape but did not report it to the police. It further submitted that the offence was reported to the police by the Head teacher of the school which the complainant is attending, and that the mother is now blaming the complainant for the arrest of the Applicant. For this reason, the Crown submitted that the applicant, if released on bail, will return home and interfere with the complainant who is a witness for the Crown.

The Applicable Law

[6] In the case of **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999(4) SA 623 at 641**, Kriegler J of the Constitutional Court of South Africa stated the following regarding bail proceedings:

“...there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court... The focus at the bail stage is to decide whether the interest of justice permit the release of the accused pending trial.”

[7] The Supreme Court held that personal liberty is a right that is entrenched in the Kingdom’s Constitution and therefore, accused persons are entitled to be released on bail unless doing so would prejudice the interests of justice.

Maxwell Mancoba Dlamini and Mario Masuku v Rex, Criminal Appeal case No. 46/2014, para 14 (unreported).

[8] In terms of section 96 (1) (a) 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. **Criminal Procedure and Evidence Act No. 38 of 1967 as amended.**

[9] In the case of **S v Acheson 1991 (2) SA 805 at 822** Mohamed J states that the presumption of the law is that an accused person is innocent until his guilt has been established in court. The court will, ordinarily, therefore grant bail to an accused person unless this is likely to prejudice the ends of justice.

[10] The Supreme Court stated that bail is a discretionary remedy that is granted by the courts. **Wonder Dlamini and Another v Rex, Criminal Appeal Case No. 1/2013, para 18** (unreported).

[11] The authorities referred to in the paragraphs above support the conclusion that bail is a discretionary remedy granted by the courts. *In casu*, the Crown's fundamental reason for opposing the bail application is that once released on bail, the Applicant will return to his homestead to stay with his wife and the complainant, and will therefore interfere with the Crown's evidence by putting pressure upon the complainant and intimidate her against testifying. That is the main issue which this court must determine.

Determination of the issues

[12] The Crown first submitted that the Applicant is not telling the truth when he states that the mother of his children died two (2) years ago. Counsel submitted that the Applicant mentioned this untruth in order to get sympathy from the court. The Crown added that by making an emphasis that he is the only parent for the children, the Applicant is putting it beyond any doubt that he is untruthful.

[13] In response, the Applicant conceded that the mother of his children is not deceased. He informed the court that what is written in the bail application is not what he meant to state. He explained that he attended school up to standard five. He stated that he asked someone who is able to read, write

and understand English to write the bail application on his behalf. He further stated that he instructed this person to mention that it is his mother who died and not the mother of his children.

[14] I agree with Counsel for the Crown that the Applicant is being untruthful. First of all there is no reason given why the Applicant wanted the court to know that his mother died. He is an adult person who has a wife, children and a homestead. The relevance of the information about his mother being dead has not been explained to this court and why it is necessary.

[15] Secondly, the bail application is written in simple English and can perfectly be understood by a standard five pupil. The relevant paragraph read as follows:

“It is (sic) sincerely plea before the honourable court to be admitted to bail considering my circumstances that I am a father of 3 children and I am their only parent, since their mother died 2 years ago. My Lord may I submit that I am a sick person, I am asthmatic. The conditions here in prison will worsen my condition. May I further state that I am the bread winner and now my neighbors come here to question me about my children and I now feel severe pain because I am their only parent.” (own emphasis).

[16] I have no doubt in my mind that the Applicant read this bail application and signed it before it was submitted to the Registrar of this court. In my view and finding the above quoted text is within the perfect understanding of a person who attended school up to standard five. The Applicant therefore misled the court and is not worthy of its trust.

[17] Counsel for the Crown further submitted that after the Applicant had been arrested, the investigating officer with the assistance of the Social Welfare office tried to place the complainant in the custody of her biological father or her paternal grandmother. The mother of the complainant, however, refused and stated that the biological father never bothered to maintain her. Counsel therefore argued that since the mother of the complainant is the wife of the Applicant, the complainant has no other place to stay except with her mother. He argued that if the applicant is granted bail he will return to his home where his wife and the complainant stay.

[18] Counsel also submitted that the mother of the complainant knew about the rape but did not report to the police. It was eventually reported by the Head teacher of the school which the complainant is attending. The investigating

officer deposed in the Crown's opposing affidavit that the mother is now blaming the complainant for the arrest of the Applicant. Counsel therefore submitted that both the mother and the Applicant will interfere with the complainant and intimidate her on testifying against the Applicant.

[19] In response the Applicant submitted that it is untrue that the mother knew about the alleged rape and never reported it. He submitted that he is certain that the wife was also shocked by the allegation. The Applicant stated that all the wife knew about is that the complainant was coerced by a certain male teacher to have sexual intercourse with him. The Applicant then stated as follows:

“2.2... My wife knew of this which is why she may have been suspicious of the allegation, I am not surprised that the matter was reported by the head teacher of the school where the teacher also works. The mother knows the honest truth and would obviously blame the child since the arrest is affecting her and my children, including my step daughter financially since I am the breadwinner at home.”
(own emphasis).

[20] I mention at this juncture that the submission by the Applicant that it is untrue that the wife knew about the alleged rape and never reported it is a matter that is within the personal knowledge of the wife and not the

Applicant. The wife ought to have deposed to an affidavit and informed the court about her knowledge or otherwise about this allegation. The Applicant's submission is evidence that is inadmissible because it is not within the personal knowledge of the Applicant.

[21] The Applicant also submitted that he will not interfere with the complainant. He submitted that if released on bail he is willing to change his place of residence by going to reside at his uncle's place at *eKukhanyeni*. He also stated that he will not even go anywhere near to where the complainant will be residing.

[22] This court, however, has not been furnished with any evidence to show that the Applicant will be accepted by his uncle for the purpose of residing at his homestead until the matter has been finalized by the court. That being the case, this court is not inclined to accept the explanation that Applicant will reside at his uncle's place at *eKukhanyeni*. The uncle was to make an undertaking to this court that he is prepared to accommodate the Applicant until the matter is finalized.

[23] On the issue of interfering with witnesses, this court has in several cases quoted with approval Mohamed J in **S v Acheson (supra) at p. 822-823 (c)** where he states the following:

“2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence, to be suppressed or distorted. This issue again involves an examination of other factors such as:

- (a) Whether or not he is aware of the identity of such witnesses or the nature of their evidence;*
- (b) Whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;*
- (c) What the accused’s relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;*
- (d) Whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.”*

See: **Sabelo Dalton Ndlangamandla v Rex Case No.15/2003** (unreported); **Mcolisi Mhlanga v Rex, case No. 6/2003** (unreported).

[24] Section 96(7) of the Criminal Procedure and Evidence Act N0. 38 of 1967 as amended list factors which the court should consider in an application for bail when determining the likelihood that witnesses will be influenced or intimidated. These factors, amongst others, include the following;

- (i) the fact that the accused is familiar with the identity of the witnesses and with the evidence which the witnesses will give;
- (ii) whether the witnesses have already made statements and agreed to testify;
- (iii) whether an investigation against the accused has been completed;
- (iv) the relationship of the accused with the witness and the extent to which they could be influenced or intimidated;
- (v) how effective and enforceable bail conditions prohibiting communication between the accused and the witnesses are likely to be; and
- (vi) any other factors which in the opinion of the court should be taken into account.

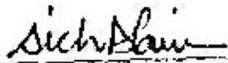
[25] *In casu*, the complainant is a step daughter of the Applicant and is definitely known to him. The evidence of the complainant is known to the Applicant because it only relates to the offence of rape which the Applicant is alleged

to have committed against the complainant. The wife of the Applicant is the mother of the complainant and they stay in the same homestead. Evidence was submitted in an affidavit under oath that the Applicant's wife is blaming the complainant for the arrest of the Applicant. The Applicant is content with the blame being placed on the complainant.

[26] Furthermore, the wife of the Applicant refused to have the complainant taken to the custody of her biological father or paternal grandmother in order to keep her away from the homestead of the Applicant. In this kind of family environment the complainant is highly likely to be influenced and intimidated from testifying against the Applicant. Above all, I am of the considered view that any condition which this court may impose to prevent communication between the Applicant and the complainant cannot effectively be policed.

[27] There is therefore, in my view, a great likelihood that the Applicant will interfere, directly and indirectly, with the complainant who is the Crown's witness.

[28] For the foregoing reasons, the bail application is refused and dismissed.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For: Applicant: In person

For Respondent: Stanly N. Dlamini