



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 272/2016

In the matter between:

SIFISO MTHAYI GAMEDZE

Applicant

And

REX

Respondent

Neutral citation: *Sifiso Mthayi Gamedze v Rex* [272/2016] SZHC 75 [2017]
(20 April 2017)

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

Date heard : 4th November 2016

Date of delivery : 20 April 2017

Summary: *Criminal Procedure – Bail application – The Applicant also faces offences that are listed in the Fifth Schedule of the Criminal Procedure and Evidence Act as amended – Evidence of exceptional circumstances is therefore required to be adduced by the Applicant in his bail application.*

Held: *That the Applicant failed to adduce evidence of exceptional circumstances and the application for bail is therefore dismissed.*

JUDGMENT

The Application

[1] The Applicant is a Swazi citizen of kaMkhweli area in the Lubombo region under Chief Prince Mshengu Dlamini. He is charged with three offences, namely; Murder, Robbery and House Breaking with Intent to commit the crimes of Murder and Robbery. He has now applied to this court to be released on bail pending his trial for these offences. The application is opposed by the Crown.

Applicant's case

[2] The Applicant submitted that before his arrest he was employed as a shopkeeper. He has a single parent who is now too old to work and is dependant on the income earned by the Applicant. He also has two brothers to take care of, and that one of them is disabled and the other one lives in South Africa. He also submitted that these relatives are now suffering

because of his incarceration. He undertook to abide by all bail conditions that this court will impose.

[3] The Applicant further submitted during arguments that he does not deny having committed the offences as he is now a person who accepted Jesus Christ in his life. He therefore pleaded that if he cannot be released on bail he requests that his trial be expedited and conducted soon.

[4] With regard to the request by the Applicant that his trial be conducted soon if he is not released on bail, I wish to mention that I am not the person responsible for determining which matters are to be heard and determined before others. I however know and wish to mention that many accused persons have been in custody for lengthy periods and are looking forward to have their matters heard soon.

Respondent's case

[5] The Crown's opposing affidavit was deposed to by 6010 Constable Sindani Dlamini who is the investigating officer. He submitted that the fact that the Applicant has a brother who resides in South Africa will tempt him to go and stay with the brother and therefore will evade trial.

[6] He also submitted that the Applicant is facing serious offences and the expected punishment if convicted would be a lengthy imprisonment term.

This, he submitted, will tempt and force him to evade trial more especially because the bail amount he would want to pay and can afford would not induce him to remain within the jurisdiction of the court. He stated that this is also because of the nature of his job. He is a shopkeeper and that job does not pay much hence he may easily leave the job and go to South Africa where his brother stays.

[7] The investigating officer further stated that the release of the Applicant would endanger the safety of the public because a neighbor to the Applicant was present when the Applicant handed over exhibits to the police. In other words the neighbor who was present when the Applicant handed over the exhibits is a member of the public and would therefore be put to danger by releasing the Applicant on bail.

[8] The officer also submitted that during arrest the Applicant fought the police and was not co-operative. This evidence is however denied by the Applicant in his replying papers.

The law applicable

[9] In a bail application the enquiry by the court is not concerned with the question of guilt but only to assist the court in deciding whether or not the interest of justice permit the release of the accused pending trial. This was stated by **Kriegler J** of the Constitutional Court of South Africa in the case

of **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 at 641**

- [10] The Swaziland Supreme Court held that personal liberty is entrenched in the Constitution and therefore accused persons are entitled to be released on bail unless doing so would prejudice or undermine the interests of justice. **Maxwell Mancoba Dlamini and Mario Masuku v Rex (46/2014) [2014] SZSC 09** (unreported).
- [11] In terms of **section 96 (1) (a) of the Criminal Procedure and Evidence Act No.67 of 1938 as amended**, an accused person is entitled to be released on bail unless it is in the interests of justice that such accused person be detained in custody.
- [12] Per **Mohamed J**, the court will ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. This is so because the presumption of the law is that an accused person is innocent until his guilt has been established in court. **S v Acheson 1991 (2) SA 805 at 822**
- [13] The court therefore has a discretionary power to grant bail. See also: **Wonder Dlamini and Another v Rex (1/2013) SZSC 2 [2013]** unreported; **Sipho Shongwe v Rex (203/2016) SZHC 58 [2017]** (unreported).

Determination of the issues

[14] Both the Applicant and counsel for the Respondent filed written arguments. I note however, that the Applicant contradicts himself. In his bail application he submitted that he has a single parent who is now old and is dependant upon him. He also has two brothers to take care of. One in South Africa and the other is disabled. He further submitted that these relatives are now suffering because of his incarceration. However, in his written arguments and submissions made in court, the relatives who are in South Africa are adults and are working, hence there is no reason for him to take care of them. This contradiction leaves in my mind the picture of a confused Applicant whose evidence is not to be trusted.

[15] In the written arguments the Applicant also submitted that he disputes the Crown's evidence which is that at the place where he resides no one knows him (the Applicant) and that none of those people know him as a family member. The Crown did not submit such evidence. What the Crown submitted is that it has no knowledge of the fact that the Applicant has a parent. It further submitted that each time the officers visited the Applicant's home only his brother would be found. This misinformed and mistaken response by the Applicant strengthens my suspicion that the Applicant is a confused person whose evidence is not to be trusted.

[16] In setting out the reasons for opposing the bail application, the Crown submitted that the Applicant has a brother in South Africa who he says he wants to look after. Counsel for the Crown argued that given the seriousness

of the offences and the lengthy period of imprisonment if convicted, the Applicant will not be induced to stand trial. He will therefore, it was submitted, evade trial and go to stay with his brother in South Africa. He will also be prepared to forfeit his bail as he cannot afford to pay a substantial amount since he works as a shopkeeper, a job that he can easily be prepared to lose.

[17] The Crown further submitted that the Applicant has no assets or has not disclosed if he has any in Swaziland. The Crown argued that it would not be in the interest of justice to release him on bail. The prospects of him evading trial are very high.

[18] The Crown also submitted that there is a likelihood that the Applicant will interfere with witnesses. Counsel argued that the fact that the person who was murdered by the Applicant was a neighbor, the witnesses are neighbourhood people and the likelihood is great that they would be interfered with by the Applicant.

[19] Furthermore, the Crown submitted that the Applicant also faces offences that are listed in the Fifth Schedule of the Criminal Procedure and Evidence Act as amended. He is therefore required to adduce evidence of exceptional circumstances when applying for bail.

[20] I will first consider and determine the last mentioned reason for opposing the bail application because it is a point of law. The charges of Murder and Robbery faced by the Applicant are the ones that are listed in the Fifth Schedule. In terms of **section 96 (12) (a) of the Criminal Procedure and Evidence Act**, the Applicant is required to adduce evidence of exceptional circumstances in his bail application. 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.”

[21] The Applicant is, in the clear terms of the statute, required to give evidence to the satisfaction of the court that exceptional circumstances exist which in the interest of justice permit his release from custody. See **Selby Musa Tfwala and Another v Rex (383/2012) (b) SZHC 34 [2013]** (unreported); **Shongwe Bheki v R, Criminal Appeal No. 11/2005 (2000 – 2005) SLR 380 at 381**

[22] In the case of **Senzo Menzi Motsa v Rex (15/2009) SZSC 8 [2009]** (unreported), **Magid AJA** stated the following:

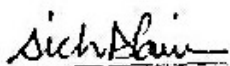
“In my judgment, the word “exceptional” in relation to bail must mean something more than merely “unusual” but rather less than “unique” which means in effect “one of a kind.” (para 11)

[23] In my opinion the Applicant absolutely failed to submit evidence of exceptional circumstances as defined by **Magid AJA** in the **Senzo Menzi Motsa (supra)** case. He simply submitted that he will not evade trial because he knows the consequences of doing so. He stated that doing so is in itself an offence that might also result in him being shot at by the police. He also submitted, during arguments, that he does not dispute having committed the offences and mentioned that he is now a person who has accepted Christ in his life.

[24] In my view the Applicant has not adduced evidence to the satisfaction of the court that exceptional circumstances exists which permit his release from custody. For this reason alone, the bail application must fail and it is so ordered.

[25] On the basis of the finding I make in the paragraph above, I will not labour to consider and determine the other reasons advanced by the Crown in opposition. The application fails on the point of law that I have considered.

[26] For the above reasons, the bail application is dismissed.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : In person

For Respondent : Mr S. Maseko