



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No. 316/18

In the matter between

Dumisa Mkhathswa

Applicant And

The King

Respondent

Neutral Citation: *Dumisa Mkhathswa v The King 316/2018-SZHC- 275 [2019]*

Coram:

D. TSHABALALA J

For Applicant:

MDLAMINI

For Respondents:

2

T
M
A
M
B
A

1

Heard on: 31/10/2018
Delivered: 16/01/2019

Summary - Criminal law and procedure: Bail - offence listed in the fifth Schedule of the CP & Act - whether special circumstances exist in terms of Section 96 (12) (a) of the CP& E Act- Authorities considered on the definition of "Special Circumstances." Held the applicant failed to show by evidence existence of exceptional circumstances as required by the law.

JUDGEMENT

[1] Herein are the reasons for judgment that was delivered *extempore* on the 16 January 2019, dismissing the application for bail. The applicant lodged an application for bail on the 18 October 2018. The applicant faces a charge of contravening Section 3 (1) of the Sexual Offences and Domestic Violence Act 15/2018 it being alleged that he unlawfully and intentionally had sexual intercourse without a condom with the complainant, a female of 15 years. The charge sheet alleges that the offence is accompanied with aggravating factors in terms of Section 185 (b) of the Criminal Procedure and Evidence Act No.67/1938 (CP&EA) as amended in that the accused committed the offence without using a condom thus exposing the complainant to sexually transmitted diseases; and that the victim was a minor incapable of appreciating the nature of Sexual intercourse.

[2] The crown opposes the application on the basis that the applicant faces a 5th Schedule offence and therefore is required to show existence of exceptional

circumstances compelling the Court to grant him bail. It is the contention of

the crown that the applicant has failed to adduce evidence of any special circumstances and therefore the application must be dismissed.

- [3] It is the Crown's further contention that the interests of justice will not be served if the applicant is released on bail for the reason that he will intimidate the complainant who is his relative and the two live in the same area in close by homesteads.
- [4] The applicant alleges in support of his application that he is asthmatic and that the conditions in prison are detrimental to his health and condition. He denies commission of the offence and contends that the Crown's evidence against him is weak.
- [5] The application was argued on the 31 October 2018. Both the applicant's and Respondent's Counsels filed their heads of argument at the start of their submission. Counsel for the applicant also filed a replying affidavit from the bar. Judgement in the matter was reserved for review of the latest documents.
- [6] There are glaring contradictions and discrepancies in the applicant's affidavits. The applicant claims in the founding affidavit that he did not know the identity of crown witnesses and that he was awaiting the particulars of the charge without which he said he could not state his defence. This is despite that a particularized charge sheet was attached to the founding affidavit. One of the reasons for the application according to the applicant was the likelihood

that it was going to take long before his matter came for trial due to prevalence of similar cases that were awaiting trial. He claims in the founding affidavit that he does not know the trial date. However, he somersaulted in the replying affidavit following revelation by the investigating officer's answering affidavit that earlier trial dates were set before the magistrate and that the applicant twice sought postponements resulting with a new trial date being set. It is the view of the crown that the applicant deliberately frustrated commencement and finalization of his trial. The applicant has not countered this nor revealed the necessity of the said postponements made at his behest, nor justify his claim that he will be subjected to undue trial delay in the circumstances.

[7] Section 96(12)(a) of the CP&E Act provides:

" 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 interests of justice permit his or her release." [Emphasis added.]

One of the CP&EA Fifth Schedule offences is *"Rape, when committed where the victim is a girl under the age of 16 years. "*

[8] Exceptional circumstances in relation to bail mean something more than merely *unusual*. It means in effect *one of a kind*. See *Wonder Dlamini and another v Rex*¹ at paragraph [7] wherein reference is made to a definition by Magid AJA in *Senzo Menz Motsa v Rex2* at paragraph [11].

[9] The South African Constitutional Court in *S v Dlamini, S v Dladla & Others, S v Jourbert, S v Schieekat*³ dealt with the requirement on a bail application to provide evidence of special circumstances. The court had this to say in an unanimous judgement of Kriegler J at paragraph [60] and [61] -

" an accused on schedule 6 charge must adduce evidence to satisfy a court that exceptional circumstances exist which permit his or her release.

" Under Section 11 (a) the law giver makes it quite plain that a formal onus rests on a detainee to satisfy the courtin addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that exceptional circumstances exist." [Emphasis added.]

[10] It is noted that the seriousness of the offence which increases the likelihood of temptation to abscond due to the severe penalty if convicted are also

¹ Criminal appeal case No. 1/2013.

² Appeal case No. 15/209.

³ 1999 (2) SACR 51; 1999(4) 623(CC).

important factors relevant in deciding whether or not bail be granted. *See S v Dlamini et al.*⁴

[11] The Supreme Court in *Wonder Dlamini*⁵ cited with approval the authority in *S v Dlamini et al*⁶ and stated that the relevant provisions of Section 96⁷ contemplate an exercise in which the balance between the liberty interests of the accused and the interests of society in denying bail will be resolved in favour of denial of bail unless, "exceptional circumstances" are shown by the accused to exist. Furthermore, this court retains a discretion to determine whether exceptional circumstances exist from the evidence presented by the applicant.

[12] Turning to the evidence tendered by the applicant, there is one relevant aspect of it for the purposes of Section 96 (12) (a). The applicant states at paragraph [14] of his founding affidavit that he is *"asthmatic and thus I reasonably fear that my health condition will deteriorate if I am left to languish in jail until completion of my trial, which I do not have an idea as to when will be that (Sic)"*

⁴ Supra at paragraph [63],

⁵ Supra.

⁶ Supra.

⁷ Of the CP&EA.

- [13] The Supreme Court in *Wonder Dlamini & Another*⁸ found that the evidence furnished by the 1st appellant satisfied the definition of exceptional circumstances. It set aside the judgement of the court *aqua* denying the 1st applicant's bail on the court *aqua's* finding that the applicant failed to attach a medical report in support of his evidence that he suffered pneumonia with frequent bouts of sinuses.
- [14] The evidence furnished by the 1¹ applicant in *Wonder Damini's* case which the Supreme Court found to satisfy the requirements for exceptional circumstances was to the effect that the appellant suffered from pneumonia with bouts of sinus. The appellant's evidence was also to the effect that the living conditions at Zakhele Remand Centre where he was apparently detained constituted a health hazard because they slept on a mat which rendered the applicant and other detainees susceptible to attract various illnesses. The Supreme Court found the evidence to disclose a situation that constituted exceptional circumstances. The evidence pertaining to the illness of the appellant satisfied the Supreme Court as "*more than unusual but rather less unique, ... a condition that is one of a kind*" in line with the definition provided in *Senzo Menzi Motsa* 's case.
- [15] I am satisfied that the Supreme Court reached the conclusion that it reached in *Wonder Dlamini* 's case based on the informative nature of the evidence furnished by the 1st appellant therein. The same cannot be said of the evidence

⁸Supra.

of the applicant in *casu* wherein he merely mentions at paragraph 14 of the founding affidavit that he is asthmatic and fears that his health condition may deteriorate if he was kept in jail until completion of his trial. There is no reference to any other conditions that may lead to alleged deterioration of his condition. The applicant fears that he may be in custody for a long time, awaiting trial as he claims he has no idea when the trial will be. The applicant was not candid to the court in his claim that he was in the dark as to when his trial was going to be. He subsequently conceded to revelations made by the crown that in fact commencement of trial has been postponed on two occasions before the magistrate, at the applicant's instance. The cause of delay by him of his trial for whatever undisclosed reasons is inconsistent with the applicant's claims made to this court. This is more so when no reasons have been disclosed to this court explaining justification for those delays.

[16] From the fore-going facts I come to the conclusion that evidence adduced does not support a finding for existence of exceptional circumstances in this case. Indeed, the Crown has indicated existence of medical services provided to inmates with similar or other conditions. The applicant misled the court in many respects as detailed above.

The application for bail is therefore dismissed.

ffiqjw
D TSHABALALA
JUDGE OF THE HIGH COURT