



IN THE HIGH COURT OF ESWATINI

BAIL RULING

CASE NO. 261/20

HELD AT MBABANE

In the matter between:

SIBUSISO FANNIE LUSENGA

APPLICANT

And

REX

RESPONDENT

Neutral Citation: *Sibusiso Fannie Lusenga [261/20] [2020] SZHC 184 (23 September 2020)*

Coram: M. LANGWENYA J

Heard: 30 July 2020

Delivered: 23 September 2020

Summary: *Criminal Procedure-application for bail-applicant charged with attempted murder-alternatively contravention of Sexual Offences and Domestic Violence Act 2018, contempt of court and malicious injury to property-applicant is a police officer-asthmatic-fears averments he will plead not guilty-is contracting covid-19 while in custody*

*of correctional services-
with Crown witnesses.*

is not a flight risk-will not interfere

*him-
before he
commit*

*Criminal Procedure-Crown opposes bail application-applicant
will interfere with Crown witnesses as they are known to
applicant is said to have threatened Crown witnesses
was arrested-applicant is said to have attempted to
suicide.*

*administration
right of*

*Criminal Procedure-import of section 95(4) of the Criminal
Procedure and Evidence Act 1938-Public interest
considerations-what factors are in the interest of
of justice-balance these factors with interest and
accused to be admitted to bail.*

Held: application for bail dismissed.

BAIL RULING

[1] This is an application for bail. The applicant, a LiSwati male police officer aged 33 years is an accused person that was arrested and detained in custody on allegations of attempted murder; alternatively contravention of section 77(1)(a) read with section 77(1)(j) of the Sexual Offences and Domestic Violence Act 15/2018; contravention of section 119(1) read with section 119(2) of the Sexual Offences and Domestic Violence Act 15/2018 and one count of malicious injury to property.

- [2] According to the charge sheet, and with the exception of the crime of malicious damage to property, the offences are said to have been committed on 18 June 2020 at Mbabane government hospital. The crime of malicious injury to property is said to have been committed on 7 June 2020 at or near Mbabane Burial, Industrial sites. The applicant is alleged to have unlawfully, wrongfully and intentionally stabbed his girlfriend Nontokozo Hlophe multiple times on the body from which the complainant almost died and thus committed the crime of attempted murder.
- [3] In the alternative, the applicant is charged with the offence of contravening section 77(1)(a) read with section 77(1)(j) of the Sexual Offences and Domestic Violence Act 15/2018 in that he physically abused his girlfriend-Nontokozo Hlophe by stabbing her with a knife several times on her body which conduct harmed or caused imminent harm to the safety, health and well-being of Nontokozo Hlophe.
- [4] The applicant is also charged with contravening section 119(1) read with section 119(2) of the Sexual Offences and Domestic Violence Act 15/2018 in that he unlawfully and intentionally breached a protection order issued on 10 June 2020 by the Magistrate Court, Mbabane and thus impaired the dignity and repute of the court.
- [5] The applicant is charged with the offence of malicious damage to property. In that on 7 June 2020 and at or near Mbabane Burial at the Industrial Sites,

he unlawfully and with intent broke a door handle belonging to Mbabane Burial.

Evidence in Support of Bail Application

[6] The applicant has now approached the court, seeking his admission to bail, protesting that he is a good candidate for bail because he is innocent of all the charges preferred against him as he never committed the offences charged. To shore up this averment, the applicant submits that he will plead not guilty to the charges during the trial¹.

[7] In support of his application to be released on bail, it was averred that applicant's continued incarceration puts his life at risk due to the rampant overcrowding and debilitating conditions in our correctional institutions where he is kept. He is concerned that his continued stay in a correctional facility increases his exposure to him contracting the deadly Covid-19 as it is not possible to practice social distancing in a crowded correctional facility. It is his submission further that his continued incarceration will result in him losing his job and other opportunities in life. The applicant submits also that he is sickly with asthma and requires constant medical attention. The poor health conditions under which awaiting trial persons are kept coupled with the cold weather conditions, applicant submits, will only exacerbate his asthma.

¹ See paragraph 8 of applicant's founding affidavit at page 7 of the Book of Pleadings.

[8] Applicant avers that he stays at Mobeni flats, Mbabane with the complainant. He also has a family at Maphungwane and is a father of seven minor children who are attending school and are entirely dependent on him for support. Implicitly, applicant argues that his children are suffering due to his incarceration. He submits further that he has no means of establishing himself anywhere outside the jurisdiction of this court. In any event, in exchange for his liberty, he is prepared to obey any conditions for his release on bail.

[9] Applicant asserts that there is no likelihood that if released on bail he may undermine or jeopardize the proper functioning of the criminal justice system since he co-operated with the police while they carried out their investigations.

Evidence in opposition of Bail Application

[10] The application is opposed by the Crown on the grounds that the applicant is likely to influence and intimidate Crown witnesses because they are known to the applicant (a nurse and a security guard at Mbabane government hospital) and he threatened some of them prior to being arrested. The complainant, a girlfriend of the applicant is also known to the applicant. Applicant confirms that he knows some of the witnesses in his replying affidavit². Applicant denies that he will attempt to influence and or intimidate Crown witnesses if admitted to bail.

² See paragraph 4 of replying affidavit, page 45 of the Book of Pleadings.

- [11] It is the submission of the investigating officer 4471 Detective Inspector Fanyana Dlamini that his investigations revealed that the applicant is a person of violent disposition especially towards his girlfriend Nontokozi Hlophe. That prior to the commission of the offence of attempted murder, the complainant reported the matter to the police and was advised to approach the magistrate court for a protection order which she did. A protection order was issued against the applicant on 10 June 2020 which prohibited applicant from committing any violent conduct towards the complainant; and also ordered applicant to keep and maintain peace with the complainant. The investigating officer submitted that applicant failed to keep the peace as ordered by the court.
- [12] The investigating officer submitted further that his investigations revealed that applicant is a person of suicidal tendencies as he attempted to end his life by overdosing on medication and also drinking a sanitizer. This averment has not been denied by applicant.
- [13] According to the investigating officer, applicant believes that complainant was cheating on him while her love affair with applicant subsists. In his replying affidavit, applicant states that his relationship with Nontokozi Hlophe was strained because of her infidelity.

Applicable Principles

- [14] The decision to grant bail and determine the amount of bail rests with the Court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As a fundamental consideration, the court will lean in favour of the liberty of the applicant and grant bail where possible.
- [15] It is a basic principle of our law and a constitutional one for that matter, that an accused person is presumed innocent until proven guilty at the end of his trial³. For that reason, pre-trial incarceration is always undesirable. However, in a bail application the accused has an opportunity to be released pending the finalization of his trial if he shows on a balance of probabilities and to the satisfaction of the court, that he will stand trial if admitted to bail or that the administration of justice will not be jeopardized if he is released on bail. The other relevant factors to be considered are the nature and seriousness of the charges, the relative strength of the Crown's case against the applicant on the merits of the charges and therefore the probability of conviction.
- [16] The duty of the court in a bail application is to assess the *prima facie* strength of the Crown's case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant.

³ Section 21(2)(a) of the Constitution Act 1/2005.

[17] I deal first with the averment that prior to his arrest, applicant attempted suicide by overdosing on medication and ingesting sanitizer. This submission was not disputed by applicant. The court has not been told that applicant has since overcome his thought of bringing an end to his own life. This, in my view confirms that there is indeed a propensity for applicant wanting to kill himself still. In the absence of independent evidence showing that it is no longer the case, I do not believe that applicant has shown on a balance of probabilities that there is no reasonable possibility of him again trying to commit suicide. In fact there seems to be a strong possibility that he might try to commit suicide again, especially when released on bail where other ways and means would then become available to him. Thus, on this ground alone, the court should decline him bail.

[18] It would appear from applicant's averments that the Crown has a strong case against him and as can be seen from his pleadings, the accused simply states that he will plead not guilty to all the charges. I do not deem it necessary to elaborate on this aspect any further.

[19] In order to curb the serious escalation of crime and the escalation of an accused person evading the course of justice by absconding, the legislature gave the court wide powers and additional grounds to refuse bail in cases of a serious nature by passing section 96(4)(a) of the Criminal Procedure and Evidence Act, 1938 which states as follows:

‘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 commit an offence listed in Part II of the First Schedule; or

may (b) Where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(c) Where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;’

[20] The offence of attempted murder is preferred against the accused and is listed in Part II of the First Schedule.

[21] In considering what the public interest is, the court will look at the circumstances under which the crime was committed and whether the public must be protected against an offender who is dangerous; whether there has been a public outcry over the commission of the crime committed, and whether the public interest is an important factor in deciding the granting of bail.

[22] When the above principles are applied to the present facts, regard must be had to the nature of the crime and the circumstances under which it was committed. Looking at the manner in which the crime of attempted murder was committed herein, it is evident that this was a callous act in which a woman was brutally assaulted with a sharp object.

- [23] At present, this country suffers an unprecedented wave of violent crime committed against a vulnerable segment of society-women. As a class of people constituting a significant portion of our society, women have the most immediate, compelling and direct interest that the courts protect them against those in society who have no respect for the rights to life, dignity and integrity of others. The rights referred to herein are enshrined in the constitution. Women are entitled to demand that these rights are upheld by the courts which, in circumstances as the present, must be alive to protect these rights even at the pre-trial stage.
- [24] The public cannot be left at the mercy of merciless criminals where neither the police nor the courts can effectively protect them. To this end, public interest becomes an important factor and where there is proper evidence before the court in support thereof, this may lead to the refusal of bail.
- [25] When a police officer acts violently in a domestic setting towards his partner- member of the public might I add-and because such conduct is diametrically opposed to what a police officer is supposed to do i.e. to protect society, these cases do receive a lot of attention from the public. The public ultimately want to see justice done by having perpetrators brought to trial. To achieve that the justice system must not fail them and the courts must as far as possible strike a balance between the rights and interests of the accused on the one hand and public interest and the administration of justice on the other.

[26] In my view, there is sufficient reason to come to the conclusion that it would not be in the interest of the public or the administration of justice to release the applicant on bail pending his trial.

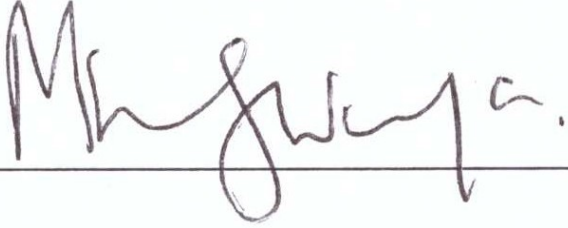
[27] I have considered the strength of the Crown's case which *prima facie* links the accused directly to the crimes charged. I have also taken into account the fact that while the accused was prohibited from committing any violent conduct toward the complainant by the magistrate court, he attacked and assaulted the complainant and was consequently charged with contempt of court and infringing the Sexual Offences and Domestic Violence Act as an alternative count to attempted murder. The behaviour of the applicant in this regard is to me, indicative of a person who has very little or no respect for the law. Conduct of this nature certainly poses a threat to the interests of the administration of justice and consequently, is likely to adversely impact on the applicant's quest to obtain his freedom.

[26] The applicant has averred that his health is in jeopardy if his incarceration continues because he suffers from asthma and is afraid he will contract covid-19 while in custody of the correctional services. I agree with respondents' averment that the correctional services have medical facilities that are equipped and able to attend to medical complaints of inmates in their care. The correctional services further refer inmates to public hospitals if the medical condition of an inmate cannot be addressed in a health facility in-

house the correctional facility. It has not been argued that the in-house medical facilities within the correctional facility where applicant is kept and other public hospitals where serious conditions are referred to by the correctional services have failed to deal with applicant's medical condition.

[27] In conclusion, the applicant's claim of being innocent and denials that he will not abscond and will not interfere with Crown witnesses, considered against those factors relied on by the Crown in its opposition of the bail application, are not very reassuring. All the evidence taken into account, I am not persuaded that the accused has shown on a balance of probabilities that it would be in the interest of administration of justice that he be admitted to bail pending prosecution of the matter.

[28] In the result, the application for bail is dismissed.



M. LANGWENYA J.

For the Applicant: Mr. O. Nzima

For the Respondent: Miss N. Mabila