



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO. 194/2014

In the matter between:

GCINA DELISA VILAKATI

APPLICANT

And

REX

1st RESPONDENT

PRINCIPAL MAGISTRATE FIKILE

NHLABATSI

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

In re:

GCINA DELISA VILAKATI

APPLICANT

And

THE KING

RESPONDENT

Neutral Citation: *Gcina Delisa Vilakati vs Rex & Two Others [2020] SZHC 147 (26th January 2022)*

Coram: LANGWENYA J

Heard: 3 April 2020; 30 April 2020, 26 January 2022

Delivered: 26 January 2022

Summary: *The applicant is charged with rape before the principal magistrate in Mbabane-matter has been pending since 2014-applicant was granted bail by the High Court with specific condition including that he should attend court whenever he is called upon to do so-trial commenced at the magistrate court and after applicant had been warned to attend for continuation of the trial, he failed to do so-the Crown applied for a warrant of applicant's apprehension-application was granted-applicant was later brought to court on strength of warrant of apprehension-Crown made application in terms of section 101 of the Criminal Procedure Act 1938-Court revoked bail but did not grant application to have bail forfeited to the State-no reasons were given for the latter order.*

Criminal Procedure-review of magistrate's ruling revoking bail-application for revocation of bail made in terms of section 101 of Criminal Procedure and Evidence Act 1938-import of section 101.

Criminal Procedure-grounds of review-misdirection on issue of procedural fairness-failure to take into account some relevant considerations-failure to consider reasonableness or otherwise of

accused's explanation before revoking bail-court a quo erred and misdirected itself-Review allowed.

JUDGMENT

Introduction

- [1] The applicant, who is the accused in the Magistrate Court is charged with rape, it being alleged by the Crown that on 24 February 2014, ka Bellinah area at eZulwini he intentionally and wrongfully had unlawful sexual intercourse with Thandeka Siphesihle Simelane without her consent. The charge of rape, the prosecution alleged is accompanied by aggravating factors in that the accused did not use a condom at the time of the commission of the offence¹.
- [2] In his founding affidavit, the applicant states that he made his first appearance before the Magistrate Court situate in Mbabane on 26 February 2014. Notably, this information is not reflected in the record of proceedings filed before this court.
- [3] On 16 May 2014, applicant was granted bail at the High court on terms as reflected in the bail recognizance form marked 'AA1.' One of the conditions was that the applicant would have to attend court wherever and whenever directed to do so pending finalization of the case against him². Subsequent to being admitted to bail, the applicant made his remands at the Magistrate

¹ See page 4 of the Book of pleadings.

² See condition number 12 of bail recognizance form under criminal application 194/14 before Mamba J on 16 May 2014.

Court. After the matter was postponed a number of times, it finally commenced on 28 August 2017.

- [4] When applicant did not attend court on 2 October 2018, the Crown applied for a warrant of his apprehension and forfeiture of his recognizance³. It was on the strength of the warrant of apprehension that applicant was brought to court on 14 June 2019 and his bail was revoked.
- [5] Ten months later, and on a certificate of urgency, applicant moved an application before this court for the review, correction and setting aside of the Principal Magistrate Order of 14 June 2019 revoking his bail. Applicant further prayed for an order admitting him to bail on similar terms and conditions as the High court ordered in terms of the conditions set out in the bail recognizance form dated 16 May 2014.

Issues for determination

- [6] The central issue in this review application is whether the decision to revoke bail is vitiated by an irregularity or misdirection. This requires that I consider two issues arising from the grounds of review namely: (i) did the Magistrate court misdirect itself in failing to consider applicant's explanation for non-attendance before revoking his bail; and (ii) did the Magistrate commit a gross irregularity by not considering applicant's explanation to ascertain its reasonableness or otherwise?

Proceedings revoking bail at the trial court

- [7] For brevity, I summarize what is reflected in the trial court's record. At the Magistrate's court, the application to revoke applicant's bail was made in

³ Section 101 of the Criminal Procedure and Evidence Act 1938.

terms of section 101 of the Criminal Procedure and Evidence Act 1938 (CP&E Act). The Crown argued that the applicant failed to appear before court on 2 October 2018; that on 14 June 2019, the applicant was in court on the strength of a warrant of his apprehension. According to the Crown, the applicant stated that he could not attend court because he was in hospital. The Crown submitted that the applicant was supposed to inform the court of his failure to attend court because he lives in eZulwini. In failing to come to court when required to do so, the prosecution contended, applicant's intention was to evade trial and by extension impede the finalization of his trial.

- [8] The applicant is said to have told the court that he had nothing to say except to state that he was at Mbabane Government hospital. Annexure 'AA2' is a copy of an out-patient record bearing date stamp from Mbabane Government hospital reflecting that applicant was admitted on 2 October 2018.
- [9] The Principal Magistrate made the following observation, reasoning and conclusion: that the applicant had failed to attend court since the last day the matter was adjourned; that the applicant never informed the court he was ill or that he had undergone an operation; that the matter had been pending since 2014 and the applicant 'has no explanation as to what prevented him from attending court' (my emphasis). The court further stated that it viewed applicant's actions as a way to avoid finalization of the case.
- [10] Consequently, the court revoked applicant's bail but refused to grant an order for the forfeiture of applicant's bail to the State. The applicant was then remanded into custody.

Assessment of evidence and the law

- [11] From the trial court's record, the Crown's submissions reflect that the applicant informed the court he could not come to court because he was in hospital. The applicant says as much and has attached an out-patient department record reflecting he was, on 2 October 2018 admitted to hospital.
- [12] That applicant did not explain to court what prevented him from coming to court is therefore not borne out by the record. The principal Magistrate who presided over the application to revoke applicant's bail was duty-bound to consider and examine the reasonableness of applicant's cause for non-attendance. She did not. Applicant informed the court he went to hospital. The court stated he offered no explanation for non-attendance when in fact he did. This was an injudicious exercise of discretion by the court resulting in a gross irregularity in the conduct of the application to revoke applicant's bail.
- [13] It was a gross irregularity and misdirection on the part of the learned principal Magistrate not to consider the fact that applicant told the court he was in hospital and therefore could not attend court. There is nothing in the court record that reflects that the court probed and satisfied itself that the version of the applicant was unreasonable and therefore false.
- [14] It is applicant's lamentation in this review application that the explanation he proffered before the learned principal Magistrate was reasonable.
- [15] Before applicant's bail was revoked he was given a chance to prove on a balance of probabilities that he had reasonable cause for failing to appear in court for the continuation of his trial after he had been duly warned to do so. In response, applicant informed the court he had gone to the hospital.

- [16] The court ought to have then considered the accused's explanation to ascertain its reasonableness or otherwise. This called for an examination of the reasonableness of the accused's cause for non-attendance. In this context, 'reasonable' is synonymous with concepts such as appropriate, fair or moderate; logical; based on sound judgment; based on reason and not exceeding the limit prescribed by reason⁴.' On the face of the court record, there was no enquiry on the part of the court about the reasonableness or otherwise of applicant's explanation. Here, the court misdirected itself.
- [17] The applicant argues that the learned principal Magistrate committed gross irregularity in the course of hearing the application for the revocation of his bail. I agree.
- [18] The applicant argues further that the learned principal Magistrate acted capriciously and failed to take into consideration relevant facts and to ignore irrelevant facts.
- [19] From the record, it is clear that the learned Magistrate holds that applicant did not inform the court of any illness or operation he had undergone. This is not accurate. The court ignored applicant's explanation in this regard. The applicant informed the court he had gone to the Mbabane government hospital. In ignoring applicant's explanation for non-appearance, the lower court acted upon a wrong principle; it mistook the facts and did not take into account some relevant considerations in its ruling to revoke applicant's bail. It stated that the applicant did not give an explanation for his absence when in fact he did. It is for this reason among others, that the ruling of the principal Magistrate is reviewed and set aside.

⁴ *Etienne v Commissioner of Police* [2018] QDC 6

[20] According to the court record, the Crown made an application to have applicant's bail revoked in terms of section 101 of the CP&E Act.

Section 101 of the CP&E Act provides as follows:

'On failure of accused to appear at trial, recognizance to be forfeited

[101] If upon the day appointed for the hearing of a case it appears by the return of the proper officer or by other sufficient proof that a copy of the indictment and notice of trial or, in case of a remittal to a magistrate's court, the summons or warning has been duly served or given and the accused does not appear after he has been three times, in or near the court premises, called by name, the prosecutor may apply to the court for a warrant for the apprehension of such accused, and may also move the court that such accused and sureties (if any) be called upon their recognizance, and, in default of his appearance, that it may be then and there declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on such recognizance for the amounts therein named against such accused and his sureties respectively.'

[21] In this section a provision is made for the forfeiture of a recognizance. The section also provides that forfeiture shall have the effect of a judgment on the recognizance for 'the amounts therein named.' But, what is a recognizance? According to the Black Law's Dictionary⁵, a recognizance is defined as follows:

'Most commonly, a recognizance takes the form of a bail bond that guarantees an un-jailed criminal defendant's return for a court date. Recognizances are aptly described as contracts made with the Crown in its judicial capacity.'

[22] William R Anson⁶ defines a recognizance in the following terms:

'A recognizance is a writing acknowledged by the party to it before a Judge or officer having an authority for the purpose, and enrolled in a court record. It usually takes the form of a promise with penalties for the breach of it, to keep the peace, to be of good behaviour, or to appear at the assizes.'

⁵ Bryan A. Garner *Black Law's Dictionary* 9th edition.

⁶ William R Anson *Principles of the Law of Contract* at pp-80-81.

- [23] In other words, bail is with cash or its equivalent such as the bail bond that a court will accept in exchange for allowing the accused person to remain at liberty until the conclusion of the trial. The bail so given creates an obligation for the accused to make all required court appearances.
- [24] The import of section 101 of the CP&E Act is that if an accused is released on bail and he fails to appear in court for trial on a date and time appointed for his trial, the court before which the matter is pending may declare the bail provisionally cancelled and the bail money provisionally forfeited to the State and issue a warrant of arrest of the accused once the prosecutor has made an application to that effect. I do not read or understand this section to mean it is an offence or contempt of court to breach one's conditions of bail. By definition a person commits contempt and may be committed to prison for willfully disobeying an order of court requiring him to do any act or to abstain from doing some act (my emphasis). Breach of bail conditions therefore will only be contempt of court if there is some additional feature such as willfully failing to comply with conditions of one's release on bail. Absent an evaluation of applicant's explanation of his absence from court by the lower court, it cannot be said his failure to come to court on the appointed day was willful.
- [25] In admitting the applicant to bail, the High court ordered that applicant should attend court wherever and whenever directed to do so pending finalization of the case against him. The High court ordered further that non-compliance with the bail conditions shall effect an escheatment of bail forthwith⁷. In line with an accused person's right to a fair trial, the escheatment of bail can only be invoked after the court has heard reasons for

⁷ See annexure 'AA1' paragraph 12 and 14.

non-compliance with bail conditions of the accused person, considered same and give reasons supporting the court's decision to escheat bail.

[26] In a criminal matter, a presiding judicial officer has the exclusive jurisdiction to enlarge, vary or revoke bail previously granted. Put differently, it is the trial court where bail conditions are breached which has the power to enforce those conditions regardless of which court had set them. It was therefore within the Magistrates court's jurisdiction to enquire into the non-compliance to bail conditions by applicant. Barring the misdirection and gross irregularity referred to in the preceding paragraphs vitiating the lower court's ruling and the improper exercise of discretion; this court would not have interfered with the learned principal magistrate's exercise of discretion in hearing the application to revoke applicant's bail.

[27] In its answering affidavit the first respondent avers that the trial court record reflects that the principal Magistrate invoked Section 145 and not section 101 of the CP&E Act. I do not agree with this averment. Nowhere in the trial court's record is it stated the court invoked section 145 of the CP&E Act. The trial court's record reflects that the prosecutor made the application for the revocation of bail in terms of section 101 of the CP&E Act⁸. In her ruling, the second respondent revokes applicant's bail and states that applicant will be kept in custody until the finalization of the matter. The second respondent refused the Crown's application to have applicant's bail forfeited to the State⁹. It is section 101 and not section 145 of the Act that deals with forfeiture of bail.

[28] Section 145 of the CP&E Act states as follows:

⁸ See page 65 of the Magistrates Court record marked annexure 'AA6.'

⁹ See page 66 of the Magistrates Court record marked annexure 'AA6.'

‘Effect of plea

[145] If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail (my emphasis).’

[29] Section 145 is, in my view self-explanatory. It applies to criminal matters where the accused is indicted and pleads to the indictment in the High Court. Even if I am wrong in this regard, proceedings held in terms of section 145 must be lawful, fair, reasonable and Constitution compliant¹⁰.

Conclusion

[30] In conclusion, because the trial court has exclusive jurisdiction to enlarge, vary or revoke bail previously granted by another court, it would be proper therefore that the matter is remitted to the Magistrate court in order for the second respondent to consider the reasonableness or otherwise of applicant’s explanation for non-appearance in court on 2 October 2018.

Order

[31] In the result the following order is made:

1. The *court a quo*’s ruling of Case L51/2014 granted on 14 June 2019 is reviewed and set aside;
2. The matter is remitted to the Magistrates Court before the second respondent in order for her to properly exercise her jurisdiction in terms of paragraph 40 of this judgment.
3. Each party to pay own costs.

¹⁰ *Nkosingiphile Mjemuka Dlamini and Others v Rex and Another* (17/2018) [2018] SZSC 58 (29 November 2018).

M. S. LANGWENYA
JUDGE OF THE HIGH COURT

For the Applicant: Mr D. E. Hleta.
For the Respondents: Mr B. Ngwenya.

