IN THE HIGH COURT OF ESWATINI

CASE NO. 238/2022

In the matter between:

WINILE TAURUS ANTONES **APPLICANT**

And

THE KING **RESPONDENT**

NEUTRAL CITATION: *Winile Taurus Antones v The King (238/2022) [2022] SZHC (178)* (16/08/2022)

CORUM: BW MAGAGULA J

HEARD: 9th August 2022

DELIVERED: 16th August 2022

Summary: *Criminal law-bail-accused charged with robbery – general principles for granting bail considered – accused Applicant has discharged her onus that it is in the interest of justice that she should be granted bail – bail accordingly granted.*

Judgment

Introduction

[1] The Applicant stand charged with committing the offence of robbery, as per the charge sheet[1] .

It is alleged that on the 5th June 2022, at or near Lwandle area in the Manzini district, the accused persons acting jointly in furtherance of a common purpose did wrongfully and unlawfully and internationally hack with a bush knife on the head and further kicked and slapped with open hands one Bhekumusa Dube. They further robbed him his motor vehicle white Chef Corsa LDV registered BSD 426 BH valued Fifty One thousand Emalangeni plus two cellphones valued at One Thousand Nine Hundred the total value of the stolen items Fifty Two Thousand Nine Hundred Emalangeni.

[2] It is common cause that in as much as there are three accused persons, it is the only the Applicant that is before Court seeking bail. It is also common course that the items involved in the robbery were recovered.

[3] The bail application is being opposed by the crown. A full set of pleadings including heads of arguments have been filed by both parties.

[1] Reference in this regard is made to rider A which is found on page 10 of the book of pleadings

Grounds for the bail application

[4] The Applicant states the following in her founding affidavit, in support of the bail application;

4.1 She appeared before the Manzini Magistrate Court on the 20th June 2022, where she was remanded back to custody. She was advised to move a bail application before this Honorable Court

4.2 She had been in custody since her arrest on the 18th June 2022 and she is currently kept at the Esidwashini correctional facility.

4.3 She denies that she committed the offence that she is charged with and she will plead not guilty during the trial as she has a good and a bona fide defence to the charge that she is facing.

4.4 She is a breadwinner and she is employed as a teacher at Emvimbeko High School. He continued incarceration will cause her to lose her employment which will have adverse effects on her family

4.5 She has two minor children, aged eleven years and four years old.

4.6 Her four year old child is living with disability, as his speech has impediments. He cannot eat nor use the bathroom without any assistance. Her child is in need of the Applicant's constant care, hence with the continued incarceration, no one is adequately suitable to care for the child.

4.7 She is currently heavily pregnant already in her late stages of her third

harm was sustained by the complainant, as a result of the robbery. The offence is listed in the 5th schedule of the Act and in terms of section 96 (2) (a) of the Act, the Applicant is required to adduce evidence to the satisfaction of the Court that exceptional circumstances exist which in the interest of justice permit her release. Therefore the crown argues that the Applicant has not complied with this requirement.

[10] In relation to the merits, the crown contends that the Applicant's trial has already been set for the 3rd August 2022 before the Magistrate Court. However, during argument the Court was not advised whether the trial has commenced or not subsequent to the setting of the trial date.

[11] The crown further contends that its case is water tight against the Applicant, as evidence in their disposal reveals that the Applicant orchestrated the commission of the offence. She apparently engaged accused number 2, 3, and 4 to assist her in carrying out a plan to murder her husband. The crown further state that the charge could have been murder, as she wanted her husband dead. She intended to use the inheritance money to settle her insurmountable debts. She is alleged to be heavily in debts. The robbery act was as a result of a murder plot gone wrong. The crown also argues that it is not in the interest of justice for the Applicant to be released on bail. Even for her own safety. Apparently the crown's investigations reveal that accused number 2 and 3 are related to the Applicant. Their relatives are outraged by the Applicant's action. This may result in the relatives taking the law into their own hands.

[12] The crown also argue that there is a real likelihood that the Applicant if released on bail may evade trial and abscond. It is also part of the grounds for

opposition by the crown that Applicant's in-law are outraged by Applicant's action. The Applicant is also alleged to have made the complainant to acquire land through Kukhonta. As such, she may isolate him and then kill him when it suites her, as she has already made an attempt to do so even now.

[13] With regard to the Applicant's allegation that she is in employment and she stands to lose her employment with her continued incarceration. The crown argues contra. The crown avers that it has transpired during their investigation that soon after committing the offence, the Applicant did not attend work and her whereabouts were unknown.

[14] In buttressing the allegation that the Applicant may abscond trial, the crown has asserted that the Applicant has relatives in South Africa and if released on bail she may use informal crossings to go to the Republic of South Africa and evade the trial. Her conduct of not reporting to work is a clear demonstration that she is capable of disappearing.

[15] The crown also argues that there is overwhelming evidence against the Applicant on the charge that she is facing, which may make her to abscond trial as there is a real likelihood for conviction.

[16] In respect of the Applicant's motivation that she has to be released so that she is able to care of the child who has special needs, the crown argues that the complainant who is the child's father, has always been hands on in assisting the Applicants to take care of the child. He will continue to do so even when the Applicant remains in custody. Further, there is also the child's grandmother who is currently taking care of the child, who will continue to

do so even if the Applicant continues to be incarcerated.

[17] With regard to the non-suitability of the correctional services to render to the Applicant adequate medical support. The crown disputes this allegation. In fact, the crown argues that the correctional facility where the Applicant is kept, has a medical centre that has qualified medical personnel. The facility also has the ability to refer complicated cases to hospitals outside the facility.

The Court's analysis and adjudication

Point in limine

[18] The crown took a point in limine to the effect that the Applicant has failed to set out exceptional circumstances entitling her to bail as required by S9b (12) (a) of the CP & E Act 67/1938

[] The Applicant in response to the point in limine, insists that she has set out sufficient facts to demonstrate that her circumstances are exceptional as required in terms of section 96 (12) (A) of the Criminal Procedure and Evidence Act 67/1938. She persist that the fact that she was heavily pregnant and the conditions of prison are not ideal for a newly born child.

[19] It is common cause as I have already mentioned earlier in this judgment, that the issue of pregnancy has been overtaken by events. It is no longer relevant to the Applicant's motivation for bail as she has gone ahead to give birth.

[20] In her replying affidavit, the Applicant actually states clearly that she has since given birth to a baby boy, whom she is nursing from her prison cell. To that extent, she states that the facility is cold and unhygienic which causes

danger not only to her child, but also to herself as she is still recovering from child birth.

[21] The Applicant also argues that her delivery was not a normal one, it was complicated as she could not deliver the child naturally. The doctor had to perform a caesarean operation. Ever since the operation, she has been in constant pain and she has been advised by the medical staff at the correctional facility that her pain and slow recovery is being exacerbated by the harsh conditions in prison.

[22] During the arguments of the bail, the asked the Applicant's counsel as to why didn't the Applicant obtain a supporting affidavit of the medical staff at correctional services whom she alleges advised her that her medical condition is being exacerbated by the harsh conditions in prison.

[23] Mr. M Magagula, counsel for the Applicant argued to the effect that, if the crown was disputing this allegation, then they were the ones that were supposed to file a contrary affidavit to that effect. I hold a different view. The general position is that he who alleges must prove. I say so without determining the veracity of the allegations made regarding the prison conditions as yet. The Court is only highlighting that if the Applicant relies specifically on an opinion that was given to her by medical staff at the correctional services, surely a report or confirmatory affidavit from the alleged "staff" would have added weight.

[24] In the matter of **Siboniso Nelisa Hlatjwako v Rex High Court case 133/18** the Court accepted that there can be as many exceptional circumstances as the

term implies[2]. The Court further accepted that the lack of evidence that the Applicant committed the crime, can also be an exceptional circumstance.

[25] In my view the dicta in the above decision points to the direction that what may constitute exceptional circumstances depend on the peculiar circumstances of each case before Court. In order for this Court to consider whether the legal point by the crown has been correctly taken, the Court needs to apply its mind whether on the peculiar factual circumstances of the Applicant's case before Court, she has been able to demonstrate firstly, that there are exceptional circumstances as per the law dictates. Secondly, her bail application in relation to the other requirements and considerations that are applicable to bail generally.

[25] It is not an everyday occurrence that an accused who is incarcerated gives birth through a caesarean operation[3]. It has not been denied by the crown that the Applicant when giving birth had complications to the extent that she had to undergo a caesarean operation. That means that the Applicant must have been under stress, hence her recovery cannot be a normal recovery like any other inmate who has given birth naturally. It is also common cause that when one gives birth through caesarean section, she undergoes surgery and her recovery may be complicated and takes longer than a mother who has given birth naturally. That coupled with the ardous task of taking care of a new born on your own, is exceptional. The other factor that the Court will have to consider is that the Applicant has stated under oath that she is currently

[2] See page 3 paragraph 3 of that judgment
[3] A caesarean section, also known as c-section or caesarean delivery, is the surgical procedure by which one or more babies are delivered through an incision in the mother's abdomen. Often performed because vaginal delivery would put the baby or mother at risk-Wikipedia

nursing a new born baby in her prison cell the and cell is unhygienic. The Respondent has not pointedly controverted the allegation that the cell currently is unhygienic. By so saying, the Court does not take it as an acceptable rule that all prison cells are unhygienic. There may be many factors why this particular cell that the Applicant is kept in is unhygienic. Especially in relation to her personal circumstances that she is nursing a new born baby. The crown had all the opportunity to controvert this allegations and demonstrate that the cell is hygienic and the conditions are befitting for the nursing of a new born baby and a mother that has recently undergone surgery. The crown elected not to do so.

[26] It is my finding that the complicated delivery of the Applicant's child and the Applicant's recovery which has been hampered by the conditions and detention are exceptional circumstances. In that regard then the point of law is ill-conceived in the specific circumstances of the Applicant. I will accordingly dismiss it.

[27] I will now turn on the merits of whether the Applicant has made out a case for bail.

[28] The Respondents have basically opposed bail on three grounds. The crown alleges that the Applicant is a flight risk and her release would undermine the public order and safety in terms of section 96 (4) the Criminal Procedure & Evidence Act. Also, she has not shown exceptional circumstances warranting her release considering that she has been charged with a fifth Schedule offence.

[30] I know no law to the effect that when an accused has been charged with a fifth schedule offence she is not entitled to bail. With regard to the likelihood that the Applicant may abscond trial, the Respondent premises its allegation on two factors. First, that the Applicant has a brother in South Africa. Second, that the seriousness of the offence may tempt the Applicant to abscond this jurisdiction. It is common cause that most of Emaswati have relatives across the border, either in South Africa or in our neighbouring Mozambique. Therefore, if the courts could use this reason, as a yard stick not to grant bail, then no one would be eligible to bail. The other contention by the crown is that the charge that Applicant is facing is serious. I accept that robbery is a very serious offence. However, many accused persons are currently out on bail, including those who are facing equally serious offences such as murder and rape. The details of the fact that the Applicant is a master mind in the murder plot that went wrong, can only come out during the evidence at trial. The evidence of the police officer who deposed to the affidavit in opposition to the bail is scanty. He only alludes to the fact that "evidence at their disposal". As to what evidence there is? from whom? It has not been fully ventilated before Court. I also accept that probably the opportunity to do so will avail itself during the trial. However, the question would be, can the Court take scanty evidence as a basis for the proposition that the Applicant is the master mind of the murder plot that went wrong and she is the one that orchestrated the offence?. The issue is further exacerbated complicated by the fact that the crown's case is that she orchestrated the murder that went wrong. However, she is not currently facing a charge of murder, but she is facing a charge of robbery. It does not come out clear in the opposing affidavit, whether it is the crown's case that she is also the one that orchestrated the robbery. In this regard, I refer to the dicta of the **Siboniso Nelisa Hlatjwako**

case and I align myself with the observation made by her Ladyship M. Dlamini J, regarding the lack of evidence implicating an accused to the charge that she is facing, as constituting an exceptional circumstance in itself.

[31] In the matter of **Maxwell Mancoba Dlamini & Another v Rex Supreme Court Criminal Appeal Case No.46/14** the Court lighted that section 96 (6) of the Criminal Procedure and Evidence Act 67/1938 as amended to deal with various grounds which the Court has to consider when determining the likelihood on the accused, if released on bail may attempt to evade trial[4]. For completeness, I will capture what the Court stated as considerations to be taken;

(a) **The emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;**

(b) **The asset held by the accused and where such assets are situated;**

(c) **the means, and the travel documents held by accused, which may enable the accused to leave the country;**

(d) **the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set**

(e) **the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Swaziland in attempt to evade trial;**

(f) **The nature and the gravity of the charge on which the accused shall be tried**

(g) **the strength of the case against the accused and the incentive that**

[4] See page 7 of the judgment

the accused may in consequence have to attempt to evade his or her trial

(h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(I) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) Any other factor which in the opinion of the Court should be taken into account.

[32] I have already stated that from the contents of the opposing affidavit, the crown has not demonstrated the nature and the gravity of the charge on which the accused will be tried as per the dictates of section 96 (6) (f). Therefore, the Court is unable on the facts at hand, to conclude that the strength of the crowns case is overwhelming, to the extent that it may compel the accused to abscond trial. Hence, the crown's contention that the Applicant is a flight risk has not been adequately demonstrated.

[33] The right to personal liberty is entrenched in The Constitution of this Country[5]. An accused is therefore entitled to be released on bail, unless doing so would prejudice the interest of justice. I have already traversed on the fact, that on the papers before Court, there is nothing that demonstrates that the interest of justice will be prejudiced if the Applicant is granted bail. In the matter of **S v Schietekat 1999 (4) SA 623 (cc) at 641 paragraph 11** the Court

[5] See S (16) of the Constitution of the Kingdom of Swaziland Act no.001 /2005 as well as section 96 (1) (4) of the Criminal Procedure & Evidence Act 69/1938 as amended

had the following to say;

"In a bail application the enquiry is not really concerned with a question of guilt. That is the task of a trial Court. The Court hearing the bail application is concerned with a question of possible guilt only to the extent that it may bare where the interest of justice lie in regard to bail. The focus at bail stage is to decide whether the interest of justice permit the release of the accused pending trial; and that entails, in the main protection the investigation and prosecution of the case against any hindrance"

[33] In **S v Acherson 991(2) SA (NH) 22** at 822 the Court also stated as follows;-

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice"

[34] In the case of **Ndlovu v S (2001) JOL 9073 (ZH)** at page 3 the Court had the following to say with regard to bail;

"The primary question to be considered is whether the Applicant will stand trial or abscond. Of equal importance is whether he will influence the fairness of the trial by intimidating witnesses or tampering with evidence. The further consideration is whether the Applicant if released will endanger the public or commit another offence"

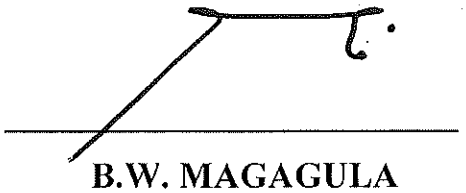
[35] With regard to the crown's argument that it may actually not be safe for the Applicant to be released on bail or that public order will be disturbed because the relatives are angry and they might take the law into their own hands. It is

the Court's consideration that the police may actually do a lot to mitigate that situation. Especially since that fact, has been brought to their attention .It does not appear in the opposing affidavit as to who amongst the co-accused's relatives issued the threats or is aggrieved. It was incumbent on the police officer, at least if the information was brought to his attention, to investigate. If he had investigated, then he would have been able to do what police officers are expected to do as part of their function of preventing the occurrence of a crime. Those persons or person would have been called to the police station and warned against taking the law into their own hands. If called, a statement would have been recorded and they would have been be put under surveillance. Further, the bail conditions can cater or mitigate against that occurrence happening. For instance, imposing conditions that the Applicant should not return to Lwandle area where the aggrieved relatives reside. But should stay at any other place which she may duggest. The Court has done that in the matter of Ntuthuko Dlamini v Rex.

[36] Due to the aforegoing reasons, the Court will accordingly grant the Applicant's application for bail. I will accord the parties an opportunity to negotiate and propose a suitable amount and bail conditions for the endorsement of the Court if acceptable.

ORDER

1. The Applicant is admitted to bail
2. The parties are accorded an opportunity to present to the Court within three days of the granting of this order, the suggested bail amount and conditions.



B.W. MAGAGULA

JUDGE OF THE HIGH COURT

FOR APPLICANT : *MR. M. Magagula (Zonke Magagula and Company)*

FOR DEFENDANTS: *Miss. N.P. Dlamini (DPP'S Chambers)*