



**IN THE HIGH**

**COURT OF ESWATINI**

**JUDGMENT**

CASE NO.321/2022

In the matter between:

**SIBUSISO JOHN NGWENYA**

**Applicant**

**VS**

**THE KING**

**Respondent**

**Neutral citation:** *Sibusiso John Ngwenya v The King (321/2022) [2022] SZHC 200 (14 September 2022)*

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

**Heard :** 4 August 2022

**Delivered:** 14 September 2022

***Criminal procedure – Bail application – Risk of accused absconding – Crown’s fear well founded – Application refused***

***Summary:*** *The applicant was arrested and charged with nine offences – He faces three offences for contravening the Sexual Offences and Domestic Violence Act 15/2018; five offences for theft by false pretenses; and one for theft – He has approached this court and asked that he be granted bail and released from custody – The application is vigorously opposed by the crown.*

***Held:*** *That the crown’s fear is well founded – Applicant is a flight risk – Application refused.*

---

## JUDGMENT

---

- [1] The applicant is charged with three offences for contravening the Sexual Offences and Domestic Violence (SODV) Act, 15/2018. According to the indictment, two of the offences were committed on 25<sup>th</sup> and 26<sup>th</sup> August 2020 by wrongfully and unlawfully having sexual intercourse with two women, whose names I decided not to disclose, against their will. The third one is for attempted rape. The indictment also reflects that the applicant faces five other counts of theft by false pretenses, and one count of theft. He now has applied to this court to be released from custody on bail.
- [2] In support of the bail application, the applicant states that he is a liSwati citizen of Mbikwakhe area under Chief Mandanda. He was arrested on the 10 May 2022 by police from the Matsapha police station. He is the breadwinner of his family and has two minor children who are dependent on him for their livelihood. He makes a living through doing piece jobs. He stated that he is innocent of the charges and if granted bail he will abide by all the bail conditions that the court may impose.
- [3] In opposition, the respondent filed an affidavit deposed to by the investigating officer, 7663 D/Const. Muzi Moshoeshoe Dlamini. He states that the applicant is facing very serious charges which attract a lengthy custodial sentence and this will induce him to abscond and evade trial.
- [4] On the charges of contravening the SODV Act, he states that the applicant threatened his victims with a gun and then proceeded to rape them. The first

victim was attacked at night in her house. He ordered her to undress while threatening her with a gun. He then forced her out of the house naked, and took her to a nearby pit latrine where he forcefully had sexual intercourse with her without her consent. He did not use a condom.

- [5] The second victim was deceived and made to believe that they were going to collect a laptop that she needed for school. Upon reaching a secluded place, the applicant produced a gun and threatened to shoot her. He ordered her to undress and remove her pants and underwear, and then bend. He proceeded to have sexual intercourse with her without her consent, and without using a condom.
- [6] The third victim was dragged by the applicant towards a bushy area. She however was fortunate because he did not proceed to rape her after discovering that she was on her menstrual cycle.
- [7] The investigating officer deposed that the applicant is highly likely to intimidate or interfere with witnesses in a bid to conceal and or destroy the evidence as he knows where the complainants stay. He stated that the three offences in relation to the contravention of the SODV Act were committed at Mbikwakhe where the applicant is also a resident. One of the complainants was attacked inside her house, while another is a sister-in-law to one Sinethemba Matsenjwa who is known to the applicant. He also knows the nature of the evidence to be presented by these witnesses, and that their safety cannot be guaranteed once the applicant is released on bail.
- [8] He further stated that the applicant faces a Rape charge that falls under the Fifth Schedule of the **Criminal Procedure and Evidence Act, 67/1938** (as amended), hereinafter referred to as “**the Act**”. For him to be admitted to bail,

he is required, in terms of **s.96 (12) (a)** of **the Act**, to adduce evidence of exceptional circumstances which in the interest of justice permit his release from custody. It was pleaded on behalf of the respondent that the application falls short of meeting this requirement.

[9] The investigating officer denied that the applicant earned a living through piece jobs but stated that he lived through proceeds of crime. He took people's money under false pretenses, and would commit crimes of theft as well.

[10] To support the submission that the applicant is a flight risk, the investigating officer deposed that the applicant had been on the run since September 2020 following his admission to the RFM hospital in Manzini. He was admitted at RFM hospital because minimum force had to be used in order to effect his arrest. When a subsequent visit was made to the hospital, the applicant had disappeared and could not be located. His whereabouts were unknown even by his family members. His relatives claimed to have no knowledge of where he was.

[11] In his replying papers the applicant denied having committed the offences and stated that he is only suspected to be the offender, and that the crown has no evidence to prove that he committed the offenses. He also denied that he used a gun and stated that he never owned one and was not found with any. He further stated that he does not know any of the witnesses but conceded that Mbikwakhe (place where offences were committed) is where his parental homestead is, and that he is always to be found there as it is where he resides.

[12] He further states that he has no relatives outside the borders of Eswatini and is therefore not a flight risk. In addition to what is stated above, he stated that

he is now a disabled person as he was injured by the police and had to undergo an operation. I presume this was during his arrest as alluded to by the investigating officer. He added that he suffers from asthma and uses a spray to keep his ailment under control.

[13] The Supreme Court held that the right to liberty is specially entrenched in the Constitution and therefore an accused is entitled to be released on bail unless his/her release would prejudice the interests of justice. *See: Maxwell Mancoba Dlamini and Another v Rex (46/2014) [2014] SZSC 09 (29 July 2014), para 14* and *Jabu Dlodlu v The King (422/2015) [2016] SZHC 04 (04 February 2016), para 11*. *See also s.96 (1) (a) of the Criminal Procedure and Evidence Act, 67/1938 (as amended)*.

[14] **S.96 (4) of the Act** guides the court on considerations to make when deciding bail applications. These considerations constitute accepted factors that would justify a refusal to admit an accused person to bail. The likelihood that an accused is a flight risk or might interfere with the witnesses are some of the factors which justify a refusal to grant bail. The Act provides, *inter alia*, as quoted below:

*The refusal to grant bail and the detention of an accused person in custody shall be in the interest of justice where one or more of the following grounds are established:-*

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

[15] In bail proceedings, the interest of justice that is sought to be protected is two-fold. The first is that the accused should attend trial and not abscond. The

second is that the accused should not undermine the proper functioning of the justice system including, but not limited to, interfering with the evidence of the prosecution. *See: Director of Public Prosecutions v Bhekwako Meshack Dlamini & 2 Others (478/2015) [2016] SZSC 40 (30 June 2016) para 14.*

[16] In my analysis of the submissions and arguments made, the applicant avoided answering the submission that he is a flight risk. In the replying papers, he answered all the allegations made against him in the opposing affidavit but nothing against the averment that he is a flight risk. This was so even during arguments. The court asked him however, to address this averment during the hearing of the application. All that he told the court is that he is not a flight risk. He also denied that he disappeared whilst he was admitted at the RFM hospital but stated that he was transferred to Mbabane government hospital for an operation.

[17] On the evidence placed before court, it is my finding that the applicant became a difficult person to arrest. This ultimately necessitated the use of what the investigating officer called “minimum force”. The applicant was shot on the thighs. That is how he was arrested in September 2020. Documents that the applicant requested to produce before court and was granted leave to produce them were a picture of the applicant showing gunshot wounds on both legs on the thighs, and receipts for payments made to hospital in the years 2020 and 2021. The picture is, in my view, evidence of the averment that “minimum force” had to be used in order to arrest the applicant. I therefore come to the conclusion that the respondent has, on a balance of probabilities, made a stronger case that the applicant is a flight risk and ought not to be granted bail.

[18] Concerning the submission that the applicant will intimidate and interfere with the witnesses and thus conceal the evidence against him, the applicant pleaded in his papers that he does not know the witnesses. During the hearing, he argued and stated that *“it is not true that I know them, and I cannot even point out where they reside”*. It was also his submission that Mbikwakhe is very huge. The respondent submitted on the other hand, that one of the complainants was attacked by the applicant from the homestead where she resides. Another complainant is a sister-in-law to one Sinethemba Matsenjwa who is known to the applicant.

[19] The court directed the applicant, during the hearing, to address it on these averments made against him. In response, he submitted that Mbikwakhe is very huge such that it is divided into ‘Zones’. That is the reason he doesn’t know them although he is also a resident of Mbikwakhe. The court however reminded him that Mbikwakhe is known and is not one of the communities that may be described as a huge community. The applicant then submitted that he may be ordered to go and reside at his grand mother’s place of residence, without telling the court about where that place is, and how far is it from Mbikwakhe.

[20] The court is not satisfied by the applicant’s response and therefore come to the conclusion that the respondent, on a balance of probabilities, tilted the scales of justice to its favour. It has not been denied by the applicant that one of the complainants was attacked from inside her house. It has also not been denied by him that the other complainant is a sister-in-law to one Sinethemba Matsenjwa who is known to the applicant. The charge sheet which the applicant attached to his application (for bail) make specific mention of the names of the complainants. For the applicant to state that he doesn’t know

them is, in my view, a submission that no reasonable man would accept and be content with. This is truer because the applicant and the complainants reside in the same community of Mbikwakhe, and one of the complainants was attacked whilst inside her house.

[21] Having considered the totality of the submissions and arguments made, considered with the attendant lengthy custodial sentences in respect of the offences for contravening the SODV Act, the court comes to the conclusion that there is a good likelihood that the applicant will evade trial and is therefore a flight risk. There is also a good likelihood that he will influence or interfere with the witnesses.

[22] The applicant's submission that he does not know the witnesses due to the huge size of Mbikwakhe is rejected by this court. This is more particularly because one of the complainants was attacked in her house. The other complainant was deceived and lied to about a laptop that she needed for school. These are without doubt people that the applicant has knowledge of. For these findings, I find it unnecessary to deal with the alleged failure by the applicant to adduce evidence of special circumstances. Based on the conclusions I have come to, bail is refused, and the application is dismissed.

---

**T. DLAMINI**  
**JUDGE - HIGH COURT**

For the applicant:            In person  
For the respondent:        Ms. N. Mhlanga