



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 311/2022

In the matter between

Sonnyboy Mtshali

Applicant

V

The King

Respondent

Neutral citation: *Sonnyboy v The King (311/22) [2022] SZHC 220 [2022] (14/10/2022)*.

Coram : Tshabalala J

Heard : 07/10/2022

Delivered : 14/10/2022

Summary: Criminal law and Procedure – Opposed bail application – An offence listed in Fifth Schedule of the Criminal Procedure and Evidence Act – Requirement that Applicant adduces evidence of exceptional circumstances to the satisfaction of the court that circumstances of the case permit his release on bail in terms of Section 96 (12) (a) of the Act – Further requirement in terms of

Section 96 (14) (a) of the said Act for the applicant to disclose any previous conviction.

Held: The Applicant failed to comply with both provisions of Section 96, that is, subsections (12) (a) and (14) (a) of the Criminal Procedure and Evidence Act, respectively.

Held: The release of Applicant will not be in the interest of justice, therefore the application of bail is dismissed.

JUDGMENT
BAIL APPLICATION

- [1] The Applicant faces two counts of robbery alleged to have been committed on the 28th August 2022 in the Shiselweni region, at or near Nhlangano and at or near Mathendele location, respectively.

[1.1] Particulars of the charges are as follows:

“Count 1

Accused person number 1 is charged with the offence of Robbery in that upon (or about) the 28th August 2022 and at (or near) Nhlangano town in the Shiselweni District, the said Accused person did unlawfully assault one Dennis Debryun by intentionally using a firearm to induce submission and did take and steal from him money in cash amounting to Fifty Four Thousand Emalangeni (E54 000.00) the property of or in the lawful possession of the said Dennis Debruyun and did thereby rob him of same.

Count 2

The Accused persons are charged with the offence of Robbery in that upon (or about) the 28th August 2022 and at (or near) Mathendele location in the Shiselweni District, the said Accused persons either one or both acting jointly in furtherance of a common purpose did unlawfully assault one Ikram Patel by intentionally using a firearm to induce submission and did take and steal from him money in cash amounting to Two

Thousand Emalangen (E2 000.00) the property of or in the lawful possession of the said Ikram Patel and did thereby rob him of same."

- [2] The Applicant has applied to be released on bail, pending his trial. The application is strongly opposed by the Crown, which also raised points *in limine*.

The Application

- [3] The Applicant advances a number of grounds in his founding affidavit which he states support his release on bail. That he is innocent of the charges and will plead not guilty at the trial; avers that he is sickly with asthma and that he had had an operation on the right leg. Applicant alleges that crowded conditions at the Correctional Centre are not conducive for his asthmatic condition; that he is prone to suffer chronic pain from the right leg whenever it gets cold, and that there is no heating system of any form in prison.
- [4] The Applicant wishes to invoke the provisions of Section 16 (7) of the Constitution of 2005 and to enforce his rights therein to be admitted to bail, undertaking to stand trial.

Points in *limine*

- [5] The Crown raised two points of law and subsequently filed answering affidavit.
- [6] The first point is that the Applicant has failed to comply with the provisions of Section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67/38 as amended, (hereinafter, the Act or CP&EA) in that he has not adduced evidence that exceptional circumstances exist which in the

interest of justice permit his release on bail. The Crown points out that the robbery charges against the Applicant and his co-accused involve the use of a firearm, thus bringing the said charges under the purview of the Fifth Schedule of the Act. The Crown avers that in terms of Section 96 (12) (a) of the Act the Applicant must adduce evidence of existence of exceptional circumstances. The Crown submits that the Applicant has not adduced the required evidence.

- [7] The second point raised *in limine* relates to Section 96 (14) (a) (i) of the Act. The Crown avers that the Applicant failed to comply with the requirements in that he has not disclosed to the court that he has previously been convicted of an offence of house breaking with intend to steal and theft.

The Crown on the Merits

- [8] The Crown avers that the Applicant is implicated in the commission of the offences charged. Detective Constable Victor Ndlangamandla, states in answering affidavit that he is the investigating officer of the crimes involving the Applicant. He avers that he is in possession of evidence in the form of a video clip depicting the Applicant at the scene in Nhlangano where the robbery offence in respect of Count 1 was committed, and further that the Applicant was found in possession of E8,000.00 cash which he failed to account for. That, the Applicant has been identified by eye witnesses at an identification parade as a culprit in respect of one of the two robbery counts.
- [9] The Crown submits that due to the strong evidence against the Applicant it was not in the interest of justice to admit him to bail as there is a likelihood

that he will evade trial. There is also the likelihood to intimidate or influence the witnesses.

[10] The Crown submits that if released on bail the Applicant who was at the time of arrest out on bail on another charge is likely to undermine the bail system by committing another offence.

[11] The crown submits that the alleged sickness of the Applicant can be attended to at health facilities within the Correctional Centre or at government hospitals if need be. The Crown submits that no evidence has been furnished suggesting that applicant's ailments cannot be treated while awaiting trial in custody.

Analysis and Findings

[12] The court proceeds to consider both the points raised *in limine* and the merits together as they are intertwined and inseparable. It would be a farce to try to deal separately with the facts and the law in both instances.

[13] The issue is whether, given the circumstances of this matter, it will be in the interests of justice to admit the Applicant on bail.

[14] It is not entirely correct that the Applicant has not adduced evidence in an attempt to comply with the provisions of Section 96 (12) (a). The relevant part of the section reads thus:

"96 (12) (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 interest of justice permit his or her release;" [Emphasis is added]

[15] The question should rather be whether the evidence adduced by the Accused establishes existence of exceptional circumstances which in the interest of justice permit his release. I say this because the Accused deposed in his founding affidavit that he suffers from asthma and that overcrowding in the remand facility is not conducive environment for his ailment. The Applicant's deposition is that he has an operation in the right leg which causes him pain in cold weather, and that heating is not provided in custody where he is kept. It is this evidence adduced by the Applicant which must be interrogated and assessed as to its sufficiency and whether it satisfies the court on existence of exceptional circumstances that warrant his release, in the interests of justice.

[16] It is common for those seeking to be admitted to bail within the context of Section 96(12)(a) to present ill-health as justification for their release. This court as well as the Supreme Court have, in a number of cases provided interpretation of the phrase "*exceptional circumstances*" in relation to alleged sickness / illness in a given case. The Supreme Court decision in **Senzo Motsa v Rex**¹ had this to say:

"... The word 'exceptional' in relation to bail must mean more than merely 'unusual' but rather less unique, which means in effect 'one of a kind.'"

[17] From the evidence furnished by the Applicant, can it be concluded that asthma from which he said he is suffering, or having had an operation on

¹ Criminal Appeal Case No. 15/2009

the leg, constitute something more than unusual, or 'one of a kind'? The Crown made the following observation and assertion at paragraph 15 of the answering affidavit -

"...the Applicant has not stated that his alleged sickness cannot be addressed by medical practitioners or nurses at the Nhlanguano Correctional Facility. Furthermore, I have been advised that at the Correctional Facility inmates are assisted to attend to medical practitioners of their choice if they afford to. Furthermore if they do not afford and their sickness complicate, they are taken to Government Hospital for medical attention. The Applicant has not attached any medical records pertaining to his alleged ailments and that the Government Hospitals have failed to address his alleged sickness."

[18] The Applicant stated in his replying affidavit, in reference to these assertions, *"Contents herein are noted; however, I wish to state that my condition requires that I be not exposed to cold weather conditions and at the Correctional Centre it is very cold and crowded. The conditions are unbearable for myself."*²

[19] Per his reply the Applicant accepted, or noted the Crown's assertions that medical attention is provided at the remand facility, and that for cases beyond the scope of the internal facility, inmates are referred to government hospitals, and further that, inmates are allowed to consult medical practitioners of their choice if they can afford. Thus, the Applicant does not dispute that as an asthmatic person he can access treatment while in custody. For inmates there is bound to be a measure of

² See para 18 of the Replying affidavit.

discomfort from sharing space with many others. Applicant's complaint about the cold cannot hold water in the hot summer season that has currently set in.

[20] The evidence adduced by the Applicant falls far short of satisfying the court of existence of exceptional circumstances warranting his release in terms of Section 96 (12) (a). See **Wonder Dlamini & Another v Rex**.³

[21] The next question is the weight which the can attach to the omission by the Applicant to disclose in his application that he was previously convicted of a criminal offence. Section 96 (14) (a) (i) of the CP&EA provides -

"96(14)(a) notwithstanding any law to the contrary – in bail proceedings the accused or legal representative, is compelled to inform the court whether-

(i) the accused has previously been convicted of any offence"

(ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges." [Emphasis added]

[22] It is not in dispute that the Applicant was previously convicted of house breaking with intent to steal and theft, which fact the Applicant did not disclose. He only admitted it after it was raised in the Respondent's papers. The Crown submits that this shows dishonesty on part of the Applicant, and that he cannot be trusted to stand trial once released, and therefore may not be released on bail. The Applicant's response to the Crown's assertions is that *"the 2007 conviction was reasonably forgotten."*⁴

³ Criminal Appeal No. 1/2013

⁴ Paragraph 4 of Applicant's replying affidavit.

However, it is his comment before that, in the same paragraph, that is somewhat startling -

“I served and received my sentence for that charge and I do not believe that a 2007 charge should follow me for the rest of my life...”

[23] The Applicant or his legal representative seem to lose sight of the fact that the disclosure is not optional but peremptory in terms of the wording of the section and, there is no time line as to when such conviction occurred. It is important in a bail application for the Applicant to exhibit traits of reliability, that he can be trusted to honour the conditions of his release, to stand trial, among others. The Applicant cannot choose or decide to ignore the requirement stipulated by the law on the basis that the conviction occurred many years ago, or that he paid the price of his transgression and therefore it is no longer worthy of disclosure. Applicant’s attitude does not augur well with the need to show respect of the law. For possible consequences of such conduct, see **Fakudze v Rex**.⁵ The requirement for disclosure of previous convictions, pending criminal charges and whether the Applicant is on bail is relevant to assist the court to consider all the relevant factors.

[24] The court in exercise of its discretion whether to grant or refuse bail has a duty to balance the interests of the Applicant and his right to liberty, with the public interest and the administration of justice. In consideration of the factors highlighted above, namely, absence of exceptional circumstances in terms of Section 96(12)(a), failure to disclose previous conviction in terms of Section 96(14)(i); the likelihood to commit another offence, if released

⁵ Case No 55/2019 at para [28].

on bail,⁶ the gravity of the offence with which he is charged; and strong *prima facie* evidence against the Applicant, all these factors have the commutative effect that the court exercises its discretion to refuse bail, in the interest of justice.

The application is therefore dismissed.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala
Judge

For the Applicant: Mr R Mwelase : BS Dlamini and Associates.

For Respondent: Mr N Lukhele: Director of Public Prosecutions

⁶ This is surmised from the fact that when he was arrested for the current charges the Applicant was out on bail in respect of another charge.