



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CONSOLIDATED CASES NOS. 27/23 & 34/23

In the matter between:

LUNGELU THANDUKWAZI DLAMINI

1st Applicant

CONSTANCE SIBONGILE NKAMBULE

2nd Applicant

And

THE KING

Neutral Citation: *Lungelo Thandukwazi & Another v Rex (27/2023 & (34/2023) [2023] SZHC 273 (03 October 2023)*

CORAM:

N.M. MASEKO J

FOR THE APPLICANTS:

N. NDLANGAMANDLA

FOR THE RESPONDENT:

B. FAKUDZE

DATE HEARD: 16/02/2023

DATE DELIVERED: 03/10/2023

Preamble:

Criminal Law – Criminal Procedure – Bail Application – Robbery offences in terms of Schedule V of the Criminal Procedure and Evidence Act No. 67/1938 as Amended – Exceptional circumstances to be proven by the Accused persons justifying their release on bail in terms of Section 96 (12 (a) of the Criminal Procedure and Evidence Act.

Held: that the Applicants have failed to adduce evidence of exceptional circumstances warranting their release on bail. Further the Applicants reside in the Republic of South Africa and utilized the informal crossings to enter the country and commit the offences. Bail refused

COMBINED BAIL JUDGMENT

MASEKO J

- [1] On the 25th January 2023, the Applicant moved an application to be admitted to bail on such terms and conditions as this Court may deem fit.
- [2] The Applicant states that he was arrested by members of the Royal Eswatini Police Services (REPS) and subsequently charged with six (6) Counts of robbery and contravening the Arms and Ammunition Act No. 24/1964. He states that pending the hearing of his case he is desirous of being admitted to bail, and that he did not commit the crimes with which he is charged. He states that on the day of his arrest the 08/01/2023, he was offered a lift by unknown people who include his co-accused, and was on his way to Buhleni area, further that the motor vehicle was stopped at a police roadblock along the way and they were arrested and informed that the motor vehicle had been stolen using a firearm. The police searched the motor vehicle and found five (5) live rounds of ammunition in the boot of the motor vehicle. He states that none of the stolen items were found in his possession.
- [3] The Applicant states further that if admitted to bail he will not abscond his trial and shall abide by all the conditions of his bail which may be imposed by this Court. He states further that he is unemployed and has two minor children currently attending school and who all depend on him for support.

[4] The Crown in opposition to the Applicant's bail application, has filed the Answering Affidavit of 7212 D/C Charleton Mthethwa who states the following:-

- (i) that the applicant and his co-accused who are all South African citizens entered through an informal crossing at Mavula near Driekoppies Dam on the 30/12/2022 and embarked on robbery of Bongani Mkhali of his Mazda Demio motor vehicle and continued to rob the complainants in Counts 5 and 6 respectively;
- (ii) that on the 31/12/2022 the Applicant and his co-accused committed other robberies as reflected in Counts 2 and 4, and still using the same motor vehicle.
- (iii) that after committing these robberies they then headed back to South Africa after abandoning the said Mazda Demio motor vehicle at Mavula;
- (iv) that the applicant and his co-accused came back into Eswatini on the 08/01/2023 and robbed one Dumisani Mfanzile Dlamini of his Honda Fit motor vehicle and a pink Samsung cellphone. This is contained in Count 1;
- (v) that the applicant and his co-accused were eventually arrested on the 08/01/2023 at Mpofu area after having been chased by the police all the way from Zandondo area where the Honda Fit was stolen at gun-point;
- (vi) that the applicant is the one who was driving the Honda Fit motor vehicle when they were arrested, and therefore the Investigating Officer wonders how he was given a lift as he alleges. Further that the applicant as the driver of the aforesaid Honda Fit motor vehicle did not stop at police road blocks manned by Buhleni police;

- (vii) that the cellphone referred to in Count 2 was found in the possession of the applicant, and also that the five (5) live rounds of ammunition were produced by the applicant from his trouser's pocket and that is the reason he is the only one facing Count 7;
- (viii) that all the accused persons i.e. applicant and his co-accused were all positively identified by the respective complainants in the various counts during the **identification parade**;
- (ix) that the applicant is not firmly rooted in the Kingdom as he resides at kaMhlushwa RSA with his girlfriend Phumzile Magagula, and he does not have a Siswati Identity Document nor does he hold a South African Identity Document, and therefore Officer Mthethwa is of the view that the applicant is likely to abscond his trial and cannot be traced.

- [5] Officer Mthethwa states further that the applicant and his co-accused are all charged with offences falling within the Fifth Schedule of the Criminal Procedure and Evidence Act No. 67/1938 As Amended, and he has failed to adduce any evidence of the existence of exceptional circumstances, justifying his release on bail.
- [6] Officer Mthethwa states further that the applicant has no parents that he lives with and also does not have children to support, and thus he is a flight risk as he does not have his roots in Eswatini. The officer states further that the applicant faces serious charges and that the Crown has overwhelming evidence which is highly likely to lead to a conviction and therefore such fact alone can induce the applicant to abscond his trial. In these circumstances Officer Mthethwa believes that it will not be in the interest of justice for this Court to admit the applicant to bail.

As Regards Applicant Constance Sibongile Nkambule:

- [7] In her Founding Affidavit, the Applicant states that she is a South African citizen based at Naas area where she resides. She states that she was arrested on the 8th January 2023 by Mliba police and has been in custody ever since. She was subsequently charged with six (6) Counts of Armed Robbery and one (1) Count of contravening Section 14 (2) (c) of the Immigration Act 17/1982.
- [8] She states that she intends to be admitted to bail pending her trial, and that she is innocent of the charges preferred against her by the Crown. She states that on the 7th January 2023 she arrived in the Kingdom to visit her Liswati boyfriend.
- [9] She states further that on the 8th January 2023, she together with her boyfriend got a lift from unknown people who include her co-accused, they were on their way to Buhleni area, and the motor vehicle they were traveling in was stopped at a roadblock and they were all arrested, and subsequently charged with the criminal offences. She states further that if released on bail she will comply with all the bail conditions as may be imposed on her by this Court.
- [10] She states that she has two (2) minor children who attend school and who depend on her for support. She undertakes not to interfere with the interests of justice in any manner if released on bail. She states that she is a holder of a valid South African passport and that if released on bail she will report to the nearest police station. She states further that she is a law abiding citizen and that her circumstances in this case guarantee her an acquittal from this case, therefore it would be in the interest of

justice for this Court to grant her bail. She argues further that she is a law abiding citizen who has never been arrested for any criminal charge prior to this arrest and thus reiterate her innocence in this case *in casu*.

- [11] In opposition to this application, the investigating officer 7213 Detective Constable C. Mthethwa states that his investigations revealed that the applicant together with her co-accused entered the Kingdom of Eswatini on the 30/12/2022 through the informal crossing at Mavula area and proceeded to Mzimnene area where they robbed one of the complainants of his Silver Grey Mazda Demio motor vehicle. On the very same day they proceeded to rob items at Dvokolwako area using the stolen motor vehicle, to wit, the Mazda Demio. Officer Mthethwa states that they proceeded to Manzana area and robbed other complainants of their items. Mthethwa states that they then abandoned the Mazda Demio at Mavula area and crossed back to South Africa.
- [12] Officer Mthethwa states that the applicant and her co-accused returned to the country on the 08/01/2023 and proceeded to Zandondo area where they robbed the complainant in Count 1 of his Honda Fit motor vehicle and other valuables including a pink Samsung cellphone.
- [13] Officer Mthethwa states that the applicant is the one who was used as a decoy in the commission of these robberies where she would stand by the roadside pretending to be a desperate person asking for lifts from unsuspecting motorists who would then stop to assist and then be attacked by her co-accused in the process and robbed of their items. Mthethwa states that this *modus operandi* was executed by the applicant and her co-accused in respect of the robberies committed in the shops.

[14] Officer Mthethwa states that the applicant was found in possession of some items that were robbed from some of the complainants and was also positively identified by the complainants during an identification parade held on the 09/01/2023 at Matsapha Police Station. Mthethwa states further that all the robberies were committed at gun point, and that the firearm recovered has an emblem of the South African Police Service. Mthethwa argues that the firearm was stolen from the SAPS and therefore people found in its possession should not be admitted to bail.

[15] Mthethwa argues further that the applicant has not provided or adduced evidence of the existence of exceptional circumstances warranting this Court to admit her and her co-accused to bail, this is in terms of Section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67/1938 (as amended) (the Act).

Analysis of the Case and the Law Applicable:

[16] It is common cause that the two applicants are charged jointly and with furtherance of a common purpose, including the other co-accused.

[17] The Investigating Officer Detective Constable Mthethwa has outlined his grounds of opposition in these two applications with sufficient facts and the strong evidential material of his aforesaid opposition. As regards the First Applicant Lungelo Thandukwazi Dlamini, Officer Mthethwa has demonstrated that even though he is a Liswati by birth, but he no longer reside in Eswatini as he spends most of his time in the Republic of South Africa and therefore is a flight risk. As for the Second Applicant Sibongile Nkambule she is a South African citizen and residing at Naas Location, and therefore a flight risk as well. The Investigating Officer has also

articulated the *modus operandi* by the applicants and their co-accused in the commission of these offences, whereby the 2nd Applicant Constance Nkambule would deceive the unsuspecting victims into believing that she was in distress and upon attending to her, the aforesaid victims would then be attacked by her co-accused and robbed of their items.

- [18] Mthethwa has also demonstrated how they used the porous informal crossing at Mavula to enter and leave the country at will after having committed the offences. Surely these are not the type of accused persons who deserve to be admitted to bail. Officer Mthethwa has also submitted that the Applicants and their co-accused are charged under Schedule V of the Act and as such this is another major hurdle facing the two applicants wherein none of them has even attempted to adduce evidence of exceptional circumstances which satisfies this Court that it would be in the interest of justice to permit their release on bail. This is in terms of Section 96 (12) (a) which provides as follows:-

96 (12) notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

- (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.

[19] In the case of **Mbhekeni Sikhulu Mbhamali v Rex (227/2013) [2014] SZHC 70 (2014) 3 April 2014**, MCB Maphalala J (as he then was) stated the following at paras 4, 6, 9 and 10:-

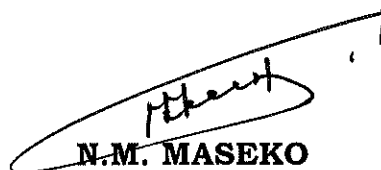
- [4] *The onus placed upon the applicant for bail in cases listed in the Fifth Schedule is very stringent. The reason for this is not difficult to tell as the offences listed in the Fifth Schedule are very serious and violent offences which attract severe penalties upon conviction. There is no doubt that when Parliament enacted this law, the purpose was to render bail very difficult to obtain and to fight the scourge of violent crime in the country. The onus placed upon the applicant is to adduce evidence which would satisfy this Court that exceptional circumstances exist which in the interest of justice permit his release. No such evidence has been adduced by the applicant.*
- [6] *The onus placed upon the applicant by Section 96 (12) (a) of the Act is more stringent than the onus placed upon the applicant in terms of Section 96 (12) (b) of the Act. The former deals with more serious and violent offences listed in the Fifth Schedule and the latter section deals with other offences listed in the Fourth Schedule which are equally serious but not to the extent of offences listed in the Fifth Schedule ---*
- [9] *In the **Ndlovu v Rex 1982-1986 SLR at 52** His Lordship Nathan CJ said the following:-*
- “---in a bail application the onus is on the accused to satisfy the Court that he will not abscond or tamper with Crown witnesses, and if there are substantial grounds for the opposition, bail will be refused. The two main criteria in deciding bail applications are indeed the likelihood of the applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case --- there is a subsidiary factor also to be considered, namely the prospects of success in the trial.”*
- [10] *Considering the string of offences allegedly committed by the applicant with his co-participants inclusive of Robbery, Common Law Theft, contravention of the Theft of Motor Vehicles Act 16/1991 as well as housebreaking, there is a great likelihood that the applicant would abscond trial if granted bail. It is not disputed that the applicant has no fixed place of abode or a stable means of income. What is apparent from the pleadings is that the applicant is a member of a gang of men who are alleged to be committing a string of robberies, house breaking and theft related cases. --- These offences are serious attracting heavy penalties upon conviction ---”*

[20] *In casu* the applicants form part of a gang that committed the robberies during the date 31st December 2022 as well as on the 8th January 2023. They were identified by the respective complainants during an identity parade and were also found in possession of some of the stolen items and also found in possession of a stolen South African Police Service firearm. The Investigating Officer state that they defied police instructions to stop at lawfully mounted police roadblocks whilst driving in the Honda Fit motor vehicle which was robbed from one of the complainants at Zandondo area.

[21] In the circumstances, it is my considered view that, the First Applicant although being a Liswati no longer reside in Eswatini, but resides in South Africa together with the Second Applicant, and they crossed illegally into Eswatini to commit these offences with which they are charged. Further these two applicants have not proven the existence of exceptional circumstances warranting their release on bail by this Court.

[22] Consequently, the bail applications in respect of both applicants are hereby dismissed and they are to remain in custody pending resumption and completion of their trial.

So ordered.


N.M. MASEKO
JUDGE