IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 332/2023**

In the matter between:

NATHI MAKHATHU **APPLICANT**

And

THE KING **RESPONDENT**

NEUTRAL CITATION: **NATHI MAKHATHU V THE KING (332/2023) SZHC – 369 (13/12/2023)**

CORAM: **BW MAGAGULA J**

HEARD: **24/10/2023**

DELIVERED: **13/12/2023**

SUMMARY: *Criminal Law and Procedure – Bail – Applicant able to demonstrate that the crown was a weak case against him on the charge having involved a dangerous weapon. The allegation that he has breached bail conditions is also unfounded.*

HELD: *Exceptional circumstances exist for the Applicant to be granted bail. Application granted.*

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[1] The Applicant has approached this court under a certificate of urgency and seeks to be admitted to bail upon such terms and conditions as the court may deem fit.

[2] The crown is opposed to bail being granted. An answering affidavit of Detective Constable Charles Dlamini has been filed, which sets out the basis for opposition.

APPLICANT'S GROUNDS FOR BAIL

[3] The Applicant avers that ever since he was arrested by members of the Royal Eswatini Police, he has been kept at the Zakhele Remand Centre in Manzini.

[4] He has been charged with offences of robbery. The particulars of the charge are as follows;

The Accused persons are charged with offence of Robbery. In that upon or about 02/05/2023 at or near William Pitcher, in the Manzini District, the said Accused person (s) each or both of them acting jointly in furtherance of common purpose, did wrongfully, unlawfully and intentionally use force and violence (knife-point), ordering him not to offer any resistance to induce submission to one Luyanda Dludlu and did take and steal from him a Redmi 9i cellphone blue in colour, valued at E2, 250-00, the property of or in the lawful possession of Luyanda Dludlu and thereby did commit the above cited offence.

[5] The Applicant avers that he has a valid *bona fide* defence to the charge against him and he denies that he ever committed same. He also denies ever associating himself with any person for that matter in the commission of the offences he is charged with.

[6] On the issue of exceptional circumstances, as required by **Section 96 (12) of The Criminal Procedure and Evidence Act of 1967**, the Applicant deals with the following in his founding affidavit;

6.1 On or around the month of May 2023, I was in the company of my co-accused, one Madodezile Dlomo enjoying some alcoholic beverages at Ngawane Park. We then decided to go back home and two (2) gentlemen asked for a lift from me as I was driving.

They offered to pay E100-00 ***(One Hundred Emalangeni)*** *for the ride.*

6.2 *When it was time for the passengers to alight, they refused to pay the amount of E100-00* ***(One Hundred Emalangeni)*** *fare as promised and we got into an argument. They then disclosed that they did not have any money and requested to me a cellphone which they would collect the following day when they were ready to pay me. We exchanged numbers and they left.*

6.3 *Days went by and they did not call. I kept the phone until I received a phone call from Police Officers who wanted the cellphone. I duly reported at the Manzini Police Station and handed the phone to them. I was surprised when I was informed that I had robbed the passengers of their cellphone and I was being charged the offence of robbery.*

6.4 *I must state that my friend, Madodezile was also charged with robbery and has since been granted bail by the above Honourable Court.*

6. 5 *It is further my humble submission that I did not commit the offences that I am charged with and I will plead not guilty when the matter comes for hearing.*

The Crown's Grounds for Opposing the Bail Application

[7] Through the affidavit of Detective Constable Charles Dlamini, the crown has articulated the grounds for opposing bail as follows;

7.1 The Applicant's version that he is the one that was driving on the day of the alleged robbery is denied. Infact what the police officer has adduced in his affidavit is that it is the Applicant and his co-accused that requested a lift from one Mzomuhle Shongwe who was driving a Noah 7 seater vehicle.

*7.2 The said Mzomuhle Shongwe is alleged to have seen the Applicant take a cellphone belonging to Luyanda Dludlu after the Applicants' co-accused Madodezile Menzi Dlomo had induced the submission of the complainant using a knife. In the process he ordered Mzomuhle to drive off. The statement of the said Mzomuhle which he made at the police station has been annexed to the answering affidavit as annexure **NM1**.*

7.3 The Applicant is out on bail facing a murder charge where violence was a factor. The robbery of the cellphone which the Applicant has been arrested for also involves violence. The crown therefore argues that the Applicant has a propensity to commit offences where violence is a factor.

7.4 It is refuted that the Applicant has a bona fide defence for the charge against him. The cellphone in question was recovered from one Mfanukhona Stewards who recorded a statement to the effect that we obtained the cellphone from the Applicant.

7.5 *The Applicant has breached one of the bail conditions for murder, which is reporting at the Manzini Police Station. It is said the Applicant is no longer reporting. Applicant also alleged to have breached another bail condition, which is that, he was warned not to commit other offences whilst on bail, yet he has committed the offence of robbery which he is currently facing and it is the same offence which he seeks to be admitted on bail for.*

ANALYSIS OF THE EVIDENCE

[8] It appears that the crown takes an issue of the Applicant's propensity to commit violent crimes. The basis for that assertion is that the cellphone which is the subject of the offence, was taken violently from the complainant in the company of his girlfriend. A knife was apparently produced by the Applicant's co-accused to induce the complainants into submission whilst the Applicant took the cellphone. On perusal of the statement of Muzomuhle Nhlanhla Shongwe who is said to have been there when the robbery took place, it does not seem to allude to the violence as alleged. In as much as Muzomuhle controverts the Applicant's version, in so far as who was the driver of the vehicle. However, in so far as what transpired when the victim was dropped off at William Pitcher, he does not say the complainant was robbed by the Applicant, let alone at knife point. What the statement says, is that after the victim and his girlfriend alighted from the vehicle, the driver and the other occupants of the vehicle (including the Applicant and his co-accused) continued with their journey. It is then not clear at what point did the

robbery occur, or even how the cellphone belonging to the complainant ended up in the possession of the Applicant.

[9] It appears to me, the crown has failed to place sufficient facts before court that speaks to the Applicant having robbed the victim with a knife. At least not at William Pitcher as the charge alleges. It therefore appear that for purposes of bail, it has not been demonstrated that the Applicant has committed an offence involving violence whilst out on bail.

[10] The other issue that merits analysis in so far as the facts presented before court are concerned, is the alleged failure to report at the police station as constituting a breach of the bail conditions. When the crown elected to rely on this ground as the basis for opposing the bail application, it was presented with an opportunity to establish facts that support this assertion. The possible sources of those facts would be the bail conditions as granted by the court. The name of the police station which the Applicant was ordered to report to, the intervals and times would ordinarily be contained in bail conditions. Once that document was at hand, then an enquiry would have then been made at the relevant police station, as to the register or any other document that an accused as expected to sign signifying that he has reported to the police station in compliance with the bail conditions as granted by the court. The crown in their wisdom decided that this was not necessary;

[11] Unfortunately, the Applicant has capitalized exactly on that loophole punching loopholes on the insufficiency of this reason as a ground to oppose his bail bid. How does this court come to the conclusion as a matter of fact that the Applicant has breached his bail condition, simply because the investigator of this matter says so? The deponent does not even say he perused the register at the relevant police station, where the Applicant was ordered to report and established that his last day of reporting was a certain date. A wide and general statement that the Applicant was no longer reporting is made. This is insufficient to establish that the Applicant has breached his bail conditions.

[12] The court will now discern to consider the other ground on which the bail is opposed, which is that the Applicant had been ordered not to commit other offences whilst out on bail. The court has already been observed that there is insufficient facts to show that violence was used when committing the alleged robbery. However, it does not necessary follow that an offence was not committed at all. It might have been theft or theft by false pretenses which as a lesser offence than the one that Applicant has been charged with. The evidence before court shows that the Applicant admits that he took the cellphone belonging to the complainant, but he says it was given to him voluntarily by the complainant.

[13] Unfortunately at this stage the matter is not yet at trial. It is just a bail application. Therefore, the court does not have the benefit of the full spectrum of evidence to ascertain which version is correct. In any event, that process is reserved for trial. Having said so, the question still remains, what factual or

evidential material has been place before court to enable it come to the conclusion that the Applicant has committed an offence whilst on bail, so as to disqualify him from being considered for another bail. None. The complainant himself has not filed a supporting affidavit nor has his statement that he made at the police station been attached.

THE LAW

[14] In the case of **Sabelo Dalton Ndlangamandla v Rex Criminal Case No.15/2003** (unreported) the following was stated;

> ***"The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as;***
>
> ***1) Whether or not he is aware of the identity of such witnesses or the nature of their evidence;***
>
> ***2) Whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;***
>
> ***3) What the Accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimated by him;***

4) ***Whether or not any condition preventing communication between such witnesses and the Accused can effectively be policed."***

[15] **Section 96 (4) (c)** states as follows;

"(4) The refusal of bail and detention of an accused person shall be in the interest of justice where one or more of the following grounds are established.
(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 any evidence."

[16] **Section 96 (7)** of **The Criminal Procedure and Evidence Act of 1938** goes on to state that in considering whether the grounds in subsection **(4) (c)** has been established, the court may, where applicable, take into account the following factors, namely:-

a) ***The fact that the Accused is familiar with the identity of the witnesses and with the evidence they may bring against him or her;***
b) ***Whether the witnesses have already made statements and agreed to testify;***
c) ***Whether the investigations against the Accused have already been completed;***

d) ***The relationship of the Accused with the various witnesses and the extent to which they could be influenced or intimidated.***

e) ***How effective and enforceable bail conditions prohibiting communication between the Accused and the witnesses is likely to be;***

f) ***Whether the Accused has access to evidentiary material which is to be presented at his or her trial;***

g) ***The ease with which evidentiary material could be concealed or destroyed; or***

h) ***Any other factor which in the opinion of the court should be taken into account."***

[17] The Crown alleges that the Applicant knows the Crown witnesses in the matter as they are all from Sidzakeni area. The Crown simply contends itself by making a bald allegation that the Applicant will interfere with the Crown witnesses without making a basis for that suspicion of interference.

[18] In **Musa Waga Kunene vs Rex Case No. 439/2015 SZHC (60) 2016, Mlangeni J** at page 9 – 10 paragraph 14.1 and 16 stated the following;

> *"The Applicant is in breach of his bail conditions as enjoined by Section 96 (14) (a) (ii) to disclose his pending cases and not commit other offences whilst out on bail. I humbly submit that Applicant has shown that he cannot obey any bail condition this Honourable Court can impose."*

[19] In **S v Acheson 1991 (2) SA 805 (NM) at p. 822A – B**, the court 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 unless this is likely to prejudice the ends of justice."*
>
> *"..sense of fairness must exude and if necessary, in all activities and conduct of criminal proceedings in this and all other courts. Justice and fairness are interwoven concepts which should not be dismembered or removed for any reason whatsoever."* Per **Masuku J** in **Rex v Mgungu Qwabe Criminal Case No. 64/2003** (unreported).

[20] According to **Masuku J** (as he then was) in **Sabelo Dalton Ndlangamandla v The King Criminal Case No. 15/2003** (unreported).

> *"..the Crown must place evidence which indicates that the prospects of conviction are overwhelming and which would therefore precipitate the Accused to estreat his bail ...scanty affidavits without any useful information are unhelpful to assist the Court in satisfactory addressing this question which can at times be vexing indeed. No summary of evidence has been furnished to indicate the evidence against the Accused...In the*

absence of this, there is no indication...that the Accused will be compelled to escape resulting in a failure of justice."

ADJUDICATION

[21] In as much as I agree with the sentiments expressed by Mlangeni J in the **Musa Waga Kunene** judgment, it is my considered view that the circumstances of the matter at hand, do not justify the application of the *dicta* as expressed in the Waga Kunene judgment. In the matter at hand, there are insufficient facts to support the allegation that the Applicant has committed similar offences or any offences at all. The Crown decided on its own to annex a statement to buttress the allegation that the Applicant committed a violent crime. The statement is alleged to have been authored by a witness who was there. However, on scrutiny of this statement, it does not appear that it supports the narrative that a knife was used to induce submission or that the Applicant robbed the complainant of the cellphone at all.

[22] There is therefore no causal nexus connecting the possession of the cellphone by the Applicant with any criminal activity. Unfortunately, the statement of the complainant has also not been annexed in the papers before court. The statement of Muzomuhle Shongwe does not help the situation. If at all, it exculpate the Applicant. At least of a robbery charge using a dangerous

weapon[1]. The narrative that Applicant is facing a robbery charge where violence was involved, appears to have insufficient evidential material to satisfy the threshold that it is not in the interest of justice to release the Applicant on bail.

[23] The Applicant's bail is also opposed on the ground that the Applicant has failed to disclose as per Section 96 (14) (a) (ii) that there are pending cases against him. This issue is raised in paragraph 7 of the answering affidavit. The manner in which the Applicant has dealt with this crucial issue in his replying affidavit is disappointing to say the least. At paragraph 6 of the Applicant's replying affidavit, it appears a lot of energy was expended on denying that he did not evade arrest, but did not have sufficient money to report to the police station as asked by the police. That could have as well be, but the crucial issue that Applicant was supposed to deal with convincingly, is that in his bail application he has failed to voluntarily inform the court on whether there are any charges that are pending against him. It is common cause that at the time the Applicant is alleged to have committed the current charges, he was already facing another charge of murder. The Applicant also does not deny that he is facing this charge. What he says in his replying affidavit is that the murder charge he is facing has nothing to do with the current charge, the two charges are unrelated. Unfortunately, the provisions of Section 96 (14) (a) (ii) of **The Criminal Procedure and Evidence Act**[2] compels him to inform the court of

[1] In paragraph 6 of the answering affidavit, the Applicant is said the Applicant's co-accused took a knife whilst the Applicant took a cellphone form the complainant. This information is scanty and unhelpful to assist the court. See Sabelo Dalton Ndlangamandla v The King Criminal Case No. 15/2003 (unreported).

[2] No. 67 of 1938 as amended.

any charges that are pending against him, irrespective of whether they are related to those that he has been arrested for.

[24] I deem it necessary to reproduce this Section with is as follows;

> **"96 (14) notwithstanding any law to the contrary:**
>
> ***(a) In bail proceedings the Accused, or the legal representative, is compelled to inform the court whether:-***
>
> ***(i) The Accused has previously been convicted of any offence; and***
>
> ***(ii) There are any charges pending against the Accused and whether the Accused has been released on bail in respect of those charges;***
>
> ***(b) Where the legal representative of an Accused on behalf of the Accused submits the information contemplated in paragraph (a), whether in writing or orally, the Accused shall be required by the court to declare whether he or she confirms such information or not."***

[25] The **CP& E** in **Section 96 (14) (b)** allows the Accused's Attorney to disclose the information on his behalf[3]. Unfortunately in the matter at hand, this was also done.

[26] Now that the contravention of **Section 96 (14) (a)** by the Applicant has been demonstrated, how does it affect his bail application? The answer lies in **Section 96 (14) (d)** of the same **Act**[4], where it provides as follows;

> ***"96. (14) an Accused who intentionally or wilfully -***
>
> ***(a) Fails or refuses to comply with the provisions of paragraph (a); or***
>
> ***(iii) Furnishes the court with false information required in terms of paragraph (a),***
>
> ***Commits an offence and is liable on conviction to a fine not exceeding E5 000-00 (Five Thousand Emalangeni) or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment."***

[27] It appears that the above Section makes it an offence to fail or refuse to comply with **Section (14) (a)** and upon conviction one is liable on conviction to a fine not exceeding E5 000-00 **(Five Thousand Emalangeni)** or imprisonment for a period not exceeding two years or to both fine and imprisonment. I have not read anything in this Section not the entire Act that says as a retribution the

[3] See also Musa Waga Kunene v Rex Criminal Appeal Case No. 74/2017 at para 8 at 7 – 8.
[4] Criminal Procedure and Evidence Act No. 67 of 1938

Accused must also be refused bail once he fails to inform the court that there are charges pending against him. This court can only bring it to the attention of the Director of Public Prosecution that the court has made a finding that the Applicant has failed to comply with **Section 96 (14) (a)** of **The Criminal Procedure and Evidence Act** (as amended) so that the office of the DPP may act in terms of **Section 96 (14) (d)** of the **Act**, if she deems it fit.

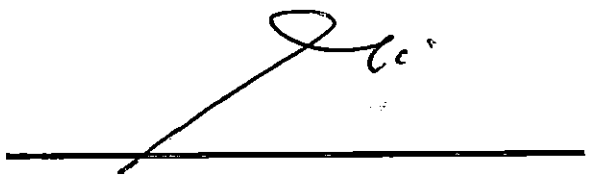
[28] The court will now discern to ultimately pronounce on the Applicant's application. As it has been demonstrated above, the Respondent has been hamstrung by a series of obstacles in its bid to convince the court that the Applicant is not entitled to bail. The courts have been entrusted with the responsibility to evaluate the facts and ensure that persons accused of serious crimes, who demonstrate that there are exceptional circumstances warranting that they be granted bail, are not unduly held in prison. In my view, the Applicant has been successful in demonstrating that exceptional circumstances exist that he be granted bail. Despite that he is charged with an offence listed in the fifth schedule. The violence and use of a dangerous weapon as alleged in the charge sheet, has not been demonstrated at all by the crown.

[29] The purpose of bail in every constitutional democracy is to protect and advance the liberty of the Accused person, to the extent that the interests of justice are not thereby prejudiced. The protection of the right to liberty is

premised on the fundamental principle that an Accused person is presumed to be innocent until his guilt has been established in court.[5]

[30] It is exactly for these reasons that I have leaned in favour of granting the Applicant bail in the absence of evidence that doing so will prejudice the administration of justice. In the matter of **S v Smith and Another 1969 (4) SA 175 a t177 E – 178 A**, it was held that in exercising the statutory discretion conferred by the foundational principle, which is to uphold the interest of justice; the court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.

[31] Due to the aforegoing reasons, the Applicant is admitted to bail. The matter is postponed to the 14th December 2023 to allow the parties to confer on the terms and conditions suitable, failing which the court will determine them.



BW MAGAGULA J

HIGH COURT OF ESWATINI

[5] See the dicta of His Lordship the ACJ MCB Maphalala as he was in Sibusiso Shongwe v Rex Criminal Appeal Case No. 26/2015 at paragraph 19.

FOR THE APPLICANT:	**N. Ndlangamandla (Mabila Attorneys in Association with N. Ndlangamandla & S. Jele)**
FOR THE RESPONDENT:	**S. Mabila (The Director of Public Prosecutions)**