

**IN THE SUPREME COURT OF
SWAZILAND**

HELD AT MBABANE

APPEAL CASE

In the matter

NO.15/09

between:

SENZO MENZI

APPELLANT

MOTSA AND

RESPONDENT

THE KING

CORAM

BAND A CJ

EBRAHIMJA

MAGID AJA MR.

MABILA MRS.

M. DLAMINI

FOR THE

APPELLANT FOR

THE CROWN

JUDGMENT

MAGID AJA:

[1] The appellant is alleged to have been involved in a robbery which took place at Pigg's Peak Police station on 4th October, 2008, in the course of which E6 258 459.00 and some firearms and a police vehicle were stolen.

[2] The appellant is in custody and has applied to be released on bail. In the Court *a quo* Maphalala J after a review of the affidavits filed held that the facts alleged by the appellant did not justify the grant of bail and dismissed the application.

[3] The appellant has appealed against the refusal of bail on the following grounds:

The Court a. quo misdirected itself in law by finding and holding that appellant, despite it being common cause that appellant had surrendered himself to the police and despite it being common cause that appellant made frantic efforts to be allowed passage into Swaziland (specifically to face the charges made against him) without a passport, had failed to establish exceptional circumstances as envisaged by Section

96(12) of the Criminal Procedure and Evidence Act (67/1938) as amended.

2. The Court a quo misdirected itself in law by failing to find and hold that the appellant's surrender to the police with full knowledge of the charges and/ or allegations made against him and his frantic efforts to be allowed passage into Swaziland (specifically to face the charges made against him) without a passport falls under exceptional circumstances as envisaged by Section 96(12) of the Criminal Procedure and Evidence Act (67/1938) as amended".

I have some difficulty in appreciating the difference between the main and the alternative grounds of appeal.

[4] It is common cause that the offence with which the appellant is charged is one which is mentioned in the Fifth Schedule to the Criminal Procedure and Evidence Act No.67 of 1938 and that accordingly the appellant is required to adduce "evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his... release".

[5] Mr. Mabila, for the appellant argued that the fact that the appellant, knowing the gravity of the offence with which he is charged, voluntarily returned to Swaziland from Johannesburg where he was totally outside the jurisdiction of the Royal Swazi

Police and of the Swaziland Courts, was in and of itself such an exceptional circumstance.

[6] Mrs. Dlamini, the Director of Public Prosecutions[^] for the Crown, made a number of submissions from which she sought to persuade this Court to conclude that the case made by the appellant in the Court *a quo* was contradictory and hence false. *Prima facie*, I consider that those submissions had little merit because Mrs. Dlamini purported to see contradictions where no real contradictions existed.

[7] Surprisingly, neither counsel made any effort to give the Court some assistance in ascertaining what guidance was to be found in the authorities as to the meaning to accord to the phrase "exceptional circumstances" in the context of a bail application.

[8] According to the Concise Oxford Dictionary (10th edition) a "circumstance" is defined as "a fact or condition connected with or relevant to an event or action". The same authority defines "exceptional" as "unusual, not typical".

[9] In Claassen's "Dictionary of Legal Words and Phrases" there is a column consisting of over thirty South African cases in which the phrase "exceptional circumstances" has been considered in the context of various legislation and rules of court. Thus in **Estate Docrat v Isaacs 1956(2) SA 35 (N)** at 38 Holmes J (later JA) approved the statement in **Prins v Carstens 1953(4) SA 107 (C)** at 111 that when the South African Rents Act No.43 of 1950 used the phrase "exceptional circumstances" in the context of a failure to pay rent timeously it contemplated "something out of the ordinary and of unusual nature." (See, too **LA. Essack Family Trust v Kathree 1974(2) SA 300 (N)** at 304 A-D).

[10] Little assistance can be obtained from South African authorities on the question of bail because:

(a) in the South African Constitution, the right of an arrested person to bail is enshrined in the bill of Rights;

(b) the "interests of justice" upon which the right to bail in a Schedule 5 offence, corresponding substantially with the Swaziland Schedule 5 and depends, is defined in Section 60 of the **Criminal Procedure Act No.51 OF 1977** (S.A.);

(c) in the South African provision there is no reference to exceptional or special circumstances.

[11] In my judgment, the word "exceptional" in relation to bail must mean something more than merely "unusual" but rather less than "unique" which means in effect "one of a kind". It is, in my opinion not unusual for a suspect to give himself up to the police. It happens fairly frequently, though perhaps less so when so much money is involved. It is perhaps a little more unusual for a suspect, who is out of the jurisdiction of the Court or the police voluntarily to return to that jurisdiction to enable an arrest to be effected. The real question before us, therefore, is whether that fact, without more, justifies the description of "exceptional".

[12] Mrs. Dlamini sought to persuade us that the Crown was aware of the appellant's whereabouts at all material times and that therefore there was nothing special about the appellant's conduct because, so she said, by reason particularly of what she described as the SADC Interpol Agreement and various extradition treaties, the appellant would inevitably have been arrested by either the Swazi or the South African police within a relatively short time. At the request of the Court, she agreed to provide us with proof of the alleged co-operation between the Swazi and South African police and the right which she said the Swazi Police had to operate in South Africa. She proceeded to provide us with a bulky set of copies of agreements, treaties and legislation relevant to the issue. But she was able to point to only one averment on the papers which she submitted demonstrated the truth of her contention, namely that in paragraph 8 of the opposing affidavit of Superintendent E. Dlamini, the deponent stated:

"I humbly state that the applicant was arrested at Ngwenya Border after a joint operation between us and the South African police".

[13] This allegation was denied in the appellant's replying affidavit and the evidence of Dlamini was challenged as hearsay, largely because, so it was said, Dlamini was not present at the time of the appellant's arrest. That fact does not render the statement hearsay for the deponent may well have known the details of the so-called "joint operation" which was alleged to have led up to the appellant's arrest without being personally present thereat. But the statement did not go as far as to confirm in general terms the alleged powers of Royal Swazi police.

[14] What is more important is that the dispute of fact, which, it appears from the judgment, was mentioned in the Court *a quo*, was never resolved by the hearing of oral evidence. The appellant, who bore the onus of proof, ought to have applied for that issue to be tested by oral evidence and cross-examination. In the circumstances, I am unable on the affidavits alone to hold that the appellant discharged the onus of proving that the circumstances of his surrendering himself to the police were exceptional.

[15] I must not be taken to have held that an accused person's voluntary surrender to arrest by the police from outside the jurisdiction can never be exceptional. All that this judgment decides is that the appellant has failed to prove **in this case** that the circumstances of his surrender were exceptional.

[16] The appeal is dismissed.

P.A.M MAGID, ACTING JUSTICE OF APPEAL

I agree:

R.A. BANDA, CHIEF JUSTICE

I agree:

A.M. EBRAHIM, JUSTICE OF APPEAL

Judgement delivered in open court on the 19 day of May 2009.