IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 03/2016

In the matter between:

MUSA WAGA KUNENE **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Musa Waga Kunene v Rex (03/2016) [2016} SZSC 26 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA CJ,**
DR. B.J. ODOKI, JA,
M. LANGWENYA, AJA.

Heard 20th May 2016
Delivered 30th June 2016

Summary

Criminal Appeal - bail - appellant charged with one count of contravening the provisions of the Prevention of Corruption Act, one count of Extortion as well as one count of contravening the provisions of thll Money Laundering Act - offences allegedly committed on the 8th October, 2015' - principles governing bail considered - appellant denied bail in the court *a quo* ori the basis that he committed

the offences when he was out on bail on two counts of Defeating or Obstructing the Course of Justice, two counts of contravening the provisions of the Prevention of Corruption Act, three counts of contravening the Pharmacy Act as well as one count of Theft - the court *a quo* held that the appellant had the propensity to commit crimes - the court *a quo* further held that appellant, if released on bail, was likely to interfere with Crown witnesses in view of his influential position as a policeman - consequently, the court *a quo* held that the appellant had failed to discharge the onus that it was in the interests of justice that the he should be released on bail.

On appeal this Court held that there is no evidence that the appellant had been convicted of other crimes to **support the finding that he had a propensity to commit crimes - held further that there is no evidence that the appellant, if released on bail, would interfere with Crown witnesses in the absence of evidence that he was aware of the identity of Crown witnesses and their evidence - appeal accordingly allowed.**

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] It is common cause that in May 2015 the appellant was charged with a total of eight counts, being two counts of Defeating or Obstructing the Course of Justice, two counts of contravening the provisions of the Prevention of Corruption Act, one count of Theft as well as three counts of contravening the Pharmacy Act. He was subsequently released on bail of E50 000.00

(fifty thousand emalangeni) on the 11tli June 2015. In terms of the bail conditions, he was required to pay cash of E5 000.00 (five thousand emalangeni), and, provide surety of E45 000.00 (forty five thousand emalangeni). The criminal trial in respect of these offences is still pending before the High Court.

[2] On the 14th October 2015 the appellant was re-arrested and charged with one count of contravening the provisions of the Prevention of Corruption Act No. 3 of 2006, one count of Extortion as well as one count of contravening the provisions of the Money Laundering Act of2011. These offences are listed in the Fourth Schedule of the Criminal Procedure and Evidence Act No. 67/1938 as amended, and, they were allegedly committed on the 8th October, 2015. The offences arose from an incident in which the appellant allegedly took E40 000.00 (forty thousand emalangeni) from Mlamuli Dlamini. Depending on the circumstances of the case, the possibility exist that these charges may give rise to improper splitting of charges when properly considered by the trial court.

[3] The appellant lodged a bail application which was dismissed by the court *a quo* on the 24th March 2016 on two grounds: Firstly, that there was a strong likelihood that if the appellant was granted bail, he would commit an offence listed in Part II of the First Schedule of the Criminal Procedure

and Evidence Act No. 67 of 1938 as amended. The basis for this finding was that the appellant had committed certain offences whilst out on bail. Consequently, the court held that the appellant had the propensity to commit crimes.

[4] The second ground for refusing bail was that, if released on bail, the appellant was likely to interfere with Crown witnesses in view of his influential position as a policeman. In coming to this conclusion the court *a quo* took into account the allegation that the appellant had used his position as a policeman to threaten Mlamuli Dlamini with arrest in the process of extortion; this is in respect of the charge of Extortion faced by the appellant. The date of trial for this matter has not yet been allocated by the court.

[5] The appellant has lodged an appeal to this Court against the refusal to grant bail by the court *a quo.* The grounds of appeal can be summarised into five. Firstly, that the court *a quo* erred in law by finding that the onus in bail applications rests upon the accused to show on a balance of probabilities that he is entitled to bail. The appellant's contention is that the Common Law position which placed the onus upon the accused was altered by the enactment of section 96 (1) as read together with section 96

(4) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

[6] The second ground of appeal is that the court *a quo* erred in law by finding that it has a discretion to determine bail when sections 96 (1) and 96 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended grant a right to be admitted to bail to an accused person. The third ground of appeal is that the court *a quo* erred in law by finding that the charges faced by the appellant show a strong possibility or likelihood that if released on bail, he may commit offences listed in Part II of the First Schedule of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. The appellant's contention is that there is no evidence supporting such a

[8] The fifth ground of appeal is that the court *a quo* misdirected itself in law, when declining the appellant's bail application, by not giving directives regarding the expeditious prosecution of the appellant. However, this contention cannot succeed on the basis that the appellant did not make an application for the appropriate directive to expedite the trial under section 88bis of the Criminal Procedure and Evidence Act No. 67/1938 as amended. The law provides that the accused should make the application to court at the time bail is refused; the order is not automatic whenever bail is refused[1].

[9] The Criminal Procedure and Evidence Act[2] further outlines the circumstances under which bail may be granted:

> **"96. (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:**
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> ***(a)*** **where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or**
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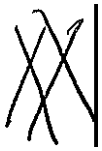
> ***(b)*** **where there is a likelihood that the accused; if released on bail, may attempt to evade the trial;**
>
> ***(c)*** **where there is a likelihood that the accused,** if

[1] Section 95 (7) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

[2] Section 96 (4) of the Criminal Procedure and Evidence Act 67 of 1938 as amended.

released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;



(d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely:

(a) the degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to any person;

(c) any resentment the accused is alleged to harbour against any person;

(d) any disposition to violence on the part of the accused, as is evident from past conduct;

(e) any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused's past conduct;

(/) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Part II of the First Schedule while released on bail; or

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

[IO] It is a trite principle of our law that bail is a discretionary remedy. Similarly, it is well-settled that an appeal court cannot interfere with a decision of a lower court in the absence of a misdirection by the court in the exercise of its discretionary power to determine bail. Furthennore, an accused bears the onus to show on a balance of probabilities why it is in the interests of justice that he should be released on bail.

His Lordship Justice Chidyausiku, Chief Justice of the Supreme Court of Zimbabwe, in the case ofLeammore Judah Jongwe v The State[3] had this to say:

> "This Court has had occasion to set out principles that should guide a court in determining an application for bail.
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> **In tl1e case of.Aitken & Another v Attorney-General 1992 (1) ZLR 249 (S), this Court reviewed a long line of cases and laid down the following guiding principles for determination of bail applications:-**
>
> **1. That the Supreme Court can only interfere with a High Court decision if there has been a misdirection or irregularity in the High Court or if**

[3] Criminal Case No. 251/2001 at page 7

the judge had exercised his discretion in a manner which was so unreasonable as to vitiate the decision reached.

2. That when dealing with the matter of bail the court had to strike a balance between the liberty of accused and the State's need to ensure that the person stood trial and did not interfere with the course of justice. '

3. That the onus is on the accused to show on a balance of probabilities ·· why it was in the interests of justice that he should be freed on bail, but · that amount of evidence necessary for him to discharge this onus would ' vary according to the circumstances of each case:"

[11] His Lordship M.C.B. Maphalala JA, as he then was, delivering the unanimous judgment of the Supreme Court of Swaziland, in the case of *Rodney Masoka Nxumalo and Two Others v. Rex*[4] had this to say:

"[7] Hail is a discretionary remedy. *Frank* Jin *Rex v. Pinero* 1992 (1) SACR 577 (NW) at p. 580 said the following:

'In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all embracing issue: will the' interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused· bail in circumstances where he will stand his trial, the interests of justice are also prejudiced, Four subsidiary questions arise. If released on bail, will the accused stand trial? Will he interfere with State witnesses or the police investigations? Will he commit further · crimes? Will his release be prejudicial to the maintenance of law and the security of the State? At the same time the court should

[4] Criminal Appeal No. 01/2014 at para 7

determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release of bail.' "

[12] His Lordship M.C.B. Maphalala ACJ, as he then was, delivering the unanimous judgment of the Supreme Court of Swaziland in the case of Maxwell Mancoba Dlamini v. Rex[5] had this to say:

"[13] It is well-settled in our law that an accused person is entitled to tie released on bail either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that the person appears at a later day for trial or for proceedings prelimhiary to trial. See Section 16 (7) of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005,

Section 96(1) (a) of the Criminal Procedure and Evidence Act No. 67/1938 as amended provides the following:

'1. (a) In any court an accused person who is iu custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody.'

[14] The right to personal liberty is specially entrenched in the Constitution of this country; hence, an accused is entitled to be released on bail unless doing so would prejudice the interests of justice, See section 16 of the Constitution as well as section 96 (1) and (4) of the Criminal Procedure and evidence Act 67/1938 as amended,

'Criminal Appeal No. 46/2014 at para 13 and 14

The court has a discretion to determine bail; however, it is trite that the court should exercise that discretion jndiciously by weighing the accused's right to liberty with the interests of justice. It is now trite that the interests

of justice sought to be protected in a bail application .are two-fold: firstly, that the accused attends trial; and, secondly, that the accused does not interfere with the evidence of the Crown. See Kriegler Jin *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at 641 para 11 had this to say:

> '11. Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. Au important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the el)quiry is not really concerned with the question of guilt. That is the task of a trial court.
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> The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear wherel the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main protecting the investigation and prosecution of the case against hindrance.' "

Similarly, Mahomed AJ in *S v Acheson*[6] held:

[6] 1991 (2) SA 805 (NH) at 822

"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 to an accused person unless this is likely to prejudice the ends of justice."

[13] The first ground upon which the Learned Judge, in the court *a quo,* refused bail was that the appellant has a propensity to commit crimes, and, that there was a likelihood that, if released on bail, he might commit an offence listed under Part II of the First Schedule of the Criminal Procedure and Evidence Act 67/1938 as amended. This finding has no legal basis because the appellant has not been charged under this Schedule. In coming to this conclusion, the learned Judge considered that the appellant had been re-arrested **wiUlin** a period of four mo11ths after he had been granted bail on other charges. However, it is well-settled in our law that a pending criminal charge, **in** the absence of a conviction, does not constitute a propensity to commit crimes.

His Lordship M.C.B. Maphalala CJ in the case of Maxwell Mancoba Dlamini7 (supra) had this to say:

[7] (supra) at para 11 and 12

"11. The court *a quo* further sought to deny bail to the first appellant on the basis ofa particular charge of sedition allegedly committed in 2013-and for which the criminal trial was pending. However, this does not constitute evidence of a propensity to commit crimes on the part of first appellant. Certainly, a pending criminal charge cannot in itself constitute evidence of propensity to commit crimes. In coming to this conclusion the court *a quo* relied upon section 96 (4) (d) read with section 96 (8) of the Criminal Procedure and Evidence Act 67/1938 as amended which provides the following:

'96. (4) (d) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system ..•.

(8) In considering whether the ground in subsection (4) *(d)* has been established, the court may, where applicable, take into account the following factors, namely:

(a) The fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;

(b) whether the accused is in custody on another charge or whether the accused is on parole (where applicable);

(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or

(d) any other factors which in the opinion of the court should be taken into account.'

[12] Section 96 (8) (b) of the Criminal Procedure and Evidence Act No. 67/1938 as amended cannot be used to deny bail to an accused on the basis that he is charged with another offence. This would violate the bill of rights enshrined in the CoQstitution. Section 21 (1) and (2) of the Constitution provide that in the determination of civil rights and obligations, an accused shall be presumed to be innocent until he is proved guilty. Accordingly, the "propensity to commit offences" in section 96 (8) (b) of the Criminal Procedure and Evidence Act should relate to instances where the accused bas previously been convicted of the offences and not merely charged. See the judgment of *Mavangira* Jin *Tsvangirai v S* (2003) JOL 12141 (ZH) at page 19.' "

[14] The Supreme Court in the case of Maxwell Mancoba Dlamini & Another v Rex[8] stated the following:

"[16] Ndou Jin *Ndlovu v S* (2001) JOL 9073 (ZH) at page 3 had this to say with regard to bail:

'The primary question to be considered is whether the applicant will stand trial or abscond. Of equal importance is whether he will influence the fairness of the trial by intimidating witnesses or tampering with evidence. A further consideration is whether the applicant, ifreleased, will endanger the public or commit an offence,

In bail applications the court will strike a balance between the interests of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty

[8] (Supra) at para 16and 17.

of an accused (who pending the outcome of his trial, is presumed to be innocent).

Grounds for refusal of bail should be reasonably substantiated .... The Court should always grant bail where possible and lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced.•..

The onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail. In discharging this burden the applicant must show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial or otherwise interfere with the administration of justice or commit an offence.'

[17] Harcourt J *inSvSmith and Another* 1969 (4) SA 175 (N) at 177 had this to say:

'The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests 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 *(McCarthy v R.,* 1906 *T.S.* 657 at p. 659; *Hafferjee v. R,* 1932 N.P.D. 518). One particularly relevant consideration is that the Court must earnestly consider whether, upon the facts before it, the applicant is likely to appear to stand his trial in due course - (McCarthy's case supra). These principles have been formulated and expressed in varying fashion, but basically the Court's task is to balance the reasonable requirements of the State in its interest in the prosecution of alleged offenders with the requirements of our law as to the liberty of the subject.'

Miller J in *S v Essack* 1965 (2) SA 161 (D) at p. 162 qnoted with approval the judgment of Demont *Jin S v Mhlawuli and Others* 1963 (3) SA 795 (C) at 796 said:

> 'In dealing with a·n application of this nature, it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safegnarding and ensuring the proper administration of justice . . . , The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, bnt if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. It seems to me, spealdng generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing his trial, there should be some evidence or some indication which touches the applicant personally regard to such likelihood.' "

[15] The Act also deals with the question of onus, and, it provides the following [9]:

> "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;

[9] Section 96 (12) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

(b) in the Fourth Schedule but not 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 the interests of justice permit his or her release."

[16] His Lordship Nathan CJ in the case of *Ndlovu v. R*[10] had this to say:

"It is pointed out in the judgment in Jeremiah Dube (1) 1979-81 SLR 187 in which the leading discussion in South Africa are that in a bail application the onus is on the accused to satisfy the court that he will not abscond or· temper with the 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, The two criteria tend somewhat to coalesce because if the applicant is a person who would attempt to influence Crown witnesses it may more readily be inferred that he might be tempted to abscond and not stand his trial. There is a subsidiary factor also to be considered, namely the prospects of success in the trial.

..• S. v Essack 1965 (2) SA 161 (D) at 162 D, in which Miller J said:

The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima fassie* case against him, but if there are indications that the proper administration of justice and the safe

. guarding thereof may be defeated or frustrated if he is allowed out on bail, the Court would be fully justified in refusing to allow him bail."

[10] 1982-86 SLR 51 at 52-53 (HC),

[I 7] The second ground upon which bail was refused was that the appellant, if released on bail, is likely to interfere with Crown witnesses. This issue involves the examination of four factors[11]: Firstly, whether or not the appellant is aware of the identity of the Crown witnesses or the nature of their evidence. Secondly, whether or not the Crown witnesses have already, made their statements to the police and further committed themselves t testify during the criminal trial or whether the matter is still being .. investigated by the police; Thirdly, the nature and extent of the relationship between the appellant and the Crown witnesses as well as the likelihood that the witnesses could be influenced by the appellant. Fourthly, the effectiveness of conditions that may be imposed by the court to prevent possible communication between the Crown witnesses and the appellant.

[18] ,There is no evidence that the appellant is aware of the identity of Crown witnesses as well as their evidence against him. Furthermore, there is no evidence of the extent of the relationship between the appellant and the prospective witnesses of the Crown which could influence or intimidate them. Similarly, no evidence has been placed before this Court to suggest that the appellant has access to evidentiary material which is to be presented at his trial.

[11] (Supra) at 822-823.

[19] Miller Jin *S. v. Fouries*[12] states the general principles governing bail:

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption ofinnoceuce.... But if there are no indications that the accused will not stand trial ifreleased on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail. But it does not follow that no other factors than the due proper administration of justice can ever be taken into account by the court when it considers whether bail should be granted or refused. Quite apart from certain statutory provisions..• it has been held that bail may be refused, even where there are no indications that the accused is likely to abscond, in cases where public safety or national security might be endangered by his release."

[20] The Supreme Court in the case of *Sib u siso Bonginkhosi Shongwe v Rex*[13] had this to say:

> "[19] It is trite that bail is a discretionary remedy; however, the court is required to exercise that discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the bill of rights enshrined in the Constitution. 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

[12] 1973 (I) SA (D) at p. IOI.
[13] Criminal Appeal No. 26/2015 at para 19

prejudiced. The protection of the right to liberty is premised on the fundamental principle that an accused is presumed to be innocent until his guilt has been established in court. It is against this background that the court will always lean in favour of granting bail in the absence of evidence that doing so will prejudice the administration of justice."

[21] In determining the appropriate amount of bail, the court will take into account the fact that the appellant is a repeat offender having committed other offences whilst out on bail. Similarly, the court will consider the seriousness of the offences faced by the appellant.

Accordingly, the following order is made:

1. The appeal is allowed and the judgment of the court *a quo* is set aside and substituted with the following order:

   (a) Bail is granted and fixed at E15 000.00 (fifteen thousand emalangeni) upon the following terms and conditions:

      (i) The appellant is required to pay El 0 000.00 (ten thousand emalangeni) cash and provide surety for E5 000.00 (five thousand emalangeni).

(ii) The appellant is ordered to surrender his passport and travelling document to the Mbabane Police Station and not apply for new ones pending the finalization of the criminal trial.

(iii) The appellant should not interfere with Crown witnesses.

(iv) The appellant should report at the Mbabane Police Station on the last Friday of every month commencing in July 2016 between the hours of 8 am and4 pm.

(v) The appellant should not commit any criminal offence during the period that he is out on bail.

M.C.B. MAPHALALA
CHIEF JUSTICE

, I agree:

DR. B.I. ODOKI
JUSTICE OF APPEAL

I agree:

M. LANGWENYA
ACTING JUSTICE OF APPEAL

For Appellant: Attorney Linda Dlamini
For Respondent: Senior Crown Counsel M. Nxumalo

DELIVERED IN OPEN COURT ON 30th JUNE 2016