IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CRIMINAL APPEAL CASE NO: 13/2017**

In the matter between:

LUCKY MATSENJWA **APPELLANT**

And

REX **RESPONDENT**

Neutral Citation: Lucky Matsenjwa v Rex
(13/2017) [2017] SZSC 60 (17TH November 2017)

Coram: **DR. B.J. ODOKI, JA**
S.B. MAPHALALA, JA
J.P. ANNANDALE, JA

Date Heard: **20TH October 2017**

Date delivered: **17th November 2017**

Summary: *Criminal Procedure – Bail – Appeal against order of the High Court refusing to grant Appellant bail – Appellant charged with murder, defeating the ends of justice, theft and contempt of Court – Requirement to prove exceptional circumstances – whether a medical condition amounts to exceptional circumstance – Crown allegation that Appellant likely to interfere with witnesses – Appellant also alleged to have breached his bail conditions relating to returning passport released to him – Held no exceptional circumstances established and interest of justice require that the Appellant be kept in custody – Appeal dismissed.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The Appellant was arrested by Police on 24th May 2017 and charged with the offences of murder, defeating the ends of justice, theft and contempt of court.

[2] On 31st May 2017, the Appellant launched an application to be admitted on bail, before the High Court, which dismissed the application.

[3] The Appellant has now appealed to this Court on the following grounds;

*"1. The court **a quo** erred both in fact and in law and/or misdirected itself by failing to follow a judgment of the above Honourable Court, being a superior Court and its judgments having binding effect on the High Court, when it found and held that a medical condition is not an exceptional circumstance.*

*2. The court **a quo** erred both in fact and in law by finding and holding that simply because the Appellant had been charged with having eliminated a witness meant to testify against him in another charge, the same amounted to interference with State Witnesses when, save for a bald and / or bold allegation, there was nothing which was produced by the Crown implicating the Appellant in the commission of the alleged offence.*

*3. The court **a quo** erred both in law and in fact and/or misdirected itself by finding and holding that the Appellant had breached his bail conditions in respect of an earlier matter regarding the surrender of his passport despite him having annexed a Court Order variating his bail terms in respect of the earlier matter and on the question of the passport and the Crown had not filed anything to counter that.*

*4. The court **a quo** erred and / or misdirected itself in law by failing to appreciate that the evidentiary burden on the question of the passport lay with the Crown because Appellant had already filed in court an order varying his bail conditions in the earlier matter.*

5. *The court **a quo** erred both in fact and in law by failing to consider that in terms of Section 96(1) of the Criminal Procedure and Evidence Act of 1938 (as amended), an Accused person is as of right entitled to be admitted to bail at any stage of the proceedings and can only be denied bail if the Crown had discharged its onus as provided for in Section 96 (4) of the Act in so far as demonstrating that it will not be in the interests of justice to admit the accused person to bail"*

ARGUMENTS OF THE APPELLANT

[4] Counsel for the Appellant submitted that the court ***a quo*** failed to consider that in terms of Section 96(1) of the Criminal Procedure and Evidence Act, the accused is as of right entitled to bail. Counsel recognized that such right to bail is subject to considerations set out in Section 95 and the Fourth and Fifth Schedules to the Act.

[5] It was counsel's contention that the use of the word "shall" in the Section clearly indicates that its mandatory or peremptory. Counsel submitted that a simple and literal interpretation of the said section is that once an accused person moves a bail application, he should as of right be admitted on bail and it is only when the court finds that it is in the interest of justice that he should be detained in custody that it can refuse to grant him bail.

[6] Counsel further argued that Section 96 (1) places the onus on the Crown to bring forth to the court the grounds which indicate that the detention of the accused in custody will be in the interest of justice.

It was Counsel's submission that his argument is supported by Section 96 (4) of the Act which sets out the grounds upon which detention in the interest of justice will be established.

[7] Counsel further contended that the Common Law principle that the onus rested on balance of probabilities on the accused person to satisfy the court that he is entitled to bail was done away with by the enactment of Section 96 (1) read together with Section 94 (4) of the Act as amended in 2004. It was the submission of the Counsel that the court ***a quo*** shifted the onus of proof on the Appellant to prove that he was entitled to bail contrary to the amendment of 2004.

[8] Counsel also referred to Section 16 (7) of the Constitution to support his submission that an accused is entitled to be released on bail pending his trial.

[9] Counsel argued that the court ***a quo*** ought not to have drawn an inference that the Appellant was guilty of the offences charged when the evidence to that effect had not yet been led and tested.

Moreover, Counsel contended, there were no allegation advanced by the Respondent supporting the findings of the court ***a quo*** that the Appellants earlier and later charges suggested a strong possibility that upon release the Appellant might commit any of the offences listed in Part II of the first schedule to the Criminal Procedure and Evidence Act.

[10] Counsel argued that the second ground upon which the court ***a quo*** dismissed the application was that the Appellant had eliminated a Crown witness in respect of another Criminal matter he was facing. However, that was a mere bald statement with no evidence before the court justifying it.

[11] It was further submitted by Counsel that the Appellant was not aware of the potential Crown witnesses as he had not been provided with the summary of evidence, nor was there any evidence that the Appellant enjoyed any form of control over the witnesses.

[12] Counsel for Appellant next argued that the court ***a quo*** erred in dealing with the Appellant's application for bail as one involving pre-meditated murder whereas there was no allegation in the charge sheet that the offence with which the Appellant was charged with was one of premeditated murder.

According to the Counsel, what was in the charge was that the Appellant was acting in furtherance of a common purpose with persons who were unknown to the prosecution, when he unlawfully and intentionally killed the deceased.

Counsel referred to the following cases on the applicability of the doctrine of common purpose. **Molisin Muhammed and Another v Rex** High Court Criminal case No.282/2013 and **Philip Wagawaga Ngcamphalala and 7 Others v Rex** Appeal No. 17/2003.

[13] Counsel submitted that the court ***a quo*** misdirected itself in finding that the Appellant's medical condition which he had cited as an exceptional circumstance was a pure fabrication. It was Counsel's contention that the Appellant had submitted medical reports of his physiotherapy examination and x-ray images indicating the extent of the injuries he had sustained in an accident in which he was involved. The Appellant had also averred that he had been advised that he urgently undergoes an operation in respect of his injury and that he required to be admitted for this purpose as the Correctional Centre had advised that it lacks such facilities.

[14] It was therefore submitted that the Appellants medical condition and lack of appropriate facilities by the Correctional Centre provided the existence exceptional circumstances for his admission to bail. Counsel argued that the court ***a quo*** erred in finding that the medical condition was not an exceptional circumstance contrary to the holding in the Case of **Wonder Dlamini and Another v Rex** Supreme Court Case No. 1/2013 (unreported) where it was held that a medical condition is an exceptional circumstance.

[15] Counsel submitted that the second ground upon which the High Court dismissed the Appellant's application for bail was that he had eliminated a Crown witness in respect of another criminal case he was facing. It was Counsel's contention that such a finding was erroneous as there was no evidence placed before the court justifying such a factual finding.

[16] Regarding the finding of the court ***a quo*** that the Appellant had breached his earlier bail conditions by failing to surrender his passport to Police after using it, Counsel submitted that the Appellant had in actual fact obtained possession of the passport through a court order. It was the contention of Counsel that the court had issued an order allowing the Appellant to access his passport whenever he required it so long as he returned it to the police after the trip. Counsel submitted further that when the Appellant crossed the border to the Republic of South Africa, he was acting in terms of the Court Order, as there was nothing to suggest that he had not complied with the Court Order in accessing his passport.

[17] It was the contention of the Appellant that the Respondent failed to discharge the burden of proof which lay on it to disapprove the assertions made by the Appellant regarding the breach of his bail conditions. The case of **John Boy Matsebula and others v Ndwandwe and Another** Court of Appeal case No. 25/2003 (unreported) was cited in support of the submission by the Appellant.

ARGUMENTS OF THE RESPONDENT

[18] Counsel for the Respondent submitted that the Supreme Court judgment relied on by the Appellant does on say that every sickness amounts to an exceptional circumstance but every case must be treated on its own merits. It was counsel's contention that when an accused alleges that he suffers from a certain sickness the court cannot simply release on bail such a person, but must carry out an enquiry to determine whether such sickness amounts to an exceptional circumstance or not. In the instant case, the court ***a quo*** made such an enquiry and came to the conclusion that the sickness was fabrication for the reasons stated in the judgment.

[19] Counsel argued that the court ***a quo*** dismissed the medical report as a fabrication basically because the medical certificate that was issued by Dr. Maleni M. Goodman of Nelspruit stated that the Appellant would be fit for duty on 22 May 2017, eight days before he moved his bail application. The Appellant had also filed medical certificates for the year 2014. This was an indication that there was no medical urgency with regard to the Appellant.

[20] Counsel for the Respondent also made reference to the several medical examinations of the Appellant after his bail application had been dismissed, on 22 June 2017 and 3 July 2017, which were analysed by Senior doctors from the Ministry of Health who came to the following conclusion that:

1. *There are some inconsistencies in the medical history that do not follow a chronological order to make medical sense;*

2. *The present medical conditions can be attended to wherever he is;*

3. *There is no reason for a surgical operation from the medical information presented.*

[21] In support of his submission Counsel referred to the case of **Abacha vs The State** 2002 5 NWLR (Pt 761) 638 where it was held that the mere fact that a person in custody is ill does not entitle him to be released from custody unless there are really compelling grounds for doing so.

[22] With regard to the second ground of appeal, Counsel for the Crown submitted that the Appellant interfered with Crown witnesses to the extent that he eliminated one of them. There was evidence that the Appellant had approached one witness requesting him to make arrangements for a meeting with the deceased to discuss the issue of the deceased's evidence in the trial of the Appellant on corruption charges. Counsel submitted that the Appellant took a very advanced stage of interference by killing the witness. There was also evidence from another witness who overheard people talking about the Appellant's plan to kill the deceased and he went and told the deceased and his wife about the plan.

[23] On the third ground of appeal Counsel for the Crown argued that the court ***a quo*** rightly found that the Appellant did not return back the passport back to the police in accordance with the Court Order, as the Appellant had failed to state the police station and police officer to whom he returned the passport.

[24] With regard to ground four, Counsel submitted that the ground must fail because the Appellant failed to bring a Court Order that entitled him to keep the passport beyond the date stated in the Court Order.

[25] On ground five, Counsel argued that it must also fail because the court ***a quo*** dealt with Section 96 (4) of the Criminal Procedure and Evidence Act since the Crown was able to establish one or more of the grounds mentioned in the section namely the likelihood of interference with witnesses and breach of previous bail conditions.

[26] Lastly, Counsel for the Crown submitted that when the Appellant was denied bail, he was facing four charges all relating to the deceased (Schaza Matsebula). However, in the intervening period, the charges have increased to eleven and, therefore, it will not be in the interest of justice to release the Appellant on bail. Moreover, Counsel submitted, the Crown is ready to prosecute the Appellant as a Pre-Trial Conference notice has been issued to the Appellant.

CONSIDERATION OF THE GROUNDS OF APPEAL

[27] Before I consider each ground of appeal, it is necessary to set out the Law relating to bail in so as it is relevant to this appeal. The right to bail is set out in Section 16 (7) of the Constitution and Sections 95 and 96 of the Criminal Procedure and Evidence Act 1939 as amended (CPEA). Section 16 (7) of the Constitution provides,

> *" If a person is arrested or detained as mentioned in sub section (3) (b) then without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that such a person appears at a later date for trial or for proceedings preliminary to trial."*

[28] The procedure for application for bail and the conditions under which it may be granted are set out in detail in the CPEA. Section 96 (1) (a) of the CPEA sets out the basic principle as follows:

> *" (1) In any court –*
>
> *(a) an accused person who is in 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 interest of justice that the accused be detained in custody."

[29] Section 96 (4) of the Act sets out the grounds upon which refusal of grant bail may be in the interest of justice. These are stated as follows:

> *(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;*
>
> *(b) where there is a likelihood that the accused if released on bail may attempt to evade the trial;*
>
> *(c) where there is likelihood that the accused if release 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 jeopardize the objectives or the proper functioning of the Criminal justice system;*
>
> *(e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine public peace or security."*

[30] In considering whether the ground in Section 96 (4) (c) relating to interference with witnesses has been established the court has to take into account the following considerations:

"(a) the fact that the accused is familiar with the witnesses and with the evidence which may be given against him or her;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has been completed;

(d) the relationship of the accused with the various witnesses and extent to which they could be influenced or intimidated."

[31] As regards determining where the interests of justice lie, Section 9 (10) of the Act provides that in considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she is to be detained in custody taking into account where applicable the following factors, namely–

"(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until disposal or conclusion of the trial of the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused;

(g) the age of the accused especially where the accused in under 16 years;

(h) whether a woman has murdered her newly born child;

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

[32] There is a requirement for an accused to prove exceptional circumstances in certain cases. This is provided for in Section 9 (12) of CPEA which states as follows:

(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 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"

[33] The offences referred to in Sections 95 and 96 of the Act as specified in the Fifth Schedule include murder when;

"(a) it was planned or premeditated;

(b) The victim was a law enforcement officer or a judicial officer performing his or her functions as such whether on duty or not or a law enforcement officer who was killed by virtue of his or her holding such a position.

(c) The offence was committed by a person or group of persons or syndicates acting in the execution of a common purpose or conspiracy"

[34] I shall now consider the first ground of appeal which complains that the court ***a quo*** erred in not following the judgment of this Court by holding that a medical condition is not an exceptional circumstance. Counsel for the Appellant relied on the decision of this Court in the case of **Wonder Dlamini and Another v. Rex** (01/2013) [2013] SZHC 2 (21/2/2013) where it was held that a medical condition of the appellant amounted to an exceptional circumstance.

[35] In **Wonder Dlamini and Another v Rex** (Supra), this Court stated at paragraphs [24] and [25] as follows;

"[24] The evidence adduced by the second appellant is to the effect that the living conditions at Zakhele Remand Centre contribute a health hazard because they sleep on a mat which render them susceptible to attract various illnesses. In a democratic country such as ours, one would have expected that inmates be provided with at least mattresses and not sleep on mats placed on a cold cement floor. As the second appellant correctly stated such a condition would invariably attract various illnesses to that extent it does constitute exceptional circumstances.

[25] Following the definition of exceptional circumstances by Magid AJA **in Senzo Menzi** **Motsa v Rex** (supra) it is our considered view that suffering from pneumonia with frequent bonts of sinus is a condition which is *"more than usual" but rather less unique; it is a condition that is "one of its kind." The failure by the respondent to file opposing papers does not deprive this court of its duty to dispense justice by determining whether or not the evidence adduced by the first Appellant does contribute exceptional circumstances. To that extent the court* ***a quo*** *misdirected itself by holding as it did that exceptional circumstances did not exist merely because there was no medical report annexed to the bail application."*

[36] In **Senzo Menzi Motsa v Rex** Criminal Appeal case No 15/2009 Magid AJA stated in paragraph 11 as follows:

> "*In my judgment, the word exceptional in relation to bail must mean something more than merely " unusual" but rather less unique which means in effect " one of its kind*."

[37] In his judgment the learned judge in the court ***a quo*** referred to the exceptional circumstances alleged by the Appellant in his affidavit which included the fact that "he is a sickly person who suffers from a severe back medical condition since he was involved in a motor accident" The appellant also alleged that he has been advised by his doctor in Nelspruit that he has to undergo an operation. He also alleged that the conditions at the Remand Centre are not conducive for a person in his state of health.

[39] In coming to the conclusion that the Appellant's medical condition did not amount to exceptional circumstances, the court ***a quo*** stated,

> *"In support of his health conditions Applicant annexes a document marked "G" to his founding affidavit. This document purports to be a medical certificate issued by a certain Dr. Maleni M. Goodman of Nelspruit. Of particular note is that this Medical Certificate states that the Applicant shall be fit for duty on the 22nd May 2017 and it says nothing*

about the need for Applicant to undergo any operation at any time. For this reason I am totally not convinced about Applicants alleged medical condition and I dismiss it as a pure fabrication."

[40] In the first place, the court ***a quo*** did not hold that a medical condition could not amount to exceptional circumstances. The court found that the Appellant had failed to establish that the medical condition he alleged to be suffering from amounted to exceptional circumstances. The court did not believe the evidence adduced by the Appellant which it considered a fabrication given the opinion provided by Senior Doctors from the Ministry of Health that the medical reports produced by the Appellant showed inconsistences in the medical history, that there was no need for a surgical operation, and that the condition could be attended to wherever the Appellant is. Therefore the court ***a quo*** did not fail to follow the decision of this court in the case of **Wonder Dlamini (supra).**

[41] In the case of **Abacha v the State** (Supra) the Nigerian Supreme Court held that the mere fact that an accused who is in custody is ill does not entitle him to be released on bail. Uwaifor JSC stated;

"It must be made clear that everyone is entitled to be offered access to good medical care whether he is being tried for a crime or has been convicted or simply in detention. When in detention or custody the responsibility of affording him access to proper medical facility rests with those in whose custody he is, invariably the authorities. But it ought to be understood that the mere fact that a person in custody is

ill does not entitle him to be released from custody or allowed on bail unless there are really compelling grounds for doing so"

[42] In the same Nigerian case, Ayoola JSC added,

"Were it the law that an accused person remanded in custody to await trial is entitled to be granted bail pursuant to a right to have access to a medical practioner or medical facility of his choice then, hardly will any accused person remain in custody to await trial.

There is co-general principle of law affording that right to ensure that the medical needs of persons remanded in custody. The duty of the State is to ensure that the medical needs of persons in custody are met does not create such extravagant right as claimed, that a person in custody is entitled to be treated by a doctor of his own choice.

The special medical need of an accused person or convict whose proven state of health needs special medical attention which authorities may not be able to provide, is then a factor that may be put before the court for consideration in the exercise of discretion to grant bail. Such need is not brought before the court by mere assertions of the accused or his counsel but on satisfactory and convincing evidence."

[43] In the present case, I hold that the court ***a quo*** did not err or misdirect itself in coming to the conclusion that the Appellant had failed to satisfy the court

that his medical condition amounted to exceptional circumstances justifying him to be admitted to bail.

[44] The complaint in the second ground of appeal is that the court ***a quo*** erred in holding that by eliminating a witness meant to testify against the Appellant, this amounted to interference with state witnesses when no evidence implicating him in the commission of the offence had been adduced. It was also counsel's contention that the Appellant could not interfere with the prosecution witness because he had not been supplied with their names.

[45] In his judgment the learned judge in the court ***a quo*** stated that apart from requirement of the Act that a person charged with a Fifth Schedule offence must allege and prove special circumstances warranting his release on bail, the court has to consider the likelihood of the accused to interfere with state witnesses In ***casu*** the Applicant is also charged with eliminating a witness meant to testify against him in another charge. The learned judge concluded:

> *"There can be no better form of interference with state witnesses than to kill them. Although this charge is yet to be substantiated by the Crown, the truth of the matter is that he remains a suspect of such interference. I am therefore not*

convinced that he will not interfere with state witnesses and for this reason also the bail application ought to fail"

[46] I am unable to fault the court ***a quo*** for the conclusion it reached on this ground. Although at this stage of proceedings the Crown is not required to adduce all evidence of likely interference in this case, the Crown stated that it had evidence of witnesses incriminating him with the murder of the deceased who was a potential witness in another charge against him. Therefore the likelihood of the Appellant interfering with other state witnesses was real. Accordingly, this ground of appeal has no merit.

[47] The complaint in the third ground of appeal is that the court ***a quo*** erred in holding that the Appellant had breached his bail conditions by failing to surrender his passport to Police after using it. In his judgment, the learned judge in the court ***a quo*** stated***;***

"*[8] An accused on bail also has to comply with bail conditions. Applicant was previously released on bail and one of his bail conditions was to surrender his passport to the Police. He later applied for a variation of this condition and he was granted an order for the temporary release of his passport to himself. The variation order required that immediately upon his return he should return his passport to the investigating officer.*

In the papers opposing the current application the crown alleged that he never returned his passport in compliance with the variation order. In response the Applicant contented himself in alleging that he returned it and when he went to South Africa in May 2017, it was released to him by the Police.

In my view such a mere allegation was not enough after he was accused of violating the variation order. He ought to state the Police Station to which he returned it and the officer who gave it back to him in May 2017.

I am therefore not convinced that the Applicant did not violate the conditions of the variation order and this also makes me to be not inclined to grant the present application"

[48] In my view, the above conclusions arrived at in the court ***a quo*** were justified. In Answering Affidavit, counsel for the Crown stated,

"8.2 Appellant stated that he was given the passport by the Police. However, he did not mention who in particular gave him back his passport and on what grounds. The Appellant as a police officer himself ought to know the name of the officer who gave him the passport."

[49] Clearly, the Appellant failed to rebut the above allegation by the Crown, and therefore the court ***a quo*** did not err in holding that the Appellant had breached his bail conditions and therefore it would be in the interest of justice not to admit him on bail again. Ground three should therefore fail.

[50] In the fourth ground the Appellant argues that the court ***a quo*** erred in not appreciating that the evidential burden regarding the question of the return of the passport lay on the Crown. For the reasons I have already given in regard to ground three, I find no merit in this ground.

[51] The fifth ground of appeal was rather a general ground dealing with the right to be granted bail and circumstances under which the right may be exercised. Although the word "shall" is used in Section 96 (1) of the Act, it is clear that the grant of bail is subject to the conditions set out in Section 96 which I quoted in detail in paragraphs [26] to [32] of this judgment.

[52] The general principle governing the granting of bail is that it is at the discretion of the court, taking into account the interest of justice as provided for in the Act. The right to bail is not mandatory nor automatic, but is subject to the conditions prescribed by law. It is true that the burden lies on the Crown to prove that it is in the interest of justice to keep the accused in custody but it is also true that the accused bears the burden in certain cases like the present one to prove that exceptional circumstances exist to allow him to be admitted to bail.

[53] In the instant case, I am unable to agree with Counsel for the Appellant that court ***a quo*** disregarded provisions of section (9) (1) and 96 (4) and wrongly shifted the burden of proof on the Appellant. This ground must also fail.

[54] For the reasons I have given, I find no merit in this appeal.

[55] However, I would urge the Directorate of Public Prosecutions to expedite the trial of the Appellant.

[56] In the result, I make the following order:

That the appeal is dismissed.

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree

S.B. MAPHALALA
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE
JUSTICE OF APPEAL

FOR APPELLANT : **ADV. M. MABILA**

FOR RESPONDENT : **MS. M. N. KHUMALO**

: **MS. N. MASUKU**