IN THE SUPREME COURT OF ESWATINI

Case No. 21/2022

HELD AT MBABANE

In the matter between:

MARTIN NKHULULEKO DLAMINI **Appellant**

And

REX **Respondent**

Neutral Citation:
MARTIN NKHULULEKO DLAMINJ V REX (21/2022)

[2023} SZSC *11 (1 JI" May 2023).*

Coram:
S.B. MAPHALALA JA.

N.J.HLOPHE JA.

M.D. MAMBA JA.

Date Heard:
16TH FEBRUARY 2023.

Date Judgment handed down: 11th May 2023.

SUMMARY

Appeal - Bail - Appellant charged with three counts of rape alleged to have been committed against his relatives comprising, two of his daughters and a cousin - He furtherfacesone count ofviolating section3 ofthe Sexual Offences andDomestic Violence Act of 2018 (SODV Act) - Citing the gravity of the charges and the resultant likelihood of the appellant to abscond coupled with the likelihood of the appellant to inte,fere with the complainants given the closeness of the relationship with most of the complainants, the court a quo declined appellant's Application for bail hence this appeal - Whether the court a quo had misdirected itself in refi1sing Appellant's application - Despite the restrictive nature on the grant or otherwise of bail for offences under the Fourth or Fifth Schedule, the grant or otherwise of bail remains a discretionary matter for the court hearing it - Whether or not to grant the appeal in the circumstances.

JUDGMENT

HLOPHEJA

[l] This is an appeal against a Judgment of Judge Z. Magagula handed down in the court *a quo* on the 14th of October 2022, in which he refused to grant bail to the appellant who stood charged with three offences of common

law rape and two of violating the Sexual offences and Domestic Violence Act No. 15/2018.

[2] It is noteworthy that the matter is characterized by some prominent features which include the fact that the Appellant is regrettably an admitted and practising attorney of this Court who is not just accused of deplorable offences of their own but his matter is also complicated by the fact that all the alleged victims of the offences complained of are closely related to him with two being shown to be his biological daughters whilst the third one is his cousin. I raise these issues to underscore the difficult circumstances a court finds itself in if it has to hear a matter involving an officer of the Court, paiticularly where the evidence is such that it has to find against that officer. It nonetheless remains a function that comts need to perform and do so as dispassionate as they can possibly be.

[3] This Comt has found it even more difficult to deal with the matter because there has been no evidential detail placed befol'e it so as to inform it about what really happened in each incident forming the basis of the charges. The paities were comf01table for their pait with reciting what the charges said. The deponent to the answering affidavit repeatedly said that there was "overwhelming evidence against the Applicant" without disclosing even the slightest such evidence for the Comt to have an idea on what had happened for it to be able in a way to assess the strength of the case against the Appellant. I have no doubt that determining the strength of the case helps the Court answer the question on where the interests of justice stand with

regards the release or incarceration of a person in the position of the of the Appellant. I say this so as to underscore what the comts have at times observed as imp01iant in those befitting matters. They have observed as one of the major considerations on whether or not to grant bail, the strength of the case for or against the accused, refe!1'ing to it in some instances as the prospects of success of the applicant during the trial.

[4] This requirement which often is not made to appear to be prominent in determination of bail applications, had its significance revealed in an excerpt from the judgment in **Ndlovu V Rex 1982 - 86 SLR 51 at 52 E- F,** as cited by Judge Z. Magagula in the judgment under appeal. That excerpt reads as follows:-

> " *The two main criteria in deciding bail applications are indeed the likelihood of the Applicant standing trial and the likelihood of his inte,fering with crown witnesses and the proper presentation of the case. These 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 trial. There* is *a subsidiarv factor also to be considered, namely, the prospects o(success in the trial. Without going into detail of the merits it may fairly be said that in the case on the applicant's own showing there is some likelihood that he will be convicted at least of culpable homicide" (emphasis have been added).*

[5] What is apparent is the egregious nature of the allegations as revealed in the charges against the appellant. For instance in the rape alleged in count **1,** the appellant is alleged to have indulged in the rape of his own daughter repeatedly between the years 2006 and 2011 whilst at Fairview in Manzini. When the dastard acts first occmTed, the victim is said to have been 12 years of age, an age under which there is a presumption against consent to sexual intercourse in our law, so much so that sexual intercourse with a person 111 that situation is taken to be rape. See **RV M 1953 (4) SA393 AD.**

[6] In count 2 the appellant was alleged to have repeatedly indulged in the unlawful sexual encounters with his cousin between the years 2007 and 2008. She was allegedly 14 years on the first such encounter. It is alleged again that there was no consent to the sexual intercourse.· In count 3, the appellant is alleged to have repeatedly had unlawful sexual intercourse with the complainant between the years 2006 and 2011. The victim in this case was his biological daughter who was also 14 years on the first encounter. It is alleged she had also not consented to the sexual encounter; hence the rape charges.

[7] In count 4 the allegations are that the Appellant indulged in repeated unlawful acts of sexual intercourse with one of his daughters between 2019 and 2020. This daughter is the same one he had allegedly had unlawful sexual intercourse with in count 3 between 2006 and 2011. The alleged victim of the Appellant's alleged sexual act is said to have fallen pregnant as a result and that she was allegedly forced to abort, rather repeatedly, by the Appellant. **1**

note as well that in the body of the answering affidavit the allegations with regards the alleged rape and its consequences are magnified to say that the appellant's daughters were actually forced to abo1t after the sexual encounter. It is alleged fmther that this happened on a number of occasions. For instance one is said to have fallen pregnant 6 times when she was between the ages of 13 - I 6. She was similarly forced by her said father, the appellant, to abott some 6 times. Tlu·ee such abortions are said to have been carried out locally, whilst the other three are said to have been carried out in the Republic South Africa. This is serious and suggests a total lack of human values by the Appellant if it happened.

[8] In a matter like the present such allegations engender a fresh perspective in the consideration of the matter against the appellant. It makes it more serious and outstandingly bad. He is likely to attract a harsher than normal sentence in the event of a conviction. This brings about a likelihood for him to abscond and not atte11d trial.

[9] I note that according to the Appellant he was once arrested for a similar offence as the sexual offences referred to in some of the counts herein. This he alleges occurred around the year 2008. It transpired that he was thereafter released on bail; a position he has remained under to this day. I note the disturbing suggestion this carries with it namely, that notwithstanding the appellant's said arrest and subsequent release on bail; it did not help deter him from committing similar abhorrent offences if the charges and the most recent offences mentioned therein are anything to go by. This alone should in law

prevent him from being released on bail. I say this because he is now facing newer charges to those for which he was arrested and subsequently released on bail in 2008. He is now shown as having committed similar offences later on, in 2008 until 2011 in the case of count 1 notwithstanding that he was actually out on bail. He allegedly also committed similar offences against the other one of his daughters between 2008 and 2011. The charges allege further that between 2019 and 2020 he again committed similar abhol1'ent offences against another one of his daughters.

[10] Of significance here is that these similar offences were committed whilst the appellant was out on bail for the offences he in his own words had been arrested for allegedly committing, subsequently charged and eventually released on bail in 2008. On this point alone it means that the chances of the appellant being released on bail again should be very slim if at all they are there. This is because he would be taken to have violated one of the implied bail conditions if it was not a direct one.

[11] If the appellant repeatedly committed similar abhorrent or horrendous offences after he had been released on bail, as the charges suggest, it would not only mean that the conditions imposed by law upon his release on bail mean nothing to him than that society as made mainly of law abiding citizens whose peace and safety ought to be protected was now left vulnerable. In such cases the law abiding members of society who look up to the courts for their protection can most effectively feel so protected if the perpetual and habitual offenders are kept away from society. That is to say, it should be found at that

stage that the interests of justice are best served when such people are not granted bail.

[12] It is one of the weighty considerations on the grant or otherwise of bail that the person accused of committing certain types of offences continued to do so after he was released on bail. The suggestion is that such a person has no regards for the law because instead of him toning down after his arrest and release on bail, he still went back to commit similar, if not worse, offences. Refusing to grant such a person bail could actually go to show the desire by the Courts to ensure the protection of other members of society including reassuring those who had earlier been violated that there was no chance of them being befallen by same plight.

[13] It only makes it worse if the alleged offender has access to the complainants in question or where it cannot be denied successfully that he has no access to his alleged victims. It in a way goes to confirm that even if the Courts were for one second considering to release him on bail, the reality of the matter is in the difficulty of policing the 1hinimization of contact between him and the alleged victims who are either his daughters or other close relatives. The appellant appears, at least *prima facie,* to have had total control over the victims of the offences he is charged with in this matter if the past is anything to go by.

[14] It complicated it further that when he was; in the past, released on bail on condition he did not commit similar offences during the tenancy of his said

release, he allegedly did not just violate those conditions by allegedly committing similar offences, but he repeatedly went on to commit several other related offences apparently exploiting the same influence he is shown to have earlier had over the same complainants or alleged victims as it made them fail to report the alleged unbecoming conduct they were allegedly being subjected to on various occasions.

[15] From the circumstances of the matter, it is not difficult to see that the totality of the circumstances do not make light the possibility that he may not attend trial. Chances are that if he is convicted in each particular count, he should in reality look at a sentence of at least 15 ·years per count which should be a matter of serious concern to him. The sentences in question are unlikely to be treated as part of the same transaction and may therefore not run concurrently in law. This brings about the likelihood of a lengthy sentence which brings with it the likelihood by the appellant to abscond trial. This is a weighty factor in such matters and often results in the refusal to grant bail. This is because experience has shown that the more the number of offences are shown to have been committed, which are by their very nature serious, the more it is likely for the accused not to stand trial. These considerations are therefore upper most in my mind as I approach this appeal.

[I 6] In an attempt to persuade this Court to yield to his request, the Appellant contended that he is, per section 16 (7) of the constitution of this Kingdom, entitled to be released on bail upon such conditions as this Court may attach to his release as soon as he applies. In other words, this court has no power

to

refuse to grant him bail once he applies for it. To refuse to do so would allegedly be a violation of his right to libe1ty. This court, according to appellant's submission, should concern itself _only with the appropriate conditions to attach to his otherwise un[\Voidable release. The section m question provides as follows:-

> "*16 (7). If a person is arrested av 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 necessmy to ensure that*
>
> *that person appears at a later date for, trial or for proceedings preliminary to trial"*

[17] According to the Appellant in his submissions, what the above section means is that once a person has been arrested for allegedly committing a crime, that person should immediately be released from custody with the court having no power to order his remand except to order his release on such conditions as it may considei· appropriate for his said release. There is logically a problem with this reasoning. It suggests that society has to ignore the age old practice that there are people who by their conduct make it impossible for them not to be kept away from other 1nembers of society at large. In reality, and it seems to me that, there are people who because of their conduct it would be in the interests of justice to keep in custody and away from those who are law abiding.

(18] He acknowledged that, sections 95 and 96 of the Criminal Procedure and Evidence Act ofl 938 as amended do not advocate for automatic release from custody of any person arrested or taken into custody for having allegedly committed an offence. Those sections acknowledge that once a person had been atTested on account of having allegedly committed an offence or offences, (like for instance those of the Fourth and Fifth Schedule), he is to be kept in custody until such time that he is released on bail after his having applied for it or until his matter would have been finalized where bail would have been refused. Given of course that if the alleged offences fall within the Fourth of the Fifth Schedules the accused has to establish exceptional circumstances to obtain bail. Othe1wise the Constitution itself says nothing about there being no one to be kept in custody in a befitting case. The said sections provide as set out herein below on the relevant parts.

Section 95 provides:-

> *"95 (1) Notwithstanding any other law the High Court shall be the only Court of First instance to consider applications for bail where the accused is charged with· any of the offences specified in the Fourth and the Fifth Schedules oi" under subsection 95 (6).*

Section 96 (1) (a) provides that:-

> *"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 an offence, unless the Court finds that it is i11 the interests of justice that the accused be detained in custody".*

[19) Section 96 (12) on the other hand provides as follows:-

" 96 (12) Notwithstanding any provisions of this Act, where an accused is charged with an offence refe,;red 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 a/justice permit his or her release,

(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".

[20) It was the contention of the Appellant that the above cited sections of the Criminal Procedure and Evidence Act (CP & E) conflict with the above cited provision of the Constitution. Given the Supremacy of the Constitution, any law that seeks to conflict with or contradict or be inconsistent with it as provided for in its section 2 then the Constitution has to prevail, which means that the provisions of section 16 (7) of the constitution have to be adhered to as opposed to sections 95 and 96 of the CP&E, which is to say the appellant

ha to be released from custody on such conditions as the Court shall find appropriate, the question of his being kept in custody not arising.

[21] The argument was extended to say that even if the point on supremacy of the Constitution was for one reason or the other not to succeed, it should suffice that the provision in section 2 of the Constitution was a newer legislation between the two - that is between section 2 of the Constitution and section 96 (12) (a) of the CP & E - and it therefore had to carry the day for that reason as well.

[22] How the alleged inconsistency between section 16 (7) of the Constitution and sections 95 and 96 (12) (a) of the CP & E was to be dealt with was stated in the Supreme Court Judgment of **Wonder Dlamini and Another V Rex, Criminal Appeal case No. 01/2013.** It was there stated that the party raising such an argument had to raise it as a constitutional matter requiring that the alleged inconsistent section of the CP & E with the Constitution be struck down. I note that this directive has not been adhered to in this matter where the alleged inconsistency is being raised. It would indeed be difficult for one to deal with the alleged inconsistency in any other way outside of what the Court has already ord.ered be done.

[23] It suffices for me to point out that the tone of the Constitution when one reads section 21(13) and 21(I)(a) thereof, does not support this inconsistency. That section, provides that being held in custody under any other law does not necessarily mean that one's right to be presumed innocent is

diminished. It is merely more about what the interests of justice favour. Sections 21(2) (a) of the Constitution and 21(13)(a) of the Constitution provide as fol\ows:-

> *"21 (2) a person who is charged with a criminal offence shall be -*
>
> *(a) Presumed to be innocent until that person is proved or has pleaded guilty.*
>
> *"21 (I 3) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of-*
>
> *(a) Subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts"*

[24] Commenting on the meaning ofsection 16(7) ofthe Constitution the High Court per M.C.B. Maphalala **J,** (as he the!) was), said the following 111 **Thambo Doggy Mngomezulu V Rex Criminal case No.380/2012** at paragraph 14:-

> *"The Applicant's Counsel fitrther referred me to section I6 (7) of the Constitution as being authority for the proposition that bail is a Constitutional right of an accused person, and, the Court has no discretion to refuse bail. He argued tha1 a Court faced with a bail application has one of two choice's; either to release the accused unconditionally or upon reasonable conditions. <u>Such reasoning</u> <u>is</u> <u>not onlv misconceived but fallacious.</u> " (Underlining has been added)"*

[25] At paragraph 17, after referring to the specific provisions of sections 16 (7) and 16 (3) (b), the High Comt in that same matter said the following:-

> *"Section 16 (7) of the Constitution endorses the general principle that bail is a discretionary remedy; in determining bail , the overriding factor is the interests of justice, and in particular ·whether there is a likehood that the accused if released on bail may evade trial, inte1fere with Crown witnesses, control or destroy the evidence".*

[26] These points as raised and argued by the Appellant are not new before the Supreme Court. Almost the exact argument was raised without success in **Wonder Dia mini and Another Vs Rex, Criminal Appeal Case No.1/2013.** Confirming a decision of the High Comt per Mabuza J in that matter, where she had said that if the Applicants intended to challenge section 95 of the Criminal Procedure And Evidence Act as being inconsistent with Section 16 (7) of the Constitution, they should have asked the Constitutional Comt to strike it down, the Supreme Court agreed with that reasoning and endorsed the conclusion in question as the best way to confront the alleged inconsistency. The Supreme Court confirmed that, a similar conflict had been confronted in that manner in the Republic of South Africa in the 1natter of **S V Dlamini, S v Dladla and others, S v Jourbert and S v Schietekat 1999**
(2) SACR 51; 1999 (4) SA 623 (cc). The contention in that matter was that there had arisen a conflict between section 60 (11) of the Criminal Procedure Act of that country and the Right to Liberty founded on the Constitution of South Africa. The conclusion of that Court was that there was no such conflict and instead that both sections, in different ways,

confirmed that the grant or refusal of bail was a discretionary matter for the Comt hearing the application.

[27] Going back to whether or not the Appellant satisfied the requirements of Section 96 (12) (a) of the CP & E the court *a quo* said the following at paragraph 10 of its judgment:-

> *"I would agree with the submission by Mr Msibifor the Applicant that section 96 (J 2) Does not deprive the Court of its discretion in determining bail applications even for fifth schedule offences, but such discretion is to be exercised judiciously. It* is *common cause that the said Applicant has been chavged with the offences listed in the fifth schedule, therefore section 96 (12) ( ) applies. He has to adduce evidence to convince the Court that there is something unusual in his particular circumstances (to borrow fi"om Magid AJA as he then was)*
> - *that is as* he was in the *matter of* ***Senzo Motsa V Rex, Appeal Case No. 15/2009".***

[28] I agree with these sentiments. The Applicant was required by section 96 (12) (a) to establish exceptional circumstances for him to be released on bail. The closest to establishing such was in his saying that he was sickly, suffering from hypertention and other ilh1esses, which it could not be disputed are not uncommon at the correctional service centres to the extent that those institutions provide the necessary care. I therefore agree that the court *a quo* did not misdirect itself in its determination of this aspect of the matter and that, that point being central to the determination of the matter now that it concerned section 96 (12) (a), there was no basis to reach a different determination.

;

[29] I also agree with the court *a quo* when it said the following with regards to section 16 (7) of the Constitution and its impact on section 96 (12) (a) of the Criminal Procedure and Evidence Act of 1938:-

> "11. *Mr A1sibi fitrther urged that the Court finds that section 96(12) (a) (of the CP & E) was in conflict with Section 16(7) of the Constitution Act of 2005. Whatever the merits or demerits of that argument I think that it is a matter that requires the attention of the full bench. The argument was also made in passing by applicant's Counsel and I need not make any finding on it, more particularly and in view of the conclusion I come to in this matter. Suffice to say that the Applicant has not adduced evidence to the satisfaction of this Court that exceptional circumstances exist that permit his release on bail"*

[30] I conclude by saying that it is hard to find fault in the following words of the court *a quo* at paragraph 15 of its judgment which I endorse fully in the circumstances of this matter:-

> *"The complainants and the witnesses are all knmvn to the accused. It could be extremely d(fficult if not impossible to police any condition preventing communication between the Applicant and the witnesses.*

.

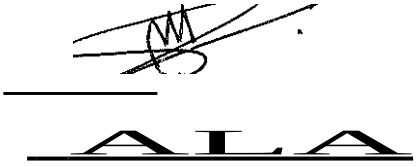
I may add that [the] gravity of the offences and the possible sanctions or penalties should they be proved at trial, are such as would encourage the applicant not to stand trial"

[31] There is also one weighty factor to consider and construe in the Respondent's favour. It is the fact that as we heard the appeal it was indicated that a hearing date for the commencement of the trial in the same matter of the appellant had been allocated in the High Comi. It is often difficult to intervene and order the grant or otherwise of bail in a matter ah'eady allocated a trial date or one where a trial has commenced if that comi is not the one seized with the trial in that matter. Unless the refusal of bail would be a very hopeless conclusion, I am of the view that at that stage such a question has to be left for the trial Court to decide. It is better placed to consider and decide that issue. As a Court that would have heard evidence so as to understand the strength of the case against the accused person and from there decide whether or not to grant bail. The trial Court decides that question bearing in mind the prospects of a conviction and possibly the sentence the accused may attract in the event of a conviction. I say this bearing in mind the power of the trial Court in terms of section 145 of the Criminal Procedure and Evidence Act to terminate bail after a plea is taken in a matter. Of course this is not to say that such a Court is entitled to act arbitrarily for the law allows no one to act in that n,anner. As for the Courts, they are enjoined to act judicially and judiciously at all times.

[32] Having said all I have above, I have come to the conclusion that the Appellant's appeal cannot succeed; it is dismissed.

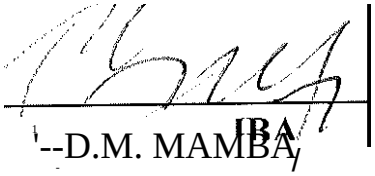
JUSTICE OF APPEAL

I Agree



. JUSTICE OF APPEAL

I Agree



--D.M. MAMBA

JUSTICE OF APPEAL

For the Appellant: MR P. Msibi

For the Respondent: MR B.

Ngwenya