IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held at Mbabane Case No. 12/2023

In the matter between:

NONHLANHLA BAKHETSILE MATSENJWA **1ST APPELLANT**

BHEKITHEMBA MATSENJWA **2ND APPELLANT**

TANDZISILE MATSENJWA **3RD APPELLANT**

AND

KING **RESPONDENT**

Neutral citation: *Nonhlanhla Bakhetsile Matsenjwa & 2 Others vs King [12/2023] [2023] SZSC 57 (6 December 2023)*

Coram: FAKUDZE AJA; MANZINI M.J.M. AJA; SIMELANE L.M. A.J.A

Heard: 28th November, 2023

Delivered: 6th December, 2023

Summary: *Criminal Appeal – Application for bail pending trial – Appellants charged with murder – Fifth schedule offence – bail refused on the grounds that the Appellants have failed to*

establish the existence of exceptional circumstances – court a quo makes a finding on failure by 1st and 2nd Appellant to discharge their duty to establish the existence of exceptional circumstances. No such finding is made with respect to 3rd Appellant – Respondent concedes that the court a quo did not make such finding – held, the granting and refusal of bail is discretionary – discretion to be exercised judicially and judiciously – no misdirection on the refusal of bail on the part of 1st and 2nd Appellants, appeal is dismissed – since no finding on the part of the 3rd Appellant, bail granted.

JUDGMENT

FAKUDZE A.J.A

Background

[1] The appellants lodged different applications for bail before the court *a quo* on the 29th March, 2023. When all the pleadings had been closed the court *a quo* ordered that the Applications be consolidated as they related to the same thing or issue. At the conclusion of the bail hearing the court *a quo* dismissed the consolidated applications basing its decision on the fact that the Applicants had failed to establish the existence of exceptional circumstances given that all the Applicant were charged with a Fifth Schedule offence. The Applicants, being dissatisfied with the decision of the court *a quo*, lodged the appeal that is before this court.

The Appeal

[2] *Following the dismissal of the application by the court a quo, the Applicants filed a Notice of Appeal on the 16 June, 2023 on the following grounds:-*

(1) The court a quo erred both in fact and in law by holding and finding that the Appellants had failed to establish the existence of exceptional circumstances;

(2) The court a quo erred and misdirected itself in law by failing to appreciate that the charge sheet upon which they had been arraigned was defective in that it failed to disclose how Appellants had unlawfully and intentionally killed the deceased;

(3) The court a quo erred both in fact and in law by relying solely on the hearsay evidence of the investigating officer (6680 Detective Constable Mpila) in refusing the Appellants bail;

(4) The court a quo erred both in fact and in law by holding and finding that whilst accepting that the guilt or otherwise of an accused person can only be dealt with at the trial, effectively found the Appellants guilty at the bail stage;

(5) The court a quo erred both in fact and in law by failing to note that the Crown, save for bare allegations, had failed to discharge the onus borne by it in terms of the Criminal Procedure and Evidence Act, 1938;

(6) The court a quo erred both in fact and in law by holding and finding that the Appellants are not guaranteed safety by the angry and aggrieved community members should they be released on bail, yet

such can never be a ground for refusal of bail, particularly where such allegation is unsubstantiated;

(7) The court a quo erred both in fact and in law by holding and finding that the Appellants are likely to influence or intimidate the witnesses of the Respondent without stating how such could occur and/or enquiring as to whether or not sufficient policing measures can be efficiently put in use and/or they had any form of authority and power over those alleged witnesses;

(8) The court a quo erred both in fact and in law, by holding and finding that, the Appellants were a flight risk when there was not even a feeble attempt to state how and to where they could flee;

(9) The court a quo erred in fact and in law by putting emphasis on a possible lengthy sentence upon conviction when on a similar case bail has been granted;

(10) The court a quo erred in fact and in law by holding and finding that, the Appellants bear the onus on a balance of probabilities to establish that it is in the interest of justice that bail be granted which is a common law position which was done away with by the 2004 Amendment Act, 1938.

The parties' contention

The Appellants

[3] The first attack the Appellants directed to the court *a quo's* finding is that the charge sheet indicated that the Appellants had been charged with a Fifth Schedule offence under the doctrine of common purpose. No details have

been given regarding the common purpose. Therefore the charge sheet is defective. Moreover, the Respondent served the Appellants with the certificate signifying that the charge against the Appellants is a Fifth Schedule offence in court whereas they should have been served earlier during the pleading stage.

[4] The second gripe is that the court *a quo* treated the bail application as a trial. That is why it came to the conclusion that there is a *prima facie* case against the Appellants. The court also failed to deal with the case of each of the Appellants but made a finding that affected all of them without taking into account that they were separate applicants. The court *a quo* also relied in its judgment on the hearsay evidence of the Investigating Officer and this should not have been the case.

[5] The third contention is that the court *a quo* adopted the pre-2004 position on bail application which placed the onus on the Crown to establish that it is not in the interest of justice that bail should be granted. The two considerations are the likelihood that if bail is granted, the Applicant(s) would evade trial and that the Applicant(s) would interfere with witnesses. (See Section 96 (1) to (4). Otherwise, the true legal position arising from the 2004 Amendment is that the Applicant is entitled to bail unless it is established by the Crown that he or she a flight risk or will interfere with witnesses. In *casu,* the court *a quo* adopted the pre-2004 position that it is the Applicant's duty to establish that it is entitled to bail;

[6] The final contention is that there was no sufficient particularity in the charge sheet in that it did not contain all allegations of the offence including the date, place and the elements of the offence, including how the offence was

committed. In this regard the **Mokhuane v S (CA05/2018) ZAN WHC (18 September 2020)** case supports this proposition. The Appellants further aver that Section 96 (12) makes provision or prescribes that where an Applicant for bail faces a Fifth Schedule offence, the onus to establish the existence of exceptional circumstances rests on the accused. Notwithstanding Section 96 (12), the sufficiency of the particulars in the charge sheet should assist in ensuring that the applicant is not burdened with the need to establish exceptional circumstances. In *casu*, the Appellants submit, there are no details of how the offence was committed. The question then becomes can the existence or otherwise of exceptional circumstances arise? The court *a quo* should not have made its finding based on the fact that the Appellants failed to make a case for the existence or non-existence of exceptional circumstances.

[7] It is the Appellants' final submission that the Appellants should be granted bail.

The Respondent

[8] The Respondent's case is that the Appellants were arrested and charged with the offence of murder, it being alleged that on or about the 11th March, 2023 and at or near Mbabane, in the Hhohho Region, the accused persons acting jointly and severally in furtherance of a common purpose, did unlawfully and intentionally kill one Malungisa Dumsani, thus committing the said offence.

[9] After listening to the bail application, the court concluded that the Appellants had failed to establish the existence of exceptional circumstances. The court *a quo* also came to the conclusion that the Appellants if released may attempt to influence or intimidate witnesses or destroy that evidence but great reliance

was placed by the court *a quo* on the issue of failure by the Appellants to establish the existence of exceptional circumstances.

[10] The Respondent further argued that it is trite law that bail is a discretionary remedy. It is also settled that the 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. In paragraphs [41] to [44], the court *a quo* made itself clear that it was inclined to find that the Appellants were likely to influence and/or interfere with Crown witnesses or destroy evidence. At paragraph [48], the court stated that the Appellants failed to establish exceptional circumstances which would be in the interest of justice to permit their release on bail.

[11] The Respondent stated that Section 96 (12) of the Criminal Procedure and Evidence Act, 1938 (as amended) clearly 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 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;*
>
> *(b) ... ..."*

[12] The Respondent contended that it is the duty of the Applicants to establish that there are exceptional circumstances which have satisfied the court hearing the bail to consider granting the Applicants bail.

[13] On the issue of the insufficient charge sheet, the Respondent stated that as far as it is concerned, the charges have been properly drawn up. All the requirements for murder have been satisfied. The Respondent also further stated that the Applicants, in their Notice of Application, did acknowledge in paragraph 31 that they are charged for an offence under the Fifth Schedule when the Applicants stated as follows:

> *"31 I am advised and verily believe that the offence with which I am charged falls under the Fifth Schedule of the Act, and as such I am enjoined to establish the existence of exceptional circumstances which I humbly submit are present."*

[14] The Respondent's case is that the acknowledgment by the Appellants signifies that they were aware that the existence of exceptional circumstances had to be proven by them. The 1st Appellant stated that she has a sickness which requires her to visit a doctor who attends to patients that have mental challenges. The 2nd Appellant stated that he has a chronic disease and worth noting is that he did not disclose this disease. The 3rd Appellant stated that she is a school going child and that she is only 22 years. The court *a quo* took into account all these factors and concluded that the Appellants had not established grounds for bail to be granted and same was denied by that court.

[15] This court asked the Respondent's Counsel that in arriving at its decision, the court *a quo* said nothing about the exceptional circumstances raised by the

3rd Appellant. The Respondent's Counsel conceded that the court *a quo* did not pronounce itself on this issue.

[16] The Respondent then submitted that the appeal should be dismissed.

The Law

[17] Section 122 of the Criminal Procedure and Evidence Act, 1938 states as follows:-

> *"(1) Subject to the provisions hereinafter contained and subject also to any special provision contained in any law relating to any particular offence, each count of the indictment or summons shall set forth the offence with which the accused is charged, in a manner, and with sufficient particulars as to the alleged time and place of committing such offence and the person (if any) against whom and the property (if any) in respect of which such offence is alleged to have been committed as are reasonably sufficient to inform the accused of the nature of the charge."*

[18] Section 131 provides as follows:-

> *"It shall be sufficient in every indictment for murder to charge that the defendant did wrongfully, unlawfully and maliciously kill and murder the deceased... ... ..."*

[19] On the issue of hearsay evidence by the investigating officer in **Jeremiah Dube v Rex 1979 to 81 S.L.R** page 187 para F Cohen J (as he then was) stated as follows:-

"It should be noted that it is the duty of the Crown in its opposition to an application for bail to present at least the basic facts on which it relies, to the court by affidavit even where such evidence may be hearsay... ... ..."

[20] In the case of **Director of Public Prosecutions v Bhekwako Meshack Dlamini and 2 Others case no. 478/2015 [2016] SZSC 40 (30th June 2016)** paragraph 14, the Supreme Court stated as follows:

"Where an accused is charged with an offence listed in the Fifth Schedule of the Criminal Procedure and Evidence Act, 1938 the accused should in addition, adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release."

Court's Findings

[21] The Appellants and the Respondent are of the same mind that the court *a quo* based its finding on the fact that there were no exceptional circumstances upon which the Appellants should be released in terms of Section 96 (12). During the hearing of this Appeal, this ground of appeal became central. The Appellants' Heads of Argument makes this point vividly clear in paragraph 3 where it states as follows:-

"3. The court a quo refused to admit all the Appellants to bail, though noting that the issue revolved around the existence (or otherwise thereof) of exceptional circumstances, by relying on the Affidavit deposed to on behalf of the Crown to the extent of then dealing with the issues and/or requirements set out in Section 96(4) of the Criminal Procedure and Evidence Act... ... ..."

[22] The Respondent, likewise, states in paragraph 14.2 of its Heads as follows:

"14.2 It is further submitted that the Appellants are charged with a Fifth Schedule offence and as such the provisions of Section 96 (12) (a) of the criminal code is instructive in this regard. The court also properly dealt with this aspect. This court is humbly referred to paragraphs [13] and [16] of the judgment, pages 199-200 of the Record of Proceedings."

[23] The court *a quo* observed in paragraph [13] of its judgment, as follows:

"[13] The onus of proof shifts to the accused in Section 96(12) where the accused has to prove exceptional circumstances; 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."

[24] Considering what has been alluded to above, this court is inclined to agree with the Respondent that once it establishes that it is not in the interest of justice that the accused be refused bail, the onus to establish the existence of exceptional circumstances rests with the accused. This is in respect of offences listed in the Fifth Schedule and referred to in Sections 95 and 96 of the Act. It includes murder when

"(a) it was planned or premeditated,

(b) ... ...

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

[25] In *casu*, the Appellants have been charged with murder in the execution of common purpose. Their case therefore falls under the Fifth Schedule of the Act. See the case of **Director of Public Prosecution v Bhekwako Meshack Dlamini** (Supra).

[26] It is this also court's finding that the existence or non-existence of exceptional circumstances is a matter of value judgment by the presiding judge. As far as the First Appellant is concerned, the Learned Judge in the court *a quo* observed that the reason advanced by this Appellant that she visits the psych hospital does not constitute an exceptional circumstance. The Learned Judge further observed that this Appellant can be referred to the psych hospital as and when the need arises. On the issue of the Second Appellant, the Learned Judge observed that the Appellant stated that he had a chronic disease without disclosing its nature. The lack of details led to the court concluding that there were insufficient particulars to establish the existence of exceptional circumstances. On the issue of the Third Appellant, the court made no finding on the exceptional circumstance that the Appellant is a school going student. This was a misdirection. In terms of Rule 33 of the Supreme Court Rules, 2023, this court is empowered to make a finding or a decision on appeal. The Third Appellant raised the fact that she is a school going kid. She also raised the issue that she is twenty two (22) years old. In exercise of this court's discretion, the grounds raised by the Third Applicant, suffice to

establish the existence of exceptional circumstances for purposes of Section 96(12) of the Criminal Procedure and Evidence Act, 1938. It is therefore this court's view that the Third Appellant be granted bail.

[27] Taking into account all that has been said above the following Order is issued:

(1) The Appeal by the First and Second Appellants is hereby dismissed.

(2) The Third Appellant is granted bail on the following conditions:

(i) The bail amount is fixed at E50,000.00 (Fifty Thousand Emalangeni); the Third Appellant is to pay Three Thousand Emalangeni (E,3000.00) in cash and Forty Seven Thousand (E47,000.00) in the form surety;

(ii) The Third Appellant shall surrender her passport/Travel Document to the police;

(iii) The Third Appellant shall report to the nearest police station to her place of residence once a month.

FAKUDZE A.J.A

I agree

MANZINI M. J. A.J.A

I agree

SIMELANE L.M. A.J.A