1303

THE HIGH COURT OF SWAZILAND

PIUS VELAPHI SIMELANE

Applicant

THE KING

1st Respondent

COMMISSIONER OF POLICE

2nd Respondent

Criminal Case No. 90/2003

Coram	S.B. MAPHALALA – J
For the Applicant	MR. M. MABILA
For the Respondents	Advocate E. THWALA

JUDGMENT

(On bail)

(12/08/2003)

The application

Serving before court is an application for bail couched in the following language:

"1. Admitting to bail upon such terms and conditions as the above Honourable court deems fit, necessary and appropriate to impose;

2. In the event of grant of Prayer 1 above, directing the 2nd Respondent to forthwith release the Applicant from custody upon payment of bail deposit; and

3. Further and/or alternative relief."

A founding affidavit of the Applicant is filed in support thereto. The application is opposed by the Crown and the opposing affidavit of 3004 Detective Constable Sikhumbuzo Fakudze is filed in opposition. In turn the Applicant has filed a replying affidavit in response to the Respondent's answer.

The facts

On the 23rd April 2003, the Applicant was arrested by members of the Royal Swaziland Police under the Serious Crimes Unit (known as Lukhozi) based in Manzini and subsequently charged with robbery and illegal possession of a firearm and was brought before the Manzini Magistrate's Court on Monday the 28th April 2003, for his first remand.

The Applicant is currently being kept at Zakhele Remand Centre in Manzini where he is awaiting trial and in the interim he is desirous of being admitted to bail.

He avers that if admitted to bail he will not abscond trial as he verily (and genuinely) believe that the charges against him cannot sustain a conviction at trial. Briefly, his defence to the charges against him, in particular the robbery case, is that he is not aware of the allegations made against him as even at the time of his arrest he was never found in possession of any proceeds from the alleged robbery and this is despite several diligent searches conducted by the police after his arrest and even after intense interrogation which if he knew something about the charges he would definitely have pointed out – nothing connecting him with the alleged offences could come out. In view of the fact that nothing which may lead to an inference of guilt being drawn ever came out even after intense interrogation (which lasted over five days). He avers that he has great prospects of success at trial and this on its own is an incentive to him to stand trial as opposed to being a fugitive from justice.

The Applicant avers that if admitted to bail he will not interfere with Crown witnesses (and/or potential ones) more so because he does not even know who they are as police (and/or the Crown) have not indicated them either to him or his attorney and he further undertakes not to commit further crimes.

He further avers that he is an asthmatic person and also suffering from sinus conditions which are known to both the investigating officers and the 2nd Respondent that if admitted to bail he will stay at his homestead at Mfabantfu and will not remove himself from the jurisdiction of this court without the requisite authority. He further urges the court to specifically issue an order directing the 2nd Respondent to release him from custody forthwith upon payment of the stipulated bail deposit.

The facts advanced in opposition of this application can be gleaned from the opposing affidavit of 3004 Detective Constable Sikhumbuzo Fakudze. The officer deposes that on the 23rd April 2003, whilst together with other officers, he arrested the Applicant in connection with a number of robberies in which motorists were hi-jacked and their cars taken forcefully at gunpoint. He subsequently charged the Applicant with four counts of robbery, two counts of illegal possession of live rounds of ammunition.

If Applicant is admitted to bail, he will abscond trial, for Applicant has been arrested on charges in consequence of which he faces the prospect of punishment which may be severe and which may even consist of a term of imprisonment. If he is admitted to bail he will abscond trial because he has recently completed a jail term after having been charged and convicted of a similar offence as the one at present. Applicant's previous conviction is of such a nature that it will induce him to abscond because, if found guilty during the trial, he is likely to receive a severe sentence on account thereof. Annexure "D21" *viz* the record of past convictions of the Applicant is filed in support of this contention.

It is contended by the officer that there is overwhelming evidence against the Applicant.

The investigations in some of the counts Applicant is currently facing and also to further possible, equally serious counts being considered, are on going as such, more evidence against Applicant is being unearthed.

Another ground advanced in opposition is that, in the event applicant is released on bail he will interfere with crucial crown witnesses. The averments can be found in paragraphs 9.1, 9.2, 9.3, 11.2, 11.3 of the opposing affidavit of the police officer.

From the above outline of the facts it is clear therefore that the Crown opposes the application for bail on three grounds which can be summarised as follows; for convenience:

i) It is likely that the accused will abscond or there is a reasonably founded apprehension that the Applicant will avoid standing trial;
ii) It is likely that the Applicant will hamper the investigations of the police in any way; and
iii) There is a reasonable possibility that the Applicant will tamper with state witnesses.

The arguments

Both counsel filed very comprehensive Heads of Arguments.

For the Applicant *Mr. Mabila's* opening salvo was that according to the authorities bail is a means of replacing the deprivation of the liberty of an accused person **who has not yet been convicted.** A compromise is sought between the extremes of individual's rights to freedom on one hand and the interest of justice on the other. *Mr. Mabila* referred the court to ***Lawsa Vol 5 Part 2 (1st Re-issue) Para 211*** and the work by ***J. Van Der berg – "Bail (a Practitioner's guide) Chapter 1.*** He contended that in dealing with bail applications the **court leans towards liberty for the un-convicted accused rather than towards incarcerating him, even to the extent of taking a risk.**

He contended that when dealing with bail applications three main factors are taken into account:

bail and considers three main factors ...

a) The risk that the accused might not stand trial;

b) The chances that he might commit another offence before his trial; and

c) The possibility that he might interfere with the course of justice.

Mr. Mabila admirably applied the above to the facts of the present application and cited numerous cases both in South Africa and this court to support his case. The court was referred to the *dictum* by Mahomed AJ in ***S vs Acheson 1991 (2) S.A. 805 NmHC) at 822; S vs Hundson 1980 (4) S.A. 145; Liebman vs Attorney General 1950 (1) S.A. 607 (W,) S vs Fourie 1973 (1) S.A. 100 (D) Nhloko Zwane vs The King (unreported) Case No. 36/2003; Mngadi vs Attorney General 1982 – 86 (11) S.L.R. 283.***

Mr. Thwala for the Crown argued *per contra*. He argued that the High Court has no jurisdiction to entertain this application for bail until the Applicant has been committed for trial. In terms of Section 97 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 provides as follows:

> "At any period subsequent to the time of commitment the accused may make written application to the Magistrate who granted the warrant of commitment or to a Magistrate of the district in which he was committed for trial or to the Magistrate within whose district he is in custody unless bail has been refused by a Magistrate or to the High Court to be admitted to bail.
>
> Provided that if the commitment is on warrant issued by the High Court it shall only be competent to apply for bail to the High Court".

Mr. Thwala contended that it is clear that the legislature intended that bail should be considered once a person has been committed. The court's attention was drawn to the language of Section 95 of the Act which states: **"every person committed for trial or sentence..."**. It is *Mr. Thwala's* contention that the High Court of Swaziland has no inherent jurisdiction to entertain the matter in the absence of a specific legislative provision. In ***Beehari vs Attorney General of Natal 1956 (2) S.A. 598*** the court said that *"the Supreme Court does not possess inherent jurisdiction to allow bail in a case not covered by legislative enactments"*. In ***S vs Kaplan 1967 (1) S.A. 634*** Bekker J held that the court did not possess inherent jurisdiction to allow bail in a case not

covered by legislation and the application was accordingly refused. The learned Judge said:

> "In ***Beehari vs Attorney General of natal 1956 (2) S.A. 598 (N)*** the court held that the Supreme Court does not possess inherent jurisdiction to allow bail in a case not covered by legislation. I would respectfully agree with the conclusion arrived at and the reasons advanced therefore by the learned Judge. As in ***Beehari's*** case, so too on the facts presently before me there is not a stage of any proceedings taken in any court in respect of the offence of bribery".

Applying the above *dicta* it is *Mr. Thwala's* contention that in the present case too " *no proceedings have been taken in any court in respect of the offence of armed robbery".* The Applicant, so goes the argument has been arrested and is in custody and appears on remand hearings now and again and has not been asked to plead to any charge nor has he been committed for trial so that he can qualify to apply for bail. The application for bail is premature.

Mr. Thwala went further to cite the case of ***Chunilall vs Attorney General of Natal 1979 (1) S.A. 236 (d)*** where Didcott J said: and I quote:

> "The power to allow bail is a special power derived from the criminal code and can only be exercised in the circumstances thereof. The court has no inherent jurisdiction apart from any specifically conferred by legislation" (my emphasis).

In ***S vs Hlongwane 1989 (4) S.A. 79 (T)*** the court did the following:

a) The court examined the powers of the supreme court to grant bail generally, both in terms of statutory law and the common law and summarized the position as follows;

b) An accused cannot rely on any common law power of the court to release on bail except possibly if particular circumstances occur where such common law power can be exercised.

Mr. Thwala argues that the accused must allege particular circumstances why common law power must be invoked. This is similar to the South African version of

the non-bailable offences law where the accused must show special circumstances why he should be granted bail. He argued that at independence Swaziland acquired the Constitution Act No. 50 of 1968 which contained a bill of rights amongst which was a constitutional right to bail. That Constitution was abolished by the authorities and the right to bail was lost. In the present constitutional document *viz* the King's Proclamation to the Nation of 1973 there is no Bill of Rights. *Mr. Thwala* contended that in terms of the said Proclamation there is no constitutional right to bail in Swaziland which can be demanded by a suspect in a court of law. It follows therefore that there is no constitutional duty of the courts of Swaziland to recognise the right to bail because it is not there.

I must say this was a very interesting and thought provoking argument presented by *Mr. Thwala* however it remains to be seen whether it is correct. I shall traverse to this argument later on in the course of this judgment.

On the bail itself *Mr. Thwala* directed the court's attention to the case of ***S vs Bennet 1976 (3) S.A. 652 (C)*** where the following questions were posed:

a) If released on bail will the accused stand his trial?
b) Will he commit further crimes?
c) Will his release be prejudicial to the maintenance of law and order?
d) Will he interfere with state witnesses or the police investigation?

Mr. Thwala thoroughly analysed the evidence before the court in his submissions and cited a number of decided cases to support the Crown's position in this case. He cited ***S vs Price 1973 (2) PHH 92 (C)*** on the likehood of heavy sentences being imposed that the accused will be tempted to abscond (see also ***S vs Hudson 1980 (4) S.A. 145 (d) 1464***).

Mr. Thwala further submitted that in 1996 the Applicant was convicted of armed robbery and sentenced to 15 years. The court's attention was drawn to annexure "SF1" which is a record of the Applicant's previous convictions.

Annexure "SF1" (RSP 107) records that on the 14th November 1992, the Applicant was found guilty for the crime of insultive language by the Manzini Magistrate Court under Case No. 1992/3351 and he paid E20-00 as admission of guilt.

On the 6th December 1996, he was convicted by the High Court for the offences of robbery, armed robbery and sentenced for the four counts to five years each count and effectively he was to serve 15 years imprisonment. This was under Case No. 39/1996. The matter went on appeal where the Court of Appeal altered the conviction and sentence to some degree.

The final submission by *Mr. Thwala* was that the crimes with which the Applicant has been charged fall within the ambit of Decree No. 3 of 2001 and the case of **Ray Gwebu** Court of Appeal which purported to invalidate this decree is challenged because it is based on a non-existent law in that it relies solely on Section 80 (2) of the Establishment of Parliament Order of 1978 which was repealed by the Establishment of Parliament Order of 1992. *Mr Thwala* submitted that this point has been raised before Masuku J in ***Mandla Ablon Dlamini – Criminal Appeal Case No. 7 of 2002.*** Relying on Section 17 of the Court of Appeal Act No. 74 of 1954 Masuku J referred the point to the Court of Appeal for an opinion. This court is therefore requested to dismiss the application on the common law grounds advanced above or postpone the application until the Court of Appeal's opinion is received in ***Mandla Ablon Dlamini*** *(supra).*

The above are the facts and the competing submissions by counsel. I shall proceed to determine the issues under three heads, *viz* i) Section 97 (1) of the Criminal Procedure and Evidence Act (as amended); ii) Consideration of bail on the facts; and iii) whether to await an opinion in ***Re: Mandla Ablon Dlamini.*** I proceed to consider the issues *ad seriatum*; thus:

i) ***Section 97 (1) of the Criminal Procedure and Evidence Act (as amended).***

Section 97 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 reads as follows:

> "At any period subsequent to the time of commitment the accused may make written application to the Magistrate who granted the warrant of commitment or to a Magistrate of the district in which he was committed for trial or to the Magistrate within whose district he is in custody unless bail has been refused by a Magistrate or to the High Court to be admitted to bail.
>
> Provided that if the commitment is on warrant issued by the High Court it shall only be competent to apply for bail to the High Court."

Section 95 of the Penal Code reads as follows:

> "Every person committed for trial or sentence in respect of any offence except treason or murder may, in the discretion of the Magistrate, be admitted to bail".

The Respondent as it has been mentioned earlier on contends that on a proper reading of the above sections of the Act the High Court has no inherent jurisdiction to entertain the matter in the absence of a specific legislative provision. I think the general principle in relation to inherent jurisdiction is probably contained in the passage cited in the case of ***The Mayor and Aldermen of the City of London vs Cox and others, L.R. 2H.L. 239*** at page *259* namely;

> "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so: and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged".

The subject of the court's inherent jurisdiction in relation to allowing bail has been discussed in a number of cases in England. In ***R vs Spilsbury, 1898 (2) Q.B. 615*** at *620*, Lord Russell CJ, said:

> "This court has, independently of statute by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way: Does the Act of Parliament, either expressly or by necessary implication, deprive the court of that power? The law relating to that subject is well stated in ***Chitty's Criminal Law, 2nd ED*** page *97*, as follows: "The court of King's Bench, or any Judge thereof in vacation, not being restrained or affected by the statute 3 EDW. 1, C. 15, in the plenitude of that power which they enjoy at common law, may,

> in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the **only exception to their discretionary authority is, where the commitment is for a contempt, or in execution.** Thus they may bail for high treason, murder, manslaughter, forgery, felonies and offences whatever".(my emphasis)

Later, at page *622*, he said:

> "This inherent power to admit to bail is historical, and has long been exercised by the court, and if the legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment" (my emphasis).

According to Caney J in the case of ***Beehari*** *(supra)* cited by *Mr. Thwala* the particular significance of the two passages cited above lies in the second exception to the existence of the jurisdiction, namely where the case is "in execution" that is to say after conviction. It would appear from the legal authorities covering this subject that, however wide the court's jurisdiction may be to allow bail before conviction, after conviction the court has no such jurisdiction unless this is conferred by statute. After reading the cases cited by *Mr. Thwala* (see ***Beehari*** *(supra)*, ***S v Kaplan*** *(supra)*, ***Chunillall*** *(supra)* and that of ***S v Hlongwane*** *(supra)* it became apparent to me that these cases only apply to the powers of the Supreme Court to grant bail after conviction and there are therefore distinguishable from the facts of the case in *casu.*

In the present case I find that the court has jurisdiction to hear this bail application Section 97 does not at all curtail this power of the High Court. I further disagree with the submissions made by *Mr. Thwala* in ***para 4*** and ***4.1*** of his Heads of Arguments. Furthermore, the submissions made by *Mr. Thwala* overlooks the provisions of Section 105 of the Criminal Procedure and Evidence Act (as amended). The said Section reads as follows:

> **"Power of High Court to admit to bail**
> save as otherwise provided the High Court may, at any stage of any proceedings taken in any court or before any Magistrate in respect of any offence, admit the accused to bail, whether such offence is or is not one of the offences specifically excepted in Section 95".

Having found that the High Court does have jurisdiction to entertain this application I now endeavour to establish whether the Applicant is entitled to bail.

ii) **Consideration of bail on the facts.**

I have considered the submissions made for and against this application. The important questions that the court must address in an application for bail were crisply enunciated in the case of ***S vs Bennet 1976 (3) S.A. 652 (C)*** as follows:

a) If released on bail will the accused stand his trial?
b) Will he commit further crimes?
c) Will his release be prejudicial to the maintenance of law and order?
d) Will he interfere with state witnesses or the police investigations?

From the facts presented before me it would appear that the Applicant in *casu* would fall under b) *viz* will he commit further crimes? In ***S vs Patel 1970 (3) S.A. 565 (W)*** it was said that bail can properly be refused if it is shown that an accused has a propensity to commit the crime with which he is charged if it is shown that he might continue to perpetrate such crime if released on bail.

In the present case the Applicant in 1996 was sentenced to 15 years in jail for a conviction on three (3) counts of armed robbery. Ten years has not elapsed for this previous conviction to be disregarded.

The Applicant is likely to commit further crimes if released on bail. Furthermore there is evidence of the police officer that investigations are still continuing in this case

It is my considered view that on this ground alone it would be too risky to release the Applicant on bail and would therefore refuse him bail on the facts presented before me.

In view of the conclusions I have just reached I find it unnecessary to determine the third issue raised.

In the result, the application for bail is refused.

S.B. MAPHALALA
JUDGE