THE HIGH COURT OF SWAZILAND

WAYNE KQASI Vs

REX

Criminal Case No. 127/04

Coram	S.B. MAPHALALA - J
For the Applicant	MR. S. MNGOMEZULU
For the Respondent	MR. DLAMINI

RULING

(15/10/2004)

Before court is an application for bail brought under a Certificate of Urgency. The Applicant is a juvenile of 16years charged with rape allegedly committed on or about the 25th September 2004, at or near Magevini in Matsapha. He is presently awaiting trial and is held at the Zakhele Remand Centre in Manzini.

The Applicant avers in his founding affidavit that on the 30th September 2004, his parents instructed attorneys from Sibusiso B. Shongwe & Associates to move an application before the Matsapha Circuit Court for his release to the custody of his father one David Kgasi with whom he resides. The Matsapha Circuit Court refused the aforesaid application and ordered that he should move a bail application at the High Court.

The Applicant avers further at paragraph 9.1 of his founding affidavit that the matter is urgent by virtue of the fact that deprivation of liberty is urgent by its nature. At paragraph 9.2 that he is being prejudiced by his continued detention in custody in that he cannot attend classes at school and that he is not allowed to study yet final examinations are around the corner.

He avers further at paragraph 9.3 that he cannot be afforded substantial relief in due course and that he has no alternative remedy save to seek the order before this court.

The Crown has not filed any opposing papers in this case. However, it was submitted from the bar on behalf of the Crown that bail is not opposed *per se* and that whatever amount is fixed by the court should be in line with the provisions of the recent amendment to the Criminal Procedure and Evidence Act, more particularly Section 95 (3) and (4) of the said amendment. The Sections reads as follows:

(3)   **Subject to the provisions of this Act, the High Court shai!, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E15, 000-00 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.**

(4)   **Where the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15, 000-00, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount.**

The Crown somewhat conceded in argument that in *casu* there are substantial and compelling circumstances as referred to in subsection (4) cited above but that whatever lesser amount the court arrives at should take into consideration the provisions of sub-section 3 cited above.

Mr. Mngomezulu for the Applicant argued that in the circumstances of this case the Applicant ought to be released in the custody of his father who is in *loco parentis.* That the Applicant is a 16years old minor who is still in the care of his parents and that it has not been shown that if given bail he will not stand trial. *Mr. Dlamini* for

the Crown however, opposed this application that Applicant be released to the custody of his father.

I have considered the facts of this matter and the arguments advanced for and against the application. It is common cause that in the present case there exist substantial and compelling circumstances to justify that the amount of bail be fixed in an amount less than El5, 000-00.

It is my considered view that an amount of El,000-00 as bail would be appropriate in the circumstances of this case.

In the result, bail is fixed at El,000-00 and the Applicant is to abide by whatever conditions to be imposed by the Crown.

S.B. MAPHALALA
JUDGE