IN THE HIGH COURT OF ESWATINI

CASE NO. 465/2022

In the matter between:

SICELO GADLELA **APPLICANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

NEUTRAL CITATION: **Sicelo Gadlela and The Director of Public Prosecutions (**465/2022) [2022] SZHC - 267 13/11/2022)

CORUM: BW MAGAGULA J

HEARD: 18/10/2022

DELIVERED: 28/11/2022

Summary: ***Criminal Law and Procedure – Bail – on the ground that Applicant has to attend to his sick mother who is diabetic and also that he has a child – Applicant argues***

that his ailment can only be attended to by a traditional healer – no proof-

Held: The requirements of Section 96 (12) (a) of The Criminal Procedure and Evidence Act 67/1938 as amended not satisfied – The exceptional circumstances not even pleaded in the founding affidavit as required in terms Section 96 (a) of the Act – Section 16 (7) of the constitution considered – both legislation make bail a discretional remedy – the Applicant has failed to demonstrate that exceptional circumstances exists in this matter - Appeal dismissed.

JUDGMENT

Introduction

[1] The Applicant is a Swazi adult male of Kwaluseni in the District of Manzini. He stands charged with contravening Section 3 (1), 3 (2) as read together with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act 15/2018. This legislation will herein after be referred to as the SODV Act.

[2] The Applicant is alleged that on or during the month of March 2020 to September 2021, at or near Kwaluseni area in the Manzini District, Applicant did wrongfully and unlawfully have sexual intercourse with a minor one Zama Mtsetfwa, who was 15 years at the time without her consent and he did contravene Section 3 (1), 3 (2), 3 (3) (c) as read with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act 15/2018.

[3] The charge sheet further reflects that the rape is accompanied by aggravating factors as stated in Section 185 *bis* of the Criminal Procedure and Evidence Act 67/1938.

[4] The detail of the multiple rape encounters is elucidated in the answering affidavit of the Principal Investigator. One of the incidents of the rape allegedly happened at the Accused' sister's rented room; it is alleged the Applicant induced the Complainant's submission by producing a knife and subsequently raped her. He is also alleged to have drugged her by making her drink a certain substance known as indayela. During that period of intoxication the Applicant is alleged to have had sexual intercourse with her.

Applicant's grounds for bail

[5] In his founding affidavit the Applicant has submitted that he is innocent of the charges leveled against him. He says he has never at any

point in time committed the offence of rape. In that regard he has openly told the court that he will not plead guilty to the charges that have been preferred against him[1].

[6] The Applicant further states that he resides at Mbhuleni with his diabetic mother and his younger sister. He therefore has no intention of changing his residence. He has also stated that he has a 6 months old baby boy, who solely depends upon him for maintenance and upbringing.

[7] I hasten to note that in as much as the Applicant has stated that he has a 6 months old baby boy, he has not stated where is the mother who would ordinarily be hands on for the nurturing and upbringing of the baby in light of the apparent tender age.

[8] The Applicant also states in his application that he is self-employed and he is the breadwinner in his family. As such, his continued incarceration is causing prejudice to his family, as there is no one to take care of his child's needs. There is no one to protect his family from other prejudicial situations.

[9] The Applicant has further assured this court that he is willing to adhere to all bail conditions that can be set. The Applicant has also took not to interfere with any state witnesses and or to interfere with further investigations if it is still continuing.

[1] See paragraph 6.1 of the Applicant's founding affidavit.

[10] The Applicant also acknowledges that he does not know the potential Crown witnesses. But all the same he undertakes that should they be disclosed to him, he will not interfere with them.

[11] It appears the Applicant is making a meal of the charges that he is facing. He states in paragraph 13 of his founding affidavit that the gravity of the charges leveled against him do not induce a sense of shock. He believes in his innocence. He alleges that he will not abscond trial. The reason why I say he trivializes the charges because when I considered the charges the Applicant is facing a possible sentence that maybe passed on someone convicted of such a charge is quit stiff. It can go up to 20 years.

[12] The Crown has opposed the bail application through the answering affidavit of 8546 Detective Constable Sibusiso Mamba. The following are the grounds for opposition:-

12.1 Applicant has not attached anything to prove that his mother is diabetic and that she solely depends on him for financial support;

12.2 It is being put in dispute that the Applicant actually financially supports the 6 months old child. Infact the Crown has submitted that the 6 months old child, was actually born by the victim and is a result of the rape committed against the Complainant an offence which the Applicant is currently facing.

12.3 The Crown insists that investigations have revealed that the Applicant frequents the Republic of South Africa, through informal crossings.

12.4 The Crown further proclaims that on several occasions when the police were looking for the Accused at his home, he could not be found. Hence, there was a delay in bringing him into justice.

12.5 It is further avowed on behalf of the Director of Public Prosecutions, that the Applicant's argument that he needs to be with his family does not hold water. His family is used to not having him around, as he is scarce. There will be no prejudice that will be suffered by his family if he remains in custody pending his trial.

12.6 There is also this argument that there is likelihood that Applicant will not abide by the bail conditions that the court may grant. He has previously failed to surrender himself to the police in Matsapha when he was called to do so. Infact he avoided arrest since December 2021 up until he was arrested on the 08th September 2022.

12.7 The times when the police would come to look for him at his homestead, they could not locate him. The police would leave a message to his family that he

should surrender himself, but he did not do so. Therefore, the Applicant is a flight risk. Releasing him on bail when his case has already began will frustrate the process of the trial and prejudice the interest of justice.

12.8 The Applicant may interfere with most of the crucial witnesses in the matter. It is argued that by his own admission that he has a minor child. This minor child's mother, is the Complainant and she is a potential witness.

12.9 The Crown further expostulate that the Applicant will interfere with other potential witness especially his sister who is implicated because she is the one that used to lure the victim to her brothers' claws under false pretenses.

12.10 The argument is therefore that if he is released, it will be easy for him to manipulate the sister as he has free access to her. The Crown submits that there is no effective means to prevent such an interference.

12.11 The Applicant is facing a very serious offence which on conviction may attract a lengthy custodial sentence, and this may induce him to flee. The Crown further submits that Section 96 (4) (b) as read with Section 96 (6) (a- j) of the Criminal

Procedure and Evidence Act 67/1938 as amended permits this court to refuse an Accused bail where there is a likelihood that the Accused may evade trial.

[13] On the issue of the ailment which the Applicant alleges he suffers from and can only be attended to by a traditional healer. The Crown submits that to be treated by a traditional healer is the choice of the Applicant. Otherwise, he may get medical attention from the Correctional Centre. The Crown also argues that the Applicant has failed to annex any document from the Correctional Health Centre facility to prove that he suffers from an exceptional ailment.

[14] The Crown therefore contends that the Applicant has failed to adduce evidence of exceptional circumstances as required under Section 96 (12) (a) of the Criminal Procedure and Evidence Act as amended, despite that he is facing a schedule five offence. The Crown also asserts that asthma is a manageable ailment which could be managed whilst the Applicant is incarcerated at the Correctional Center. There is nothing exceptional about the disease.

The Law

[15] Section 96 (12) (a) of the Criminal Procedure and Evidence Act of 1967 regulates bail applications in respect of offences listed in the fifth schedule. It provides the following;

> ***"96. (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 given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permits 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.***

[16] To have one comprehensive definition of what exceptional circumstances are, is elusive. Although the courts have made an attempt to describe or define what may constitutes exceptional circumstances. Those attempts are in no way comprehensive and

it cannot be said it constitutes a comprehensive definition of what exceptional circumstances are.

[17] In the matter of **Senzo Menzi Motsa Vs Rex**[2]**, Magid AJA** stated as follows at paragraph 11;

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

[18] In the matter of **S Vs Jonas 1998 (2) SA SACR 667 (South Eastern Cape Local Division) His Lordship Horn JA** also took a short and opined on the term of exceptional circumstances he stated the following at page 66 (178) of this judgment:

> ***"The term exceptional circumstances is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the Accused's absence is one that brings to mind. A terminal illness maybe another. It will be futile to provide a list of possibilities which will constitute such exceptional circumstances. To my mind to incarcerate in innocent person for an offence which he did not commit could***

[2] Appeal Case No 15/2009

also be viewed as an exceptional circumstances. Where a man is charged with a commission of a schedule sixth offence when everything point to the fact that he could not have committed the offence because, e.g. he has a cast -iron – alibi, this would likewise constitutes an exceptional circumstances".

[19] It must be mentioned that the above comments were in relation to a schedule six offence in the South African context, which is worded similarly to our schedule five.

[20] Section 96 (12) (a) of the CP&E Act makes it clear that an application for bail in respect of a schedule five offence bears a formal onus to satisfy to the court that exceptional circumstances exists, which in the interest of justice permit his release. The Applicant discharges this onus by adducing the requisite evidence, failing which his detention in custody continues pending finalization of a trial.

[21] Admittedly, the onus has to be discharged on a balance of probabilities[3]. It is common cause that rape is one of the offences that are listed in the fifth schedule. The Accused before court faces rape. In the matter of **Wonder Dlamini & another Vs Rex Criminal Appeal Case No. 01/2013** the court stated that the offences listed in the fifth schedule consists of serious

[3] See paragraph 8 of the Supreme Court decision in Wonder Dlamini & another Vs Rex Criminal Appeal Case No. 01/2013

and violent offences, which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of such offences most stringent and difficult to obtain. By placing the onus on the Accused to adduce the evidence showing the existence of exceptional circumstances, the legislation seeks to protect law abiding citizens against the upsurge in violent criminal activity.

[22] The legislation does not deprive the courts of their discretion in determining bail applications in respect of the fifth schedule offences. But it requires evidence to be adduced showing the existence of exceptional circumstances.

[23] It further places the onus of proof upon the Applicant. Parliament enacted Section 96 (12) (a) in order to deter and control serious and violent crimes as well as to limit the right of Accused persons to bail in the interest of justice.

[24] A bail hearing is an interlocutory and inherently urgent and unique judicial function. See S v Dlamini, SV Dladla and others, S v Joubert, S v Schietekat 1999 (4) SA 623 (cc) at para 11.

Adjudication

[25] I now discern to analyze and consider whether the Applicant's application contains exceptional circumstances which can persuade the court to judiciously exercise a discretion towards the granting of the Applicant's bail application.

[26] The Applicant propounds that he has a rare medical condition, which makes his private parts in particular, his testicles to swell and become painful. He has stated in his affidavit that this disease can only be curbed by a traditional healer.

[27] The Applicant has not disclosed to the court on what basis does he come to the conclusion that the disease can only be repressed by traditional healer. Infact, there is no medical evidence that he suffers from this disease in the first place. This makes it difficult for the court to actually separate the Accused from any other general allegation that could be made by any incarcerated person in order to escape the incarceration.

[28] In light of the evidential material that is before court, it appears that the choice of using a traditional healer is the election of the Applicant. Otherwise, there is nothing cogent that has been placed before court to show that the Applicant cannot get medical attention for his ailment from the Correctional Center. As I have stated, he has also failed to annex any document that demonstrate that his ailment is exceptional and can only be treated by a traditional healer.

[29] It is therefore my finding that the insistence to use a traditional healer is nothing out of the ordinary to meet the test exceptional circumstances.

[30] One of the reasons the Applicant has advanced to court as basis that he must be granted bail is that he has a 6 month old child who is solely dependent on him for support. The Applicant deals with this argument in an interesting manner. Especially when one considers the version that was subsequently advanced by the Respondents in the answering affidavit.

[31] In his founding affidavit he not disclose to the court who the mother of the 6 month baby is. Looking at the manner in which he has avoided the detail that subsequently came in the answering affidavit, it is indicative of stealth. He was intentionally evasive in providing the detail in his founding affidavit. He deliberately omitted to disclose to the court that this child that he is using as a basis to granted bail is the same one that he fathered with the Complainant as a result of the rape he is charged with.

[32] The Respondent deals with the issue of the child in paragraph 6 of the answering affidavit. The police officer states it in no uncertain terms that the Applicant does not support the 6 month old child born by the victim through the rape. The minor is taken care of by the victim's father.

[33] In his replying affidavit, where he should have seized the opportunity to refute such allegations deal with the issue decisively and comprehensively in a pointed manner. The Applicant elected to state the following in paragraph 12;-

> *The allegations by the Respondent is purely hearsay, in that I work at Pigg's Peak and only go to Mbhuleni only on weekends to visit my single parent mom. I further state that I was once told of an incident where at the Complainant's father in an attempt to report as per our custom the pregnancy of the Complainant, went to Gundvwini her parental homestead, whereat he was told I do not reside at Gundvwini.*

[34] He did not address at all, the pertinent facts being that he does not support the 6 months minor child, and also that this minor child is the same one that was born by the victim through the rape that she subjected the Complainant to.

[35] These facts are very pertinent, as they place the fathering of the child at the door step of the Applicant. It has not been denied that when the victim fell pregnant, she was 15 years old. Which is below the threshold age where she could consent to sexual intercourse. Secondly, the SODV Act, criminalizes sexual intercourse with a minor that is below the age of 16 years old. Therefore, the Applicant could not have fathered the child through consensual sex, which he now wants to use as basis to be granted bail. Hence, he chose not to disclose who the mother of the child is.

[36] This then talks to the Applicant's vehement denial of the charge that is leveled against him. He had the opportunity to persuade the court and demonstrate that he is so removed to the offence that he may be innocent and may not have committed the offence. Innocence has previously been considered by the court as an exceptional circumstance[4]. Also, taking leaf from one of the examples that was made as constituting exceptional circumstances in the matter of **S Vs Jonas** (supra) the Applicant could have grasped this opportunity and demonstrated may be,

[4] The learned Judge Horn JA in the matter of S Vs Jonas (9) 198 (2) SA) SACR 667 at para 678 as of what may constitute exceptional circumstances stated that to incarcerate an innocent person for an offence that he did not commit could also be viewed as an exceptional circumstances. He further stated that when everything point to the fact that he could not commit the offence, because for an example he has a cast iron *alibi* this would likewise constitute an exceptional circumstances.

through an *alibi* that he could have not committed the offence that he has been charged with.

[37] The Crown in its' answering affidavit pointedly submitted that the Applicant's sister was instrumental in luring the victim to her house so that the Applicant could take advantage of her. The court has not been told by the Applicant why he could not get the sister to file an affidavit disassociating herself from these allegations. Further, probably the Applicant never had sexual intercourse with the Complainant in her room. That would have provided substance to the denial.

[38] Instead, when addressing the issue involving her sister the Applicant simply vehemently denied it and put the Respondent to strict proof thereof. Yet in terms of the law, he is the one that should demonstrate the existence of exceptional circumstances especially since he is charged with a fifth schedule offence.

[39] In his replying affidavit, Applicant highlights that her sister stays with her husband, one Ncamiso Ngwenya in a rented flat at Mbhuleni. This is the same compound where the Complainant and her family also resides. That is exactly the disquieting issue. The homestead or compound where the Complainant is residing is the same one that the Applicants' sister lives. It is the same room where the victim was lured into. It is exactly where she nicodemusly left her with the Applicant under the guise that she was going to the toilet. It is exactly where the Applicant allegedly subsequently raped her. The replying affidavit presented an opportunity for the sister to controvert these allegations, through a supporting affidavit. It was not done. Applicant simply made a bare denial. It is trite that a bare denial is as good as no denial at all. Failure to deal with the Respondents allegations through a reply amounts to an admission. [5]

[40] The evidence before court shows that the Applicant's sister, and the Complainants' father, reside in the same compound of rented flats. The Applicant is a regular visitor to the sister. In so far as the interference with potential witnesses issue is concerned, it is likely that if the Applicant is released on bail, he is likely to interfere with the Complainant. Nothing has been put forward by

[5] See the judgment of Fakudze J at para 10.3 in the matter of Rose Neta Shabangu Vs Abednego Shabangu & 2 others High Court Case No. 1419/2013

the Applicant to show how he intends to ensure that the proximity to this witness, is mitigated. He has not even made an undertaking that he will not visit his sister in the compound where the Complainant resides, where she may see him. Even if he would not actively interfere with her, his mere presence and sight in her space would be prejudicial. That can play itself out in two possible of ways. First, the mere fact that the Accused can be in her vicinity, may have a psychological effect on her. Considering the alleged ordeal that she went through the hands of the Applicant.

[41] The Crown has submitted that it does not have effective means to prevent the interference from the Applicant, even a court order maybe ineffective. I am persuaded by this submission by the Crown. On a balance of probabilities, it is the courts' view, that the Applicant may interfere with most of the crucial witnesses if he can be released on bail.

[42] As much as the Applicant in his affidavit, is down playing the seriousness of the offence. On conviction, an offence in terms of Section 96 (4) (b) read with Section 96 (d) (6) a – j of the CP&E Act, carries a lengthy jail term. This may induce him to flee. More especially because the court has been told that he is someone who frequents South Africa using informal crossings.

It is therefore my view that the interest of justice will not be served under the circumstances. There is real likelihood that the Accused may evade trial.

Conclusion

[43] I am very much alive to the dicta by His Lordship MCB Maphalala CJ in the case of **Sibusiso Sibonginkosi Shongwe Vs Rex**[6] where the court stated the following;

> ***"[19] It is trite that bail is a discretional remedy; however, the court is required to exercise that discretion judiciously having regard to legislative provisions applicable, the peculiar circumstances of the case as well as the bill of rights set out in the constitution. The purpose of bail in every constitutional democracy is to protect and advance the liberty of the Accused person to the extent that the interest of justice are not thereby prejudiced. The protection of the right of liberty is premised on the fundamental principle that an Accused is presumed to be innocent until his guilt has been established in court".***

[44] Over and above the aforegoing reasons which are the basis of the court's decision, I have also taken into consideration that the

[6] Criminal Appeal Case No. 26/2015

interest of justice ought to be protected in all bail proceedings. I am also cognizant that the interest of justice demands of courts to intervene and take new paths and create innovative measures in upholding and protecting the rights of Accused persons, in the interests of justice, where antique laws fail to reach out.[7] I have considered that the need to consult a traditional healer may not only be an innovative ground to be granted bail, but can be a right if the Accused verily believe that his ailment will be cured by the traditional healer. The problem though is that, what evidential material do I have to firstly know as a fact that the Applicant is ill and he suffers from this rare ailment. Secondly, how do I know that the only remedy is through a traditional healer? Especially when medical help is available at the Correctional Services Department.

[45] Generally as it was observed by His Lordship MCB Maphalala CJ in the case of **Director of Public Prosecution Vs Bhekokwakhe Meshack Dlamini and 2 others, Criminal Appeal Case No. 31/2015** where he stated the following;

> *"The interest of justice sought to be protected in bail proceedings are two fold; firstly the Accused should attend trial and not abscond or evade trial. Secondly, that Accused does not undermine the proper function of the criminal justice system including, but not limited to interfering with the evidence of the Prosecution as well as*

[7] See Mafe v S (A49/22) [2022] ZAWCHC 108 (31 May 2022) at para 61

undermining the safety of the public. The Accused bears the onus to establish on a balance of probabilities that it is the interest of justice that he should be released on bail. Where the Accused is charged with an offence listed in the fifth schedule of the CP&E Act, the Accused should in addition adduce evidence which satisfy court that exceptional circumstances exists which in the interest of justice permit his release".

[46] In the matter before me, the Applicant has not been able to demonstrate that exceptional circumstances exists, which are to the satisfaction of the court, that justify his release.

Order

1) In the circumstances the Applicant's application is dismissed.

2) Bail is refused.

B.W. MAGAGULA

JUDGE OF THE HIGH COURT

For Applicant: M. Ndlangamandla MLK Ndlangamandla Attorneys

For Crown: Lomkhosi Dlamini – DPP’s Chambers