

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 339/2023

In the matter between:

SIBUSISO KHUMALO

APPLICANT

And

THE KING

RESPONDENT

**NEUTRAL CITATION: SIBUSISO KHUMALO V THE KING
(339/2023) SZHC – 366 (13/12/2023)**

CORAM:

BW MAGAGULA J

HEARD:

24/10/2023

DELIVERED:

13/12/2023

SUMMARY:

Criminal Law and Procedure – Bail - Section 95 and Section 96 of The Criminal Procedure and Evidence Act 67/1938 (as amended considered – Exceptional circumstances (point in limine taken) - Test for exceptional circumstances revisited - Section 96 of the CP&E places a burden or an onus on an Accused person to satisfy the court by way of evidence and on a balance of probabilities that exceptional circumstances exist which permits his release on bail. What places the charge that the Applicant has been charged with under the fifth schedule is robbery using a firearm. It is common cause that there was no firearm that was found by the police with the Applicant. There is also no affidavit from any of the complainants stating that there are submission when they were robbed was induced through the use of a firearm. The Applicant is a civil servant. He has been in custody now close to 5 (five) months. His continued incarceration risks his employment. In my view this fits as exceptional circumstances in this case. Especially when the rights of the Accused in respect of liberty are balanced with the risk of undermining the proper functioning of the criminal justice system.

HELD:

Point in limine must fail; the Applicant has demonstrated exceptional circumstances – Bail granted.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] The Applicant, Sibusiso Khumalo of Motshane seeks to be admitted to bail upon such terms and conditions as this court may deem fit. A close scrutiny of the charges, reflect that he is charged with his name sake Sibusiso Mvubu. It is not immediately clear on the papers before court, whether the Applicant's co-accused has already been granted bail or is not seeking one. Whatever the case maybe, that issue is not relevant for the determination of the Applicant's application. It is the Applicant that is before court for now.
- [2] The Applicant is facing five counts of robbery. All of them committed between May and July 2023.
- [3] The Application is opposed by the crown. An affidavit deposed to by 7106 Detective Constable Velile Matsenjwa has been filed. The crown argues that the Applicant has failed to adduce evidence of exceptional circumstances as required by Section 96 (12) (a) of the CP&E 67/1938 as amended. The argument is premised on the nature of the charges that the Applicant is facing. They are listed under the fifth schedule offences. They constitute Robbery using a firearm. In such circumstances, an Applicant must adduce evidence of exceptional circumstances, before he can be considered for bail.

Has the Applicant Adduced Evidence of Exceptional Circumstances?

- [4] The answer to the above question can only be ascertainable from the founding affidavit of the Applicant. The court will now discern to consider same.

[5] The Applicant deals with the requirement of exceptional circumstances from paragraphs 12.1 – 12.2 of his founding affidavit in the following manner:-

- 5.1 *The charge before court is that I committed the offence of robbery using a fire-arm. The said fire-arm has not been described nor has any fire-arm been found in my possession and as such the charge of armed robbery cannot stand thus calling upon me to establish the existence of exceptional circumstances.*
- 5.2 *The lack of evidence against me should be a factor that the above Honourable Court should consider when deciding on the issue of exceptional circumstances. I am advised and verily believe that to keep an innocent man in custody for a prolonged period of time only for him to be acquitted at trial is an injustice.*
- 5.3 *I submit that this matter is urgent and I cannot be afforded substantial redress at a hearing in due course in view of the provisions of the Constitution Act 2005 in particular Section 16 (7) read together with 21 (1) which clearly demonstrate that matters pertaining to deprivation of personal liberties are urgent.*
- 5.4 *Further, I am employed by the Eswatini Government as a driver and if my incarceration continues, I stand to lose my employment. I am married and have two (2) minor children aged seven (7) years and two (2) years respectively. The eldest*

child is school going and depends on me for support and maintenance as my wife is unemployed.

5.5 *Moreover, I am advised that the police have completed their investigations in the matter and therefore my release on bail will not cause the Crown any prejudice.*

5.6 *In any event even in terms of the Common Law such matters are by their very nature urgent and I submit that I cannot be afforded substantial redress at a hearing in due course and particularly because there is no prejudice to be suffered by the Crown if the matter is dealt with on an urgent basis.*

[6] What stands out from the founding affidavit of the Applicant as exceptional circumstances, is that there is lack of evidence supporting the charge he is alleged to have committed. What constitutes exceptional circumstances in law? In the matter of **Lucky Matsenjwa vs Rex**¹, the court cited the case of **Senzo Motsa v Rex**² where the position was stated as follows:-

“In my judgment, the word exceptional in relation to bail must mean something more than merely “unusual” but less rather unique which means in effect “one of a kind”.

¹ Supreme Court Case 13/2017

² Supreme Court Case 15/2009

- [7] The above definition of exceptional circumstances, triggers the following question, is the allegation of lack of evidence against the Applicant “one of a kind”? Actually at this stage of the matter, evidence in support of the commission of the crime should be an issue, it will only unfold during the trial. Hence every Accused is presumed innocent. It is the legislation that imposes a higher *onus* upon an Accused charged (my own emphasis) with an offence referred to in the fifth schedule. Having said so, in the case of **Selby Musa Tfwala v Rex**³ His Lordship MCB Maphalala J (as he then was) citing with approval the case of *S v Jonas* stated the following;

“...to incarcerate on innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance”.

- [8] By no means does the court say the Applicant is innocent of the charges that he is facing. Especially taking into consideration that he has not yet been tried. However, at this stage the court can only look at the summary of evidence or what has been placed by the crown constituting the charge. What is glaring though, which the court cannot overlook, is that the crown concedes that the firearm which was allegedly used in committing the robbery was not found in the possession of the Applicant or at all. In the answering affidavit the Respondent suggest an explanation for this, which is that it may have been disposed off by the Applicant as soon as the offences were committed. A lot of questions are triggered by this assertion by the crown. First, if the investigation officer knows that the firearm was disposed off, he must have

³ Criminal Case No. 383/2012 [2013] SZHC 146

been told or he established it somehow. Hence he should have taken the court to his confidence as to how and when was the firearm disposed off. Unfortunately that detail has not been placed before court. If the police officer has this information, could he have not provided depth of regarding the description of the firearm at least. Also, the manner of disposing off, was it thrown into a dam perhaps? To the extent that it is impossible to retrieve it. Was it destroyed beyond recognition? What constitutes disposing off exactly?

- [9] It the crown has accepted that it will proceed to trial and prosecute the Applicant for armed robbery without the exhibit of the alleged firearm, how does that affect the strength of the case? Are there chances of conviction on the charge as it stands? In such circumstances should the Applicant languish in jail until the date of trial where the crown may realize that there is insufficient evidence to warrant a conviction for robbery using a firearm? All the above questions are vexing. The court accepts that at this stage preemption of what will happen during trial must be limited. However, the use of a firearm on the charge that the Applicant currently faces, is what has categorized it as a fifth schedule offence. Hence it's suitability as such, cannot be insulated from evaluation and scrutiny. Especially where the Applicant is expected to demonstrate the exceptional circumstances as a prerequisite for bail.

- [10] In the circumstances, the court finds that the answering affidavit of the crown has not dispelled the Applicant's assertion that there is a lack of evidence against him because the alleged firearm has neither been described by the crown nor was it found in his possession. There is also no confirmatory

affidavit from any of the victims to confirm that indeed their submission was induced by a firearm.

- [11] There is no definitive or exhaustive list of what constitutes 'exceptional circumstances' in the context of **Section 96 (12) (a) of The CP&E**. Each case has to be dealt with according to its merits. Exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in subsection 60 (4) – (9) of the CPA. In fact, ordinary circumstances, present to an exceptional degree may lead to a finding that the release on bail is justified. (See **S v Rudolph 2010 (1) SACR 262 (SCA) para 9**. On the meaning and interpretation of exceptional circumstances in terms of Section 60 (11) (a) of the CPA, which is the South African equivalent of the CP&E Van Zyl J noted in **S v Petersen 2008 (2) SACR 355 (C) para 55**, that there have been 'wide –ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept.' The learned justice observed that generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. He was of the view that there are "varying degrees of exceptionality" and that this depends on the context and the particular circumstance of the case under consideration.

- [12] In the matter of **S vs Bruintjies 2003 (2) SA CR 575 (SCA) Shongwe AJA** give the following explosion on what is meant by exceptional circumstances.

'What is required is that the court consider all relevant factors and determine the whether individually or cumulatively the case warrants a finding that circumstances of an exceptional nature

exists, which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save that the legislature clearly had in mind circumstances which remove the Applicant from the ordinary run and which save at least to mitigation the serious limitation of freedom, which the legislature has attached to the commission of a schedule six offence."

[13] It is worth remarking that the schedule six offence that is required in the **South African Criminal Procedure and Evidence Act**, is similar to our schedule five. So, the context of the sentiments is still the same and applicable to our situation. In the matter at hand, the Applicant has placed facts, where he has stated that he is employed by Government of the Kingdom of Eswatini. He has also punched holes on the charges as he denies that he committed the offence of robbery using a firearm. The crown has not rebutted his accession that the alleged firearm has not been described nor has it been found in his possession. As such, the Applicant argues that the charge of armed robbery cannot stand.

[14] In my view, the Applicant has a point. If the circumstances of this case even at this stage give an impression that the crown's case at least on the charge crafted in the manner as it is, appears unsuited to secure a conviction. That increases his chances of acquittal at trial. I also agree that the *prima facie* lack of evidence against an incarcerated Accused, should be a factor that a court

should consider when on the issue of exceptional circumstances⁴ is evaluated. It is undesirable that to insist on keeping Accused in custody whom at the face of it appears to have a stronger defence than the case of the crown for a prolonged period of time. Only for him to eventually be acquitted at trial. This to me appears to be an injustice. The court accepts that the Applicant is not at trial yet, hence there is insufficient material to gauge his guilt or innocence. However, it is worth considering that the Applicant has flagged specific issues and it appears that the crown has struggled to deal with them convincingly. Having said so, I hold the view that the innocence or guilt of the Applicant is an issue which should be left for the trial court to determine. What this court must consider, is whether the reasons that have been adduced by the Applicant could be considered as exceptional circumstances warranting the consideration of bail in his favour. Without the risk of tautology, I have already alluded to the fact that the Applicant is a Civil Servant employed by the Government. It is highly unlikely that he may abscond trial and leave his employment benefits. Further, his continued incarceration has a real likelihood that he may lose his employment, when in terms of the constitution at this stage he must still be presumed innocent as he has not been tried yet. See: **Sibusiso Nelisa Hlatshwako vs The King Criminal Case No. 133/2018; Mashumi Shongwe vs The King Case No. 230/2023 SZHC 128.**

[15] The court accepts the submission that has been made on behalf of the Accused person, that in view of the provisions of the **Constitution Act of 2005** in

⁴ In this regard reference is made to the case of **Sabelo Dalton Ndlangamandla vs The King Criminal Case No. 15/2003** (unreported), where Masuku J (as he then was) stated that the crown must place evidence which indicates that the prospects of conviction are overwhelming and which precipitate the accused to extract his bail...

particular **Section 16 (7)** read together with **Section 21 (1)** which clearly demonstrate that matters pertaining to deprivation of personal liberties are urgent. It is the court's view, that the Accused person cannot be kept in custody pending his trial as a form of anticipatory punishment⁵.

[16] In **S v Acheson 1991 (2) SA 805 (NMHC)** at 821 F- H the court said;

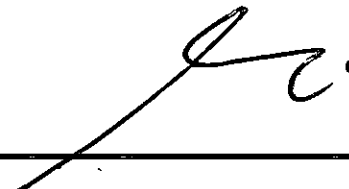
"The presumption of the law is that he is innocent until his guilt is established in court. The court will therefore ordinarily grant bail to an Accused person unless this is likely to prejudice the ends of justice."

[17] It is therefore, my consideration that once an Accused in a situation as the Applicant, where the offence that he is charged with falls under the fifth schedule has demonstrated that there are exceptional circumstances that exist. Then the court will ordinarily grant bail in his favour, unless doing so is likely to prejudice the ends of justice. The interest of justice pertaining to the grant or refusal of bail, therefore focuses primarily on securing the attendance of the Accused at trial and/ or preventing the Accused from interfering with investigation and prosecution of the case.

[18] Due to the foregoing reasons, it is my considered view that the Applicant has been able to demonstrate exceptional circumstances warranting that he be admitted to bail. The court in exercising its discretion, will lean in favour of

⁵ See *Mafe v S* (a) 49 [22] at page 121

protection the Applicant's constitutional right to liberty, as at this stage he is presumed to be innocent until his guilt has been established at trial. It is against this background, that this court will dismiss the crown's point of law and grant the Applicant's application to be admitted to bail. The matter is postponed to the 14th December 2023, to enable both Counsel for the parties to confer on a suitable amount and conditions. Failing which, the court will determine the amount and the conditions upon which the Applicant will be admitted to bail.



BW MAGAGULA J
HIGH COURT OF ESWATINI

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