THE HIGH COURT OF SWAZILAND

Crim. Case No.64/03

In the matter between:

REX

Vs

JOSEPH MGUNGU QWABE

CORAM	**MASUKUJ.**
For the Crown For the Accused	**Mr N.M. Maseko Mr S.C. Simelane**

JUDGEMENT
8th April 2004

Sir, Frank Kitto, in his article, reported in the Australian Law Journal, Vol.66 (1992) entitled, "Why Write Judgements?", said the following:-

> *"Publicity in the soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, on trial".*

This case is, from the background given below, simple and straightforward in terms of the facts and the law applicable, such that it would otherwise have been unnecessary to write a reasoned judgement. The attitude of the Directorate of Public Prosecutions in this matter, and to which I will make reference to later, has necessitated that this judgement be written and delivered, in order to dispel any aspersions* that may be cast regarding the relief sought and eventually granted.

Background

The accused, an eighty-year-old man stands before me charged with the crime of murder, it being alleged that he wrongfully and intentionally killed one Solomon Mhlanga, at Mbhuleni on the 18th October, 2002.

It became unnecessary for the accused to plead because it became evident that the accused is in a very bad state of health. I observed, when I entered Court that contrary to established custom, he failed to stand up. Mr Simelane, who represents the accused expressed his apprehensions regarding the trial proceeding because in his view, formed from previous consultations that the accused on account of his health would be unable to follow the proceedings. He further informed the Court that the accused had grave difficulty talking, was unable to stand unassisted and this his bowels were seriously malfunctioning.

A testimony to this state of affairs was that the accused had a chaperon, in one of the inmates, who attended to him continuously, supporting him and rendering all the necessary assistance. A warder from the Mbabane Correctional Institution, at the invitation of the Court also confirmed that the accused is seriously ill, although he was receiving some medical treatment.

In view of the seriousness of the accused's condition, Mr Maseko, as an officer of the Court and in his pursuit of the course of justice with sensitivity, asked that the matter'stand down to the following day to enable him to confer with the Correctional Service authorities together with the Acting Director of Public Prosecutions, regarding the fairest and most humane way of dealing with the matter in the light of the accused age and his sick disposition. Mr Simelane, suggested that the charges be withdrawn and the accused released, until such time that his health improved, whereupon, the charges could then be reinstated.

Mr Maseko, on his return informed the Court that the instructions from the Acting Director of Public Prosecutions were that the matter be postponed to some other date to afford the accused time to recuperate, with the accused remaining in custody in the interim period. I

emphasise that these were the instructions given in the face of and in full appreciation of the condition of the accused described above.

Concerned about the accused's state of health, I ordered that he be taken to a medical practitioner for an opinion on his state of health regarding his fitness to stand trial and to continue in detention at the remand centre. This was promptly done as Dr Austin Ezeogu, the Acting Senior Medical Officer of the Mbabane Government Hospital, on the some day, i.e. 31st March 2004, examined the accused and his conclusion was that the accused is not physically and medically fit to stand trial. He further opined that the accused's continued stay in custody could accelerate the deterioration of his health. I wish to commend Dr Ezeogu for his prompt and efficient attention to this sorry case.

Bail Application

In view of the unfortunate turn of events ushered in by the instructions of the Acting Director, Mr Simelane, indicated that he would move an application for the accused to be admitted to bail. This is permitted by the provisions of Section 96 of the Criminal Procedure and Evidence Act No. 67 of 1938. Due to the accused's state of health and difficulty in communicating, Mr Simelane, moved the application from the bar a course that I allowed in view of the peculiar and sad circumstances surrounding this case. Mr Maseko, for the Crown, again exhibiting his sense of dutiful fairness, supported this course.

Mr Simelane asked the Court to admit the accused to bail. He submitted that in view of the accused's age and the medical report from Dr Austin Ezeogu that it is in the interests of justice that the accused be released. He further submitted that the accused, would stand trial, in view of his very poor state of health. Since he is unable to walk unassisted, he could therefore not abscond. He submitted further that in any event, the accused had a good defence to the charge, which fact would not induce him to flee even if his physical and medical condition permitted.

In the alternative, Mr Simelane, urged the Court to release the accused on his own recognisance, a course that he implored the Court to give first preference. He submitted that this option was the most viable in view of the fact that the accused is a man of straw and had no means of livelihood, hence he could not afford bail, shot of putting cap in hand as it were.

Mr Maseko, again acting under instructions, opposed the granting of the accused to bail. In this regard, he called 1974 Inspector Fondololo Mabuza. The main thrust of his evidence was that he opposed the bail on the grounds that the accused, if admitted to bail, is likely to interfere with Crown witnesses, in particular, one Nonhlanhla Simelane, a granddaughter to the accused and who, according to information at his disposal, resides at the accused's home in Mbhuleni. This is the only basis upon which the Crown opposed the bail application.

The Law Applicable to Bail

In terms of the provisions of Section 104 (1) (a) of the Independence Constitution, which was saved after its in 1973 this Court has unlimited original jurisdiction in civil and criminal matters. This includes bail. Section 105 of the Criminal Procedure and Evidence Act, 1938, vests this Court with power, at any stage of the proceedings taken in any Court or before any Magistrate, in respect of any offence to, admit the accused to bail.

The *onus*, in matters of bail, lies with the accused. He has to satisfy the Court on a balance of probability that he will not abscond or tamper with Crown witnesses. If there are substantial grounds for opposition, bail will be refused. See **SEAN BLIGNAUT VS DIRECTOR OF PUBLIC PROSECUTIONS CASE NO. 1549/01** (unreported judgement of Masuku J.) at page 3.

The applicable law was adumbrated by Nathan C.J. (as he then was) in the following terms in **NDLOVU VS REX 1982-86 SLR 51 at 52 E-F ;-**

> *"The two main criteria in deciding bail applications are indeed the likelihood of the applicant not standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria tend to coalesce because if the applicant is a person who would attempt to influence Crown witnesses, it may readily be inferred that he might be tempted to abscond and not stand trial. There is a subsidiary factor also to be considered, namely the prospects of success in the trial. "*

I can say without fear of contradiction in this case that I am well satisfied that if admitted to bail, it is highly unlikely'that the accused would abscond. I say fhis'because it has been ably demonstrated that his condition of health does not permit him. He cannot stand on his own, has malfunctioning bowels and is generally in a very poor state of health. It is not surprising therefor that the Crown did not oppose the grant of bail on this ground for the writing is on the wall that an account of his advanced age and his debilitating state of health, chances of him absconding are next to nil.

The question now to be determined is whether the accused is likely to interfere with the Crown's witnesses if released on bail. The relevant questions to be answered in this case, were enumerated by Mahomed J. (as he then was) in **S VS ACHESON 1991 (2) SA 805 (NmHC) 822 - 823C** as follows;-

> *"The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as*

(1) *whether or not he is aware of the identity of such witnesses or the nature of their evidence;*

(2) *whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;*

(3) *what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced by him; and*

(4) *whether, or not any condition preventing communication between such witnesses and the accused can effectively be policed. "*

It must be pointed out that *in casu* there is no evidence or allegation that he might tamper with any physical evidence. It would appear that he is aware of the witnesses to testify against him. In particular, it is clear that the said Nonhlanhla Simelane made her statement to

the Police and has committed herself to give evidence. This was exemplified by Inspector Mabuza's evidence that she was present in Court ready to testify for the Crown. It would also appear, in the accused's favour, that investigations in this matter were finalised, hence the accused had been brought to trial.

Regarding the relationship between the accused and the witness, it is clear that she is his granddaughter and she resides at the accused's home On the face of it, these two factors would appear to militate against the accused being granted bail. It is however important to note that Nonhlanhla, who is now estimated to be 21, cannot be regarded as an impressionable and vulnerable child at the mercy of the accused.

It was put to Inspector Mabuza, and he was unable to deny, that Nonhlanhla does not derive any material or other support from the accused because he has no source of income. This factor viewed against her age makes her less susceptible to influence. This is more pronounced when viewed against the accused's state of health. He is unlikely to intimidate and influence her, given that he encounters difficulty in oral communication. He is also not in a state to physically assault Nonhlanhla with a view to forcing her to change her story.

The question regarding whether effective communication can be policed, although it weighs against the accused *in casu, is* in my view outweighed by the factors mentioned above.

The next question, according to Mahomed **J.** in **S VS ACHESON** *(supra)* is couched as follows:-

> *"A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as for example.*

(5) *the duration of the period during which he is or has already been incarcerated, if any;*

(6) *the duration of the period during which he will have to be in custody before his trial is completed;*

(7) *the cause of the delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such delay;*

(8) *the extent to which he might be prejudiced in engaging legal assistance for his defence and effectively preparing his defence if he remains in custody;*

(9) *the health of the accused. "*

I am of the view that it would be highly prejudicial to the accused in all the circumstances, to be kept in custody by being denied bail. I add that it would also not be in the interests of justice to keep him in custody any longer. I say the latter in view of the medical report, especially that continued incarceration, will exacerbate his already bad physical and medical condition. It is clear that if he is taken back to custody, it will be like sentencing him to death, in view of the rampant overcrowding and debilitating conditions in our correctional institutions and of which I am entitled to take judicial notice. Justice cannot be served by worsening the accused's physical and medical condition, but rather, by seeking to improve it so that he ultimately stands to face his accusers in a fit state. No one, including the Crown, and the deceased's relatives, will be elated by the accused dying before he stands trial. All should therefore be done to enhance that chance than destroying it altogether, which appears to be the result if he is denied bail, as the Crown has implored the Court to do.

The accused has not, according to our standards (which are poor), been incarcerated for a long time. But for a man of his age and poor state of health, the period from October, 2002, is long. Further, it is uncertain when he will be certified fit to stand trial, since this is contingent on his health improving, an unlikely event, given the conditions in our correctional facilities. I dare say that the impending winter, severe, as it threatens to be, from present indications, will render the accused's chances of recovery much more slim. It is well to state in regard to the other questions posed by Mohamed J. that the accused is not to blame for the delay in the commencement of the trial, rather it is his poor medical and physical state of health. All in all, I can come to no other conclusion than that it will be prejudicial to both the accused and the interests of justice if the accused is denied bail.

I am of the view that the accused has shown, on a balance of probabilities that he should be released on bail. The factors that militate against such an Order being made, are outweighed by the other factors in his favour. I would therefore grant the Order prayed for.

I should however mention that as I was ready to determine the conditions to be attached to his bail and before considering the propriety of releasing the accused on his own recognisance, the Crown made an urgent request for the Court to convene. This was done and Mr Maseko, to the relief of everybody concerned, announced a *volte face* in his instructions. He advised the Court that his instructions were now to withdraw the charges against the accused in terms of the provisions of Section 6 of the Criminal Procedure and Evidence Act, 1938, as amended, a course that was suggested very early in the proceedings, but thrown out with both hands by the Crown. The charges were accordingly withdrawn.

I wish to record the Court's appreciation to both Counsel, Mr Maseko, in particular for his avowed stand for justice and fairness. He exhibited his unwavering commitment to prosecuting the accused person and not persecuting him. It remains for me to remind those who have a heart and an ear, the timeless remarks which fell from the lips of Lord Hailsham of St. Marylebone that:-

"Prosecuting Counsel was not an avenging angel but an instrument of justice. "

See MANGISIHLATSHWAKO AND OTHERS VS THE KING CRIM. APPEAL 53/96
(unreported judgement of Dunn J.)

This attitude and sense of fairness must exude and if necessary, extrude in all the activities and conduct of all criminal proceedings in this and all the other Courts. Justice and fairness are interwoven concepts which should not be dismembered or removed from any proceedings for any reason whatsoever. I say this in the light of the matter of R VS NHLOKO ZWANE AND OTHERS, CRIMINAL CASE NO.36/2003 in which the Police vigorously opposed the granting of bail to the accused persons and after a fully blown bail application hearing the charges were eventually withdrawn. The circumstances of the accused in that case do not remotely resemble the seriousness of the accused's circumstances in this case. What is sauce for goose must be sauce for the gander.

In view of the developments which occurred at the tail end of the judgement, I therefor find it unnecessary to issue an Order regarding the issue of bail or the release of the accused on his own recognisance, if the latter were at all permissible *in casu.*

T.S.MASUKU
JUDGE J