THE HIGH COURT OF SWAZILAND

MCOLISI MHLANGA

And

REX

Crim. Case No. 6/2003

Coram S.B. MAPHALALA - J

For the Applicant MR. MDLULI

For the Respondent MR. DLAMINI

JUDGEMENT ON BAIL

(02/05/2003)

On the 21st January 2003, the Applicant filed an application by motion in the long form for an order that he be released on bail on such terms and conditions as the court may deem fit; and any further and/or alternative relief.

The application is founded on the affidavit of the Applicant himself. He avers inter alia that he is an adult male resident at Lusushwana area, in Matsapha in the Manzini district. On or about the 11th day of November 2002, he was arrested and detained by certain members of the Swaziland Royal Police's Special Branch called Lukhozi. Certain

charges were later preferred against him on Count one that of contravening Section 3 of the Theft of Motor Vehicle Act No. 16 of 1991 and on Count two that of contravening Section 11 of the Theft of Motor Vehicle Act No. 16 of 1991.

He avers in his founding affidavit that he is innocent and accordingly he will enter a plea of not guilty when asked to plead during the trial of this matter.

He further contends that if granted bail he will abide by all conditions that this court may so deem fit to impose inter alia that he will not interfere with either the complainant or crown witnesses. He will report to the Matsapha Police if ordered to do so. He also undertake to surrender any travel document which may be in his possession at this point in time and not to apply for a new one until this matter is fully disposed off.

The Crown opposes the application for bail and the opposing affidavit of 3167 Detective Constable S.B. Mamba is filed thereto. There is only one ground for opposition and it is couched this way:

"3 I submit that the Appellant is likely to interfere with crown witnesses as both complainants in the criminal matter are known to him".

When the matter came for arguments before me on the 14th ultimo Mr. Mdluli contended that the above is merely a bare statement and there are no facts to support it and thus it is insufficient to found opposition. Mr. Dlamini for the Crown, however, is of the view that paragraph 3 is sufficient in that the court should not grant bail where the interest of justice would not be served.

Bail will not be granted if the interest of justice will be prejudiced, as where:

i) It is likely that the accused will abscond or there is a reasonably founded apprehension that the accused will avoid standing trial, as by committing

suicide (see R vs Omar 1930 C. P. D. 79 and C vs R 1955 (1) P. H. H. H93 (c).

ii) It is likely that the accused will hamper the investigation of the police in any way (see Heller and another vs Attorney-General 1932 C. P. D. 102).

iii) There is a reasonable possibility that the accused will tamper with state witnesses (see Maserow vs Attorney General and another, 1941 WLD 54).

On the last point Mohamed J (as he then was) in the case of S vs Acheson 1991 (2) S.A. 804 NM (SC) 822 - 823C gave a comprehensive analysis of the legal principles which governs in bail matters as follows:

"1. .....

2. 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;

a) Whether or not he is aware of the identity of such witnesses or the nature of their evidence;

b) 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.

c) What the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;

d) Whether or not any condition preventing communication between such witnesses and the accused can effectively be policed....."

In casu the Crown has dismally failed to live up to the dicta cited above by Mohamed J in S vs Acheson (supra). The evidence in the opposing affidavit is so scanty that one cannot make a proper examination of the factors which may militate against the granting of bail in the present case. One is left to agree with Mr. Mdluli that conditions can be

imposed preventing communication between such witnesses and the Applicant and these can effectively be policed.

For the aforegoing reasons I grant the order admitting the Applicant to bail in terms of prayer 1 of the notice of motion.

The appropriate amount of bail to be agreed to by the parties and the parties to enter into the relevant recognizances.

S.B. MAPHALALA

JUDGE