



**IN THE HIGH COURT OF SWAZILAND**

**CASE No. 331/11**

**HELD AT MBABANE**

In the matter between:

**JIMSON MAVIMBELA**

**APPLICANT**

**And**

**REX**

**RESPONDENT**

Neutral Citation: Jimson Mavimbela v *The King* (331/2011) [2012] SZHC 19  
(28<sup>th</sup> February 2012)

**Coram: SEY J.**

**Heard: 24<sup>th</sup> February 2012**

**Delivered : 28<sup>th</sup> February 2012**

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## JUDGMENT

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### **SEY J.**

- [1] By notice of application dated at Big-Bend on the 13<sup>th</sup> day of September 2011, the Applicant has applied for an Order admitting him to bail. In support of his application, the Applicant filed an 8 paragraph affidavit in which he deposed to the fact that on or about 11<sup>th</sup> July 2011, members of the Royal Swaziland Police Force from Lubuli Police Station arrested him on the allegation of rape of one Phindile Dlamini at Kubhadlana area. The Applicant also stated that he has been in custody ever since and that he makes periodic appearances before the Magistrate Court sitting at Lubuli and or Big-Bend.
- [2] The Applicant also filed a supplementary affidavit dated the 12<sup>th</sup> day of December 2011 as well as a replying affidavit to which is attached a confirmatory affidavit sworn to by the Applicant's sister Thembisile Busisiwe Ndzinisa (born Mavimbela) undertaking that upon his release on bail, the Applicant will reside with her in Madonsa until the criminal case is finalised.
- [3] In the Applicant's Heads of Argument filed on the 22<sup>nd</sup> day of February 2012, Mr. Dlamini, for the Applicant, argued, inter alia, that in a bail application the enquiry is not really concerned with the question of guilt at the bail stage and that the focus is to decide whether the interests of justice permit the release of the accused

pending trial. To buttress his point, Counsel referred the Court to the judgment of **Masuku J.** (as he then was) in the matter between **REX v JOSEPH MGUNGU QWABE Criminal Case No. 64/ 03** where he had opined as follows:

*“The applicable law was adumbrated by **Nathan C.J.** (as he then was) in the following terms in **NDLOVU v REX 1982-86 SLR 51 at 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 interference 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.”*

[5] Counsel further submitted that the Applicant has demonstrated in his various affidavits filed that he is an elderly man who is nearly 52 years and that has a home in Swaziland and has 9 children and that he has no relatives outside Swaziland and he has no passport and lastly he handed himself to the police during his arrest. Counsel argued that all these facts considered together in their totality highly suggest that the Applicant will not abscond and he urged the Court to admit

the Applicant to bail.

- [6] The Respondent has opposed the bail application and, in an affidavit deposed to by one 4238 D/Constable Zodwa Dlamini; the Respondent has raised certain points of law *in limine* as well as opposing the application on the merits.
- [7] In arguing his point of law *in limine*, Mr. Magagula submitted that the Applicant has not complied with the provision of Section 96 (12) (a) of the Criminal Procedure and Evidence Act 67 of 1938 as amended in that he has not adduced evidence to the satisfaction of the Honourable Court that exceptional circumstances exist which in the interest of justice permit his release. In support of his argument Counsel referred the Court to the unreported judgment of the Supreme Court in **Senzo Menzi Motsa v The King, Appeal Case No. 13/2009.**
- [8] Mr. Magagula further submitted that the Applicant is charged with the rape of a female who is under the age of sixteen (16) years and that such offence falls under the Fifth Schedule of the Act. Counsel stated that Section 96 (12) (a) of the Act provides that a person who has been charged with any offence appearing in the aforementioned schedule shall be detained in custody unless the accused adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release. Counsel further argued that the onus is on the Applicant to show that there

are exceptional circumstances and that the Applicant has failed to adduce any evidence that would permit his release.

[9] **Section 96 (12) (a) of The Criminal Procedure and Evidence (Amendment) Act, 2004** provides as follows:

*“(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 been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release;”*

[10] It is common cause that the offence with which the Applicant is charged is rape of a girl under the age of 16 years. This is an offence mentioned in the Fifth Schedule to the **Criminal Procedure and Evidence (Amendment) Act, 2004** as aforementioned. Accordingly, the Applicant is required to adduce “evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his .....release.”

[11] The primary question posed for the Court’s consideration at this

stage revolves around the meaning of “exceptional circumstances” in relation to bail. In delivering the Supreme Court judgment in **Senzo Menzi Motsa v The King** (supra), His Lordship **Magid AJA** pronounced at paragraph [11] thereof as follows:

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

- [12] Mr. Magagula, for the Respondent, has argued that it is neither unusual for an accused person to give himself up nor is the fact that the Applicant is sickly “one of a kind” and that the Applicant has failed to show any exceptional circumstances.
- [13] The Applicant has stated in his affidavits that his health condition is very fragile as he was once treated for TB and further that he is currently taking ARVs. I have carefully perused all the affidavits filed by the Applicant together with the medical reports annexed to his replying affidavit and it is patently clear to me that this Applicant has demonstrated a chronic history of Tuberculosis dating as far back as 2001. In this regard, Out-Patient Record/Prescription cards in the name of Jimson Mavimbela aged 42 years have been exhibited before this Court and they undoubtedly show that on 25/10/01 and 9/11/01, respectively, the Applicant had been diagnosed with TB and referred for treatment.

[14] Even though the case of **REX v JOSEPH MGUNGU QWABE** (supra) was determined before the **Criminal Procedure and Evidence (Amendment) Act, 2004**, I find the dictum of **Masuku J.** (as he then was), at page 7 of the said judgment, very apt in that:

*“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.”*

[15] In this instant case, the Applicant has deposed to the fact that he was once treated for TB and he fears that it may start all over again especially when he is under conditions that are moist, smelly and unclean. Furthermore, that he is desirous to be afforded an opportunity to seek medical attention as the medication at his disposal currently is unsatisfactory.

[16] Now, after a careful review of the various affidavits filed as well as taking into account due consideration of all the submissions made by both counsel, I am of the view that the facts adduced by the Applicant pertaining to his state of health satisfy the Court that “exceptional circumstances” exist which in the interest of justice

permit his release on bail. Moreover, it would also not be in the interest of justice to keep the Applicant in custody any longer considering that tuberculosis is a highly infectious and contagious disease that can be transmitted from one person to another either by direct contact with the person or by indirect contact, for example, by contact with his clothes. It cannot also be gainsaid that denying this Applicant bail and continuing to keep him in custody poses a serious health hazard to all persons in contact with him.

[17] In the light of all the foregoing, the Respondent's points of law *in limine* are hereby dismissed and I would admit the Applicant to bail.

[18] In the circumstances, the Applicant is hereby admitted to bail upon the following terms and conditions:

(a) The Applicant is to deposit a cash amount of E3000.00 and to provide sureties in the sum of E12 000.00.

(b) The Applicant must not interfere with the complainant Phindile Dlamini at KuBhadlane area under Chief Maja in the Lubombo region and/or any other Crown witnesses in any manner whatsoever.

(c) Upon his release on bail and until the criminal case against him is finalised, the Applicant must reside with his sister Thembisile Busisiwe Ndzinisa at her place in Madonsa next to Moyeni area at Ebhodini bus station, under Chief Nkosini, in the Manzini region.

(d) The Applicant must not go to the complainant's



neighbourhood for any reason whatsoever until the criminal case against him is finalised.

(e) The Applicant must report to the Manzini Police Station fortnightly until the criminal case against him is finalised.

**For the Applicant**

**Mr.**

**S. Dlamini**

**For the Respondent**

**Mr.**

**B. Magagula**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE.....  
DAY OF FEBRUARY 2012**

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**M. M. SEY (MRS)  
JUDGE OF THE HIGH**

**COURT**



