



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 389/2011**

In the matter between:

**ZWELITHINI GIDEON TSABEDZE**

**APPLICANT**

**AND**

**THE KING**

**RESPONDENT**

Neutral Citation: *Zwelithini Gideon Tsabedze v The King (389/2011)* [2012] SZHC 20 (19<sup>th</sup> March 2012)

**Coram: SEY J.**

**Heard: 2 and 16 March 2012**

**Delivered : 19 March 2012**

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**JUDGMENT**

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**SEY J.**

[1] Serving before Court is an application brought under a Certificate of Urgency for an Order admitting the Applicant to bail. The said application was filed on the 9<sup>th</sup> day of November, 2011. However, the Crown filed a notice of intention to oppose dated at Mbabane on the 11<sup>th</sup> day of November, 2011 and thereafter the Applicant's Attorney filed a notice of set down dated 29<sup>th</sup> February 2012.

[2] In support of his application, the Applicant has filed an 18 paragraph Founding Affidavit in which he deposed to the fact that on the 28<sup>th</sup> day of October, 2011, he was arrested and charged with three (3) counts being murder, unlawful possession of a firearm and unlawful possession of one live round of ammunition.

[3] The Applicant has also stated in detail how the deceased, one Ntokozo Maseko, was killed. In paragraphs 8 - 10 of his Founding Affidavit, the Applicant averred as follows:

*"8.1 On or about the 26<sup>th</sup> day of October 2011, I was at my workplace, Dicapol Primary School's teachers' quarters watching wrestling on television with the deceased in our flat which we shared, the deceased being also my friend and colleague since our days from the University of Swaziland {Kwaluseni Campus} in the year 2003.*

*8.2 We watched the television up until around 10:00 p.m. when the wrestling programme came to an end.*

*8.3 Since the school had no running water in those days the deceased then requested me to accompany him to a nearby bush as he said he wanted to respond to the call of nature. I agreed*

to accompany the deceased as this came as a coincidence as myself had earlier on that day made an appointment to see my girlfriend {Phatsiwe Ngcamphalala} whose parental homestead is located nearby our school.

8.4 On this particular day {26 October 2011} it was drizzling.

We took off from school and along the way to the forest whereat the deceased intended to relieve himself I asked him if he would wait for me after relieving himself as I was to fetch my girlfriend some distance ahead of the place where the deceased intended to relieve himself. He replied by telling me that he would not wait for me as I did not know how long it was going to take me to see my girlfriend.

8.5 The deceased then branched off from the road we were travelling upon to the forest to relieve himself and I proceeded to my girlfriend's parental homestead.

8.6 It took me about twenty {20} minutes from the time we parted ways with the deceased to meet my girlfriend. After meeting my girlfriend we then went back to the teachers' quarters.

8.7 Along the way to the teachers' quarters my girlfriend spotted a person standing next to the school's fence in a dark place hence she alerted me about the person. We went past the person after which he began following us.

8.8 When I saw the person standing next to the school's fence, I thought it was the school's security guard {Mandla Mavuso} and in an attempt to verify my suspicion I then dialled the security guard's cell phone number as I thought (if) the person we were seeing was the security guard he could receive the call and notice him when placing the cell phone next to his ear. But the security guard did not receive the call but the call went through and the

person continued following us without anyone receiving the security guard's call.

8.9 When the person was following us we upped our pace and often looked back to ascertain what the person intended to do. After a short while the person began running after us and in fear my girlfriend held one of my hands with both of her arms, and while all this was happening the person did not utter any word to us.

9. Eventually the person caught up with us and in fear of being attacked by the person I kicked him on the abdomen after which a scuffle ensued resulting to the person being accidentally shot in the process. Due to the absence of light we could not recognize who the assailant was.

9.1 After the shooting had taken place my girlfriend and myself ran to the teachers' quarters where upon arrival I looked for my colleague {deceased} as I wanted to narrate to him about the incident. However, I could not find the deceased in his room after which I tried calling him in his cell phone but the cell phone rang without being answered.

9.2 I began trembling even worse as I became suspicious that the person who had been injured could be my colleague {the deceased}. I ran around the teachers' quarters and peeped at the windows of one Mfanafuthi Ndwadwe, another colleague, but it was dark inside his room hence I could tell that the deceased was not there and my fears intensified.

9.3 Sensing that indeed the person who attacked us was the deceased I then called one Philemon Ngcamphalala {my girlfriend's father}, woke up Mfanafuthi Ndwadwe my colleague and with the security guard we proceeded to the scene of accident and I was carrying a torch and my fears were confirmed that indeed it was my colleague who got

killed during the scuffle. I then dialled 999 and Police arrived at around 12:00 p.m. and the incident occurred 10:00 p.m.

10 I wish to humbly state that during the trial of the matter I will plead not guilty to all the charges as preferred against me as the deceased got killed while trying to defend myself and the said Phatsiwe Ngcamphalala. I will therefore defend myself during trial by informing the Court that my colleague {deceased} got killed while I was defending myself and my girlfriend.”

- [4] In the Applicant’s heads of argument filed on 28 February 2012 Mr. Xaba argued, *inter alia*, that the conduct of the Applicant in calling the police to the scene, after the death of the deceased, is an indication that he is not a flight risk. Counsel referred the Court to the book of J. Van der Berg entitled Bail - a practitioner’s guide - at page 59 where the author states as follows:

*“If the purpose of bail and the delicate balance which ought to be struck between the liberty of the individual on the one hand and the administration of justice, on the other hand, are borne in mind, it appears that a Court faced with a bail application is expected to consider one issue only: will a refusal of bail constitute an injustice because it is unnecessary - or must bail be refused in order to safeguard the administration of justice, irrespective of the effect of such refusal on the individual accused? In striving to strike a balance between the interests of the accused and the interests of the administration of justice the Court will assess the risks involved in releasing the accused from custody. The paramount considerations are (a) whether the accused will stand trial; (b) whether the accused will interfere with state witnesses; (c) whether the accused will commit offences while on bail; and (d) whether the accused’s release will jeopardize law and order or state security.”*

[5] It is trite that in deciding bail applications, the two main criteria are indeed the likelihood of the applicant not standing trial and the likelihood of his interference with Crown witnesses. As was stated by **Nathan CJ** (as he then was) in the case of **NDLOVU Vs REX 1982 - 86 SLR 51 at E - F:**

*“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.”*

[6] In opposing the bail application in this instant case, the Crown has raised certain points *in limine*, namely, that the Applicant has not complied with the provisions of Section 96 (12) (a) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended).

[7] It is common cause that one of the offences with which the accused is charged is Murder. This offence falls under Schedule 5 of the Criminal Procedure and Evidence Act of 1938 as amended by Act No. 4 of 2004. The circumstances under which bail may be granted to accused persons awaiting trial on a charge that falls under Schedule 5 are succinctly set out in Section 96 (12) ( a ) of the Act aforementioned 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;"*

- [8] It is submitted by Mr. Nxumalo, on behalf of the Crown, that the Applicant faces a charge of Murder and that he has not adduced evidence to the satisfaction of the Court that exceptional circumstances exist which in the interest of justice permit his release. As to the connotation of the word "exceptional," this Court has been referred to the case of **Senzo Menzi Motsa v The King, Appeal Case No. 15/2009** where 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." It is, in my opinion not unusual for a suspect to give himself up to police."*

See also **Bheki Shongwe v Rex Criminal Appeal Case No.**

**11/2005; Bhekani Mlotjwa v Rex Case No. 403/2010;**

[9] I shall now turn to consider whether the Applicant herein has adduced evidence to satisfy the Court that exceptional circumstances exist which in the interest of justice permit his release. As pointed out in **Bheki Shongwe (supra)**, the relevant factors lie within the knowledge of the accused person and he must adduce evidence of them. The information before the Court has been gleaned from the Founding Affidavit made by the Applicant as well as the Respondent's Opposing Affidavit.

[10] I have also perused the Applicant's Replying Affidavit and in particular paragraph 18 thereof which reads as follows:

"18. May I humbly state that it is an exceptional circumstance that after the incident I personally called the Police through 999 as another person could have run away after the death of the deceased. The Police Officers who handled the investigations of this matter can even attest that I fully co-operated with them.

It would, however, be unjustly if every person applying to be released on bail must have adduced evidence which show that exceptional circumstances exist which in the interest of justice favour his release because that would mean every suspect is no longer presumed innocent



until proved otherwise by a Court of law hence the denial of bail.”

[11] The Applicant has further argued in his heads of argument that, if every accused person charged with an offence listed under Schedule 5 is expected to satisfy the stringent requirement of Section 96 (12) (a) before he can be released on bail, such may offend against Section 21 (2) (a) of The Constitution of the Kingdom of Swaziland of 2005 which provides that “A person who is charged with a criminal offence shall be presumed to be innocent until that person is proved or has pleaded guilty.”

[12] It cannot be overemphasised that the basic principle which underlines the criminal process in this jurisdiction is the presumption of innocence as enshrined in the Constitution. Thus every person is presumed to be innocent until the contrary is proved. Moreover, Section 21 (13) (a) of the said Constitution clearly states that “nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.” In the light of the foregoing provision, I find the Applicant’s contention, that Section 96 (12) (a) of the Criminal Procedure and Evidence Act (as amended) may offend Section 21 (2) (a) of the Constitution, flawed and untenable.

[13] It also needs to be mentioned that it is not the mere charging of an accused with an offence which falls under Schedule 5 of the Criminal Procedure and Evidence Act (as amended by Act No. 4 of 2004), that disqualifies the accused person from successfully applying for bail. As **Hlophe J.** aptly put it in the case of **Bhekani Mlotjwa Case No. 403/2010**, the section is meant

*“to make it difficult for persons charged with the offences like the ones faced by the accused herein to obtain bail. This therefore necessitates that an accused person who is able to lead evidence demonstrating exceptional circumstances would be entitled to obtain bail.”*

[14] The crucial question before this Court therefore, is whether the facts, averred to by the Applicant, without more, qualify as “exceptional circumstances.” I would venture further to ask whether it is “one of a kind” for a suspect to personally call the police through 999. In my considered opinion, these questions cannot be answered in the affirmative because it happens frequently that suspects in homicide cases do phone the police to report the crime and they also seemingly co-operate with the police for reasons best known to themselves.

[15] It is beyond dispute that when a person is charged with an offence which falls under Schedule 5 of the Criminal Procedure and Evidence Act (as amended by Act No. 4 of 2004), he bears the onus of adducing evidence to satisfy the Court that there are exceptional

circumstances justifying his release from custody. This evidence should be satisfactory and not just mere allegation. Suffice it to say that, after thoroughly examining all the facts postulated by the Applicant in his Affidavits, I find that such facts do not amount to “exceptional circumstances.”

[16] In the light of all the foregoing, the inescapable conclusion I have reached is that the Applicant has not met the requirements of Section 96 (12) (a) of the Criminal Procedure and Evidence Act of 1938 (as amended). I would therefore uphold the Respondent’s point *in limine* and, in the circumstances, the Applicant’s application is hereby dismissed.

**For the Applicant**

**Mr. B. Xaba**

**For the Crown**

**Mr. M. Nxumalo**

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

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

**COURT**

