IN THE HIGH COURT OF SWAZILAND

Criminal case No: 1526/11

In the matter between:

Maxwell Dlamini	**First applicant**
Emmanuel Ngubeni	**Second Applicant**
AND	
Manzini Senior Magistrate	**First Respondent**
The Attorney General	**Second Respondent**
University of Swaziland	**Third Respondent**
The Commissioner of Correctional Services	**Fourth Respondent**
The Director of Public Prosecutions	**Fifth Respondent**
Coram:	**Maphalala M.C.B., J**
For Applicants	Attorney Mandla Mkhwanazi
For Fifth Respondent	Senior Crown Counsel Phila Dlamini

Summary

Criminal Law – application for bail- accused charged with contravening Sections 8 (1) and 9 of the Explosives Act No. 4 of 1961 – alternatively charged with contravening section 11 of the Arms and Ammunition Act No. 24 of 1964 – bail granted where interests of justice will not be prejudiced – application granted.

JUDGMENT

28 .03.2012

---

[1] The Applicants instituted an urgent application seeking an order directing the fourth respondent to submit the first applicant to the University of Swaziland, Kwaluseni campus to write his final year examination paper and to subsequently keep him in custody thereafter. They further sought an order reviewing and/or setting aside the first respondent's Ruling refusing bail to the applicants.

[2] They were arrested on the 13th April 2011 and charged for contravening sections 8 (1) and 9 of the Explosives Act No. 4 of 1961, and, alternatively a contravention of section 11 of the Arms and Ammunition Act No. 24 of 1964.

[3] They subsequently lodged a bail application at the Manzini Magistrate's Court before the first respondent. The application was opposed by the fifth respondent who also led witnesses in support of his defence; the applicants also tendered evidence in support of their application. However, the application for bail was dismissed by the first respondent.

[4] The fifth respondent in his answering affidavit denied that her decision was irrational or outrageous. He argued that the denial of bail was based on section 96 (4) (e) of the Criminal Procedure and Evidence Act in that there was an apparent threat of violence which induced a sense of shock and

outrage to the community where the explosives were found as well as the public at large; that the offence involves possible indiscriminate public violence by means of explosives; that the offence is likely to undermine and jeopardise the sense of peace and security among members of the public; and that the offence will jeopardize the public confidence in the criminal justice system.

[5] The fifth respondent further argued that in terms of the Constitution, a person's liberty can be limited lawfully by placing him in custody upon a reasonable suspicion that he has committed a criminal offence. He further argued that the issue relating to the first prayer has been overtaken by events since the examination referred to was written in May 2011. He argued correctly that the only prayer which the court has to consider relates to the review of the refusal by the first respondent to grant bail to the applicants.

[6] The applicants in their replying affidavits concede that the issue relating to the first prayer has been overtaken by events. A consent order was issued on the 9th May 2011 by this court directing the fourth respondent to submit the first applicant to the University of Swaziland to write his examination on the 9th and 10th May 2011. The court further ordered the first respondent to submit the record of the proceedings in the court *a quo* by the 18th May

2011. The second applicant was granted leave to supplement his Founding Affidavit by the 10th May 2011.

[7] They argued that the first respondent failed to apply her mind to the facts presented to her in the court a quo since no evidence was led to show that there is a likelihood that the release of the applicants on bail may disturb public order or undermine public peace or security. They further denied that there was evidence that their release would jeopardise the public confidence in the criminal justice system; and they also argued that the first respondent misconstrued the provisions of section 96 (4) (e) of the Act.

[8] The applicants argued that section 16 (7) of the Constitution obliges the court to release them either conditionally or upon reasonable conditions that will ensure their attendance at trial. Section 16 (7) provides the following:

> **"If a person is arrested or detained as mentioned in subsection (3) (b), then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, as are reasonably necessary to ensure that person appears at a later date for trial or for proceedings preliminary to trial."**

[9] Section 3 (b) of the Constitution provides that a person who is arrested or detained upon reasonable suspicion of that person having committed a criminal offence shall unless sooner released be brought without undue delay before a court. Similarly, the applicants also referred the court to section 16 (1) (e) of the Constitution which provides that "a person shall not be deprived of personal liberty save as may be authorised by law upon reasonable suspicion of that person having committed or being about to commit a criminal offence under the laws of Swaziland".

[10] The applicants argued that section 16 (1) (e) of the Constitution does not prevent the court from admitting an accused person to bail. Similarly, they argued that section 16 (7) of the Constitution was a mandatory provision which obliges the court to release them either conditionally or upon reasonable conditions that would ensure their attendance in court either for trial or for proceedings preliminary to trial.

[11] The applicants further argued that the court may invoke section 96 (15) of the Criminal Procedure and Evidence Act when granting bail to them, and it provides the following:

"The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice."

[12] Similarly, the applicants urged the court to grant bail and invoke section 96 (18) (b) of the Act if that could be necessary; the section allows the court to add further conditions on a person granted bail at the instance of a public prosecutor. The section provides the following:

"Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor add any further condition of bail with regards to any place to which the accused is forbidden to go."

[13] Dealing with the grounds of view, the applicants correctly argued that the overriding issue is whether or not the interests of justice will be prejudiced by the release on bail. One of the cases they quoted is *Rex v. Pinero* 1992 (1) SACR 577 (NW) at 580 c-d where *Frank J* said the following:

"In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all embracing issue: will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail,

will the accused stand his trial? Will he interfere with state witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the state? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail."

[14] The fifth respondent submitted that section 16 (1) (e) of the Constitution, allows for a person's liberty to be limited on reasonable suspicion that he has committed an offence; however, I agree with the applicants that the said section does not preclude the court from admitting an accused person to bail.

[15] The first respondent further relied on section 96 (4) (e) as well as section 96 (a) (c) and (d) of the Act. Section 96 (4) (e) provides the following:

"96 (4) The refusal to grant bail and the detention of an accused in custody shall be in the interest of justice, where one or more of the following grounds are established:….

(e) Where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace and security."

[16] Section 96 (9) of the Act provides the following:

"**96 (9) In considering that the ground in Subsection 4 (e) has been established, the court may, where applicable take into account the following factors, namely:**

(a) Whether the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed….

(c) Whether the safety of the accused will be jeopardized by his or her release.

(d) Whether the sense or peace and security among the members of the public will be undermined or jeopardized by the release."

[17] The fifth respondent led the evidence of Musa Dlamini, an Indvuna or headman of Kwaluseni; this is the area where the explosives were found. He told the court that he objected to the release of the second applicant who resides in the area because the community was not at ease, and, it was bitter because they did not know the target of the explosives. He further told the court that he feared that the community police and the community might pose a threat to his life and might even kill him.

[18] He conceded under cross-examination that no community meeting was held where a resolution was taken that he should oppose bail to the second applicant. He further conceded that the second applicant has another

parental home at Bhadzeni area where he could stay if granted bail; and, that the second applicant could stay at Bhadzeni area upon his release.

[19] The fifth respondent also led the evidence of Samuel Kunene, an Indvuna or headman of Mantambe area; he told the court that the first applicant resides in his area and that he is related to his family. He further told the court that the community might be compromised if he was released on bail because other young people might emulate his actions. However, he conceded under cross-examination that he would not object if the first applicant after being admitted to bail, would reside with his father at his place of employment at Dvokolwako or stay with his aunt at Manzana in Mbabane upon his release. In addition, he further conceded that no community meeting was converged to discuss the arrest of the first applicant, and his possible release on bail.

[20] The first respondent also led the evidence of Police Officer Force No. 3475 Assistant Supt. Sihlongonyane, who was a Desk Officer at Mbabane Police Station and in charge of the Criminal Investigation Department. He opposed bail on the basis that the applicants might interfere with state witnesses, and, that investigations were not yet complete; he argued that their release would jeopardize their investigations. He told the court a *quo* that the police required a period of thirty days to finalise their investigations; this period has long passed.

[21] He further alleged that society was still traumatized by the discovery of the explosives; hence, if the applicants were released, society might harm them. He further alleged that the applicants, if released might escape to South Africa. These are mere allegations and no evidence was led to substantiate them.

[22] Benson Ngwenya, an Indvuna of Bhadzeni area testified that he knew the family of the second applicant, and, that he last saw the second applicant when he was still young. He told the court that if he would be safe upon release, he could be granted bail. He also told the court that the community was grumbling about the incident; however, he conceded under cross-examination that no community meeting was ever convened to deliberate the arrest and possible release of the second applicant on bail.

[23] He also told the court that there were concerns with the community that the second applicant wanted to attack the King; however, he conceded under cross-examination that this was a rumour which he could not verify as factual. He further conceded that he would not object if the second applicant was released on bail and allowed to stay with her relative Sonto Ngubeni who resides at her marital home at Mhlangeni area in Bhunya.

[24] The Crown has not adduced any evidence showing that the interests of justice will be prejudiced if bail is granted to the applicants in light of section 96 (4) of the Criminal Procedure and Evidence Act. The case of *Rex v. Pinero* 1992 (1) SACR 577 (NM) at 580C-D reflects our law on the question of bail; the overriding issue is whether the interests of justice will be prejudiced by the granting of bail in the particular case. It is central and fundamental to the granting of bail that the accused should stand trial, not interfere with Crown witnesses, that his release should not endanger the maintenance of law and order as well as undermine the security of the state; in doing so the Court will have regard to the gravity of the offence charged. If the charge is serious, the likelihood is great that he would not stand trial, and, would interfere with Crown witnesses.

[25] I don't agree with the submission made by the applicants that section 16 (7) of the Constitution is mandatory to the extent that the court has no discretion whether or not to grant bail. It is trite law that the admission to bail of an accused person lies within the discretion of the court; and, in deciding the application, the court has regard to the interests of justice. The outcome to a bail application should not prejudice the interests of justice.

[26] The Constitution as well as the High Court Act of 1954 gives jurisdiction to the High Court to review the decisions of the Magistrate's courts. Section 151 of the Constitution provides the following:

"151 (1) The High Court has-

(a) Unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;

(b) Such appellate jurisdiction as may be prescribed by or under the Constitution or any law for the time being in force in Swaziland;

(c) Such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and

(d) Such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland."

25.1 Section 152 of the Constitution provides the following:

"152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers."

25.2 Section 4 of the High Court Act No. 20 of 1954 provides the following:

"4. (1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct same.

(2) Such power, jurisdiction and authority may be exercised in open court or in chambers in the discretion of the judge."

[27] It is now settled law that the High Court has jurisdiction to review decisions of all courts subordinate to it including the Magistrates courts, the Industrial Court and the other tribunals exercising quasi–judicial powers; the court exercises this power on Common Law grounds. These grounds include the fact that the decision in question was arrived at arbitrarily or capriciously or *malafide* or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the court misconceived its functions or took into account irrelevant considerations or ignored relevant ones or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter, and more importantly that the court or tribunal committed an error of Law:

- ***Takhona Dlamini v. the President of the Industrial Court and Another Appeal Court of Swaziland*** **case NO. 23/1997(unreported) at page 11**
- ***Hira and Another v. Booysen and Another*** **1992 (4) SA 69 (A) at 93**

- ***Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd*** **1988 (3) SA 132 at 152**
- ***Paper printing Wood & Allied Workers Union v. Piernaar NO*** **1993 (4) SA 621 (A) at 626-627**

[28] The refusal of the magistrate to grant bail to the applicants is based on section 96 (4) (e) that it was not in the interests of justice to do so. She concluded that the entire Swazi community was shocked and outraged by the offence, that peace and security among members of the public would be undermined and jeopardized by their release and that the public confidence in the criminal justice system will be jeopardised. As stated in the preceding paragraphs, the evidence tendered by the Crown falls short of establishing that the release of the applicants will prejudice the interests of justice; the court *a quo* in holding that it did, committed an error of law. In the circumstances, the decision of the court a quo is reviewed and set aside.

[29] Section 96 (15) of the Act provides that the court may make the release of an accused on bail subject to conditions which in the court's opinion are in the interests of justice. In light of the seriousness of the offence charged, it is in the interest of justice that bail should be granted and be fixed at E50, 000.00 (Fifty thousand emalangeni) in respect of each applicant payable in cash; that the applicants report at the Mbabane police station

four times a week on Monday, Tuesday, Thursday and Saturday between 8 am and 4 pm; that they do not interfere with Crown witnesses; that they surrender their passports and travelling documents to the Mbabane Police Station and not apply for new ones; and that they attend trial.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT