



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 352/12

In the appeal between:

FANA JOEL MASILELA

APPLICANT

AND

THE COMMISSIONER OF POLICE

FIRST RESPONDENT

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND RESPONDENT

Neutral citation: *Fana Joel Masilela vs The Commissioner of Police & Another*
(352/2012) [2013] SZHC175 (9 August 2013)

CORAM: M.C.B. MAPHALALA, JA

Summary

Criminal Procedure – Bail application – section 96 (4) of the Act as amended dealing with the requirements for the granting of bail in respect of offences in the Fourth Schedule discussed – section 16 (7) of the Constitution also discussed – application dismissed in terms of s 96 (4) (b) of the Act.

**JUDGMENT
9 AUGUST 2013**

[1] This is a bail application lodged on the 19th February 2013. The applicant was police and subsequently charged with murder. He argued that he has a valid defence to the charges; however, he did not state the basis of his defence save to deny killing the deceased.

[2] The application doesn't state the particulars of the charge and the person he is alleged to have killed. Furthermore, the charge sheet has not been annexed to the application.

[3] The Crown is opposing the application, and it argues that there is sufficient evidence linking the applicant to the commission of the offence. It is further argued by the Crown that part of its evidence comprises two accomplice witnesses who will testify against the applicant, being Sandile Mavuso and Vusi Dlamini.

[4] The Crown further argues that prior to the arrest of the applicant, the police received information that the applicant was planning to abscond and run away to South Africa; and that the police acted promptly and found the applicant early in the morning bathing in his apartment and exhibiting signs that he was leaving the country. In this regard the Crown argues that there is a reasonable apprehension that the applicant, if granted bail, will evade trial. Furthermore, the Crown argues that if the applicant escapes to South Africa, as he intended to do, it would be difficult to extradite him without an assurance that he would not receive a death sentence upon conviction.

[5] The Crown fears that the applicant if released on bail would interfere with Crown witnesses in general and the accomplice witnesses in particular. The Crown contends that the applicant has stated in his application that if granted bail, he would reside at Msunduzi in Mbabane where he was a resident before his arrest. The Crown argues that if the applicant goes back to his place of residence, he will interact with the accomplice witnesses and consequently interfere with them given the nature of their relationship.

[6] The Crown alleges that both accomplice witnesses have reported to the police that they have been attacked by a mob at Gobholo area; and, that they fear for their lives since the community doesn't understand why they are not in detention pending finalisation of the criminal proceedings. The Crown further argues that the applicant may be attacked as well if he is released on bail; and, that his release may in the circumstances disturb public order and further undermine public peace and security. However, the applicant argues that if granted bail, he would reside with his uncle at Ngowane in Pigg's Peak or with his sister at Mafutseni area, far away from the Crown witnesses in Mbabane.

[7] The applicant concedes in his replying affidavit that the police found him bathing in the morning of the day of arrest; however, he denies that he was preparing to escape. The applicant argues that he had not bathed the previous day since he was drunk; hence, he was found by the police bathing himself. He contends that he does

not have a passport to cross the border into South Africa and that he does not have relatives in South Africa. He further contends that he has never been to South Africa.

[8] However, the applicant concedes that both accomplice witnesses were arrested the previous day of his arrest; and, that it is possible that they may have told the police that he intended to escape to South Africa. He conceded that after the arrest of the accomplice witnesses, he knew that he would also be arrested. However, he argues that if he intended to escape, he would have done so during the night.

[9] The applicant concedes that he is charged with a serious offence; and, for the first time in his replying affidavit he admitted killing the deceased; however, he argues that the deceased was the aggressor and had provoked him. He further argues that he was drunk at the time of commission of the offence and that the offence did not warrant a capital punishment.

[10] The underlying reasons advanced by the Crown for opposing bail are as follows: Firstly, that the applicant would be attacked by the member of the public if released on bail as they did to the accomplice witnesses. However, there is no evidence that the applicant will also be attacked by the mob. It is common cause that the accomplice witnesses were attacked by a mob at Gobholo Township; however, it is not in dispute that the applicant doesn't reside at Gobholo but resides at Msunduza Township in Mbabane. The applicant has argued that he could also reside in Pigg's

Peak and Mafutseni with his relatives. This point advanced by the Crown is bound to fail.

[11] Secondly, the Crown has argued that since the applicant resides at Msunduza, if released on bail, he would be within easy reach of the accomplices who are his neighbours; and that the applicant is a friend to one of the accomplice witnesses Sandile Mavuso. However, the applicant contends that he could leave Msunduza Township if granted bail and reside with his relatives in Pigg's Peak and Mafutseni areas. For that reason this point is bound to fail as well.

[12] Thirdly, the Crown has further argued that there is sufficient evidence linking the applicant to the commission of the offence. The Crown contends that two accomplice witnesses will testify against the applicant during the trial. Incidentally, the applicant in his replying affidavit has admitted killing the deceased but has raised provocation as his defence. The Crown contends that the overwhelming evidence at its disposal would influence the applicant to evade trial if granted bail.

[13] The Crown further contends that the penalty to be meted out to the applicant if convicted of the offence charged is a capital punishment; to that extent, it was argued by the Crown that the possible sentence on conviction may persuade the applicant to evade trial if granted bail. However, if the defence advanced by the accused succeeds, the Court will not impose a capital punishment.

[14] Evidence has been tendered by the Crown that after the arrest of the two accomplice witnesses on the previous day, the police received information that the applicant was preparing to escape to South Africa. The police acted promptly and accosted the applicant in the morning at his apartment; they found him bathing as evidence that he was about to escape. The contention by the applicant that he was bathing early in the morning because he had not bathed the previous night due to intoxication is not convincing in light of the evidence before Court.

[15] Section 96 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

“96. (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-

- (a) where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or**
- (b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;**
- (c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;**
- (d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or**
- (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.

....

- (6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-**
- (a) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;**
 - (b) the assets held by the accused and where such assets are situated;**
 - (c) the means, and travel documents held by the accused, which may enable the accused to leave the country;**
 - (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;**
 - (f) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Swaziland in an attempt to evade trial;**
 - (e) the nature and the gravity of the charge on which the accused shall be tried;**
 - (g) the strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;**
 - (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;**
 - (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;**
- or**
- (j) any other factor which in the opinion of the court should be taken into account.”**

[16] I am satisfied, in light of the evidence adduced that the applicant intended to flee the country and evade trial. It is not denied that the extradition of an accused is not readily affected; after the arrest of an accused by Interpol, there is a long and arduous procedure employed in extradition. Similarly, it is not in dispute that the nature and gravity of the charge against the accused is serious; furthermore, the nature

and gravity of the punishment which is likely to be imposed should the accused be convicted of the charge is severe and could induce him to evade trial. In addition the strength of the case against the accused, is *prima facie*, strong partly because two accomplice witnesses will testify against the accused and partly because the applicant admits to killing the deceased but raises provocation as a defence. During the trial the Crown will only have to decide whether the applicant was provoked.

[17] The applicant has also argued that he is entitled to be released in terms of section 16 (7) of the Constitution. That section provides the following:

“16. (7) 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, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial.”

[18] In *Thambo Doggy Mngomezulu v. Rex* Criminal case No. 380/2012 at para 17, I had occasioned to state the following:

“17. Section 16 (7) of the Constitution endorses the general principle that bail is a discretionary remedy; in determining bail, the overriding factor is the interest of justice, and in particular whether there is a likelihood that the accused if released on bail may evade trial, interfere with Crown witnesses, conceal or destroy the evidence.”

[19] In *Rex v. Pinero* 1992 (1) SACR 577 (NW) at 580 where Frank J said:

“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.”

[20] The applicant has, in the circumstances, failed to discharge the onus of proving on a balance of probabilities that the interest of justice will not be prejudiced if he is granted bail. Accordingly, the application is dismissed.

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

For Crown
For Defence

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