



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Crim. Case No. 282/2012

In the matter between:

SANDILE JOSEPH SIMELANE

Applicant

VS

REX

Respondent

Neutral Citation: *Sandile Joseph Simelane v Rex 282/2012) [2013] SZHC 96*
(24th April 2013)

Coram: **M. Dlamini J.**

Heard: **24th April 2013**

Delivered: **24th April 2013**

Bail Application – respondent contesting application on the basis that applicant is a flight risk – court calling for an enquiry – burden of proof upon respondent to prove applicant is a flight risk.

Summary: The applicant faces a murder charge allegedly committed during the course of robbery. He has applied for bail. The respondent has strenuously opposed bail on the ground that the applicant is a flight risk.

[1] The applicant appeared in person. As his application for bail was opposed and owing to the seriousness of the charges, the court enquired on the financial status of the applicant for purposes of securing an attorney. Applicant indicated that he had previously instructed an attorney from Nhlangano. The matter was adjourned and Registrar was ordered to trace the whereabouts of the said Nhlangano attorney in order to represent the applicant as per applicant's instructions. On the set date, the Registrar indicated that the said attorney had declined.

[2] The respondent, through an opposing affidavit, had informed the court that applicant had been on the run for the past two years. The offence was committed on 30th May, 2010. Since then the police have been tracing the whereabouts of the applicant. The affidavit further showed that applicant was, following intense investigation, residing in Amsterdam, South Africa. He was later arrested by the South African police. Applicant on the other hand informed the court that at all material times he had been residing at Mankayane with his girlfriend one Hlobisile Dlamini. He has never set a foot in Amsterdam let alone South Africa. The court subpoenaed Hlobisile Dlamini. She appeared before court and informed the court that the applicant was her lover. He was residing at her parental home area, Mankayane since 2007. She was not a full resident at her parental homestead at Mankayane as she was working in Mbabane. She, however, visited home on weekends. She only resided at Mankayane since 2012 after the arrest of applicant.

[3] The court enquired whether she could be in the position to hire services of an attorney on behalf of the applicant. She responded to the positive. The matter was adjourned for applicant's attorney to appear.

[4] Mr. S. C. Simelane was roped in as Counsel for applicant. He was advised to resort to the record of proceedings for purposes of Ms Hlobisile Dlamini's evidence and the matter adjourned further. On the return date Mr. Simelane indicated that he does not need to call any witnesses nor to recall Ms Hlobisile Dlamini as this court granted him leave to do so. He closed his case.

[5] Respondent called one Constable Nhlanhla Simelane who, under oath, testified that applicant faces a charge of murder and robbery. A firearm was used in both offences. The offences occurred around May 2010. Applicant was eventually arrested on 26th May 2012, two year after the offences.

[6] He explained that the cause of the delay in arresting the applicant was, as he discovered through investigations, that applicant resided in the Republic of South Africa. The applicant was residing with his girlfriend who works at the bank. Further his investigations proved that applicant has no family in Swaziland. His parents were living in Swaziland but later immigrated to South Africa. The father left for Cape Town while his mother for Dumbe, South Africa. He did visit applicant maternal parental home and discovered through his uncle that applicant left five years ago. He lived in that homestead.

[7] It was his evidence further that he had to send a message through Interpol for applicant's whereabouts to be communicated to him. Applicant was

therefore located at Amsterdam Police station. He visited Amsterdam and photographed applicant while in the police station. He handed to this court two photographs depicting the face of applicant.

[8] He came back to Swaziland and began processing extradition documents. He however, received a tip off that applicant was at Sicunusa. He proceeded there and arrested applicant.

[9] After the arrest he received information that he had a homestead at Mankayane. He proceeded to Mankayane to verify the information. He however, discovered that he had a girlfriend whose homestead was at Mankayane.

[10] Under cross-examination, it was disputed that the photographs presented to court were captured at Amsterdam police station.

[11] It was further contested that applicant was ever at Amsterdam. It was divulged that the parents of applicant left Swaziland in 1990, leaving applicant behind by applicant's Counsel. The witness was asked whether he did visit applicant's grandfather at Mashayitafula. He responded to the positive, and informed the court that applicant's grandfather informed him that the last he heard about applicant was that he was living at Egesini, an area adjacent to Swaziland but in South Africa. When asked whether he visited the homestead at Mankayane, he informed the court that when he reached Mankayane, he enquired about the homestead. He was informed that there was no one in that homestead as applicant's girlfriend was said to be in Mbabane where she was employed. He further divulged that Mr. Fakudze, a police officer, was a police nearby who went and arrested applicant and he arrived later.

[12] The next witness on behalf of respondent was Simon Velaphi Nhleko who, under oath, identified himself as the Chief's runner of the homestead of applicant's girlfriend. He informed the court that he once saw the applicant before court. He was in the company of Hlobsile Dlamini. The following day he enquired from Hlobsile as to who the person she was with the previous day. Hlobsile told him that it was the father of her child. She was constructing a homestead with him. It was his further evidence that Hlobsile had been apportioned a piece of land by the Chief following a request to do so by Hlobsile's father. Applicant Counsel wanted to know whether this witness knew that he eventually married Hlobsile. This witness said that he was not aware. The court asked whether if it were so, he would be expected to know. He responded that he ought to have been advised of the same and that no report made about the two being married. The court further wanted to know whether he was aware that applicant has been a resident of his constituency to which he said that he only saw applicant once in his area.

[13] The last witness was Constable Sabelo Douglas Zwane of South Africa. He, on oath informed the court that he arrested the applicant at a location in South Africa called Kwathandeka for violating immigration laws. The applicant was residing with his girlfriend. Police from Swaziland arrived and interviewed the applicant. They also photographed the applicant. He was shown the two photographs handed by Constable Simelane. He identified the applicant and the background. He was cross-examined on the photographs and he insisted that they were photographed at Amsterdam Police station.

[14] During submission, Counsel for applicant withdrew his services from the bar. The applicant submitted in person and informed the court that the

parents of Hlobsile would be in a position to testify in his favour that he has been residing at Hlobsile's homestead at the material time. He has never been in South Africa. This court adjourned the proceedings in the interest of justice to allow applicant witness to give evidence.

[15] Bester Dumsile Dlamini under oath informed court that she knows applicant. He is a boyfriend of my second born daughter.

[16] Her evidence is as follows:

[17] The applicant has been residing at Hlobsile's home for the past seven to eight years. She would check on them. hlobsile worked in Matsapha while applicant stayed at home. When asked as to whether she was aware where applicant was arrested, she responded that she received a call from applicant who informed her that he was arrested in Mahamba. She was asked whether she was aware that applicant would be at Mahamba on that day. She stated that as children would come and go she was not aware. She discovered later.

[18] During the course of her evidence she divulged that Hlobsile's home was constructed and completed towards the end of last year and that is when the duo moved from her homestead to live together. She was further asked on what she could say on the evidence by the Chief's overseer that he only saw applicant once in the area and the following day enquired as to who the gentleman she was with the following day. Hlobsile told him that he was the father of her child and they were constructing a home with him. This witness disputed the Chief's overseer as a person who was new in the office. When pointed to her that even if he was new, it is common course that a person to be appointed as the Chief's right man such as Mr. Velaphi

Nhleko had to be an aborigin of that area, she could not come up with a clear answer.

[19] The evidence of this witness, from the showing had a number of inconsistencies and contradicted that of Hlobsile. Hlobsile informed the court that she fell in love with the applicant in 2007. Applicant resided at her home while she was working in Mbabane. This is a direct contrast to what Ms Bester Dlamini's evidence in that her evidence was that the applicant and Hlobsile lived together for the past seven to eight years. She exaggerated the period of the two being together. However, there is an aspect of her evidence which is material in the issue at hand. This evidence was stated by this witness more than once while she was giving her evidence under oath. She informed the court that applicant would come and go as he pleases without making a report as to where he was going. Even on the date of his arrest, she was not aware that applicant was not at home. She assumed applicant was at home but to her surprise.

[20] The burden of proof, although originally resting with the applicant shifted to the respondent. The respondent had to prove on a balance of probabilities that the applicant is a flight risk. This emanates from Section 96 (4) of the Criminal Procedure and Evidence Act 67 of 1938 prescribes that the court may refuse bail where:

“(b) Where there is a likelihood that the accused, if released on bail may attempt to evade the trial.”

[21] The girlfriend informed the court that she was not residing on full time basis at her homestead in Mankayane. She did so after arrest of applicant.

She only visited home on weekends. Her evidence in that regard does not assist the court.

[22] The Chief's runner informed the court that he only saw applicant once in the area.

[23] The evidence of the investigating officer points to the direction that the applicant has no permanent abode. He was arrested at Sicunusa border. He was during the period of investigations found in South Africa. He disputes that he was in South Africa at any point in time. This cannotaccept the evidence of the two police officers viz. Constable Simelane and Constable Zwane. They corroborated each other on the evidence that applicant resided in South Africa with his girlfriend. Both his parents immigrated to South Africa and this was confirmed by applicant under cross-examination conducted by applicant's attorney.

[24] In fact both police officers under cross-examination, it was never put to them that the applicant was never at any time in South Africa. What applicant's attorney sought to do was to dispute that when they went to South Africa applicant was incarcerated. Further applicant's attorney demanded documentary evidence to prove that applicant was in South Africa. He sought for the court to draw an inference from absence of records from South Africa to the effect that applicant was never in South Africa. The absence of such record cannot in any way be adverse to the respondent. Respondent's duty is to discharge burden of proof not beyond any reasonable ground at this stage but on a balance of probabilities. It is sufficient that respondent called the second police officer to corroborate the evidence of the arresting officer.

[25] I juxtapose the present case with that of **Sicelo S. Mkhabela v Director of Public Prosecutions Case No.99/2013** where her **Ladyship Ota J.** dismissed applicant's application for bail in the basis that he was arrested at the Lubombo Mountains, an area adjacent to Mozambique. The court drew an inference from such circumstance and held that applicant was a flight risk. *Fortiori*, the applicant in *casu* was arrested at Sicunusa border – an area adjacent to South Africa. As her **Ladyship Ota**, *supra* dismissed applicant's averments that he was not a flight risk, I do not see why applicant in *casu* should be treated differently. In fact the circumstances that the applicant was in South Africa and for the past two years the investigators have been searching for him, it will not be in the interest of justice to grant him bail.

[26] I note the postponements and the latitude granted to applicant in an endeavour to grant applicant the opportunity to bring witnesses to court who would rebut the evidence of the respondent. However, despite several postponements, all the witnesses on behalf of applicant failed to adduce evidence in his favour.

[27] On the totality of the above, applicant's application for bail is refused.

M. DLAMINI
JUDGE

For Applicant : **In person**
For Respondent : **Ms N. Masuku**