IN THE HIGH COURT OF SWAZILAND

Criminal case No: 277/2013

In the matter between:

MBHEKENI SIKHULU MBHAMALI **APPLICANT**

VS

REX **RESPONDENT**

Neutral citation: *Mbhekeni Sikhulu Mbhamali v. Rex (*277/2013) *[2014] SZHC70 (2014) 3 April 2014*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Procedure – bail – applicant charged with co-participants with the offence of Rape with aggravating factors, five counts of Robbery, three counts of contravening section 3 (1) of the Theft of Motor Vehicle Act 16/1991, one count of contravening section 12 (1) of the Theft of a Motor Vehicle Act 16/1991, one count of Common law Theft as well as one count of House-breaking – held that the count of rape is an offence listed in the Fifth Schedule of the Act – held further that in terms of section 96 (12) (a) of the Act, the applicant is required to adduce evidence to the satisfaction of the Court that exceptional circumstances exist which in the interest of justice permit his release – held further that the applicant has failed to discharge the onus as required – application for bail is dismissed.

JUDGMENT
3 APRIL 2014

[1] The applicant was arrested on the 12 June 2013 and charged with one count of rape with aggravating factors in that the applicant and his co-perpetrators raped the complainant without a condom and thus exposing her to sexually transmitted diseases; they committed the offence in the execution of a common purpose. The applicant is also charged with five counts of robbery, three counts for contravening section 3 (1) of the Theft of Motor Vehicle Act 16/1991, one count of contravening section 12 (1) of the Theft of Motor Vehicle Act 16/1991, one count of Common law Theft as well as one count of House-breaking. The offences are alleged to have been committed by the applicant and his co-perpetrators acting in furtherance of a common purpose.

[2] The count of rape is accompanied by aggravating factors, and, it is listed in the Fifth Schedule as stated in the preceding paragraph. It is trite law that for the applicant to be admitted to bail, he is required to comply with the terms of section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938 which provides the following:

> **"96. (12) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-**

- **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."**

[3] Apart from the count of rape which is accompanied by aggravating factors , the accused, as apparent from the preceding paragraphs, is charged with other very serious offences. It is also clear that he operates with his co-perpetrators in crime, acting in the furtherance of a common purpose. All these offences carry with them serious penalties which could have a tendency of dissuading the applicant from attending trial if granted bail and to evade trial. The offences of rape and robbery carry a custodial sentence upon conviction.

[4] The onus placed upon the applicant for bail in cases listed in the Fifth Schedule is very stringent. The reason for this is not difficult to tell as the offences listed in the Fifth Schedule are very serious and violent offences which attract severe penalties upon conviction. There is no doubt that when Parliament enacted this law, the purpose was to render bail very difficult to obtain and to fight the scourge of violent crime in the country. The onus placed upon the applicant is to adduce evidence which would satisfy the

Court that exceptional circumstances exist which in the interest of justice permit his release. No such evidence has been adduced by the applicant.

See *Wonder Dlamini and Lucky Dlamini* Criminal Appeal No. 1/2013.

[5] The *Wonder Dlamini and Lucky Dlamini* case (supra) quoted with approval the South African Constitutional case of *S. v. Dlamini; S. v. Dladla & Others; S. v. Joubert; S.v. Schietekat* 1999 (2) SACR 51; 1999 (4) SA 623 (CC) at para 64. This case dealt with section 60 (11) (a) of the South African Criminal Procedure Act No. 51 of 1977 which section is substantially the same as our section 96 (12) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938.

> **"64. However, s 60 (11) (a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise … in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60 (11) (a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by section 35 (1)**

(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interests of justice' were to be applied.' "

[6] The onus placed upon the applicant by section 96 (12) (a) of the Act is more stringent that the onus placed upon the applicant in section 96 (12) (b) of the Act. The former deals with more serious and violent offences listed in the Fifth Schedule and the latter section deals with other offences listed in the Fourth Schedule which are equally serious but not to the extent of offences listed in the Fifth Schedule. Section 96 (12) (b) only requires the applicant for bail to satisfy the Court that the interests of justice permit his release. It provides the following:

"96. (12) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-

....

- **In the Fourth Schedule but not 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 the interests of justice permit his or her release."**

[7] In determining section 96 (12) (b) the Court would have regard to section 96 (4) of the Act which 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 grounds under the provisions of section 96 (4) are established-

- **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**

- **Where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;**

- **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;**

- **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**
- **Where in exceptional circumstances there is a likelihood that the release of the accused, may disrupt the public order or undermine public peace or security."**

[8] With regard to the other offences for which section 96 (12) (b) applies, the onus placed on the applicant is less onerous to discharge. What the applicant has to show is that he will attend trial, not interfere with Crown

witnesses and not commit further offences or do anything that will undermine the objectives of the proper functioning of the justice system.

[9] In *Ndlovu v. Rex* 1982 – 1986 SLR 51 at 52 His Lordship Nathan CJ said the following:

> **"... in a bail application the onus is on the accused to satisfy the Court that he will not abscond or tamper with the Crown witnesses, and if there are substantial grounds for the opposition, bail will be refused. The two main criteria in deciding bail applications are indeed the likelihood of the applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case.... there is a subsidiary factor also to be considered, namely the prospects of success in the trial."**

[10] Considering the string of offences allegedly committed by the applicant with his co-participants inclusive of Robbery, contravening of section 3 (1) of the Theft of Motor Vehicle Act 16/1991 Common – law Theft, contravention of section 12 (1) of the Theft of Motor Vehicle Act 16/1991 as well as house-breaking, there is a great likelihood that the applicant would abscond trial if granted bail. It is not disputed that the applicant has no fixed place of abode or a stable means of income. What is apparent from the pleadings is that the applicant is a member of a gang of men who are alleged to be committing a string of robberies, house-breaking

and theft related cases. There is a likelihood that they will interfere with Crown witnesses if released on bail and defeat the proper functioning of the justice system. These offences are serious attracting heavy penalties upon conviction, and, the applicant has not disputed evidence that he made certain pointing out with regard to some exhibits and other exhibits found in his possession. This points to a likelihood of conviction during trial. On the papers before Court, the applicant has not discharged the onus required of him in terms of section 96 (12) (b) of the Act.

[11] Similarly, with regard to the rape charge the applicant has failed to discharge the onus as required by section 96 (12) (a) of the Act. Other than adducing evidence of a bare denial to the offence charged, the applicant merely alleges without evidence that his wife is sickly. As stated in the case of *Zolile Motsa v. Rex* Criminal case No. 3/2014, the mere production of a medical report will not automatically amount to the discharge of the onus by the applicant. In the exercise of its discretion the Court would have to be satisfied that the sickness is not only terminal and severe but that the applicant will not access adequate medical treatment whilst in custody. Each case has to be decided upon its own peculiar facts and circumstances, the seriousness of the offence charged, the number of counts charged, the prospects of success in the trial, the severity of the

penalties upon conviction and whether his release would not undermine the objectives for which section 96 (12) (a) of the Act was enacted.

[12] Accordingly, the application for bail is dismissed.

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

For Applicant	In person
For Respondent	Crown Counsel Macebo Nxumalo