



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 03/2014

In the matter between:

ZOLILE MOTSA

APPLICANT

VS

REX

RESPONDENT

Neutral citation: *Zolile Motsa v. Rex (03/2014 [2014] SZHC72 (2014) 24 March 2014*

Coram:
MAPHALALA, J

M.C.B.

Summary

Criminal Procedure – bail – applicant charged with nine counts of Armed Robbery and one count of Theft from a Motor Vehicle – held that the offence of armed robbery is an offence listed in the Fifth Schedule, and, that section 96 (12) (a) requires the applicant for bail to adduce evidence that would satisfy 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 required in terms of section 96 (12) (a) of the Act – application for bail is hereby dismissed.

JUDGMENT
24 MARCH 2014

[1] This is an application for bail brought on a certificate of urgency. The applicant is charged with nine counts of Armed Robbery and one count of Theft from a Motor Vehicle. The applicant contends that he is a sickly person as a basis of exceptional circumstances; however, no documentary evidence has been furnished to sustain the seriousness of the sickness in light of the serious offences charged.

[2] The offence of armed robbery is listed in the Fifth Schedule of the Criminal Procedure and Evidence Act No. 67 of 1938; hence, the applicant bears the onus of proving that exceptional circumstances exist which in the interest of justice permit his release in terms of section 96 (12) (a) of the said Act as amended. This section provides as follows:

“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] The bail application is opposed by the Crown on the basis that the applicant is charged with nine counts of armed robbery, and, that this offence is listed in the Fifth Schedule of the Criminal Procedure and Evidence Act as a very serious offence. The Crown further contends that the applicant was found in possession of the items obtained from the commission of the offences. Similarly, the Crown contends that if the applicant is released on bail, he is likely to interfere with Crown witnesses which would undermine and jeopardise the criminal justice system. The basis for such a contention is that the Crown witnesses are friends to the applicant and that it would be difficult to prevent communication between them.

[4] It is a further contention of the Crown that the applicant has dealings outside the country, and, that together with his co-accused, they would run to Mozambique every time they had committed an offence in the country. After they had utilised the money obtained from crime, they would come back to commit another offence. The Crown alleges that during the period from November 2013 up to his arrest, the applicant was staying in Palmera in Mozambique at the homestead of Gabriel Maphanga, a traditional healer.

[5] It is also the Crown's contention that if the applicant were granted bail, there is the likelihood that he would skip the country and evade trial. The Crown contends that in the absence of an extradition treaty between Swaziland and Mozambique, this country will not be able to extradite the applicant and bring him to justice in the event he flees the country to Mozambique after being granted bail.

[6] *Magid AJA in Senzo Menzi Motsa v. Rex* Appeal case No. 15/2009 defined the word "exceptional" in relation to bail to mean something more than merely unusual but rather less than unique. He explained that to mean "one of a kind". On the other hand in the Supreme Court case of Wonder Dlamini and Lucky Sandile Dlamini Criminal Appeal No. 1/2013, at para 15, I adopted a definition made by *Horn JA in S. v. Jonas* 1998 (12) SACR 667 where the learned Judge said the following:

"15.The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the

fact that he could not have committed the offence because, e.g. he has a cast-iron *alibi*, this would likewise constitute an exceptional circumstance.”

[7] Section 96 (12) (a) does not take away the court’s discretion to hear and determine bail where an accused is charged of an offence listed in the Fifth Schedule. However, the legislature intended to render the granting of bail in respect of such cases more stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances.

[8] In an attempt to discharge the onus, the applicant contends that he suffers from Asthma; however, he has not furnished documentary evidence in that regard. Consequently, he has failed to discharge the onus required in terms of section 96 (12) (a) of the Criminal Procedure and Evidence Act. But a mere production of a medical report will not automatically amount to the discharge of the onus by the applicant. The Court would have to be satisfied that the sickness is not only terminal and severe but that the applicant will not adequately access medical treatment whilst in custody. Each case will 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. The Court cannot close its eyes, in the present case, that the applicant is not only charged with a very serious and violent offence of

armed robbery but nine counts of armed robbery. Certainly the Court releasing such an applicant on bail would have difficulties explaining how such a decision can be said to be in the interest of justice. Certainly, if convicted, the applicant would be exposed to a severe custodial sentence; hence, his release on bail would undermine the criminal justice system by defeating the objects for which section 96 (12) (a) of the Act was enacted. It would encourage further commission of serious and violent offences to the detriment of the country and its socio-economic development.

[9] In coming to this conclusion, I have taken into account the fact that the applicant is charged with nine counts of armed robbery as well as one count of Theft from a Motor Vehicle, the fact that the offence of Armed Robbery is a serious offence listed in the Fifth Schedule as well as the lack of evidence of the seriousness of the medical condition of the applicant and whether or not he cannot adequately access medical treatment whilst in custody. Furthermore, there are no exceptional circumstances which are shown to exist in this matter as required.

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

M.C.B. MAPHALALA

**JUDGE OF THE HIGH
COURT**

For Applicant

Attorney Noncedo Ndlangamandla

For Respondent

Crown Counsel Ayanda Matsenjwa