



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 439/14

In the matter between

MTHULISI ALASTER KHUMALO

Applicant

and

REX

Respondent

Neutral citation: *Mthulisi Alaster Khumalo v Rex* (439/14) [2015] SZHC 12 (06 February 2015)

Coram: Mamba J

Heard: 9 January 2015

Delivered: 6 February 2015

[1]Criminal Law and Procedure – Application for bail before conviction in terms of sections 95 and 96(1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Applicant bears onus to establish that exceptional circumstances do exist warranting his release on bail or that it is in the interests of justice that he should be so released.

[2]Criminal law and Procedure – Application for bail. Existence of prima facie strong evidence against the applicant who faces multiple and very serious crimes. Applicant has relatives outwith the jurisdiction of the Court. Such facts prima facie prove that accused likely to abscond his trial should he be released on bail.

- [3] Criminal law and Procedure – Application for bail – applicant bears onus to prove on a preponderance of probabilities the existence of special and exceptional circumstances warranting his release on bail. Applicant alleging that he is asthmatic and this is an exceptional circumstance. Suffering from asthma is per se not an exceptional circumstance as defined in the Act. Application refused.
- [1] This is an application for bail. The application is opposed by the crown on the grounds *inter alia* that
- (a) the applicant has failed to show or establish that there are exceptional circumstances warranting that he be released on bail;
 - (b) the applicant is likely to abscond trial as he often spends his time in the Republic of South Africa and
 - (c) the applicant is facing four counts of robbery, which on its own is a very serious offence and the evidence against him is overwhelming and this would induce him to abscond trial should he be released on bail. All four counts were allegedly committed on 31 October 2014 at Nkoyoyo near Mbabane.
- [2] The applicant is a 23 year old male Swazi of eNgculwini in the District of Manzini. He has denied that he was involved in the robberies aforesaid. He states that on the day in question, together with one Zama, whose better and further particulars are unknown to him, got a lift from a certain mini bus or

kombi at the Ngwenya Border Gate. They were headed or bound for Mbabane.

[3] The applicant states further, rather strangely I should say, that;

‘9.2 Along the way and at Nkoyoyo area, the said Zama hijacked the Kombi and drove off with the same. Whilst all this was happening I had fallen asleep since I was drunk.

9.3 Apparently, the Kombi was involved in an accident at Matsapha whilst driven by the said Zama and he managed to escape and leave me at the accident scene.

9.4 I was woken up by members of the police from the kombi since I did not even realize that the Kombi had been involved in an accident.’

Later in his replying affidavit he states that

‘11. I submit that after the Kombi had been involved in accident, I passed out as I had been sleeping because of my intoxication and I was retrieved from the Kombi by members of the community police who assisted me.’

[4] The above allegations by the applicant are, as stated above, rather strange and confusing. First, he creates the impression that he did not witness Zama hijacking the minibus. He, however, knows that it was Zama who did so

and that this occurred at Nkoyoyo. Secondly, when Zama did this, the applicant was fast asleep and he did not witness it. Thirdly, when the Kombi got involved in an accident at Matsapha, it was being driven by Zama. The applicant then 'passed out' after the accident and was extricated from the motor vehicle by members of the community police in the area. I am of course mindful of the fact that the applicant has categorically denied in his replying affidavit, ever witnessing the robberies by Zama. He has also stated that he was not involved in the robberies.

- [5] Concerning his residence or sojourn in the Republic of South Africa, he concedes that he only stayed there as a student at Cornerstone College in Johannesburg and on the day in question he was on his way home having completed his matric examinations. He is supported in this regard by his mother, Bakhile Lukhele. In Johannesburg, the applicant stayed with his mother's brother Mbhenzi Sibandze.
- [6] Lastly on the issue of exceptional circumstances, which the applicant has to establish or prove, he states that he suffers from acute or severe asthma and this, he submits, constitutes such circumstances in this case.

- [7] In opposition to this application, 3401 D/Sgt Themba Dlamini, the investigations officer, states, in detail, the evidence against the applicant. He states that the accused was involved on all the robberies together with his accomplice who is at large. He states further that when the applicant was arrested, he was found in possession of some of the items stolen from the complainants or victims of the robberies.
- [8] From the above evidence, it is clear to me that the applicant has a relative, in the form of his mother's brother, in the Republic of South Africa. The applicant has lived with this man in Johannesburg whilst studying there. The charges faced by the applicant are serious and carry a straight and severe custodial sentence. The allegations are, or the evidence against him is prima facie serious, strong and cogent. All these factors tend to show in my judgment that the applicant, if released on bail, would be likely to abscond his trial. Put differently, he has failed to discharge the onus resting on him to establish that the interests of justice demand that he be released on bail or that the interests of justice would not be prejudiced by such release.
- [9] Whilst it is true that there is nothing to gainsay the applicant's averment that he is suffering from acute asthma, I do not think that this factor takes his

case any further. I say so because I think that such malady or sickness is, at least under the circumstances of this case, not an exceptional circumstance. Asthma is a sickness or ailment but it is neither terminal, rare nor exceptional as defined in the relevant law. It is not ‘one of a kind’. (per Magid AJA in *Senzo M. Motsa v R*, Appeal 15/2009, unreported).

[10] For the above reasons, this application is refused.

MAMBA J

For the Applicant : Ms N. Ndlangamandla

For the Respondent : Ms B. Ndlela