**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 316/2017

In the matter between:

**Majaha Mbokazi** **Applicant**

**And**

**The King** **Respondent**

**Neutral citation:** *Majaha Mbhokazi v The King* (316/2017) [2017] *SZHC 240 (17 November 2017)*

**Coram : T. L. Dlamini J**

**Date heard : 22 September 2017**

**Date of delivery : 17 November 2017**

**Summary:** *Criminal Law and Procedure – Bail application – Accused charged with two Robbery offences – Robbery is listed in Part II of the First Schedule – Accused arrested shortly after his release from custody following a conviction in respect of other Part II, First Schedule offences – In determining whether or not to admit an accused person to bail, the court is empowered by the Criminal Procedure and Evidence Act to also consider other factors which in the opinion of the court should be taken into consideration.*

**Held**: *That it is not in the interests of justice to release the Applicant on bail – Bail application dismissed.*

## JUDGMENT

### The application

[1] The Applicant was arrested by the Gege based police on the 17th May 2017 and was charged with two (2) Robbery offences that were both committed on the 16th May 2017. The Applicant has applied to be released on bail pending his trial for these offences. The application is opposed by the Crown which is cited as the Respondent.

[2] In support of the application, the Applicant submitted that he is a family man with minor children that he left with his mother because their mother left

him. He stated that both his parents are very old now as they are approaching 70 years.

[3] To sustain himself and his family, the Applicant stated that he operates a tractor business for rental to the community members. As it is now the time for ploughing, the Applicant submitted that he desperately needs to return home to plough for community members in return for payment which he uses to maintain his family.

[4] He also submitted that he is innocent of the charges and the police merely suspected that he was involved in the commission of the offences. He implored this court to grant him bail and stated that his co-accused was admitted to bail. He undertook to abide by all bail conditions which the court will impose.

**The opposition**

[5] The Respondent submitted that in August 2015 the Applicant was arrested for four (4) offences, *viz*., Murder, Robbery, Theft and contravention of the Theft of Motor Vehicles Act.

[6] Counsel of the Respondent submitted that there was a separation of trial in respect of these offences. The Applicant was therefore tried by the

Magistrates Court for the Robbery, Theft and contravention of the Theft of Motor Vehicles Act.

[7] Counsel submitted that on the 20th August 2016 the Applicant was convicted of these offences by the Magistrates Court. He was sentenced to a fine of ten thousand emalangeni (E10, 000.00) or to imprisonment for ten (10) years.

[8] On the 27th April 2017 the Applicant paid the fine and was released from custody. Counsel submitted that the release of the Applicant from custody was by mistake because he (Applicant) was not granted bail in respect of the Murder charge that is still pending. He therefore argued that the Applicant ought to have remained in custody even after paying the fine.

[9] It was also submitted on behalf of the Respondent that the Applicant committed the current offences shortly after being released from custody. This was within one month. Counsel argued that the admission of the Applicant to bail will not therefore be in the interest of justice.

[10] Counsel further submitted that the Applicant used his two names, namely; Majaha and Sanele, interchangeably and in a manner that conceals his real identity. This makes it, according to the Respondent's counsel, difficult to detect the Applicant's previous charges and conviction.

**The applicable law**

[11] An accused person is entitled to be admitted to bail unless his/ her release on bail would prejudice the interests of justice. This right is entrenched in the Constitution for the Kingdom of Swaziland of 2005, and is also provided for in the Criminal Procedure and Evidence Act No. 67 of 1938 as amended (the Act). See: **s. 16 (7) of the Constitution Act, 2005; s.96 (1) of the Criminal Procedure and Evidence Act, 1938; Maxwell Mancoba Dlamini and Another v Rex (46/2014) [2014] SZSC 09 (29th July 2014)** paragraph 14; and **Jabu Dludlu v The King (422/2015) [2016] SZHC 04 (04 February 2016)** paragraph 11.

[12] A consideration to be made in a bail hearing is to determine whether or not the interests of justice permit the release of the accused pending his trial. See: **s. 96 (4) of the Criminal Procedure and Evidence Act, 1938** and the case of **S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (4) SA 623 at 641.**

**Application of law to facts**

[13] The basis for opposition is summarized into the following issues, *viz.,* that the applicant was mistakenly released from custody because he still has a pending Murder charge for which he was not granted bail; there is a likelihood that if released on bail the Applicant will commit an offence listed in Part II of the First Schedule; and that the Applicant conceals his true

identity by using his two names interchangeably and this makes it difficult to detect the Applicant's previous conviction or pending charges. I will now proceed to determine these issues.

**(a) Mistakenly released from custody**

[14] Counsel for the Respondent submitted that in August 2015 the Applicant was arrested and charged with four offences, *viz.*, Murder, Robbery, Theft and contravention of section 11 of the Theft of Motor Vehicles Act. There was a separation of charges at the Magistrate Court and the Applicant was tried and convicted by the Magistrate in respect of the Robbery, Theft and contravention of section 11 of the Theft of Motor Vehicles Act. He was convicted on the 20th August 2016 and was fined ten thousand emalangeni (E10, 000.00) or ten (10) years imprisonment.

[15] In respect of the Murder charge the Applicant appeared before this court on the 18th September 2015 under High Court Case No. 392/2015 and sought an order admitting him to bail. This was so because only this court is conferred with the power to admit to bail in respect of a Murder charge.

[16] The bail application was opposed and it was not finalized. The record of the Judge's file reflects that the matter came before court about seven (7) times and would be postponed at the instance of the attorneys. On the eighth (8th) occasion the matter was removed from the court's roll for no appearance by the parties. It was never pursued thereafter.

[17] According to counsel for the Respondent, following the conviction by the Magistrate in respect of the three offences save the murder offence, the Applicant was released from custody upon payment of the fine. It eluded the minds of the responsible officers that the Applicant was still to remain in custody in respect of the Murder charge which is pending even today. Instead, the Applicant was released from custody by mistake when he ought not to have been released.

[18] I asked the Applicant if it is correct that the Murder charge is still pending. I also asked him if it is correct that he was not admitted to bail in respect of the Murder charge. In response, he conceded that the charge is still pending and that he was not granted bail for that offence.

[19] For the foregoing, I conclude that the Applicant is not entitled to be released from custody even if I were to admit him to bail in respect of the current charges. He is to be kept in custody on account of the earlier Murder charge that is still pending before this court.

**(b) Likelihood to commit an offence listed in Part II of the First Schedule**

[20] Counsel for the Respondent submitted that it is not in the interest of justice to admit the Applicant to bail because there is a likelihood that he will

commit an offence listed in Part II of the First Schedule of the Act. He argued that the Applicant was arrested in August 2015 for, *inter alia*, Robbery and Theft. He was convicted of these offences on the 20th August 2016 and paid the fine on 27th April 2017 whereupon he was then released from custody. He was however arrested again on the 17th May 2017 for two Robbery offences where the complainants are Sibusiso Nkonyane and Trevor Sethu Greenhead. His re-arrest shortly after being released from custody is an indication of his likelihood to commit these offences, argued counsel for the Respondent.

[21] The Applicant denied having committed these offenses. He stated that even the complainant Sibusiso Nkonyane attempted to withdraw the charges but the police and the Magistrate refused. He also mentioned that Sibusiso is his cousin.

[22] In my considered view, the attempt by Sibusiso to withdraw the charge does not absolve him from the allegation that he committed the offences. Even if the aforesaid Sibusiso can successfully withdraw the charge wherein he is the complainant, there is a second complainant in respect of the other Robbery charge. The alleged attempt by Sibusiso to withdraw the charge does not assist the Applicant at this stage.

[23] In determining the likelihood to commit another offence, the Act list factors which the court is to take into account and or consider. The factors include

*inter alia* "***any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused past conduct***." See: **s. 96 (5) (e) of the Criminal Procedure and Evidence Act.**

[24] Robbery and Theft, Theft either at common law or as defined by any statute, are both Part II offences of the First Schedule.

[25] The Applicant was convicted for Robbery and Theft on the 20th August 2016. He paid his fine on the 27th April 2017 and was released from custody. Shortly after his release, he was again arrested on 17th May 2017 for two (2) Robbery offences that were committed on the 16th May 2017. This, in my view, is an indication that if released on bail, there is a likelihood that the Applicant will again commit another offence listed in Part II of the First Schedule. His recent previous conviction for such offences is a sufficient indication in my opinion.

[26] For the foregoing, I find that it is not in the interests of justice that the Applicant be admitted to bail. His application for bail must therefore fail and it is so ordered.

**(c) Use of two names interchangeably by Applicant**

[27] Counsel for the Respondent submitted that in the earlier bail application under High Court Case No. 392/2015 the Applicant used the name of Sanele

Mbokazi. It was after the appointment of new attorneys N.E. Ginindza in substitution of the earlier attorneys of record that the name of Majaha was used in reference to the Applicant.

[28] Counsel submitted that in the present bail proceedings the Applicant has used the name of Majaha only. He argued that the use of the names in this manner is meant to conceal the fact that the same person was arrested and convicted for an offence that is similar to the one for which he has again been arrested shortly after his release from custody.

[29] In my opinion, this reason for opposing the application is, with due respect to counsel Dlamini, without merit. I say so because in the letter dated 17th July 2017 wherein the Applicant applies for bail in respect of the present proceedings, the Applicant attached a charge sheet with the offences he has been charged with. *Ex facie* the charge sheet, the accused person is Majaha Sanele Mbokazi, a S/M/A under Chief Mlobokazana. In the replying affidavit which the Applicant has mistakenly referred to as an answering affidavit, filed with the Registrar on the 5th September 2017, the Applicant states what is quoted hereunder:

> *"I, the undersigned*
>
> *MAJAHA SANELE MBOKAZI*
>
> *Do hereby make oath and say that:"*

[30] For the above considerations, it is my considered view that the Applicant did not use his two names interchangeably in a manner that conceals his true

identity, hence making it difficult to detect his previous charges and conviction. In my opinion, his use of one name in other instances was done honestly and not meant to deceive the Crown in an attempt to conceal earlier charges. This reason for objection must fail and is dismissed.

**(d) Likelihood to evade trial**

[31] Counsel for the Respondent did not submit that there is a likelihood that the Applicant will evade trial as one of his reasons for opposing the application. In deciding whether or not an Applicant is to be admitted to bail, the court is to determine if it is in the interests of justice to do so. Factors to be taken into consideration include those which in the opinion of the court should be taken into account. See: **Sections 96 (5) (h), 96 (6) (j), 96 (7) (h), 96 (8) (d), 96 (9) (f) and 96 (10) (i).**

[32] Prior to the arrest of the Applicant in August 2015, efforts to arrest him were futile as he fled to the Republic of South Africa. An opposing affidavit deposed to by 5879 D/Const. Welile Simelane under Case No. 392/2015 states that the Applicant became a fugitive of justice until he was arrested on the 26th August 2015.

[33] The affidavit further states that whilst still a fugitive of justice the Applicant made it a habit to illegally cross the border line between South Africa and Swaziland and would smuggle motor vehicles in the process.

[34] According to the depositions by D/Const. Simelane, on the day of the arrest the Applicant tried to avoid arrest by fleeing from the police. This led to a high speed chase and the Applicant was eventually shot by the police, hence his arrest. In his bail application filed with this court on the 15th September 2015, the Applicant stated in his founding affidavit the following:

10.

*"During my arrest I was shot and I need medical attention urgently lest my injuries get worse."*

[35] From the above depositions I am of the view and opinion that the Applicant will be motivated to flee the jurisdiction of this court because he still has a pending Murder charge. Another factor that may motivate him to evade trial is the recent conviction that might attract a more severe punishment if found guilty.

[36] For the foregoing I am of the view that the Applicant will evade trial if admitted to bail. Admitting him to bail will not therefore be in the interests of justice. His application fails and must be dismissed.

[37] For the aforegoing, the bail application is dismissed.

[38] Right to appeal and review explained.

T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : In person

For Respondent : Mr Stanley Dlamini