IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 176/18**

In the matter between:

VIKA VELABO DLAMINI **APPLICANT**

v

REX **RESPONDENT**

Neutral citation: *Vika Velabo Dlamini v Rex (176/2018) [2018] SZHC 207 (18 September 2018)*

CORAM: **MAMBA J**

HEARD: **29 August 2018**

DELIVERED: **18 September 2018**

[1] Criminal law – Application for bail – Factors to take into account – ultimately, consideration must be whether a release on bail would not prejudice the interests of justice.

[2] Criminal law – Application for bail – Applicant facing multiple and serious offences. Such may, per se, be adequate or sufficient inducement for the Applicant to abscond trial.

[3] Criminal law – Trial before Principal Magistrate – Issue of jurisdiction a factor to consider. Various and serious offences committed in three jurisdictions – multiple trials undesirable and offences should be tried before the High Court which has overall jurisdiction.

[1] The Applicant, together with 4 other persons, has been charged on five counts. His case is due to be heard before the Shiselweni Principal Magistrate's Court. The Applicant was arrested on 23 April 2017 and has been in custody since that date, pending his trial.

[2] Save for only one of his co-accused, the rest of the accused persons were granted bail and released from custody. His application for bail is opposed by the Crown.

[3] On the first count, the Applicant is charged with a contravention of Section 11 (1) of the Arms & Ammunitions Act 24 of 1964 (as amended). It is alleged that on the 24th of April 2017 and at or near Kaphunga area,

he was found in unlawful possession of a firearm. The second count alleges that on the same date and place, he was found in unlawful possession of ammunition.

[4] On count three it is alleged that on 23 April 2017 and at Kaphunga area, he was found in unlawful possession of dagga which is a habit forming drug within the meaning of the provisions of Act 37 of 1922 (as amended). The crime was allegedly committed at KaMfishane area in the district of Shiselweni.

[5] On counts 5, 6 and 7 he faces the crime of Robbery. These three crimes were also committed in the Shiselweni area on various dates in 2017 and on each occasion a firearm was used by the Applicant in the commission of these offences. On all the charges faced by the Applicant, it is alleged that he, together with his co-accused acted jointly in furtherance of a shared or common purpose.

[6] It is not altogether clear why the trial of the Applicant and his co-accused has not started or been finalised. Several dates have, it is common cause, been set for such trial but for some reason or reasons, the trial has not started to date. For instance, the Applicant states that on 25 June 2018,

the trial could not start because the Crown was not ready to prosecute the charges against him; and his co-accused. This has not been denied by the Respondent. This court notes, however, that this Application for bail was filed in May 2018; i.e. before 25 June 2018. The Crown states that the Accused persons in a ploy to delay the proceedings, have caused these postponements or delays (per para 7.1).

[7] In terms of annexure MM1, the Applicant has also been charged with seven (7) other counts of Robbery which were committed outside the jurisdiction of the Shiselweni region. For instance, counts thirteen, fourteen and fifteen were committed in the Lubombo Region whilst the rest were allegedly committed in the Manzini Region. There is no indication on the papers herein if any attempts have ever been made to have the Applicant tried for these cases. The only trial dates that have even been set but not utilized relate to those matters cognisable in the Shiselweni Region.

[8] The Crown has submitted that because the charges faced by the Applicant are very serious in nature and generally carry stiff sentences on conviction, there is a real likelihood that on being released on bail, the Applicant would abscond trial to the prejudice of justice. The Crown has

also submitted that the Applicant was once convicted of the crime of Attempted Murder and he has failed to disclose this in his Founding Affidavit, contrary to the dictates of Section 96 (14) (a) (i) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). The Crown submits further that the crimes faced by the accused herein were committed by him shortly after his release from prison for the conviction of Attempted Murder.

[9] It is also significant to observe that the Crown has also submitted that on being arrested by the police for the current charges, the Applicant falsely informed the police that he was Bongani Dlamini. For this false information, he has also been charged with a contravention of Section 24 (3) of the Criminal Procedure and Evidence Act of 67 of 1938 (as amended).

[10] The Applicant has submitted that because his other co-accused, bar one of them, have been released on bail, he must *ipso facto* be so released. He states that to rule otherwise would be an act of discrimination against him and such would be unconstitutional and unconscionable in law. I do not agree. That the Applicant and his co-accused have been charged with the same offences does not make their situations similar. The court has to

view each bail application on its own peculiar or particular facts. Such facts or factors include the personal circumstances of each applicant or accused person. Where for instance an accused person has previously attempted to escape or has actually escaped from lawful custody, this may be a strong consideration in denying him bail. Such a factor, needless to say, may not be relevant in considering the application for his co-applicants. Treating the cases differently would, in the circumstances, not be viewed as unfair discrimination.

[11] On the question or issue of non-disclosure of his previous conviction, the Applicant has in my judgment, rightly stated that he did disclose this in his previous bail application which was filed on his behalf by another attorney. This application forms part of these proceedings (See page 45 para13) of the Book of Pleadings.

[12] There is no denying the fact that the Applicant faces numerous and very serious offences. These crimes were committed in at least three of the four regions of the country of Eswatini. These crimes involve violence to the person of another. In most cases, a firearm was used in the commission of the Robberies. Again these crimes were committed within a very short space of time; between 23 February 2017 and 24 April 2017.

That is fifteen cases committed with 60 days; on diverse occasions around the country.

[13] Whilst it is true that these charges against the Applicant remain allegations at this stage inasmuch as he has not been found guilty thereon and therefore he still has the benefit of the presumption of his innocence, these allegations do not constitute an irrelevant or inconsequential issue. At the end of the enquiry, the court is enjoined to give due weight to these allegations. Similarly, where the court gives considerations to the strength of the Crown's case against the Applicant, such consideration does not mean that the Applicant has been tried for such offences. That, I dare say, is in the very nature of a bail application. The court never returns a verdict of guilty or otherwise. As Miller stated in *S v Essack 1965 (2) SA 158*,

> 'In dealing with an application of this nature it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. --- the presumption of innocence operates in favour of the applicant even where it is said that there is a strong prima facie case against him, but if there are indications that the proper administration of justice and the safeguarding

thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing his trial, there should be some evidence or some indication which touches the applicant personally regard to such likelihood.'

Giving a false name or particulars to a police officer may be viewed as an attempt to evade trial; particularly where one is a repeat offender. Again, an attempt to delay the actual trial may be such attempt, in an appropriate case. Both sides have accused each other of such delays and attempts in this case.

[14] In *Rodney Masoka Nxumalo & 2 Others v Rex, CRI Appeal 01/2014*, the Court stated per MCB Maphalala JA,

'[7] Bail is a discretionary remedy. Frank J in S v Pinero 1992 (1) SACR 577 (NW) at p. 580 said the following:

"In the exercise of its discretion to grant or refuse bail, the Court does in principle address only one all-embracing issue: will the interests of justice be

> prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand trial? Will he interfere with state witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and the security of the state? At the same time the court should determine whether any objections to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail."

See also, generally, the judgment in S v Acheson 1991 (2) SA 803 (NHC).

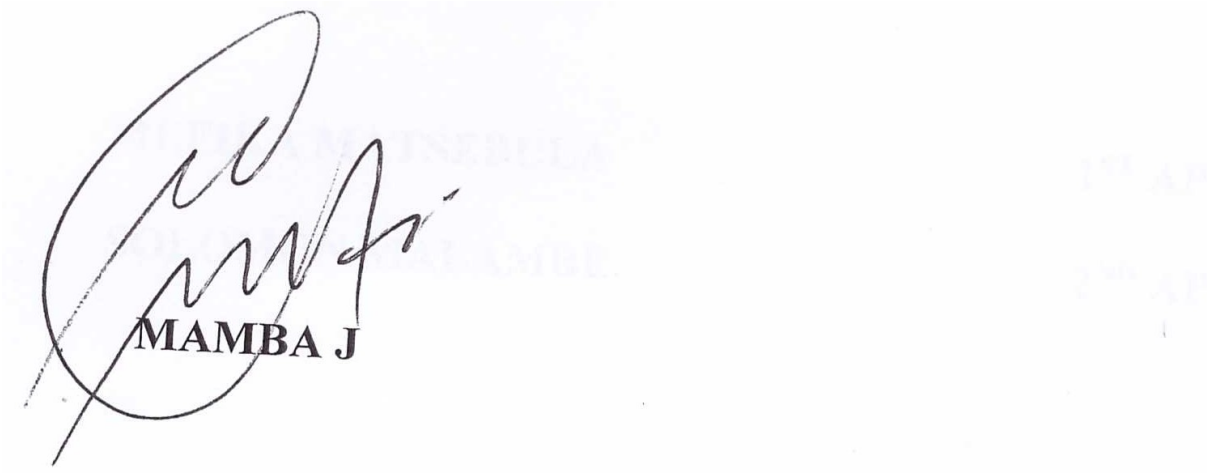
[15] In the present application, this court has, as already stated above, taken into account the various serious crimes faced by the Applicant, the repetitiveness or frequency with which they were committed, the previous convictions of the Applicant, his failure (alleged) to give or disclose his true particulars, the time he has already spent in custody since his arrest

and detention, the apparent delays on both sides to commence the trial in the Shiselweni Region and the failure by the Applicant to establish the existence of exceptional circumstances herein and his constitutional right to be presumed innocent at this stage. I am unable to conclude that justice demands that or favours that the Applicant be released on bail pending his trial. In fact the Applicant has failed to establish that exceptional circumstances do exist that warrant his release on bail. The Applicant said these circumstances were present in the very fact that his trial was not taking off. I do not agree. There is nothing special or exceptional about such an issue; though of course it may and is a relevant factor to consider.

[16] I have stated above the long period that has already lapsed since the arrest of the Applicant. It is over a year. But, as already stated, he is not free from blame for these delays. Again, whilst it is the prerogative of the DPP to decide where to prosecute or try an accused person, informed of course by the issue of jurisdiction of the various courts of the land, I do not think that justice in this case demands that the charges faced by the Applicant be split in the manner apparently being done in this case. The cases, it would appear to me must be tried before this court. This would overcome the issue of jurisdiction that may be posed by holding a trial

before the Principal Magistrate's Court. A multiplicity of trials do no appear to me to be in the interests of justice in a case such as this one. In any event, the cases against the accused are serious enough to deserve the attention of this court. That, however, is a matter for the DPP as the *dominus litis*, to decide.

[17] For the above reasons, the application is dismissed.



FOR THE APPLICANT: MR G. MHLANGA

FOR THE RESPONDENT: MR S. MATSENJWA