



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 344/2022

HELD IN MBABANE

IN THE MATTER BETWEEN

SANELE LASTLY TFWALA

APPLICANT

AND

THE KING

RESPONDENT

NEUTRAL CITATION:

***SANELE LASTLY TFWALA VS THE KING
(344/2022) SZHC – 197 [14/09/2022]***

CORAM:

B W MAGAGULA J

HEARD:

02/08/2022

DELIVERED:

14/09/2022

SUMMARY: Bail application – Accused charged of contravening Section 3 (1), 3 (3) (a) (c), 3 (4) (c), 3 (6) (e) as read with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act 15/2018 – Bail opposed – Court considers whether the rape as defined in Section 3 (1) would be interpreted in a similar way as the common law rape to catapult the offence to a schedule five offence in terms of the Criminal Procedure and Evidence Act – Court also considers the general considerations of bail and the constitutional provisions with regards to same.

JUDGMENT

BACKGROUND FACTS

- [1] The Accused person is a Liswati adult male of Mahlanya in the Manzini District. He stands charged with the contravention of Section 3 (1), 3 (3) (a) (c), 3 (4) (c), 3 (6) (e) as read with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act 15/2018.
- [2] There is a sensitive issue regarding the charges faced by the Accused. He stands charged for sexually violating his own biological daughter.

[3] The bail is opposed by the Crown on the following grounds;

- 3.1 **The charge that the Accused is facing is a schedule five offence and as such, he had not demonstrated exceptional circumstances that would entitle him to bail.**
- 3.2 **The Applicant is charged with an offence of rape where the victim is below the age of 16, yes.**
- 3.3 **Evidence implicating the Applicant in the commission of the alleged offences is over whelming, and there is a real likelihood that he may escape if released on bail.**
- 3.4 **There is a real likelihood that the Applicant will intimidate or interfere with the Crown's witnesses in a bid to completely destroy the evidence, in particular the Complainant who is a minor and his daughter.**
- 3.5 **Applicant knows where the Complainant stays, as well as her mother. They stay in the same area, where he stays, around Mahlanya. As such, it will not be in the interest of justice to release him.**

[4] That is by and large the basis on which the Respondent opposes the bail; However, the detail of grounds will appear later in the judgment, where I will deal with them in detail.

The Applicant's Case

[5] The Applicant stated the following as his basis for the bails application;

5.1 He will not plead not guilty to the charges when they eventually get to be read to him during trial, as he did not commit the alleged rape at all and he will demonstrate during the trial that he is being framed by the complainant.

5.2 he did not sleep with the complainant at all, and he denies any sexual intercourse as a fact. His defence to the charge is that he did not do actus rea of the crime and did not have the necessary mens rear to commit the crime. If in the event it is proved that the Applicant had sexual activity, she might have had sex with someone else who is not the Applicant.

5.3 There is no DNA evidence which shows that there is a similarity or any discharge from his fluids into the victim, hence the Crown's case is more speculative and relying heavily on the evidence of the complainant. Where there is no *cusal*

anexus between whatever documentary evidence they have with the applicant.

- 5.4 He denies in strong as possible terms, that he was involved in a sexual relationship with the Complainant, between the dates that are alleged on the charge sheet, and he avers that the police are merely on a fishing expectations and lacking on specifics. he denies he had ever kept sexual relations with the Complainant and during the trial he will stick to the story as it is as the only truth.

APPLICANT'S SUBMISSIONS

Presumption of innocence

- [6] The Applicant argues that in so far, as he has not been tried and convicted of the charges he is facing, he must be presumed innocent. In buttressing this argument, the Applicant has cited an authority, being a book titled **Presumption of Innocence, Jutta and Company Ltd, 1999 citing HL Parker (The Limit of Criminal Sumptions 1958 166)**, at page 29 where the concept is defined as follows;

“..... until there has been an adjudication of guilt by authority legally competent to make such an adjudication, the suspect is to be

treated for reasons that have nothing to do with the probative outcome of the case, as his guilt is an open question”.

- [7] The Applicant therefore argues that what is contained in the opposing affidavit by Officer Sifiso Simelane, is nothing but speculative allegations which are in no way close to what he terms “*overwhelming evidence*” at this stage. Applicant argues further that, the test in any event, should not be the existence of overwhelming evidence pointing to the direction of him having committed the charge he is charged with. He says at this stage, such a test is irrelevant; What he is before court for, for now, is for a bail application; His guilt or otherwise will be determined at a later stage, during the trial stage of the proceedings.
- [8] The Applicant further argues that S 29 of the **Constitution Act of 2005** provides that the person shall be presumed to be innocent until he pleads guilty or is proven guilty.

Difference between the rape referred to in Section 3 (3) 4 (1) of The Sexual Offences and Domestic Violence Act “(SODV)” of 2018 and Common Law Rape.

- [9] The Applicant has argued strenuously that, it is factually incorrect that he faces an offence that is listed in the fifth schedule of the (CP&E), based on Section 96 (12) (a) of the CP&E Act.
- [10] The Applicant argues that, nowhere in the fifth schedule of the CP&E does Section 3 (3) and 4 (1) of the Sexual Offences and Domestic Violence Act appear. The Applicant therefore argues that it is incorrect for the Applicant to be made to satisfy a higher standard, that is set out for one that seeks to be admitted to bail having been charged with an offence that appears in the fifth schedule, when in-fact he had been charged with a statutory offence which is set out in the SODV Act. Applicant further argues that, there is a difference between a common law rape and the rape that is referred to in SODV Act.

Constitutionality of Section 96 (12) (a)

- [11] The Applicant has also brought in a constitutional argument relating to the constitutionality of Section 96 (12) (a) of the CP&E. Applicant argues that in light of Section 20 of the **Constitutive Act of 2005**, which impresses against discrimination and stresses that all persons are equal before the law. It follows therefore that all Accused persons should be presumed innocent until they plead guilty or are proven guilty. There is therefore no justification constitutionally, why certain Accused persons that are charged under Section 96 (12) (a) for instance rape, should be required to demonstrate exceptional circumstances before they are admitted to bail.

[12] The Applicant takes the argument further by arguing that Section 20 (4) of the Constitution provides that parliament is not to be competent to enact a law that is discriminatory either of itself or in its effect. Hence, the provisions of Section 96 (12 (a) of the CP&E is discriminatory.

Answering affidavit of Sifiso Simelane defective, as it constitutes hearsay.

[13] The Applicant has further argued that the court must not consider the answering affidavit deposed to by the investigating Officer Mr Sifiso Simelane, as it constitutes hearsay. As much as he has deposed that the facts are within his personal knowledge and belief and are true and correct. In the affidavit itself, he keeps on referring to the fact that he “*has gathered from somewhere else*”, or “*it has been gathered from*”. This indicates that the facts he has deposed to, are not within his personal knowledge. As such, the court must not consider the context of this affidavit as they constitutes hearsay, so argues the Applicant.

The Crown’s Legal Arguments in Opposition

[14] It is the Respondent’s submission that it will not be in the interest of justice to release the Applicant on bail. The Crown submits that the wording used in Section 96 (4) of the Criminal Procedure & Evidence Act 67/1938 is

mandatory, and as such the court shall detain an Accused person when one or more of the grounds stated in the statute exists and had been established.

The aforesaid statute captures the following;

The refusal to grant bail and the detention of an Accused person in custody, shall be in the interest of justice where one or more of the following grounds are established;

- a) 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 2 of the first schedule;**
- b) Where there is a likelihood that the Accused if released on bail may attempt to evade trial;**
- c) Where there is likelihood that the Accused if released on bail may attempt to influence or intimidate witnesses or destroy evidence.**
- d) Where there is a likelihood that the Accused if released on bail may undermine or jeopardize the objective or proper functioning of the justice system, including the bail system.**
- e) Where in exceptional circumstances there is a likelihood that the Accused may disturb or intimidate the piece and public security.**

- [15] The Respondent escalates it's argument by stating that the Applicant may attempt to evade trial due to the nature and strength of the case against him, should he be granted bail. Applicant may also interfere with the witnesses in particular the Complainant, who is his daughter and the mother. Applicant knows where both witnesses stay and can easily intimidate and/or interfere with them to prevent them from testifying against him in court.
- [16] The Crown continues to argue that the nature of the sentence on the offences the Applicant is charged with is that, on conviction is custodial in nature and does not have an option of a fine, which may also induce and motivate the Applicant to flee once granted bail.
- [17] The Crown also argues that in bail matters the *onus* lies on the Accused and to discharge it on a preponderance of probability that he will not abscond or interfere with the Crown witnesses. The Crown argues therefore that in the current matter the Applicant has failed to do so.
- [18] In buttressing that argument the Crown cites the case of **The Director of Public Prosecutions Vs Bhekwako Meshack Dlamini and others (478/2015) [2016] SZSC 40 (30th June 2016) at paragraph 14** where the judgment states as follows;

“[14] The interest of justice sought to be protected in bail proceedings are two fold; firstly, that the Accused should attend trial and not abscond or evade trial. Secondly, that the Accused does not

undermine the proper functioning of the Criminal Justice System, including but not limited to interfering with the evidence of the Prosecution as well as undermining the safety and security of the public. The Accused based the onus to establish a balance of probability that it is in the interest of justice that he should be released on bail...”.

[19] The Crown in reinforcing its argument, also cited the case of **Vusani Mancoba Mhlanga Vs Rex Criminal Case No. 440/18** at page 16 where **LaNgwenya J** stated the following;

In bail proceedings the Prosecution is not obliged to prove its case against the Accused, all it needs to do is to show on a balance of probabilities that the evidence in his possession will prove the guilt of the Accused?.

[20] The Crown therefore argues that it has demonstrated that the evidence of the Complainant together with that of the doctor will prove the guilt of the Accused. The Complainant is the one implicating the Applicant in the commission of the offence. The Crown therefore argues that there is a real likelihood that the Applicant may abscond or evade trial, should he be released on bail.

THE LAW APPLICABLE

[21] Section 96 (12) of the CP&E provides as follows;

“Notwithstanding any provision of this Act, where an Accused is charged with an offence referred to – (a) in the fifth schedule the court shall order that the Accused be detained in custody until he/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 exceptional circumstances exists which in the interest of justice permits his or her release; b)”.

[22] Since the Accused person stands charged for contravening Section 3 (1), 3 (3) (a), 3 (4) (c) (3) (6) (e) as read with Section 3 (9) (b) of the Sexual Offences and Domestic Violence Act 15/2018 and another of contravening Section 4 (1) as read with 4 (2) (b) of the same Act, it is proper that a survey be made of the provisions of the above Sections.

Rape 3.1 A person who rape another commits an offence of rape and, for the purposes of this Act, the offence of rape is committed either by a male or female person against another person.

(2) For the purposes of this Section rape is defined as unlawful sexual act with a person.

(3) An unlawful sexual act for the purposes of this part constitutes a sexual act committed under any of the following circumstances – a in any of cohesive circumstance; b under false pretenses or by fraudulent means; c in respect of a person who is incapable in law

of appreciating the nature of the sexual act; d duress; psychological oppression; or f fear of violence.

(4) Cohesive circumstance, referred to in (3) (a), includes any circumstance where there is – a) a use of force against person or against the property of that person or that of a person. b) a threat of harm or against a person or against the property of that person or that of a person or c) an abuse of power authority to the extent that the person in respect of homosexual act is committed is inhibited from indicating his resistance to participate to such an act or his unwillingness to participate in such an act.

[23] In the case of **R Vs Mark M. Shongwe 1982 – 86 SLR 193 at H** it was stated that the court has to approach the question of bail on the basis of likelihood. It is further stated that regarding the risk he might not stand trial the issues that require consideration are the following;

- 1. How deep is emotional, occupational and family roots with this country are.***
- 2. His assets in the country.***
- 3. Means he has to flee***
- 4. His ability to forfeit his bail deposit***
- 5. Travel documents at his disposal to enable him to flee.***
- 6. Extradition arrangement in case he flees.***
- 7. Inherent seriousness of the offence with which he is charged.***

8. Strength of the case against him and the inducement there for him to abscond.

9. Severity of sentence likely to be visited on him.

[24] In the matter between **Sibusiso B. Shongwe Vs Rex Supreme Court of Appeal Case No. 1/2018 His Lordship Justice MCB Maphalala ACJ** as he then was, stated the following;

“19 It is tried that bail is a discretion the remedy however, the court is required to exercise that discretion judiciously, having regard to legislative provisions applicable, and the peculiar circumstances of the case as well as bill of rights is find in the constitution. The purpose of bail in every constitutional democracy is to protect and advance the liberty of the Accused person to the extent that the interest of justice are not thereby prejudiced. The protection of the right to liberty is premised on the fundamental principle that an Accused person is presumed to be innocent until his guilt has been established in court. It is against this background that the court will always lean in favour of granting bail in the absence of evidence that being so, will prejudice the administration of justice”

[25] The Applicant has argues strenuously that the charge which the Applicant faces, is not one that is listed in the fifth schedule. Applicant argues that this

allegation by the Crown is factually and legally incorrect. The Applicant further buttresses his argument by stating that nowhere in the fifth schedule to the (CP&E) does Section 3 (3) 4 (1) of the Sexual Offences and Domestic Violence Act appear.

[26] The fifth schedule states as follows;

Fifth Schedule

[27] *Offences referred to in Section 95 and 96, murder when – a) when it was planned or premediated, b) The victim was – 1...2... c.....1 rape; or (ii) incense committed with a baby or on a baby child or an adult person who is not a consenting party; or (iii) robbery with aggravating circumstances; rape – a when committed (i) in circumstances where the victim was raped more than once, whether by the Applicant or by any co-perpetrator or complex (ii)....(iii)....(iv)....b) where the victim – (i) is a girl under the age of 16 years;*

[28] *The very Section 3 (3) of the Sexual Offences and Domestic Violence Act, which the Applicant concedes he is charged with, has a sub-heading titled “Rape”. Section 3 (1) states as follows; (1) A person who rapes another commits an offence of rape, and for purposes of this act the offence of rape is committed by either a male or female person against another person. (2) For the purposes of this Section rape is defined as unlawful act with a person. (3)The offence of rape is replic both in the Sexual*

Offences and Domestic Violence Act and as I have demonstrated above, in the fifth schedule. The Applicant's argument seems to hinge on the fact that the legislation itself, which is the Sexual Offences and Domestic Violence Act "(SODV)" is not listed in the fifth schedule. But that argument is flawed as the issue here is not the heading or labeling of the legislation, but it is the act of raping that is offensive. The fact that SODV refers to rape and that the fifth schedule also counts an offence of rape amongst the offences listed, in my view should not make a difference. Rape is rape. As long as the Crown demonstrate that all the essential ingredients of the offence of rape exists in the alleged unlawful act committed by the Applicant, then it is rape.

[29] The Applicant also argued that what the Sexual Offences and Domestic Violence Act brought, which is new, is a reference to rape in relation to a male. Honestly, that should not make any difference whether a male is raped or a female is raped, it is still rape. Whoever commits such a heinous act, commits rape. The Applicant stands charged of Section 3 (3) of the SODV Act which mentions rape as part of the general offences.

[30] It is on that basis that the Applicant's argument on this respect is without merit and must be accordingly fail.

Constitutionality of Section 96 (12) (a)

[31] The Applicant also argued that Section 96 (12) (a) is of the Criminal Procedure and Evidence Act is unconstitutional, in the sense that it offends against Section 20 of the Constitution Act which impresses against discrimination. The constitution states that all persons are equal before the law. The import of the argument being that Section 96 (12) brings about classifications of offences. Therefore, the application of the exceptional circumstances on the offences listed in the fifth schedule of the CP&E is discriminatory: It presupposes that those persons who are charged with the offences listed in the schedule are being discriminated against those charged with offences that are not listed in the fifth schedule.

[32] The current application before court is for bail. Section 96 (12) (a) does not prevent persons facing those listed offences from applying and granted bail. What the Section states is that, the onus is on those persons charged with those offences to demonstrate exceptional circumstances before they can be admitted to bail. Therefore they are still entitled to bail like all other Accused persons. The difference is that the legislator deemed it fit that in light of the seriousness of the offences they face, a high standard be applicable to them.

[33] In the matter of **the Director of Public Prosecutions Vs Bhekwo Meshack Dlamini and 2 others at paragraph 1498** it was stated as follows;

“Where the Accused is charged with the offence listed in the fifth schedule of the Criminal Procedure and Evidence Act, the Accused should in addition, Accused evidence which satisfies the court that exceptional circumstances exists which in the interest of justice permit his release”.

[34] What comes out clear from the above caption is that whenever an Accused person is charged with the offence listed in the fifth schedule, as the Applicant before court as he is charged with rape, which is listed in the SODV Act. Then the obligation is on the Applicant to adduce evidence which satisfies the court that exceptional circumstances exists, for him to be admitted to bail.

[35] I therefore do not agree that the act is discriminatory in any manner.

[36] The Applicant in buttressing his argument that the act is discriminatory has cited the decision of **Senzo Matsenjwa Vs The King Supreme Case No. 30 of 27** where in paragraph 14.2 the court correctly cited Section 21 (1) of the Constitution. This provision states as follows;

“All persons are equal before and under economic, social and cultural life and in every other respect shall enjoy equal protection of the law”.

[37] The issue that was for determination in the Senzo Matsenjwa case, was a breach of bail conditions and the subsequent denial of bail in light of the alleged breach. The *court aquo* was faulted by the Supreme Court for not determining whether the proper procedure was to charge the Appellant under the prevention of corruption Act No. 3 of 2006.

[38] It is therefore my observation that the case cited by the Applicant is clearly distinguishable from the matter at hand. The Applicant faces a charge of rape amongst other offences which is set out under Section 3 (3) of the “SODV” Act.

[39] I do not seem to appreciate how the equality of persons before the law which is referred to in Section 21 (1) of the Constitution, find applicability in the matter at hand.

[40] In this jurisdiction there are clearly three arms of government, being the legislature, judiciary and the executive. The legislature is the arm that is empowered to enact legislation. In it’s wisdom, it enacted the Section 12 (a) with the intention to highlight the sensitivity and seriousness of the offences listed therein and to render the granting of bail in respect of such offence to be more stringent to obtain by placing the onus on the Accused to adduce evidence showing the existence of exceptional circumstances.

[41] By so doing, the legislature, in my view did not then usher inequality between Accused persons. In my view, it is clearly within their realm as the legislature to achieve certain objectives in society to provide for stringent measures in particular categories of Accused that are charged with heinous crimes as those set out in the SODV Act. That does not in my view, in any way then ushers in discrimination as provided in Section 20 (4) of the Constitution.

[42] In the matter at hand, the Accused is still entitled to bail, save for the fact that the Criminal Procedure and Evidence Act, in light of the offence of the rape charge that he is facing, imposed more strict measures by placing the onus on him to adduce evidence showing the existence of exceptional circumstances before he is granted bail. In a nutshell, Accused persons that are charged with rape are still entitled to bail it is just that they have to go a step further in demonstrating that exceptional circumstances exists. This is in line with the sensitivity and seriousness of the charges. Parliament deemed it fit in it's wisdom that Accused persons facing such offences must go an extra length to demonstrate the existence of exceptional circumstances before they could be granted bail.

DEFECTIVE ANSWERING AFFIDAVIT

- [43] The Applicant has argued that the opposing affidavit of Detective Sergeant Sifiso Simelane which has been relied on by the Respondent in opposition of the bail application, constitutes hearsay. The reason adduced by the Applicant is that the investigating officer keeps on referring to his affidavit that “*I gathered*” or “*it was gathered*”.
- [44] The investigating officer states in paragraph 1 of the affidavit that he is one of the investigating officers that investigated the charges that the Applicant is facing. As such the facts of the matter are within his personal knowledge due to the first hand exposure to the facts on the ground as one of the investigating officers. In my view, his reference to him gathering evidence must be interpreted in context not in abstract. He was referring to the facts that came to his knowledge as he was carrying out the investigation.
- [45] The peculiar circumstances of this matter as provided for in Section 95 and 96 of the Criminal Procedure and Evidence Act, is instructive in this matter. The Supreme Court in the case of **The Director of Public Prosecutions Vs Bhekwako Meshack Dlamini and 2 others (478/2015) [2016] SZSC 40 at paragraph 14**, stated clearly in such instances, that the Accused is to establish on the balance on probability that it is the interest of justice that he should be released on bail.
- [46] Therefore, applying the above dicta to the matter at hand, the evidence and facts that the investigating officer refers to when he says he gathered

information, does not speak to the onus that the Applicant must discharge. Especially where it is the Applicant that must demonstrate on a balance of probability that it is in the interest of justice that he must be released on bail.

[47] In **Vusani Mancoba Mhlanga Vs Rex Criminal Case No. 440/2018** at page 6 **LaNgwenya J** had the following to say on the issue of bai;

“In bail proceeding the Prosecution is not obliged to prove it’s case against the Accused, all he needs to show is the balance probability that the evidence in his possession will prove the guilty of the Accused”.

SURVEY OF THE APPLICANT’S FOUNDING AFFIDAVIT

[48] I now turn to consider the founding affidavit of the Applicant to ascertain if he has met the threshold and has demonstrated exceptional circumstances for him to be admitted to bail.

[49] The Applicant in his own words refers to his own biological daughter in the following manner;¹ *“I was arrested on or about the 16th July 2022 by the Malkerns police on charges of contravening Section 3 of the Sexual Offences and Domestic Violence Act of 2018 in that I had sexual reltions with the*

¹ This is at paragraph 7 of the Applicant’s founding affidavit

Complainant therefore one Xoliswa Saneliso Tfwala who is under age and thereby incapable of legal concern”.

[50] When one reads the voluntary version of a father referring to his own daughter as a Complainant. In as much as that is what a person that lays a charge is referred as. However, using such a distant choice of words as “I had sexual relations with the Complainant therefore one Xoliswa Saneliso Tfwala”. Why would a father refer to his own daughter in such an official and cold manner. This very person that the Applicant refers to as one Xoliswa Tfwala, is his own biological daughter. Where is that fatherly love and compassion that should ordinarily obtain when a father refers to his daughter.

[51] The distant choice of words is a cause for concern for me. It gives me an impression that the Applicant considers his own daughter as an adversary/or a Complainant, as he chose to refer to her. Where is that fatherly passionate, warm embracing reference of a father when he is talking about his daughter? This then leads one to picture the likelihood of what may happen if the Applicant is released to be in same vicinity with “the Complainant” where he can have access to her. Even if is not physical, the court cannot be ignorant of the use of technology to access the Complainant. A Complainant in a sexual case has a right to be reasonably protected from an Accused person.²

²See comments that were made to the Law Reform Commission in South Africa when the sexual offence legislation was considered by Her Ladyship, the retired Justice Moroko.

[52] The Applicant goes further in his affidavit to deny that he slept with the Complainant and he denies any sexual intercourse as a fact. His defence to the charge is that he did not do the *actus rea* of the crime at all and did not have the *mens rea* of the crime. Mr Tfwala goes on to state that if the Complainant was indeed involved in sexual activity as alleged, he may have had sex with someone else, elsewhere not from him.

[53] The court is mindful that at this stage of the proceedings the court is not concerned about the guilt of the Accused. Although the court has previously held that the lack of evidence that the Accused person committed the crime can also be an exceptional circumstance³. What comes out clearly though in the affidavit from the Applicant is that in as much as he denies that he committed the crime, he goes on to state that if his own under age child was indeed involved in sexual activity as alleged. She may have had sex with someone else, elsewhere not him. This is a parent talking who has the primary responsibility of not only to protect, guide and discipline his child. He now not only totally abdicates such a responsibility but he publicly deflects to someone else somewhere the sexual violation which he should have shielded his daughter from. He is not concerned about who might have sexual intercourse with his own daughter. This is done in a way of solely to deflect the imputation of any wrong doing to him. This is concerning.

³ See Siboniso Neliswa Hlatshwako Vs Rex High Court Case No. 133/2018

[54] The Applicant further argues that the Crown's case is speculative and relying heavily on the evidence of the Complainant who is assuming things (my own underlining) against him. The Complainant is 15 years of age. In her entire life of 15 years, she has never assumed things "*against the Applicant*" only to do so in June 2022. This begs the question, if the Applicant is in the habit of assuming things, why didn't she do so all along? only to start now in June 2022. The other mind boggling issue is that of the assumption;

"That the Complainant may have decided to do in June 2022 are quite serious, they are sensitive let alone to be made against you own father".

[55] The Complainant must have been really been assuming things, to all of a sudden decide to concoct such sensitive allegations of unlawful sexuality against her own father. At 15 years, she knew that such fabrication if it is, would have serious consequences. This is her own father that she lives with. He is the breadwinner in the household she lives in. The effects would compromise her own livelihood and relationship with her father. Why would she goes to such great lengths to fabricate such allegations? This act which she accuses her father to have committed against herself is heinous. What is the likelihood of her doing that? I ask a rhetoric question obviously.

[56] The detail of the particulars of the alleged sexual act that was allegedly to have been done by the Applicant to the Complainant is annexed to the

Applicant's application. It states that the rape is accompanied by aggravating circumstances in the following respect;

“1. The Accused person exposed the victim into danger of being infected with sexual infection such as HIV and Aids by not using condom when committing the offence.

2. The victim was forced into sexual intercourse several times.

3. The Accused person inflicted physical and mental trauma by having sexual intercourse with the Victim”.

[57] One cannot help but to note that if the Applicant says all these detail was the Complainant's own imagination and fabrication where would she get all the detail of the heinous sexual acts that the Applicant is alleged to have committed to her. For instance, that he did not use a condom, and that she was forced, and that she was physically and mentally traumatized. I am highlighting all these possibilities without in anyway getting into merits and determining the guilt or otherwise of the Applicant. However, the detail is flagged to assess the likelihood of the Complainant fabricating the charges that are faced by the Accused person. Also to assess the exceptional circumstances that the Applicant has proffered in motivating his bail application. And also the likelihood of him escaping due to the seriousness of the charges he is facing.

[58] It appears that in the founding affidavit ⁴ the Applicant is hell-bent to continue with his trade of selling liquor at his homestead in Mahlanya area where he is a resident upon his release on bail. This is one of the factors that the court must consider in his favour. He argued that should his detention be prolonged, he will be at risk of losing his customers and also that his stock is at the verge of being spoiled due to lying idle. This means that the Applicant when he signed the affidavit, formed determined intension that upon release he is going to go back to Mahlanya area. The concerning aspect of this is that the Complainant also lives in Mahlanya area. Although it has transpired through the replying affidavit that she now resides at her mother's parental home, but it is also in Mahlanya, the vicinity of the Applicant.

[59] The interest of the Complainant must also be taken into consideration, in releasing the Applicant to the community where the Complainant stays. The Complainant is only 15 years old. I can only imagine what could possibly go through her mind if she bumps on her father on her way to school or to the shops. Would she have confidence in the judicial system? Would she not be intimidated by his physical presence? These observations are made being mindful of the averments that the Accused person has made in his replying affidavit. Being that in the event he is released on bail he can stay in the outskirts of Manzini. However, that only came in reply, after the Crown had raised the issue of proximity. In my opinion this aspect of staying in Manzini is an afterthought. There is no explanation why the Applicant did not state this crucial fact in his founding affidavit. The Applicant didn't even provide the detail of where in the outskirts of Manzini would he be staying.

⁴ In paragraph 14

He just mentions the outskirts of Manzini. Clearly the outskirts of Manzini do not have a name. This gives an impression that no seriousness is attached this undertaking. The devil is in the detail. The relatives have also not been mentioned. How are they related to the Accused person? The other issue is that it is well known that a witness protection programme or structure is still work in progress in this jurisdiction. Therefore, there is nothing before court as evidence that the court could consider that would ensure that when the Applicant is released on bail, he will not interfere with the Complainant. More especially because that is such a sensitive issue, as the Complainant is the Applicant's own biological daughter. The Complainant is vulnerable, this is her father. She could easily be intimidated, coerced to even withdraw the charges. It is therefore in the interest of justice that the Complainant must be fully protected from the Accused/ Applicant.

[60] The issue is further exacerbated by the affidavit of Detective Sergeant Sifiso Simelane, who in paragraph 7.6 of the opposing affidavit stated that he gathered that in each occasion that the Applicant would have the unlawful sexual intercourse with the Complainant, he would order her not to tell anyone about the abuse. The Applicant is alleged to have also told the Complainant that if she tells anyone, they will report him to the police and he would be arrested and she will not continue with school since no one will pay for her fees. In as much as the Applicant has denied these allegations the position and relation of the Applicant to the Complainant is imposing and intimidatory on it's own. I have already mentioned earlier that as a father he is not only responsible to feed the Complainant, but as the allegations state, he is alleged to have threatened that her education would be in limbo, if he

gets arrested. This physiologically intimidation of a child by her own father is despicable. What is the probability of such intimidatory tactics not being pursued after his release?

[61] The other factor is that the charges Applicant is facing are very serious. They carry upon conviction a custodial sentence of over 20 years. It is highly likely that any opportunity that the Applicant may get if he is released on bail to intimidate the Complainant to the extent that evidence is interfered with or the Complainant is forced to withdraw the charges. He could easily take advantage of same use it without doubt. Especially if he is alleged to have threatened the Complainant in the past. Again, the seriousness of the offence is also a consideration that the court must take in a bail application are indeed serious. Why would this child frame her father to the extent that she would report the intercourse to her teacher at school? Frame her father and communicates this to her biological mother, and go further to report it to the Malkerns Police Station, well knowing the consequences of this on her own livelihood.

[61] Again, the detail and the timing of the alleged harassing act is also worth considering. It is alleged that the Applicant sexually abused the Complainant when his wife who is not the Complainant's biological mother, Tenele Tfwala was away. One cannot help but to also consider this in light of the allegations made by the Applicant to the effect that he is being framed by the

Complainant and she is assuming things against him.⁵ Why would the Complainant manufacture such detail?

[62] So the Applicant is alleged to have been opportunistic, this is the very same consideration that the court must take in considering the likelihood of him interfering with the Complainant if he can be released on bail. If the Applicant has propensity to be cunning and manipulative, what would prevent him from using such stealthful technics to manipulate the Complaint. Even if for one minute we accept that he would stay in the “outskirts of Manzini”. He will still have access to technology, for instance cellphones and the like to and communicate with the Complainant. These are one out of a lot a possible means that Applicant could use other than physical contact. These that have not been addressed in the papers, as to how they could be mitigated.

[63] The other aspect again that the court is considering, is the strength of the case against the Accused. The incentive that the Accused may have to attempt to evade his trial. This is one of the considerations that the court took in the matter of **Maxwell Mancoba Dlamini and another Vs Rex**⁶. The court highlighted that Section 96 (6) of the Criminal Procedure and Evidence Act of 67/1938 as amended to deal with various grounds which the court has to consider when determining the likelihood on the Accused if released on bail to attempt to evade trial.

⁵ See paragraphs 8 and 10 of the Applicant's founding affidavit.

⁶ Supreme Court Criminal Appeal Case No. 46/2014.

[64] I have already alluded earlier on in the judgment, that the nature and gravity of the charge that the Applicant is facing is very serious. Section 3 (8) of the SODV Act states that any person who commits the offence of rape, if the victim is or was between 15 and 18 years at the time of the offence, the sentence should not exceed 20 years in the case of a first offender. This is only applicable on the charge rape. The Applicant also faces the charge of incest which is the contravention of Section 4 (1) of SODV Act. That charge alone comes with a custodial sentence on conviction, of not exceeding 25 years.

[65] This leads to the inescapable conclusion that the nature and the gravity of the charges that the Applicant is facing are very serious. This then makes the likelihood of a heavy prison sentence that may be imposed should the Applicant be convicted to be very high; This also has a bearing on the likelihood of the Applicant attempting to evade trial and escaping⁷.

[66] In the circumstances, the court cannot ignore and close it's eyes on the above considerations which are applicable to the Applicant. The Applicant is charged with a very serious offences. His likelihood of evading trial to escape the heavy custodial sentence which is possible upon conviction is very high. Certainly, if the Applicant is convicted he will be exposed to a

⁷ Accused persons that have been granted bail have breached the bail conditions and escaped. In the matter ofwhere two Accused were charged,who was granted bail escaped. The matter is currently proceeding on against the one Accused as the other cannot be traced by the police. Therefore, it is a reality that an Accused on bail can escape successfully.

severe custodial sentence. His release on bail would definitely undermine the criminal justice, system by defeating the objects which Section 96 (12) (a) of the Act was enacted⁸

[67] Due to the foregoing reasons I am inclined to agree with the sentiments expressed by **Frank J in Rex Vs Binerio 1992 (1) SACR 577 (NW)** at page 580 who stated the following;

“In the exercise of it’s discretion to grant or refuse bail, the court does in principle address only one missing issue, will the interest of justice be prejudice if the Accused is granted bail. And in this context it must be on mind that if the Accused is refused bail in circumstance where he will stand his trial the interest of justice are also prejudiced”.

[68] 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 security or the state? At the same time the court should determine whether any objection to release on bail suitable be made appropriate conditions pertaining to the release on bail.

⁸ See the comments of His Lordship MCB Maphalala JA (as he then was) in the matter of Rodney Mancoba Nxumalo and 2 others Vs Rex Criminal Appeal Case No 1/2014.

[69] I am fortified that in the present case there are circumstances that if the Applicant's case which are considerations that have influenced me to take the view, that there is likelihood that if the Applicant is released on bail he may attempt to evade trial. There is also a likelihood that the Applicant if released on bail may attempt to influence or intimidate not only the other witnesses, but the Complainant herself to try and destroy or temper with evidence.

[70] It is also my consideration that it will not be in the interest of justice to release the Applicant on bail. I take note of the mandatory tone used in the statute which is "*shall*" which make it mandatory for the court to detain an Accused person where one or more of the stated grounds exist and has been established. I have in the body of my judgment outlined in detail how in my assessment such grounds exist.

[71] I therefore conclude that it will not be in the interest of justice that the Applicant be released on bail pending his trial. That would compromise the prosecution of the case against him, and it will also expose the Complainant to intimidation from the Applicant.

ORDER:

The Applicant's bail application is dismissed.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: Mr A. C. Hlatshwako from Sibusiso B. Shongwe & Associates

For the Respondent: Miss N. Mhlanga from The Director of Public Prosecutions