



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 329/2018

In the matter between:

Patrick Sibusiso Sithole

Applicant

And

The King

Respondent

Neutral citation: *Patrick Sibusiso Sithole v The King (329/2018) [2018]*

SZHC 197 (11 September 2018)

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

Heard : 22 August 2018

Delivered : 11 September 2018

Criminal Procedure – Bail application – Factors to be considered by the court.

Summary: *Applicant filed an application for bail after being arrested and charged for the offence of Rape with aggravating factors – Application opposed by the Crown, firstly; on the ground that the applicant will evade trial, and secondly, on the ground that the applicant has not adduced evidence to show that exceptional circumstances exist which in the interest of justice permit his release on bail.*

Held: *That to be released on bail is a constitutional right – And that having a relative to stand-in as a personal surety is an acceptable assurance that the applicant will avail himself for trial.*

Held further: *That the crown’s failure to prosecute the applicant on the already set trial date constitutes an exceptional circumstance on the facts of this case – Applicant was accordingly admitted to bail.*

REASONS FOR RULING ISSUED ON 23 AUGUST 2018

[1] The applicant is an adult male South African of Nansi Municipality at Section 401 B under Inkosi Ngomane. By profession he is a Civil Engineer and is employed by the NANSI MUNICIPALITY as a projects Manager.

- [2] According to the founding affidavit, the applicant has family roots at Mangcongco near Bhunya under the Manzini region, Kingdom of Eswatini. That is where his maternal home is situated, at the homestead of Amos Mntshali.
- [3] The applicant was initially charged with the offence of Abduction under the Sexual Offences and Domestic Violence Act No. 15 of 2018. The charge was thereafter amended and now he faces the charge of Rape with aggravating factors. It is alleged that on or about the 11 August 2018 at or near Mangcongco area in the Manzini Region the applicant wrongfully, unlawfully and intentionally had sexual intercourse with the complainant who is 16 years and without her consent and thereby committed the crime of Rape.
- [4] It is also alleged that the offence is accompanied by aggravating factors in that the victim is a minor, and that he had sexual intercourse with her more than once. It is further alleged that on one occasion the applicant did not use a condom and therefore exposed her to sexually transmitted infections.
- [5] The applicant has applied for bail pending his trial for this offence. The application is opposed by the Crown and the reasons for opposition are mainly that, firstly, the applicant will evade trial if admitted to bail, and, secondly, that he has not adduced evidence of exceptional circumstances as required given that the offence falls under the Fifth Schedule of the Criminal

Procedure and Evidence Act of 1938 as amended (hereinafter referred to as the Act).

- [6] The applicant contends that on Saturday 11 August 2018 he came to Eswatini for a special function at his maternal homestead at Mangcongco. The complainant, who he alleges to be his girlfriend, knew that he was coming. She therefore came to see him and that her parents approved of their relationship as he was also preparing to marry her before the end of this year (2018).
- [7] The applicant alleges that the charge against him was not preferred by the parents of the complainant but by some other forces who are standing in their position. He also contends that he never had sexual intercourse with the complainant on the day in question and that he knows her to be 17 years old.
- [8] He further contends that he is the breadwinner in his family and takes care of his old aged mother, his disabled sister and his three (3) young children who attend school and are dependent on him for financial support.
- [9] The Crown's opposing affidavit was deposed to by police officer 6210 Detective Constable M. Vilakati who is the Investigating Officer. He states in the opposing affidavit that the charge against the applicant was preferred by the mother of the complainant and that she also recorded a statement with the police. He also states that the complainant's mother denied any

knowledge of a love relationship between the complainant and the applicant and that she only knows the applicant to be her customer who buys firewood from her.

[10] In support of its contention that the applicant will evade trial if admitted to bail, the Crown submitted that it would be easy for him to remain out of the jurisdiction of this court since he is a South African citizen who permanently resides in South Africa and is also employed there.

[11] It was however submitted by the applicant's attorney that his client has deep emotional and family roots in the Kingdom of Eswatini and has a brother and sister from the same mother who are prepared to be his personal surety. Both siblings filed supporting affidavits wherein they vouch that the applicant has deep emotional and family ties with the Kingdom of Eswatini. The brother, Thokozani Mandlenkhosi Dlamini, went to the extent of undertaking to be the applicant's personal surety.

[12] In the case of **Maxwell Mancoba Dlamini and Mario Masuku v Rex (46/2014) [2015] SZSC 09 (29 July 2015)** the Supreme Court held that personal liberty is a right that is entrenched in the Constitution and that accused persons are entitled to be released on bail unless doing so would prejudice the interests of justice (paragraph 14).

[13] In determining the likelihood that an accused person may evade trial if released on bail, the court is to consider, in terms of section 96(6) of the Act, amongst other factors, the following:

- (i) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;**
- (ii) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Eswatini in an attempt to evade trial;**
- (iii) the strength of the case against the accused and the incentive that the accused may in consequence, have to attempt to evade his or her trial; or**
- (iv) any other factor which in the opinion of the court should be taken into account.**

[14] The above-mentioned factors are, in my view, in favour of the applicant. He has his maternal home at Mangcongco. He also has siblings who reside there and he regularly visits this home at monthly intervals on average. His arrest took place during one of such regular visits.

[15] The Kingdom of Eswatini has a bilateral extradition agreement with the Republic of South Africa. The fact that the extradition processes are cumbersome and lengthy, as submitted by the attorney for the Crown, is irrelevant in my opinion. Those processes were known and agreed to by the two countries. They cannot therefore take precedence over the constitutional right of the applicant to be admitted to bail. As a matter of fact, these processes are meant to ensure the protection of this entrenched constitutional right.

- [16] A copy of the complainant's birth certificate was attached to the answering affidavit together with a report of her medical examination that was conducted at the Mankayane Government Hospital. The birth certificate shows that she was born on the 5th November 2001. She therefore was 16 years and 10 months at the time of the alleged offence.
- [17] The respondent's attorney submitted that the medical report was attached in order to rebut the applicant's version that he did not have sexual intercourse with the complainant. I am mindful of the fact that this is not a trial for the offence. I do take note however, that the medical report only reflects an absence of the complainant's hymen and concludes that she (complainant) is not a virgin and nothing more.
- [18] This does not, in my view, points towards a strong case against the applicant. I am accordingly not persuaded to believe that once released on bail the applicant will evade trial for this offence.
- [19] The Constitutional Court of South Africa, per **Kriegler J**, stated what I quote hereunder, regarding bail applications:

“In bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court... The focus at the bail stage is to decide whether the interest of justice permit the release of the accused pending trial.”

See: S v Dlamini ; S v Dladla and Other; S v Joubert; S v Schietekat 1999 (4) SA 623 at 641.

[20] I am satisfied that the availability of Thokozani Mandlenkhosi Dlamini who undertook to avail himself as the personal surety for the applicant is an acceptable assurance that the applicant will not evade trial. In my view, the interest of justice permit the release of the applicant on bail pending his trial for the offence.

[21] The charge of Rape with aggravating factors falls under the Fifth Schedule of the Act. **Section 96(12)(a)** requires an applicant for bail who is charged with such offence to adduce evidence of exceptional circumstances which satisfies the court that the interests of justice permit his or her release from custody.

[22] It was submitted on behalf of the Crown that the applicant failed to adduce any evidence of exceptional circumstances. **His Lordship Magid AJA** in the case of **Senzo Menzi Motsa v Rex (15/2009) [2009] SZSC 8 (19 May 2009)** stated that the word “*exceptional*” in relation to bail means something more than merely unusual but rather less than unique which means in effect “*one of a kind*” (paragraph 11).

[23] The Supreme Court of Appeal, per **Beck JA**, in the case of **Shongwe Bheki v R 2000–2005 (1) SLR 380 at 382**, stated that the existence of exceptional

circumstances lies within the knowledge of the accused and he must adduce evidence of them.

[24] The applicant deposed in his founding affidavit that he is employed as a Projects Manager and is a breadwinner in his family. He takes care of his old aged mother, his siblings (particularly his disabled sister) and his three children who all attend school and are dependent on him for financial support.

[25] He also deposed that on the 14th August 2018 he was denied bail at the Magistrate's court on the basis that he is a South African and will evade trial. The Crown then undertook to proceed with his trial soonest and a trial date was set for 16th August 2018 at Bhunya Magistrate's Circuit Court. He waited for trial on the set date until it was around 1300 hours when he was informed that his trial cannot proceed as the Crown's witness is not fit to testify. He was given a new trial date of 13th September 2018.

[26] In answering the averment concerning the failure of the trial to proceed on the set date of 16th August 2018, the Crown only stated that those contents are noted.

[27] In my view and finding, the Crown's failure to proceed with the prosecution or trial of the applicant on the set date is an exceptional circumstance on the facts of this case. The applicant had already been refused bail. He is however

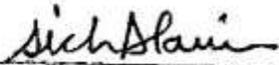
still innocent of the charge. In terms of **Section 21(2)(a) of the Kingdom's Constitution of 2005**, he is presumed to be innocent. The fabric of his life is therefore to be kept intact and he should be allowed to maintain his employment and family ties.

[28] For an accused to be informed that his prosecution cannot proceed because the complainant is unfit to give evidence is not a good reason, in my opinion, for extending his detention in custody. This is particularly true because the reason that rendered her unfit is not even stated.

[29] For these reasons, I concluded that the interests of justice permit the release of the applicant from custody. I accordingly issued an order admitting the applicant to bail on the 23rd August 2018 on the following terms and conditions:

1. The applicant was admitted to bail of **E50, 000.00**. He was ordered to pay **E10 000.00** cash and provide sureties for **E40 000.00**;
2. He was further ordered to secure the availability of Thokozane Mandlenkhosi Dlamini to stand as a surety in accordance with the undertaking which the said Thokozane made in the supporting affidavit that he filed;
3. To attend court wherever and whenever required to do so;
4. Not to interfere with any evidence and the witnesses for the Crown, including possible Crown witnesses;

5. On account of the applicant's residence and employment in the Republic of South Africa, he is to report to the Bhunya Police Station once every month during the last week of each month between 0800 hours and 1600 hours commencing in September 2018; and
6. To furnish the Investigating Officer with all his contact details and physical residence information.



T.L. DLAMINI J
JUDGE OF THE HIGH COURT

For Applicant : Mr N. B. Mabuza
For Respondent : Ms N. Mabila