

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 73/2020

In the matter between

ANDREAS MFANASIBILI SHONGWE

V

THE KING

Neutral citation: *Andreas Mfanasibili Shongwe v The King (73/20) [2020] SZHC - 50 [2020] (26th March 2020).*

Coram: D Tshabalala J

Heard: 20th March 2020

Delivered: 26th March 2020

Summary: Bail application: The applicant applied to be released on bail following arrest and charge for rape of his 9-year-old son with whom he lived, in contravention of SODV Act. He asserts that he will stand trial, will not interfere with witnesses and that the charges preferred against him are fabricated. The applicant further alleges that apart from a chronic illness requiring constant medical attention he also damaged his spinal cord. The crown opposed bail for fear that if released there is the likelihood, inter alia, that the applicant will

interfere with, influence or intimidate witnesses in particular the complainant. The crown further argues that there was no evidence of exceptional circumstances adduced in view of rape as a Fifth Schedule offence.

Held: The applicant's affidavit proffered insufficient proof that his alleged sicknesses constitute special circumstances in line with case law on definition of "special" for the purpose of the application.

JUDGEMENT

- [1] This is an opposed bail application filed under the certificate of urgency on the 17 February 2020. The Applicant was arrested on the 11 February 2020 and subsequently charged at Simunye with Contravention of Sexual Offences and Domestic Violence Act of 2018 (SODV), it being alleged that he unlawfully and intentionally had sexual act with his 9-year-old son.
- [2] The Applicant avers in his founding affidavit that if admitted to bail there is no likelihood that he will endanger the safety of the public or any particular person; that he will abscond trial; interference, intimidate or influence Crown witnesses.
- [3] The Applicant intends to plead not guilty to the charge and is confident of acquitted as he did not commit the offence charged. He alleges that he is being falsely implicated by the complainant's mother with whom he admittedly has differences.

[4] Bail is opposed by the Crown on the following grounds stated in the answering affidavit of Constable Nqobile Msibi:

That it will not be in the interests of justice to release the Applicant; he will be a danger to the complainant who is his 9-year-old son. The crown refers to complainant's statement he allegedly made to his aunt that he did not report the sexual abuse to anyone prior because the Applicant threatened to assault and kill him if he did; that the safety of the victim's mother would be at stake as the Applicant has a grudge against her and accuses her of orchestrating the false charge against him, among other issues.

[5] It is the Crown's contention that the Applicant will abscond trial due to the seriousness of the charge which if convicted will likely attract a custodial sentence.

[6] The Crown fears that the Applicant will influence or interfere with Crown witnesses, in particular the victim who is Applicant's biological son and with whom he lived at Simunye where the alleged offence occurred. Further that applicant's release will traumatize the young victim.

[7] The Supreme Court noted in *Matsenjwa V Rex*¹ that the procedure for application for bail and the conditions under which it may be granted are set out in the *Criminal Procedure and Evidence Act* (CPEA). Section 96 (1) (a) thereof provides that an Accused in custody is entitled to bail, subject to the provisions of Section 95 and the Fourth and Fifth Schedules, and unless the Court finds that it is in the interest of justice that the Accused is kept in custody.

¹ (13/2017) [2017] SZSC 60 (17th November 2017)

- [8] The Supreme Court further refers to the provisions of Section 94 (4) of the Act which set out the grounds upon which bail may be refused. These include the likelihood that the Accused may endanger the safety of the public or any particular person; ² the likelihood that the Accused if released may attempt to influence or intimidate witnesses or to conceal or destroy evidence.³
- [9] Relevant factors that the Court has to take into account in considering the likelihood of an attempt to influence or intimidate witnesses as set out by the Supreme Court include, the Accused's familiarity with witnesses and the evidence that may be given against him, the relationship of the Accused with such witnesses and the extent of which they could be influenced.⁴
- [10] Guidelines for the courts in determining where the interests of justice lie as envisaged by Section 9 (10) of the Act, that is weighing the interests of justice against the right of the Accused to personal freedom, include the following: the period for which the Accused has already been in custody; the probable period of detention until conclusion of trial; state of health of the Accused; any impediment by his detention in the preparation of Accused's defence.
- [11] I turn now to the main assertions made by the Applicant which the Crown disputed. These questions relate to the likelihood to interfere with or intimidate witnesses and whether exceptional circumstances exist

² Section 94 (4) (a).

³ Section 94 (4) (c).

⁴ (Matsenjwa, supra)

warranting release of the Applicant who is facing a charge of Fifth Schedule offence.

Interference/intimidation of Crown witnesses.

- [12] The Applicant denies that he committed sodomy on his child and maintains that the charge has been fabricated by the child's mother. He suggests that in any case the child may stay with its mother and not with him anymore. At this stage the Crown is not required to prove the offence in any detail. It suffices that the Crown has shown by *prima facie* evidence that the offence may have been committed. The statement of Fisiwe Magagula and the allegations therein, do not constitute conclusive evidence against the Applicant, nonetheless their relevance cannot be ignored for the purpose of this application. The relevant part of the statement is her observation of apparent injury on the anus of the complainant and the response she received from the complainant which implicated the Applicant.
- [13] Authorities are abounding in support of ill-health as a basis for existence of exceptional circumstances warranting release on bail of an Accused charged with Fifth Schedule offence, rape in this case. It is trite that the Applicant must in this regard adduce or furnish evidence in support of his claim of ill-health.
- [14] The Crown argued that the Applicant failed to adduce the required evidence to prove that exceptional circumstances existed and therefore it was in the interests of justice to release him on bail, despite that he was charged with an offence under the Fifth Schedule of the CPEA.
- [15] It was counter-argued for the Applicant that exceptional circumstances for release of the Applicant have been shown in that he mentioned in his

deposition that he suffered from chronic illness which required consistent medical attention. He also mentions elsewhere in his affidavit that he damaged his spinal cord as a result of which he was granted sick leave from work by his employer.

[16] The term “exceptional” has been defined by the Supreme Court for the purposes of bail as -

“...something more than just “unusual” but rather less unique, which means in effect “one of its kind...”⁵

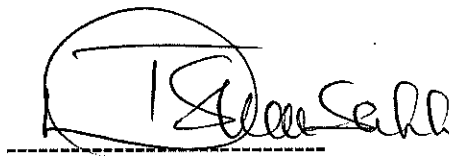
[17] It is not a given that a mere mention of a medical condition by the Applicant automatically qualifies or justifies exceptional circumstances for the purpose of bail. The onus is on the Applicant to furnish convincing evidence that it will be in the interest of justice to release him on bail. It appears in the present case that the Applicant merely mentioned that he has a chronic disease requiring continuous medical attention. There is no indication what chronic illness he suffers from, or whether the required medical attention cannot be provided while in custody. In the second instance he mentioned that he has damaged his spinal cord, but furnished no further details how critical or exceptional his condition is except that he was on sick leave granted by the employer on that account.

[18] The Applicant and his Counsel made mere assertions but no convincing satisfactory evidence regarding the alleged illnesses and that they constitute exceptional circumstances as defined by case law referred to above.

⁵ *Senzo Meluzi Motsa v Rex* Criminal Appeal Case No. 15/2009, per Magid AJA, quoted with approval by Odoki JA in *Matsenjwa v Rex* at paragraph [36] supra.

[19] It is found that it will not be in the interest of justice to release the Applicant on bail in circumstances where his minor child is the complainant against him. Applicant's relationship with the child witness and his proximity to him poses apprehension and likelihood that he will attempt to influence or intimidate him.

[20] For the forgoing reasons the application is dismissed.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line. The signature is stylized and somewhat cursive.

D Tshabalala
Judge

For the Applicant: Mr S Jele

For the Crown: Ms Mhlanga