

IN THE SUPREME COURT OF SWAZILAND

01/2013

Criminal Appeal Case No:

In the matter between:

WONDER DLAMINI

FIRST APPELLANT

LUCKY SANDILE DLAMINI

SECOND APPELLANT

AND

REX

RESPONDENT

Neutral citation: *Wonder Dlamini and
Another vs Rex (01/2013) [2013] SZHC 2 (2013)*

Coram:

RAMODIBEDI CJ, M.C.B. MAPHALALA JA, OTA JA

Heard:
7 February 2013

Delivered:
1 February 2013

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Summary

Criminal Law and Procedure - Bail –
Appeal on the ground that the
appellants have satisfied

the requirements of section 96 (12) (a) of the Criminal Procedure and
Evidence Act No. 67

of 1938 as amended – The principle
of exceptional circumstances as
contained in section 96

(12) (a) of the Act discussed as well
as section 16 (7) of the Constitution
– Both legislation

make bail a discretionary remedy
–
Court misdirected itself in holding
that exceptional

circumstances did not exist – appeal
allowed.

JUDGMENT

THE COURT

[1] This is an appeal against the judgment of Madam Justice Q.M. Mabuza delivered in the court *a quo* on 11 January 2013. The appellants are charged with two counts of Armed Robbery, one count of Attempted Murder as well as one count of contravening section 8 of the Opium and Habit Forming Drugs Act No. 37 of 1922 as amended.

[2] In his bail application before the court *a quo*, the first appellant contended that he suffers from pneumonia and frequent bouts of sinus and that he requires high levels of ventilation and protection from colds; he averred that his continuous incarceration is likely to worsen his condition since he cannot receive the required levels of ventilation whilst in custody. He also submitted that his condition may be worsened by the living conditions at the Remand Centre where he sleeps on a mat which cannot protect him from attracting further illnesses. This was also the basis for the second appellant when applying for the grant of his own bail.

[3] The appellants further argued that section 16 (7) of the Constitution of 2005 is mandatory in nature and compels the court to release them either unconditionally or upon reasonable conditions; and to that extent they argued that section 96 (12) (a) was inconsistent with that provision of the Constitution on the basis that it requires an applicant for bail to prove the existence of exceptional circumstances which in the interest of justice permit his release. They contended that section 96 (12) (a) of the Act takes away the discretion of the court to grant bail.

[4] Two points of law were raised by the respondent. Firstly, that both appellants are charged with two counts of Armed Robbery which were committed using firearms, and that these offences fall under the Fifth Schedule of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. Secondly, that according to section 96 (12) (a) of the Act, where an accused is charged with an offence referred to in the Fifth Schedule, the court should order that the accused be detained in custody until he 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 exceptional circumstances exist which in the interest of justice permit his release.

[5] In her ruling the learned judge in the court *a quo* had this to say:

"1. In answer to the issue of exceptional circumstances Mr. Piliso has raised two responses:

First, that the first applicant suffers from pneumonia. My answer to that is that he has not filed any medical report from his doctor detailing his medical history and the prescriptions that he is normally given. This would have enabled Mr. Magagula to file a full and comprehensive answering affidavit opposing the grant of bail. This point fails.

Secondly, Mr. Piliso referred me to section 16 (7) of the Constitution which gives back to the court its discretion to grant bail which discretion was removed by section 95.

My answer thereto is that in order to rely on this section and succeed in this case he ought to have challenged section 95 and asked the court to strike it down as being inconsistent with section 16 (7) of the Constitution. This point fails.

2. In the circumstances I hereby uphold the point *in limine* and dismiss the application."

[6] The offence of Robbery when committed using a firearm falls under the Fifth Schedule of the Criminal Procedure and Evidence Act; hence, the two counts of Robbery for which the appellants are charged fall under the said Schedule. Section 96 (12) (a) of the Criminal Procedure and Evidence Act deals with bail applications in respect of offences listed in the Fifth Schedule, and it provides the following:

"96. (12) 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 or 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 exceptional circumstances exist which in the interest of justice permit his or her release."

[7] In defining exceptional circumstances *Magid AJA*, in *Senzo Menzi Motsa v. Rex* appeal case No. 15/2009 stated as follows at para 11:

"In my judgment, the word "exceptional" in relation to bail must mean something more than merely "unusual" but rather less than unique which means in effect "one of a kind".

[8] Section 96 (12) (a) makes it clear that an applicant for bail in respect of a schedule five offence bears a formal onus to satisfy the court that exceptional circumstances exist which in the interest of justice permit his release; the applicant discharges the onus by adducing the requisite evidence failing which his detention in custody continues pending finalization of the trial. Admittedly, the onus has to be discharged on a balance of probabilities.

[9] The offences listed in the Fifth Schedule consist of serious and violent offences, and, which upon conviction are accompanied by severe penalties. It is apparent that when Parliament enacted this law, the purpose was to render the granting of bail in respect of these offences most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances. The legislation seeks to protect law-abiding citizens against the upsurge in violent criminal activity. The legislation does not deprive the courts of their discretion in determining bail applications in respect of the Fifth Schedule offences but it requires evidence to be adduced showing the existence of exceptional circumstances. It further places the onus of proof upon the applicant. Parliament enacted section 96 (12) (a) in order to deter and control serious and violent crimes as well as to limit the right of an accused person to bail in the interest of justice.

[10] The South African Statute dealing with bail applications in respect of serious and violent crimes is section 60 (11) (a) of the Criminal Procedure Act 51 of 1977, and its wording is substantially the same as our section 96 (12) (a) of the Act. In South Africa these offences are listed in the Sixth Schedule. The South African Constitutional Court in the case of *S. v. Dlamini; S. v. Dladla and others; S. v. Joubert; S.v. Schietekat* 1999 (2) SACR 51; 1999 (4) 623 (CC) dealt with the issue of "exceptional circumstances" in bail applications. The issue before the Constitutional Court was whether or not section 60 (11) (a) of the Act infringes upon the accused's right to personal liberty by the requirement of "exceptional circumstances" which places a rigorous test to bail.

[11] *Kriegler J* who delivered the unanimous judgment of the court stated the following at paragraphs [60] and [61]:

"[60] ...an accused on a Schedule 6 charge must adduce evidence to

satisfy a court that 'exceptional circumstances' exist which permit his or her release.

[61] Under ss 11 (a) the lawgiver makes it quite plain that a formal onus rests on a detainee to 'satisfy the court'. Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that 'exceptional circumstances' exist."

[12] His Lordship at paragraphs [63] and [64] of the judgment analysed the

Change to bail applications which has been introduced by the

amendment in section 60 (11) (a) of the Act. He stated the following:

“[63] Section 60 (11) (a) applies only when an accused is charged

with one of the serious offences listed in Schedule 6. It is true

that the seriousness of the offence, and with it the heightened

temptation to flee because of the severity of the possible penalty,

have always been important factors relevant to deciding whether

bail should be granted. So, too, have been the possibility of

interference with the course of the case, and the accused's

propensity to interfere in the light of his or her criminal record.

Indeed, those are factors that are expressly mentioned in

the list of 'ordinary' circumstances contained earlier in section 60.

[64] These are factors, therefore, which in the past would have been

considered in determining whether bail should be granted. However, s 60 (11) (a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the

exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise ... in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60 (11) (a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by section 35 (1) (f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interests of justice' were to be applied."

[13] The court has a discretion in each case, to determine whether exceptional circumstances exist. *Kriegler J* put it more succinctly at paragraph [74] as follows:

"[74] Section 60 (11) (a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provisions. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted."

[14] We have been referred by Counsel to the case of *S v. Jonas* 1998 (2) SA SACR 667 (South Eastern Cape Local Division) which was decided before the decision of the Constitutional Court referred to above. The essence of *Jonas'* case is that it emphasises the discretion of the court in determining whether or not the evidence adduced by the applicant does constitute exceptional circumstances; it further emphasises that the onus rests upon the applicant to establish the existence of exceptional circumstances.

[15] At page 678 of his judgment *Horn JA* in dealing with section 60 (11) (a) of the Act stated the following:

“From the aforesaid provisions it is clear that a court is obliged to order an accused’s detention where he stands charged of a Schedule 6 offence and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. The effect of this provision is to shift the onus to the accused to convince the court on a balance of probabilities that such circumstances exist. The Schedule 6 offences are serious offences such as murder, rape and robbery where there were aggravating circumstances present when they were committed.

The term ‘exceptional circumstances’ is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g. he has a cast-iron *alibi*, this would likewise constitute an exceptional circumstance.”

[16] It has also been argued by the appellants’ counsel that section 16 (7) of the Constitution is mandatory in nature and that the court does not have the discretion to refuse bail. This argument is misconceived. This section provides as follows:

“16. (7) If a person is arrested or detained as mentioned in subsection

(3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial.”

[17] Section 16 (3) (b) provides as follows:

“16. (3) A person who is arrested or detained-

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. .
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(b) Upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence, shall unless sooner released, be brought without undue delay before a court.”

[18] Section 16 (7) of the Constitution endorses the general principle that bail is a discretionary remedy. For a person charged with an offence under the Fifth Schedule, section 96 (12) (a) of the Act requires that the court has to be satisfied that the applicant for bail has adduced evidence showing that exceptional circumstances exist which in the interest of justice permit his release. If the court is not satisfied bail is refused. However, section 96 (12) (a) of the Act does not take away the court’s discretion to grant bail. It is the duty of the court in every bail application to determine if the facts and averments made constitute exceptional circumstances. The first appellant has adduced evidence that he suffers from pneumonia and frequent bouts of sinus both of which requires high levels of ventilation and protection from colds. He further argued that his continued incarceration would worsen his condition because at the Remand Centre they sleep on a mat.

[19] The court *a quo* found that exceptional circumstances did not exist in respect of the first appellant because no medical report was annexed to the application. The court *a quo* reasoned that if a medical report had been furnished the respondent would have filed a comprehensive answering affidavit opposing the granting of bail. It is common cause that the respondent did not file an answering affidavit, and, this was not caused by the first appellant’s failure to file a medical report.

[20] The appellants quoted the South African case of *S. v. Jonas* (supra) as authority for their proposition that averments of an applicant for bail which

have not been challenged by the State constitute exceptional circumstances. They contended that since the Crown has not challenged the evidence adduced, they have discharged the onus of proof as required by section 96 (12) (a) of the Act.

[21] At pages 678-679 *Horn JA* said the following:

“In this matter the State did not place any evidence before the court, either in opposing the application for bail or in rebuttal of the appellants’ denial of the commission of the offences with which he had been charged. It would appear that the State had adopted this line of approach on the assumption that the appellant had all to do in order to succeed with his application for bail.

On the strength of the onus which the amending provisions had cast on the appellant, the magistrate simply adopted the attitude that because the appellant had shown no exceptional circumstances bail should be refused. The magistrate did not say what such exceptional circumstances might be. I do not believe that it could have been the intention of the Legislature, when it enacted the amending provisions of section 60 (11) (a) of the Act, to legitimise the at random incarceration of persons who are suspected of having committed Schedule 6 offences, who, after all, must be regarded as innocent until proven guilty in a court of law.

The State cannot simply hand up the charge sheet to show that the accused had been charged with a Schedule 6 listed offence and then rely on the accused’s inability to show exceptional circumstances.... The magistrate was wrong in finding that the State had proved a prima facie case against the appellant simply upon the State’s tendering of the charge sheet in which the offences were dealt with. This cannot be the law. What the magistrate at the end of the enquiry had before him, was the uncontested evidence of the appellant (a) denying that he had committed the offences or as in any way implicated in the commission of the offences, and, (b) the appellant’s evidence of an *alibi* which, if proved, would have served to show that the appellant could not have committed the offence.

Unchallenged, these averments, to my mind, constituted exceptional circumstances which justified the magistrate to consider the merits of the applicant's bail application.

The magistrate had approached the case on the basis that because the onus rested on the appellant, the State had no duty to rebut....

Firstly, the magistrate could not have known what kind of evidence the investigating officer would have given. Secondly, the State adduced no evidence or placed no evidence on record which could show that the State did have a *prima facie* case against the appellant. On the contrary, it was the appellant who placed evidence on record showing that he could not have committed the offence and that he should have been granted bail.

If the State was serious with its opposition to the granting of bail, it should have led rebutting evidence at least placing in dispute the uncontested evidence of the appellant. Placing in dispute in this sense, postulates a genuine dispute. Mere accusations are not enough."

[22] In the present case, as was in *S. v. Jonas* (supra), the Crown did not place any evidence before the court either in opposing the bail application or in rebuttal of the appellants' denial of the commission of the offences for which they have been charged. However, and with due respect to Justice Horn JA in *S. v. Jonas* (supra), this does not mean that the unchallenged evidence adduced by the appellants would automatically constitute exceptional circumstances. As was stated in the case of *Senzo Menzi Motsa v. Rex* (supra) as well as the South African Constitutional Court case referred above, the Court has a duty in each bail application to determine whether the evidence adduced by the accused does constitute exceptional circumstances irrespective of whether or not the State has placed before court evidence opposing the bail application or evidence in rebuttal of the appellants' denial. To that extent we are not bound to follow the *Jonas* case.

[23] It is common cause that the court *a quo* did not deal with the evidence adduced by the second appellant in respect of his bail application. To that extent the court misdirected itself; it was incumbent upon the court *a quo* to analyse and assess the evidence of the second appellant in order to determine if it disclosed exceptional circumstances which in the interest of justice permitted his release. Notwithstanding this the court *a quo* also refused bail to the second appellant.

[24] The evidence adduced by the second appellant is to the effect that the living conditions at Zakhele Remand Centre constitute a health hazard because they sleep on a mat which render them susceptible to attract various illnesses. In a democratic country such as ours, one would have expected that inmates be provided with at least mattresses and not sleep on mats placed on a cold cement floor. As the second appellant correctly stated, such a situation would inevitably attract various illnesses; to that extent it does constitute exceptional circumstances.

[25] Following the definition of exceptional circumstances by *Magid AJA*, in *Senzo Menzi Motsa v. Rex* (supra), it is our considered view that suffering from pneumonia with frequent bouts of sinus is a condition which is "more than unusual" but rather less than unique; it is a condition that is "one of a kind". The failure by the respondent to file opposing papers does not deprive this Court of its duty to dispense justice by determining whether or not the evidence adduced by the first appellant does constitute exceptional circumstances. To that extent the court *a quo* misdirected itself by holding as it did that exceptional circumstances did not exist merely because there was no medical report annexed to the bail application.

[26] Furthermore, the court *a quo* ruled that in order for the appellants to rely on section 16 (7) of the Constitution, they ought to have challenged section 95 of the Act and asked the court to strike it down as being inconsistent with section 16 (7) of the Constitution. The court *a quo* was correct in holding that if counsel for the appellants intended to challenge section 95 of the Act as being inconsistent with section 16 (7) of the Constitution, they ought to have asked the court to strike it down. This was the situation in the South African Constitutional case of *S. v. Dlamini; S. v. Dladla and others; S. v. Joubert; S.v. Schietekat* (supra) where the applicants asked the Court to strike down Section 60 (11) (a) of the Criminal Procedure Act No. 51 of 1977 as being inconsistent with the right to personal liberty by the requirement of "exceptional circumstances" which places a rigorous test to bail.

[27] However, as stated in the preceding paragraphs, sections 95 and 96 of the Act as well as section 16 (7) of the Constitution retain the discretion of the court to grant bail. It is open to any litigant, if so advised, to challenge the constitutionality of section 96 (12) (a) of the Act on the basis that it is inconsistent with section 16 (7) of the Constitution. That as can be seen, is a matter for another day should the issue arise. It would, therefore be premature for us to express a concluded view one way or the other at this stage.

[28] It follows from the foregoing considerations that the appeal must succeed. The judgment of the court *aquo* is set aside. Accordingly the following orders are made:

- (a) Bail is granted at E50 000.00 (fifty thousand emalangi) in accordance with section 95 (5) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended; the applicants will pay cash of E10 000.00 (ten thousand emalangi) and provide surety worth E40 000.00 (forty thousand emalangi).
- (b) The appellants must not interfere with Crown witnesses.
- (c) The appellants must attend trial.
- (d) The appellants must surrender their passports and travelling documents and not apply for new ones pending the finalization of the summary trial.
- (e) The appellants must report at the Manzini Police Station monthly on the last day of every month between the hours of 8 am and 4 pm.

M.M. RAMODIBEDI

CHIEF JUSTICE

M.C.B. MAPHALALA

JUSTICE OF APPEAL

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E.A.

JUSTICE OF

For The Appellants:

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For the Respondents:

Senior Crown Counsel Mr. B. Magagula