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PART B - ACTS

4. The Criminal Procedure and Evidence (Amendment) Act, 2004 S1

PUBLISHED BY AUTHORITY

THE CRIMINAL PROCEDURE AND EVIDENCE
(AMENDMENT) ACT, 2004

(Act No. 4 of 2004)



I ASSENT

MSWATI III
King of Swaziland

11th September, 2004

AN ACT
Entitled

An Act to regulate bail applications, provide for evidence through intermediaries, repeal the Non-Bailable Offences Order No.14 of 1993, and to provide for other incidental matters

ENACTED by the King and the Parliament of Swaziland.

Short title and commencement.

1. This Act may be cited as the Criminal Procedure and Evidence (Amendment) Act, 2004, shall be read as one with the Criminal Procedure and Evidence Act, 1938 (hereinafter referred to as the "Principal Act" and shall come into force on the date of publication.

Amendment of section 95.

2. Section 95 of the Principal Act is amended by deleting and replacing it with a new section 95 as follows -

"Power of the High Court regarding bail.

95. (1) Notwithstanding any other law the High Court shall be the only Court of first instance to consider applications for bail where the accused is charged with any of the offences specified in the Fourth, the Fifth Schedules or under subsection 95 (6).

(2) Notwithstanding any other law the High Court may, subject to this section and section 96 of this Act, at any stage of any proceedings taken in any court or before any magistrate in respect of any offence, admit the accused to bail.

(3) Subject to the provisions of this Act, the High Court shall, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E15, 000 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.

(4) Where the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15 000, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount.

(5) Where an accused person is charged with any of the offences listed in the Fourth Schedule and it appears to the Court, or the prosecution submits to the satisfaction of the Court, that aggravating circumstances exist, or where an accused person is charged with any of the offences listed in the Fifth Schedule, and the Court is of the opinion that the circumstances warrant that the accused may be admitted to bail, subject to the provisions of this Act, admit the accused to bail and fix the amount of bail in an amount not less than E50 000 (Emalangeni fifty thousand) in addition to any other conditions it deems fit.

(6) Where an accused person is charged with any offence, other than the offences covered by the provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the Court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the Court may, for purposes of this subsection, without or with the assistance of any person the Court deems could be of assistance to it, also fix an amount to be the value of the property or such thing.

(7) Where the High Court refuses an application for bail, it may upon application give appropriate directives to expedite the procedure under section 88 bis.

(8) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the grounds under the provisions of section 96(4) are established"

Amendment of section 96.

3. Section 96 of the Principal Act is amended by deleting and replacing it with a new section 96 as follows -

"Bail application of accused in court

96. (1) In any court -

- (a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody;
- (b) subject to section 95, an accused who desires to be released on bail may make a written application in the form of a petition, or in any other form if the court so directs, to the appropriate court;
- (c) subject to the provisions of section 95, the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time and where the commitment is on a warrant issued by the High Court, it shall only be competent to apply for bail to the High Court;
- (d) if the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether the accused wishes that question to be considered by the court.

(2) In bail proceedings the court -

- (a) may postpone any such proceedings;
- (b) may, in respect of matters that are in dispute between the accused and the prosecutor, enquire in an informal manner the information that is needed for its decision or order regarding bail;
- (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;
- (d) shall, where the prosecutor does not oppose bail applications in the High Court in respect of matters referred to in subsections (12)(a) and (12)(b), require of the crown's counsel to place on record the reasons for not opposing the bail application.

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The refusal to grant bail and the detention of an accused in custody shall be in the interests 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 II of the First Schedule; or
- (b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;
- (c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- (d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from past conduct;
- (e) any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused's past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Part II of the First Schedule while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable the accused to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Swaziland in an attempt to evade trial;
- (f) the nature and the gravity of the charge on which the accused shall be tried;
- (g) 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;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole (where applicable);

- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factors which in the opinion of the court should be taken into account.

(9) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.

(10) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) the age of the accused, especially where the accused is under sixteen (16) years;
- (h) where a woman has murdered her newly born child;
- (i) any other factor which in the opinion of the court should be taken into account.

(11) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (10) to weigh up the personal interests of the accused against the interest of justice.

(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;

- (b) in the Fourth Schedule but not 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 the interests of justice permit his or her release.

(13) Notwithstanding any law to the contrary -

- (a) if the Director of Public Prosecutions intends charging any person with an offence referred to in the Fourth Schedule or Fifth Schedule, the Director of Public Prosecutions may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that the Director of Public Prosecutions intends to charge the accused with an offence referred to in the Fourth Schedule or Fifth Schedule;
- (b) the written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court; and
- (c) whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in the Fourth Schedule or Fifth Schedule, a written confirmation issued by the Director of Public Prosecutions under paragraph (a) shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge to be brought against that person.

(14) Notwithstanding any law to the contrary -

- (a) in bail proceedings the accused, or the legal representative, is compelled to inform the court whether -
 - (i) the accused has previously been convicted of any offence; and
 - (ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges;
- (b) where the legal representative of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not;
- (c) the record of the bail proceedings, excluding the information in paragraph (a) shall form part of the record of the trial of the accused following upon such bail proceedings and where the accused elects to testify during the course of the bail proceedings the court shall inform the accused of the fact that anything the accused says, may be used against him or her at the trial and such evidence becomes admissible in any subsequent proceedings; and
- (d) an accused who intentionally or wilfully -
 - (i) fails or refuses to comply with the provisions of paragraph (a); or
 - (ii) furnishes the court with false information required in terms of paragraph (a), commits an offence and is liable on conviction to a fine not exceeding E5000 (Emalangeni five thousand) or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.

(15) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(16) The court releasing an accused on bail in terms of this section, may order that the accused -

- (a) files a Government Revenue Office receipt with the clerk of the court or the registrar of the court, as the case may be, or with a Correctional Services Department official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, reflecting that the sum of money determined by the court in question has been paid; or
- (b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that which has been increased or reduced in terms of subsection (19), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

(17) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the court otherwise directs and this subsection shall not be construed as denying an accused access to any information, record or document to which the accused may be entitled for purposes of the trial, at the time of the trial.

(18) Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail -

- (a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;
- (b) with regard to any place to which the accused is forbidden to go;
- (c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
- (d) with regard to the place at which any document may be served on him under this Act;
- (e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
- (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

(19) Subject to the provisions of this Act -

- (a) any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provisions of sections 95 (3) and 95 (4), increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application;
- (b) if the court referred to in paragraph (a) is a superior court, an application under that paragraph may be made to any judge of that court if the court is not sitting at the time of the application.

(20) The court dealing with bail proceedings as contemplated herein or which imposes any further condition under subsection (18) or which, under subsection (19), amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof and where such court is a magistrate's court, any document purporting to be an extract from the record of

proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such conditions or any amendment or supplementation thereof.

(21) In this section, a refusal to admit an accused to bail after commitment to trial shall be without prejudice to the rights of the private party mentioned in sections 10 and the proviso to section 108 is subject section 95 and this section."

Amendment of section 97.

4. Section 97 of the Principal Act is amended by deleting and replacing it with a new section 97 as follows -

"Rules and regulations.

97. The Minister, in consultation with the Chief Justice, may make regulations respecting the operation of sections 95, 96 and for this Part, and may also amend any Schedule to this Act for the better carrying into effect the objectives of this Act and where necessary the Chief Justice may make rules to give effect to the objectives of this Part".

Repeal of section 105.

5. Section 105 of the Principal Act is repealed.

Amendment by insertion of a new section 223bis.

6. The Principal Act is amended by adding a new section 223bis immediately after section 223 as follows -

"Evidence through intermediaries

223bis. (1) In this section, whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if such person testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give the evidence through that intermediary.

(2) In these proceedings -

- (a) no examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary; and
- (b) the said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give the evidence at any place -

- (a) which is informally arranged to set that witness at ease;

- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
 - (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.
- (4) In this section -
- (a) the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries; and.
 - (b) an intermediary who is not in the full-time employment of the Government shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine."

Amendment of section 291bis

7. The Principal Act is amended by deleting and replacing section **291bis** with a new section 291bis as follows -

"Continuance of proceedings

291bis. Notwithstanding any law or provision to the contrary -

- (a) where a presiding officer dies, resigns, the presiding officer's services are terminated or is for a just reason unable to continue with the trial, a re-trial, review, appeal, compliance with an order of a superior court, another judicial officer of that court may, at any stage of the proceedings, assume and continue the proceedings;
- (b) the judicial officer, shall before continuing with the proceedings acquaint himself or herself with the recorded evidence and where the judicial officer deems it necessary, call or recall any witness; and
- (c) the judicial officer may do any other thing that he or she may lawfully do to ensure that justice or the administration of justice is achieved."

Repeal of King's Order-in-Council No. 14 of 1993.

8. For purposes of certainty, the Non-Bailable Offences Order No. 14 of 1993 is repealed and any other law inconsistent with sections 95, 96 and 223bis shall to the extent of the inconsistency be null and void.

Effect of Repeal.

9. All acts or actions done under the repealed Non-Bailable Offences Order, 1993 shall only be lawful and valid up to the date of the repeal.

Consequential amendments

10. The Criminal Procedure and Evidence Act, 1938 is amended as follows -

- (a) in sections 102(1); 102(2); and 104 by adding at the beginning, but after the numerical figure, of the section or subsection, as the case may be, and changing the subsequent alphabetical letter appropriately, the following words -

"Subject to the provisions of section 95 and 96";

- (b) in section 103, at the end of the Proviso therein by deleting the full stop (.) and adding the following words -

"and the amounts specified under section 95 shall not be construed as excessive.";

- (c) under section 238 -

- (i) in paragraph (1) (a), by inserting the words "or a principal magistrate's court" directly after the words "the High Court";
- (ii) in paragraph (1) (b), by inserting the words "other than a principal magistrate's court" directly after the words "a magistrate's court" and
- (iii) in the Proviso to subsection (1), by replacing the words "sixty rand" wherever they appear in the Proviso with the words "two thousand Emalangeni";
- (d) in section 312 subsection (1), by replacing the words "sixty rand" wherever they appear in that subsection with the words "two thousand Emalangeni"; and
- (e) by replacing the words "Deputy Prime Minister" wherever they appear in the Act with the words "Prime Minister".

Amendment of the Schedules.

11. The Principal Act is amended by adding the new "FOURTH SCHEDULE" and "FIFTH SCHEDULE" as follows -

"FOURTH SCHEDULE"

Offences referred to in sections 95 and 96.

Treason.

Murder.

Attempted murder involving the infliction of grievous bodily harm.

Sedition.

Rape.

Any offence referred to in section 2 of the Opium and Habit Forming Drugs Act, 1922 (Act 37 of 1922) or Section 12 of the Pharmacy Act, 1929 (Act 38 of 1929), if it is alleged that -

- (a) the value of the substance in question is more than E 50 000; or
- (b) the value of the substance in question is more than E 10 000 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) the weight, if it is cannabis or dagga (insangu) or such similar substance, is 15kg or more; or
- (d) the number of tablets or capsules is thirty (30) or more;

- (e) the offence was committed by any law enforcement officer or a member of the Umbutfo Swaziland Defence Force.

Any offence relating to the dealing in or smuggling of or illegal manufacturing of ammunition, firearms, explosives, armament or arms of war.

Any offence relating to exchange control, money laundering, corruption, extortion, fraud, forgery, uttering or theft -

- (a) involving amounts of more than E 500 000; or
- (b) involving amounts of more than E 100 000, if it is alleged that the offence was permitted by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) if it is alleged that the offence was committed by any law enforcement officer -
 - (i) involving amounts of more than E 10 000; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Indecent assault on a child under the age of 16 years.

An offence referred to in Part II of the First Schedule -

- (a) and the accused has previously been convicted of an offence referred to in Part II of the first schedule; or
- (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Part II of the First Schedule.

FIFTH SCHEDULE

Offences referred to in sections 95 and 96.

Murder, when -

- (a) it was planned or premeditated;
- (b) the victim was -
 - (i) a law enforcement officer or judicial officer performing his or her functions as such, whether on duty or not, or a law enforcement officer or judicial officer who was killed by virtue of his or her holding such an position; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Part II of the First Schedule;
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:
 - (i) rape; or
 - (ii) robbery with aggravating circumstances; or
- (d) the offence was committed by a person, group of persons or syndicates acting in the execution or furtherance of a common purpose or conspiracy.

Rape -

- (a) when committed -
 - (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution of a common purpose or conspiracy;
 - (iii) by a person who is charged with having committed two or more offences of rape; or
 - (iv) by a person knowing or having a reasonable foresight of the possibility that he has the acquired immune deficiency syndrome or the human immunodeficiency virus (HIV or AIDS);
- (b) where the victim -
 - (i) is a girl under the age of 16 years;
 - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
 - (iii) is a mentally ill woman as contemplated in section 2 of The Mental Health Order, 1978 (K.O.I.C 20 of 1978)
- (c) involving the infliction of grievous bodily harm.

Robbery, involving -

- (a) the use by the accused or any co-perpetrators or participants of a firearm;
 - (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or
 - (c) the taking of a motor vehicle.
- Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.

An offence referred to in the Fourth Schedule -

- (a) and where the accused has previously been convicted of an offence referred to in the Fourth Schedule or this Schedule; or
- (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in the Fourth Schedule or this Schedule."

