IN THE HIGH COURT OF ESWATINI

JUDGMENT

CRIMINAL CASE NO.371/2018

In the matter between:

THE KING

AND

SONBOY SHANE HARRIS

Neutral Citation: *The King* vs *Sonboy Shane Harris (371/18) [2019] SZHC (129) 23rd July 2019*

Coram: **MLANGENI J.**

Date Heard: **14th February 2019**

Order Made: **14th February 2019**

Reasons handed down: **23rd July 2019**

Flynote: *Criminal procedure – application for bail – Applicant charged with murder under the Fifth Schedule – DPP filing a certificate of classification in terms of Section 96 (13) (a) and (c) of the CP & E.*

DPP's certificate is prima facie proof of the intended charge and cannot be impugned lightly where the classification is bona fide and not an abuse of process – Applicant therefore required to establish exceptional circumstances in terms of Section 96 (13) (a) of the CP& E .

Exceptional circumstances differentiated from the usual hardships and inconvenience that come with incarceration.

Held: *Applicant had failed to establish special circumstances.*

Held, further: *Applicant is a flight risk.*

Application dismissed.

JUDGMENT

Reasons for refusal to grant Bail.

[1] The Applicant was arrested in connection with the murder of an elderly lady of the same community as him, namely Ka-Mfishane area, near Hlathikhulu in the Shiselweni Region. The Director of Public Prosecutions (DPP) has filed a certificate in terms of Section 96 (13) (a) and (c) of the Criminal Procedure and Evidence Act (CP&E) in confirmation that the Applicant will be charged with murder under the Fifth Schedule. In terms of Section 96 (13) (c) of the said Act the certificate of the DPP is **"prima facie proof of the charge to be brought against that person".**

[2] In order to be admitted to bail a person charged under the Fifth Schedule must, among other things, furnish evidence **"which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release….."**[1] It is axiomatic that this onus is upon the Applicant. I will come back to the issue of the Fifth Schedule later in this judgment.

[3] In his founding affidavit the Applicant states that he was arrested at his home area, Ka-Mfishane[2], on or about the 22nd November 2018. In its opposing affidavit the Crown denies that he was arrested there and asserts that he was in fact arrested **"at Mbadlane area in the Lubombo Region after he had gone for cleansing at a traditional healer in Malindza area…."[3].** In his reply the Applicant concedes that he was actually arrested in the Lubombo Region but adds that **"Mbadlane is actually next to Manzini."** He does not explain how it came about that in his founding affidavit he alleged that he was arrested at his home area. This does not reflect well upon the Applicant, and his attorney's explanation from the bar as to how this incorrect information was given to the court does not make the situation any better for the Applicant. Mr. Magagula's submission from the bar was that it was the assumption of the drafter of the affidavit that the Applicant was arrested at his home area. But then even this, if true, would suggest that he did not disclose to his attorney where he was arrested and what he was doing there.

[4] Standing alone, the issue of whether he was arrested ka-Mfishane or at Mbandlane is obviously not decisive of the matter. But it is of some

[1] Per Section 96 (12) (a).
[2] At para 5, page 5 of The Book of Pleadings.
[3] At para 6.1, page 12 of The Book.

relevance to the conclusion that I came to on the matter, that the Applicant is a flight risk. In reply, his explanation for being found at Mbadlane is that he had gone there not for cleansing but to seek treatment from a traditional healer for piles. Whether there is relevant expertise for the treatment of piles at Mbadlane is another matter.

[5] It is the Crown's further evidence that after committing the crime the Applicant left his home area and relocated his family to Ngwane Park in Manzini. His explanation, in reply, for relocating his family to Manzini is that they **"were being harassed by the community even before I was arrested"[4].** The fact that he did not substantiate the allegation of harassment and did not report same to relevant authorities, especially to the Police, lends credence to the Crown's submission that he moved away from the area, together with his family, in order to evade arrest.

[6] My view is that the movements of the Applicant soon after the death of the deceased are consistent with flight risk, someone who will do anything within his means to avoid being brought to book. This is particularly so when one considers that the deceased died on the 18th November 2018 and the Applicant was arrested three days later, on the 22nd November. Within just a few days he had moved himself and his family away from his home area and was allegedly seeking the assistance of a traditional healer, for whatever purpose.

[7] On behalf of the Applicant attorney Mr Z. Magagula submitted that the classification of the offence as a Fifth Schedule one by the DPP should

[4] At para 8.2, page 26 of The Book.

not be accepted dogmatically, that it must be subjected to scrutiny. According to Section 96 (13) (c) of the CP & E the DPP's certificate is *prama facie* proof of the charge to be preferred against the accused. My understanding of this is that in the absence of bad faith or abuse of legal process[5] by the DPP, and so long as he or she acts in *bona fide* exercise of the constitutional and statutory powers bestowed on him or her, the classification cannot be impugned. It is, after all, the DPP's prerogative to decide, on the basis of available evidence, what charge or charges to prefer against a suspect and this prerogative should not be hampered lightly.

[8] On the case before me there is much in support of the DPP's classification of the offence as a Fifth Schedule one. The Applicant does not deny that he was in the area when the deceased was killed through strangulation. At paragraph 8.1 of his reply he states that he **"could have been around the area where the deceased died, but that does not mean that I was involved in her death."** The Applicant has poignant anger against elderly people who occupy salaried positions of authority in communities because this, according to him, is at the expense of the unemployed youth. He vented this anger in vitriolic fashion in an article that he published in the Times of Swaziland of November 5, 2018, headlined **"OLD GEEZERS MUST RETIRE"[6].** The deceased, a retired Correctional Services Officer, was on her third term as **"bucopho"** of the constituency, which places her well over the age of seventy years at the time of death. She was killed only two weeks after publication of the angry article that I mentioned above. In the said article, which the Applicant positively embraces[7], he wrote as follows at paragraph 4 thereof[8]:-

[5] See Section 162 (b) (a) of the Constitution.
[6] At page 23 of The Book.
[7] At para 16 of his reply, page 27.
[8] See page 23 of The Book.

"As I was writing this, in my chiefdom, there is a 70 something year old bucopho who had been in the same position for the past three terms. During the elections there were four young people who were vying for the same post but were unable to get positive results.

And what drives me totally up the wall is how legislators keep singing the same old tune about the youth looking for options….".

[9] Upon arrest, the Applicant made a confession to a judicial officer[9]. In reply he denies that he was cautioned prior to making the confession and he alleges that he was threatened. The admissibility of the confession is for another day. For present purposes I observe in passing that he does not even say in what manner he was threatened.

[10] It appears to me that there is nothing untoward about the classification of the Applicant's offence as Fifth Schedule, hence he is required to establish exceptional circumstances. Has he done so?

[11] He alleges that he is of poor health, suffering from severe piles for which he requires medication; that he is unemployed and earns a living through the sale of vegetables and chickens; that he has a wife and two minor children who are solely dependent upon him for support; that he is a student at Regent Business School where he pursues a

[9] Para 8.2 of the answering affidavit, page 13 of The Book.

Batchelor's Degree and that while his wife is away at school in South Africa he looks after the minor children.

[12] On the basis of legal authorities none of the issues that he canvasses amount to exceptional circumstances that would justify his release on bail. They are in the nature of normal hardships or inconvenience that is unavoidably occasioned by incarceration or conviction and they are by no means **"one of a kind".**[10] They can be raised and are often raised by just about anyone who finds himself in the position of the Applicant, and clearly there is nothing exceptional about them. Regarding the sickness, the Applicant has not demonstrated that the nature of his ailment is beyond the capacity of the medical facilities that are accessible to His Majesty's guests at the Correctional institutions.

[13] In the case of SIFISO MATANATANA DLAMINI v REX[11] the Applicant made allegations that:-

13.1 He was very sickly, suffering from tuberculosis;

13.2 He was self- employed an assisted his mother in her business which was the only real source of income.

13.3 He has three minor children who depend on him for support;

13.4 He was incarcerated for an offence which he did not commit.

The court, per T. Dlamini J. held that he had failed to establish exceptional circumstances. I quote His Lordship at paragraph 21 of the judgement:-

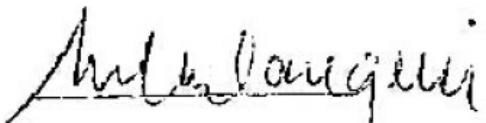
[10] See Senzo Menzi Motsa v Rex, Criminal Appeal No. 15/2009, per Magid AJA.
[11] (11/2016) [2017] SZHC 49, 21st March 2017.

"There is nothing in my view and finding……which may be said to constitute exceptional circumstances as defined by Magid AJA in the case of SENZO MENZI MOTSA v REX …..Applicant has stated factors that are commonly stated by accused persons in their bail applications. They cannot therefore be regarded as 'one of a kind'."

It bears repeating that the factors enumerated by the Applicant in the matter are a natural and normal consequence of incarceration and not all exceptional.

[14] Having already found that the Applicant is a flight risk, I again find that he has failed to establish exceptional circumstances. It is on the basis of the aforegoing that after hearing legal arguments on the 14th February 2019 I dismissed the application.

[15] The delay in handing down my reasons is because I was not aware that an appeal had been lodged on the matter, until a couple of weeks ago, and at that time the court record was untraceable. It became available to me only on the 16th July 2019. The delay is regretted.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: Attorney Z. Magagula

For the Respondent: Mr K. Mngometulu