

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

**CRIMINAL
NO.184/19** **CASE**

In the matter between:

NYIKO TITOS LUIS COSSA

APPLICANT

AND

THE KING

RESPONDENT

Neutral Citation: *Nyiko Titos Luis Cossa vs The King (184/19)
[2019] SZHC (142) 31st July 2019*

Coram: MLANGENI J.

Heard: 26th July 2019

Order Made: 26th July 2019

Reasons handed down: 31st July 2019

JUDGMENT

Reasons for dismissing bail application.

- [1] The Applicant has sought to be admitted to bail. He is co-accused in a matter involving the gruesome murder and robbery of one Sifiso Ndaba whose body was sprinkled with petrol and set on fire. They face a total of six (6) counts. It is common cause that the deceased was kidnapped from his home at Mpolonjeni, on the outskirts of Mbabane urban area, and conveyed in his motor vehicle to Sigombeni Mountains in the Manzini Region where he was eventually murdered.
- [2] On the basis of the above, it is apparent that the murder is a Fifth Schedule offence. In terms of Section 96 (12) (a) an accused who is charged with a Fifth Schedule offence and who desires to be released on bail is enjoined to adduce evidence to the satisfaction of the court **“that exceptional circumstances exist which in the interest of justice permit his or her release.”** It has been held that special circumstances are not the usual and normal hardships and inconvenience that are occasioned by incarceration¹. Inability to fend for one’s dependents or to look after one’s home and personal belongings or to look after one’s ill or infirm relative are a natural consequence of incarceration and do not fit the description of exceptional circumstances. In the absence of something out of the ordinary (**“one a kind”**)², bail cannot be granted. While paying every attention to the importance of the liberty of the individual, and the constitutional presumption of innocence, courts may not readily depart

¹ The King v Sonnyboy Shane Harris (371/18) [2019] SZHC 129 (23RD July 2019)

² Sifiso Matanatana Dlamini v Rex (11/2016) [2017] SZHC 49 (21st March 2017) at para 21

from the clear intention of the legislature, expressed in black and white.

- [3] When the Applicant initiated the bail application he was unrepresented and he did so by letter. In his letter, dated 27th May 2019, he states among other things that he will not abscond trial, will abide by all conditions of bail, will not interfere with Crown witnesses and that although he is a Mozambican national he is now firmly rooted in this country, having continually resided here since 2008. In all that he stated in his letter, there is nothing that fits the description of exceptional circumstances. He obviously did not have the expertise to know and canvass issues of that nature.
- [4] The Crown filed opposing papers and, through the affidavit of 4528 Detective Constable Wonderboy Maseko, it raised three main issues. First, that the Applicant is a flight risk. Secondly, that he is likely to interfere with Crown witnesses and lastly that he may endanger the safety of the public. In response to the Crown averments the Applicant filed what is styled **“APPLICANT RESPONDING AFFIDAVIT”** dated 25th June 2019. In it he disputes that he is a flight risk and asserts that he is firmly rooted in this kingdom, that he will not leave this country, that he will not interfere with Crown witnesses and will not endanger public safety. Significantly, he also states that his co-accused **“who knows the witnesses have already been admitted to bail.....”**.
- [5] Subsequently, the Applicant got legal representation and filed a **“supplementary replying affidavit”** through attorneys Mabuza - Johnson & Associates. In the replying affidavit he re-iterates that he is

firmly rooted in this country, to the extent that he participated in the National Elections of 2018; that he is not a flight risk because he is traceable; that he is innocent until proven guilty; that he has a defence to the charges because he was merely a driver “**who was not aware that a commission of crime was about to occur**”; that to deny him bail would be discriminatory because his co-accused has been admitted to bail. In the last paragraph of his reply, he makes the following averment:-

“If I were a danger to public safety, my other co-accused also ought to have been labelled in the same sentiment. However, they have been granted bail indicating that this Honourable Court has seen them not a threat to society.....”.

[6] It is clear to me that the Applicant has made absolutely no attempt to establish exceptional circumstances. *Ex lege*, the onus is upon him to do so and the fact that the Crown has not raised this aspect does not absolve him of the responsibility to do so. It is my considered view that on this ground alone he cannot be admitted to bail.

[7] The Applicant is not a Swazi National. His home country is Mozambique, just across the South Western border with Eswatini. Although he has resided in this country since 2008, in his own affidavit it is clear that his connection with Mozambique is alive and well. Him and his co-accused are facing six counts, including one of gruesome murder. If convicted, he stands to spend significantly long jail time. There is no doubt that he is aware of this possibility, and if this is not

an incentive to abscond and go back to his home country, then nothing would be. The Applicant has cited the authority of AITKEN AND ANOTHER v ATTORNEY GENERAL, ZIMBABWE³ where the court made the following apposite remarks:-

“In judging the risk (of abscondment) the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly it is guided by the character of the charges and the penalties which will in all probability be imposed if convicted, the strength of the state case, the ability to flee to a foreign country and the absence of extradition facilities.....”⁴

[8] To go back to Mozambique the Applicant does not have to use a formal crossing point. It is common knowledge that there are informal crossing points between this country, Mozambique and South Africa. If he surrenders his travel document it is not entirely within the power of this jurisdiction to deny him one in future. He does not deny that he was part of the team that mercilessly ended the life of one Sifiso Ndaba. If it is true that his role was merely that of a driver, he is still an accessory and therefore potentially liable. There is hardly any doubt that between the optimism that may have been there when the offences were committed, and now, the reality of possible consequences are as clear as a crystal in the mind of the Applicant. In my view there is sufficient incentive for him to abscond trial and thereby defeat the interest of justice. I accordingly find that he is a flight risk.

³ 1992 SACR 296.

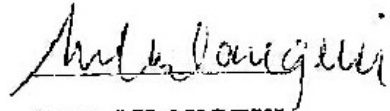
⁴ At page 299

[9] There is no extradition arrangement between this country and Mozambique. As a matter of fact, the Constitution of Mozambique specifically provides that no Mozambican citizen may be expelled or extradited from the National territory.⁵

[10] It remains for me to deal with one important point that the Applicant has raised, the fact that his co-accused have been released on bail. At the hearing of legal arguments I was informed that only one co-accuse was granted bail and that the other one is a juvenile who is being handled through other processes, most probably in terms of the Children Protection And Welfare Act 2012. Of course consistency is an important part of our justice system, but it is equally trite that each case is to be dealt with on its own peculiar circumstances. I do not know whether the other co-accused was able to establish special circumstances or not, neither do I know whether he was or was not found to be a flight risk. On the other hand I have on the facts before me made a finding in respect of the two determinant factors. It is my view, in any event, that consistency should never be at the expense of the interest of justice and in the present matter the latter has loomed like a colossus.

[11] It is on the basis of the above considerations that after hearing legal arguments on the 26th July 2019 I dismissed the application.

⁵ At article 67(4) of the said Constitution.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For The Applicant: Mr V. Ndzimandze

For The Respondent: Ms B. Fakudze