

IN THE HIGH COURT OF ESWATINI

CASE NO. 161/2023

HELD AT MBABANE

In the matter between:

NKOSINGIPHILE DALUCOLO MKHABELA

APPLICANT

AND

THE KING

RESPONDENT

NEUTRAL CITATION:

**NKOSINGIPHILE DALUCOLO MKHABELA
VS THE KING (161/2023) SZHC – 249
[19/09/2023]**

CORAM:

BW MAGAGULA J

HEARD:

17/07/2023

DELIVERED:

19/09/2023

SUMMARY:

*Bail application for a fifth schedule offence – requirements for
bail restated – onus on the Applicant to demonstrate personal*

exceptional circumstances – Applicant has dismally failed to do so – over and above the failure to adduce exceptional circumstances - Applicant likely not attend trial as he has on two previous occasions made an attempt to escape from police custody. Bail refused.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] The facts of the matter appear to be crisp. The Applicant was initially charged with 13 counts of theft of copper wire. The offences were committed around the same area, Tabankulu in the Lubombo Region. It is common cause that the Crown subsequent thereto amended the charge sheet and the Applicant is now facing five counts. The theft relates specifically to the same goods being copper wire. The owner of the copper wire is Eswatini Post and Telecommunications.
- [2] The Applicant is desirous of being released on bail. The bail application is vigorously opposed by the Crown. Detective Constable 6564 Dr Dladla has deposed to an affidavit in opposition.

- [3] It is common cause that the charges are ones that are listed under fifth schedule of the Criminal Procedure and Evidence Act. In his own words, in the founding affidavit¹ the Applicant acknowledges that in terms of the law, he has the onus of adducing exceptional circumstances which entitles him to bail.

Exceptional circumstances as averred in the founding affidavit

- [4] The Applicant has motivated his bail application in the following manner:-

- 4.1 He is innocent of the charges as he has never committed the said offences.
- 4.2 He intends to plead guilty at trial and he has a *bona fide* and valid defence to the charges. He did not partake in any theft as alleged in the charge sheet.
- 4.3 He does not know of the theft charges. He is only a relative to one Mcolisi Mkhabela who was once apprehended for the copper wire theft, unfortunately he later escaped. To-date he is still on the run.
- 4.4 When he was arrested at Tabankulu stadium and the police never told him what he was being arrested for, until the time when he arrived at the police station. At the police station, he was severely beaten and was denied the chance to seek medical attention.
- 4.5 He is not a thief.

¹ He makes this concession in para 12 of the founding affidavit

[5] In light of the fact that this is a fifth schedule offence, the Applicant has set out the exceptional circumstances to be as follows;

- 5.1 He is unemployed. He makes ends meet by doing piece jobs for the community by mending fences, building pit latrines, collecting fire wood and any other job he gets.
- 5.2 He has five minor children who are dependent on him for support. They are at a school going age.
- 5.3 The circumstances leading to his arrest are a clear indication that he will be acquitted and discharged when the matter comes to trial.
- 5.4 To keep an innocent man in custody for a prolonged period of time only for him to be acquitted and a trial is an injustice.
- 5.5 He is a law abiding citizen, he has never been arrested.
- 5.6 He cannot be afforded substantial redress at a hearing in due course, in view of Section 16 (7) together with Section 21 (1) of the Constitutional Act of 2005.
- 5.7 His continued incarceration might greatly prejudice him and his children, as he will not be able to hustle for his children and to provide for them.

The Crown's basis for opposition

[6] In summary, the basis for the opposition of the bail application by the Crown is as follows;

- 6.1 There is overwhelming evidence that the Applicant committed the offences since the buyers who had bought the copper wire from the Applicant, made a statement to the police. They pointed to the Applicant as the one who sold them the copper wire together with his brother Mcolisi Mkhabela who is on the run.
- 6.2 The Applicant is a flight risk. He has on two previous occasions made an attempt to escape from police custody.
- 6.3 The Applicant has failed dismally to discharge his onus of laying sufficient grounds that there exist exceptional circumstances for him to be released on bail.
- 6.4 The Applicant is likely to interfere with the potential witnesses when he is released on bail.
- 6.5 Applicant has no emotional family and occupational ties to the jurisdiction of the court, as he has no permanent place of abode. He resides at Vuvulane with his grandfather. In most instances, he is not found at his grandfather's place of residence. He lodges with his friends around the area and has no fixed place of residence.
- 6.6 The Applicant has relatives outside the court's jurisdiction, in the Republic of South Africa. At the moment, the police are searching for his brother Mcolisi Mkhabela. Despite being tagged on all police stations as a wanted fugitive of justice, none of the police stations has

raised an alert. It is on that basis that the Applicant may as well follow his brother and escape the jurisdiction.

6.7 The commission of the offence that the Applicant is facing is on the rise. The effect of which has dire consequences on socio economic position of the country.

6.8 The Applicant has a disposition to commit the offences that he is charged with. Between the months of July and February, he had committed quite a number of these offences.

THE LAW

[7] Section 96 (4) (a) of **The Criminal Procedure and Evidence Act of 1938** (as amended) stipulates the following:-

“The refusal to grant bail and the detention of an Accused in custody shall be in the interest of justice, where one or more of the following grounds are established;

a) Where there is a likelihood that if the Accused, if released on bail may endanger the safety of the public or any particular person or may commit an offence listed on part two of the fifth schedule”.

[8] Section 96 of **The Criminal Procedure and Evidence Act 67/1938** as amended deals with various grounds who's the court needs to consider when

determining the likelihood that the Accused if released on bail may attempt to evade trial.

[9] The following factors are supposed to be considered;

- a) *The emotional, family, community or occupational ties of the Accused to the place at which the Accused shall be triad;*
- 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 him 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 Eswatini in an attempt to evade trial;*
- f) *The strength of the case against the Accused person and the incentive that the Accused may in consequence, have to attempt to evade his trial;*

[10] In the matter of **Sabelo Dalton Ndlangamandla vs The King**². The court stated the following position;

² Criminal Case No 15/2003

“The Crown must place evidence which indicates that the prospects of conviction are overwhelming and which will therefore precipitate the Accused to extrict his bail...Scanty affidavit without any useful information are unhelpful to assist the court in satisfactory addressing this question which can at times be vexing indeed. No summary of evidence has been furnished to indicate the evidence against the Accused. In the absence of this there is no indication that the Accused will be compelled to escape resulting in a failure of justice”.

- [11] In the case of **Director of Public Prosecutions vs Bhekwako Meshack Dlamini and 2 Others Criminal Appeal Case No 31/2015**. The Chief Justice MCB Maphalala held as follows at paragraph 15 page 10 of the judgment;

“The Accused bares the onus to establish on a balance of probabilities that it is in the interest of justice that he should be released on bail. Where the Accused is charged with an offence listed in the fifth schedule of the Criminal Procedure and Evidence Act. The Accused should in addition adduce evidence which in the interest of justice permits his release.”

- [12] In the case of **Musa Waga Kunene vs Rex Criminal Appeal Case No 74/2017** at paragraph 10 the court held as follows;

“It is a trite principle of our law that bail is a discretionary remedy. Furthermore, the Accused has the onus to show on a balance of

probabilities that it is in the interest of justice that he should be released on bail."

ADJUDICATION

[13] In his replying affidavit specifically to the allegations made by the investigating officer that he had previously made two attempts to escape from police custody, the Applicant does not deny this fact. However, he justifies it by saying he was avoiding to be further assaulted by the police. In the second instance, where he was with his brother during a pointing out. Both of them fled from the police and he the only one subsequently arrested. He justifies his conduct by saying that he had been told by his brother that the offences they are facing are serious. They would spend a lengthy period of time in jail if convicted.

[14] Applicant was allegedly captured because he could not run as fast. He alleges this is because had been assaulted by the police. This clearly shows that the Applicant does not deny that he once made an attempt to escape from the police custody.

[15] Section 96 (4) (b) of The Criminal Procedure and Evidence Act clearly states that where there is likelihood that an Accused if released on bail, may attempt to evade a trial, the refusal to grant bail shall be in the interest of justice.

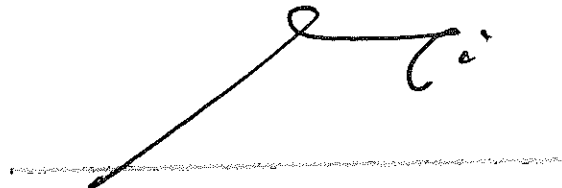
[16] The Applicant has exhibited a conduct where in his own admission, he has previously made an attempt to escape from police custody. This conduct on it's own is indicative of his inclination to escape. This is a demonstration of a likelihood that if he is released on bail, he may attempt to evade trial.

[17] The Applicant in his replying affidavit has not refuted that he took the police to a pointing out and then made an attempt to escape. He only justifies his unlawful conduct by saying that he was propelled to do so because he had been assaulted earlier. As to how did he point to the scene, he says that it where he knows the copper wire is burnt. I find this to be unlikely. How does he know where copper wire is burnt if he is not involved in one way or the other with copper. He must have known that this copper wire is being processed at that particular place. I am persuaded that the Crown has a strong case against the Applicant. He is likely to abscond trial if he is released on bail, and as such the interest of justice may not be served.

[18] The Crown's submissions that the Applicant if released on bail is likely to endanger the safety of the public as he has a disposition to commit the offences in part two of the first schedule also has merit. The charges reflect that the Applicant was able to commit the theft of copper cables in a number of occasions, hence he faces five charges. As per the requirement of Section 96 (5) of The Criminal Procedure and Evidence Act, the court finds that the commission of copper theft in the country is on the rise and it is actually prevalent.

ORDER

[19] Due to the foregoing reasons the Applicant's application for bail is hereby dismissed.

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a loop and a small flourish.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant:	Miss N. Ndlangamandla (Mabila Attorneys in Association with N. Ndlangamandla & S. Jele)
For the Respondent:	Miss N. Dlamini (The DPP)