



IN THE HIGH

COURT OF ESWATINI

JUDGMENT

CASE NO.353/2019

In the matter between:

REX

VS

SIMANGALISO CHARLES DUNN

Neutral citation: *Rex v Simangaliso Charles Dunn (353/2019) [2022] SZHC 199 (14 September 2022)*

Coram: **T. Dlamini J**

Heard : 20 July 2022

Delivered: 14 September 2022

Criminal procedure – Bail – Breach of bail conditions – Revocation of the bail

Summary: *The accused absconded trial set for 21 and 23 February 2022 – This was despite having been personally warned by the court for trial on these dates – A warrant for his arrest was issued and the accused was eventually re-arrested about five months later – He was called upon to show cause why his bail should not be revoked for breach of the bail conditions that manifested in failure to appear in court when directed to do so, and failure to report at the specified police station – No satisfactory reasons were given by the accused on the date of hearing – Of relevance is that his non-appearance was on this occasion for the second time and that he had been warned by the court on the first occasion*

Held: *That the accused failed to give satisfactory reasons why he did not appear in court for his trial notwithstanding a warning by the court – Bail that was granted accordingly revoked.*

JUDGMENT

- [1] The accused was arrested and charged with the murder of Bongani Erasmus Littler in August 2019. On the 29 January 2021 he was admitted to bail by my sister Justice Langwenya J. The bail conditions were, *inter alia*, that he was to attend court wherever and whenever directed to do so, pending finalization of the case against him; to report at the Mbabane police station between 08:00 hours and 16:00 hours every last Friday of the month, the first reporting day being the first Friday following his release from custody; and to provide the investigating officer with his residential address for, *inter alia*, purposes of *domicilium citandi*.
- [2] Trial for the offence commenced on 12 July 2021. Two witnesses testified and the proceedings were postponed to 4 October 2021 for continuation of trial. The accused was personally warned by the court to be present for continuation of the trial on this date. A notice of trial was also prepared and served upon him on 29 September 2021. A return of service was furnished to the court. He however did not come to court and his name was called outside three times by a court orderly police officer without a response. His defence attorney Mr. Simelane was also not present in court.
- [3] The crown applied for a warrant for the arrest of the accused and the court did not hesitate to grant the application. The matter was postponed to 6 October

2021. The police successfully executed the warrant and the accused was brought to court on the 6 October 2021. His attorney Mr. Simelane also showed up on this date. An apology was extended to the court and the accused explained that he thought that he would be notified by his attorney concerning the date of coming back to court. His attorney also extended an apology to the court and explained that he inadvertently diarized an incorrect date. The court accepted the apology but warned the accused about the danger he would run into should he again fail to come to court. The court then discharged the warrant. The matter was postponed for continuation to the 21st and 23rd February 2022.

- [4] The accused failed again to appear for continuation of his trial on 21st and 23rd of February 2022. This was notwithstanding that he was personally warned by the court that his trial will continue on these dates. His attorney explained that he had no knowledge of the whereabouts of the accused. On application by the crown, the court issued another warrant for his arrest. The court ordered that he should be brought to court on 23 February 2022. He did not appear even on this date as he had not yet been re-arrested. The court then ordered that he should be brought to court on the next court day following his arrest.
- [5] The accused was eventually re-arrested and brought to court on 15 July 2022. Counsel for the crown informed the court that the accused, according to the investigating officer, did not comply with the bail condition directing him to report to the Mbabane police station every last Friday of the month. The court directed the crown to file a formal process detailing the non-compliance.
- [6] The court informed the accused in the presence of his attorney that he is called upon to show cause why his bail should not be revoked for failure to

appear for trial on 21st and 23rd February 2022 despite having been personally warned by the court for the trial on these dates. He was further informed that he would also need to explain and justify the alleged non-compliance with the bail condition of reporting every last Friday of the month to the Mbabane police station once it is formalized by the crown. The matter was postponed to 20 July 2022 for submissions to be made.

- [7] An affidavit was prepared and deposed to by officer 5757 D/Const. Bongani Mdziniso who is the investigating officer of the case. Attached to it is a copy of the bail recognizance form that reflects the bail conditions that were imposed upon the accused. Also attached is a copy of the reporting record book with entries pertaining to the accused. It only has one reporting entry of 25 May 2021 made at 11:03 hours.
- [8] The affidavit states that the accused paid the bail amount and was released from custody on 07 March 2021. The bail conditions ordered the accused to first report to the police station on the first Friday following his release from custody. The first Friday for reporting was therefore on 12 March 2021. The investigating officer states in the affidavit that the accused did not make the first reporting as ordered by the court. He also did not report on the last Friday of March 2021. He again did not report on the last Friday of April 2021. He only reported once and this was on 25 May 2021.
- [9] During submissions, the attorney for the accused first explained that he read the affidavit deposed to by the investigating officer. He also read the documents attached thereto. He also consulted the accused. He conceded that he is called upon to defend what appears to be an indefensible inquiry as the affidavit deposed to by the investigating officer contains factual allegations

that are supported by documentary evidence. His instructions are that indeed the accused was warned by the court for continuation of the trial. He however mixed up the dates, hence his failure to be in court on those dates. He explained this to be human error.

[10] Explaining the failure to report as per the bail conditions, the defence attorney submitted that his client said he encountered financial constraints, hence he could not travel to make the required reporting to the Mbabane police station as he resided in Matsapha. The attorney then submitted that he seeks mercy from the court on behalf of the accused. He asked the court to be a father to him and grant him a last opportunity. He further urged the court to lean towards the constitutional principle of innocence until proven guilty. On this request, the court ask the defence attorney about how the accused is to be found innocent or guilty when his conduct prevents the process that has to lead to the finding of the innocence or guilty verdict. In response he stated that the question is challenging as he had already conceded that he is in a precarious position of defending the indefensible.

[11] Counsel for the crown submitted that if the accused encountered financial constraints, he was to seek a variation of the bail condition and seek permission from the court to report at the nearest police station, viz., Matsapha, instead of Mbabane police station. She also submitted that the conduct of the accused clearly demonstrates that he does not and will not abide by the bail conditions. She reminded the court that the accused did not report on the first Friday following his release from custody. He also did not report on the last Friday of March and April 2021 but only reported on the last Friday of May 2021. This was his first and last reporting to the police station.

- [12] The last bail condition stipulates, per the signed recognizance form, that non-compliance with any of the bail conditions shall effect an escheatment of the bail forthwith. The word *shall* is used in order to place emphasis on what must happen in the event the accused absconds trial.
- [13] In bail proceedings the interest of justice that is sought to be protected is two-fold. First is that the accused should attend trial and not abscond. The second is that the accused should not undermine the proper functioning of the justice system including, but no limited to, interfering with the evidence of the prosecution. *See: Director of Public Prosecutions v Bhekwako Meshack Dlamini & 2 Others (478/2015) [2016] SZSC 40 (30 June 2016), para 14.*
- [14] The failure by the accused to appear in court for his trial has caused a delay to finalization of the trial. Prosecution witnesses who would have testified but have not might die before testifying. This would effectively constitute interference with the evidence of the prosecution.
- [15] Having considered the undisputed depositions made by the investigating officer, I find that the accused failed to make his first reporting to the police station immediately after release from custody; he also failed to report on the last Friday of every month to the police station but did so only once; and that he has been re-arrested twice following his failure to attend trial. I therefore come to the conclusion that the bail which the accused was admitted to is to be and must be revoked.
- [16] **S.101 of the Act** provides that if the accused fails to appear in court on the day appointed for his trial, the accused and his sureties may be called upon their recognizance and the surety declared forfeited.

[17] I have come to the conclusion and finding that the accused has no respect for the court. He did not report to the Mbabane police station on the first Friday following his release from custody, yet he was ordered to do so.

[18] As at 20 July 2022 when arguments herein were tendered, the accused ought to have reported seventeen times to the Mbabane police station. He ought to have reported twice in March 2021, plus nine times from April up to December 2021. He also ought to have reported six times in 2022 from January to June. Unchallenged and undisputed documentary evidence reflects that the accused reported only once out of the seventeen intervals he ought to have reported on.

[19] The accused went on to abscond trial after two prosecution witnesses had testified on the first day of hearing, viz., 12 July 2021. Trial was to proceed on 4th and 6th October 2021. It however did not proceed because the accused absconded. This was despite having been duly warned by the court. It was also notwithstanding that a notice of trial was also served upon him on 28 September 2021, and whose return was duly filed in court.

[20] A warrant for his re-arrest and production to court was issued on 04 October and was duly executed. He was produced in court on 06 October 2021. An apology was tendered by the accused and his defence attorney. The court accepted the apology but warned the accused about the consequences for failure to attend court for trial. A third witness for the prosecution was led in evidence and cross-examined. The matter was then postponed to 21st and 23rd February 2022 for continuation.

[21] The accused again absconded trial and did not come to court on both the 21st and 23rd February 2022. A warrant for his arrest was issued on the 21

February 2022. He was ultimately re-arrested and produced in court on 15 July 2022. He then was called upon to show cause why his bail should not be revoked for failure to appear in court for his trial, hence the judgement of this court today.

[22] For the reasons stated and discussed in the paragraphs above, I make the following order:

[22.1] The bail which was granted to the accused on the 29th January 2021 by Her Ladyship Langwenya J is revoked forthwith.

[22.2] The accused is ordered to remain in custody until his trial is finalized by this court.

[22.3] The recognisance which was taken on the admission of the accused to bail is hereby declared forfeited to the state.

T. DLAMINI
JUDGE - HIGH COURT

For the crown: Ms. N. Mhlanga

For the accused: Mr. N. Ginindza