

SOUTH AFRICA / JUDGMENT

Booi v S (CA&R09/10) [2010] ZAECHHC 2 (17 May 2010)

[2010] ZAECHHC 2

COURT

Eastern Cape High Court, Bhisho

BEFORE

Kemp

CASE / FILE NUMBER

CA&R09/10

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, BHISHO

CASE

NO: CA & R 09/10

Reportable: No

DATE

HEARD: 17/05/2010

DATE

DELIVERED: 17/05/2010

In the matter between:

BUYILE
PHATHA BOOI
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

KEMP AJ

- [1] This is an appeal against the refusal by the magistrate in Mdantsane to grant bail to the Appellant. The Appellant applied twice to the magistrate in Mdantsane for bail – once on the 26th January 2010, and again on the 5th March 2010, alleging in the second application that new facts had arisen warranting his release on bail. After hearing the matter I granted the Appeal and indicated that my reasons would follow – these then are those reasons.

- [2] The Appellant, along with three accomplices, were charged with robbery with aggravating circumstances. It is alleged that they wore police reflective vests and stopped a truck carrying parcels at a roadblock, where they produced a fire-arm and ordered the truck driver and his assistant to offload much of the contents of the truck, after which they allowed the truck driver and his assistant to carry on, warning them however, not to report the matter until they returned back to their base. The truck driver however immediately reported the matter upon his release and the 1st accused was arrested on the following day, with the Appellant's arrest following the day after.
- [3] At the first bail hearing Mr Gxwem, the 1st accused, testified in support of his own application for bail. It appears that the audio recording of the proceedings was of a very bad quality, and much of the proceedings were apparently inaudible to the person who transcribed the proceedings. For example, the following appears from what was what appeared to be an important exchange during the proceedings whilst Gxwem was being cross examined.[1]

There is ... (inaudible) going to lead evidence ...(inaudible) the State case against you is strong. --- I do agree.

(Indistinct) ... the reason is that the ...(inaudible) of this offence, ... (inaudible) stopped in front ... (inaudible)

Pretending to be police officials, wearing the police official uniform. --- It's like that, Your Worship, ...(inaudible) by the owner of the truck, Your Worship, to rob.

And there's going to be further evidence, wherein ...(inaudible) this robbery was taking place, you are – took the driver of this truck as well as his assistant, you robbed the items which were in the truck. --- Yes Your Worship, it's like that.

- [4] From the above transcript it is not clear what exactly has been missed. What is clear is that there appears to be some sort of acknowledgement by Gxwem that he and his co-accused pretended to be police officials and were involved in the theft from the truck. He also testified at the second bail application, this time in support of the Appellants application, where under cross examination he clarified what happened at the scene.
- [5] The Appellant's version was that he had played no role in the robbery, but had simply been called upon to transport goods at the behest of Gxwem, and that he had no idea that a theft or robbery was in progress, which version Gxwem confirmed, although he put the Appellant on the scene whilst the robbery was in progress. He alleged however that the Appellant was in his motor vehicle some distance away and would not have seen what they were doing and would not have seen the toy gun which he alleged he used.

[6] Although he testified in his first bail application the Appellant chose in the second bail application to call Gxwem and to produce an affidavit by his wife. The prosecutor indicated that the State did not admit the facts deposed to in the affidavit and despite an invitation by the magistrate to consider testifying in person regarding the facts contained in the affidavit, the Appellant's legal representative chose to just hand in the affidavit. It does not appear that any of the facts would have been seriously challenged,

but in his reasons for judgment, I gained the impression that the magistrate viewed the affidavit evidence as weaker than what he should have. Although it is true that in *S v Mathebula*,^[2] a judgment referred to by the magistrate, the learned judge of Appeal stated that the Appellants tilt at the State case was blunted by producing affidavit evidence, the Appellant in that case was seeking to attack the merits of the State case by way of affidavit. He alleged that he had been tortured into making a confession and that he had an alibi defence. In the present case the Appellant has not produced highly contentious facts by way of affidavit. The thrust of the present claim to exceptional circumstances seems to me to be directed towards the financial hardship encountered by the Appellant's family. To the extent that the magistrate viewed the Applicant's wife's evidence as unreliable it appears to have been a misdirection. It does not appear that the State would have been in a position to contradict any of the evidence deposed to by the Appellant's wife. Although I agree with the magistrate's view that viva voce evidence is stronger, one should be careful not to impute a weight to the affidavit evidence which is unduly weaker than what it should be. One always has to factor into consideration the nature of the evidence being introduced by way of affidavit. If it has a potential to be contentious then it may well be weaker if untested.

[7] The Appellant's wife testified that they had met in 1989, after which they formed a relationship and got married in 1992. They have three children. The Appellant was initially a taxi driver but in 1995 started buying his own vehicles, which were later increased to three in 2009. His wife had never run the taxi business but was a full time school teacher. She testified that they had lost a lucrative contract with a local company to pick up their night shift employees for R8000 per month due to misconduct

on the part of one of the drivers. Their house has a balance on its bond of around R350 000 and the bond instalments are R4500 per month, which are deducted from her salary, leaving her with a net salary of R8400 for all the other household necessities. One of their children is at College and they have twins who cost them R800 per month for the pre school. The domestic worker costs R600 per month whilst the two taxis cost R17 200 per month. Mrs Boo's own car, which was used on the night in question, and has been impounded by the police, costs R4500 per month and insurance on the taxis costs R3000 per month. She alleged that if her husband remained incarcerated they would lose their business, that she was struggling to meet the financial commitments to the drivers, who were paid 25% of their takings, in addition to whatever they hid from her.

- [8] It is obvious that the parties are facing financial collapse and that a school teacher who has not been exposed to the running of the business will not be able to maintain it on a sound footing. It is also clear that without the presence of her husband, that her drivers are exploiting the situation for their own short term gain. She has noticed that the three drivers had in the past rendered different incomes every day, but were now obviously colluding, and handing in the same amount as each other every day, which was obviously an unlikely coincidence. From what she said it is obvious that financial ruin is on the cards. Although financial pressure appears to have been referred to as not being an unusual circumstance in Mathebhula, [3] financial ruin seems to me to be an exceptional circumstance, and although financial pressure was a factor raised in the first application, the passage of time clearly appears to have exacerbated the situation. I am not sure what details of the financial pressure were given in the Mathebhula case, but am satisfied that in the present matter sufficient evidence has been produced, perhaps barely but nevertheless sufficient, to lead me to conclude that as a matter of probably immutable course, financial ruin will follow should the Appellant not be released on bail.
- [9] The magistrate was satisfied in the first bail application that the Appellant had made out exceptional circumstances but had failed to prove that it would be in the interests of justice that he should be released. He did not state what those exceptional circumstances were and I am not sure which circumstances he was referring to. He found that the financial circumstances were unexceptional, so it seems as if he was referring to the Appellants prospects of success on the merits. His prospects were certainly stronger than those of the 1st accused, who had also made a written confession implicating the Appellant, and then claimed that he was coerced into making the confession, but I'm not sure if I would have called them exceptional.
- [10] A confession by an accomplice is inadmissible against a co-accused [4] and whether or not Gxwem will ever testify against the Appellant remains to be seen. What the strength of his evidence will be if that ever happens also remains to be seen. From what I have read of his evidence he does not appear to be a particularly reliable or impressive witness. What is clear is that it appears to be common cause that none of the victims will be able to identify any of the perpetrators, due to the fact that the events took place at night and that they never had a good opportunity to see the faces of their assailants.
- [11] It is also common cause that some of the goods that were stolen from the courier truck were recovered from the home of the Appellant. His explanation is that he had been instructed to fetch the goods and to leave them at his home to be collected. His wife alleged in her affidavit that the goods had been kept separate from their other household goods, and that she believed her husband when he told her that somebody would be coming to pick them up.

- [12] On the Appellant's version he was an innocent transporter of goods. It may be suspicious that he agreed to load goods at nine o'clock in the evening from the side of a national road, but I have seen thinner defences succeed.
- [13] The Appellant also pointed out, via his wife's affidavit in the second bail application, that Gxwem had alleged that he had conspired with the truck driver to stage the robbery, that it was in fact not a robbery at all, but merely a theft, and that the truck driver had subsequently been dismissed. The investigating officer was however called as a witness and confirmed that he had that very day spoken with the owner of the transporting business, who confirmed that the driver was still working for the company. It appears that whatever Gxwem says has to be taken with a pinch of salt. The weapon, or toy gun, if Gxam is to be believed, has
- still not been recovered.

- [14] As indicated above, the magistrate found that the Appellant's circumstances would probably qualify as exceptional after the first bail application, but questioned as to whether that exceptionality was sufficient to warrant his release, in the interests of justice. He appears to have taken as a strong counter indicator the fact that at that point in time there appeared to be no problem with his business, his wife was operating it, that it was operating smoothly, and that to keep him in custody would not appear to have too detrimental an effect on his income. That factor was obviously cancelled out by his wife's subsequent testimony. Although not tested by cross examination, it is doubted whether the State would have seriously disputed it. Although the magistrate labelled the subsequent information regarding the Appellant's financial circumstances as mere embellishments of prior factors, and thus inadmissible as additional factors, I do not with respect entirely agree. I accept that the magistrate is to an extent correct in saying that the financial circumstances were raised at the prior hearing, and that there has, to some extent been, as the magistrate put in, an embellishment of these factors. I am also mindful of the prohibition against a reshuffling of old evidence or an embroidering upon it.[5] The passage of time, even if only six weeks, has however clearly been enough to demonstrate to the Appellant and his wife and to anyone with any insight into how important it is to maintain monthly payments on vehicles and immovable property, that permanent and irreversible financial ruin lies not far in the future. The magistrate appears to have been of the view that the Appellant in the present matter is in a better financial situation than the Appellant in Mathebula, as the present Appellant's wife works. I fail with respect, to see the logic in that reasoning. If the Appellant was contributing

towards an additional income and now cannot do that then the loss of a substantial portion of the household's income can hardly be described as an inconsequential factor. Granted, the effects of the only income earner being deprived of an income will no doubt be felt quicker by a household, but the removal of one, and probably the greater, of two incomes will no doubt be just as devastating.

[15] The magistrate also appears to have found that the fact that the appellant never disclosed his previous convictions to the court to weigh against him, and appeared to reject his explanations that he only thought it necessary to disclose previous convictions for which he had been imprisoned. It appeared, from what I can make of the record, with all of the problems related to the sound quality encountered during the transcription, that he was convicted of theft in 1981 and received corporal punishment. He then had a second conviction for theft in 1987 for which the punishment is unknown, due to the poor sound quality, an assault in 1986, for which he appears to have received a fine, theft in 1988 for which he may have been imprisoned, although the record is not entirely clear, an assault in 2003 and a road traffic offence also in

2003. although his failure to disclose the previous convictions may

well raise some suspicion against his credibility, as he has seven previous convictions, he has not had any for nearly seven years, and his version that he thought that he only had to disclose those for which he had served time, although possibly objectively viewed may be hard to believe, may possibly have been a genuinely held belief by the Appellant. I express no views in this regard as I do not believe that my decision on whether to grant the Appellant bail hinges on an acceptance of his credibility or not. In appropriate circumstances it might have influenced my thinking, but not in this case.

[16] Although it has previously been held [6] that the fact that the appellants business suffers prejudice can not be regarded as an exceptional circumstance, as everyone that is in custody is detrimentally affected in one way or another by his or her incarceration, and it is a common phenomenon,[7] it appears that this view is no longer supported.[8]

[17] As far as the merits being an independent ground as an exceptional circumstance are concerned, I don't think that the Appellant is particularly strong on his defence. I don't think that the State is particularly strong either. I think the Appellant is stronger than the Appellant in Mathebula, who had to persuade the court in due course that his confession had been extracted under duress. In as much as the onus is on the Appellant to prove exceptional circumstances I think that absolution would have had to be granted on this ground in a civil court, although bearing in mind that the State does not appear to have a prima facie iron clad case against him, and in my view that is a factor to be taken into account and a distinguishing characteristic from the Mathebula case. The Appellant is a man with roots in the community, with much to lose and no particular incentive to think that the State's case against him is iron clad. He does not appear to be a flight risk and the State also never submitted as much. There is no onus on him to prove his defence in due course and as indicated above, I have seen much thinner defences succeed, particularly in the absence of independent eye witnesses.

[18] Where the Appellant has in my view succeeded in proving exceptional circumstances is that he has proven on a balance of probabilities that he, his wife and three children are facing financial ruin and taken with all of the other factors, that it would be in the interests of justice to grant bail to him.

[19] The Appeal was successful and the refusal to grant bail set aside and substituted with the following orders:

(a) The Appellant is granted bail of R3000.00 on the following conditions:

The Appellant is warned not to contact or attempt to contact or communicate with the complainant, or any State witnesses, in particular the driver of the courier vehicle which was robbed;

(b) The Appellant is to report to Cambridge Police Station once per week;

The Appellant is to present himself at the next hearing of the matter.

L. KEMP

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Adv S J Swartbooi Instructed by Makhanya Incorporated For the Respondent: Adv C de Kock

[1] See p 10 pf the record, lines 7 - 19

[2] Mathebula and The State (431/09)[2009]SASCA 91 (11 September 2009)

[3] Supra at paras 8 and 15

[4] S 219 of the Criminal Procedure Act No. 51 of 1977

[5] See S v Petersen 2008

(2) SACR 355 at 371 paras 57-58 [57] "When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented

evidence. [58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. if the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous application, and not separately. (footnotes omitted)

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[6] *S v Mokgoje* 1999 (1) SACR 233 (NC) at 243 a

[7] “Die vierde feit wat as ‘n buitengewone omstandigheid aangemerkt word, is die feit dat die appellant se besigheid benadeel word. Dit opsigself kan nie as ‘n buitengewone omstandigheid beskou word nie aangesien elkeen wat in hegtenis aangehou word, op een of ander manier benadeel word en dit algemeen voorkom” per Steenkamp J at 242 a – b in *S v Mokgoje* ibid

[8] See *S v Mohammed* 1999

(2) SACR 515 at d where Comrie J expressed the view that the view adopted by Steenkamp J in *Mokgoje* should now be regarded as too narrow, Kruger, Hiemstra’s Criminal Procedure (2009) 9-13, where the learned author confirms that “Proof that the accused’s business interests will be seriously jeopardized by continued detention qualifies as an exceptional

circumstance which can be taken into account”, and Du Toit et al, Commentary on the Criminal Procedure Act (2009) 9 – 48.

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