

SOUTH AFRICA / JUDGMENT

Dlangamandla v S (A05/2020) [2021] ZAMPMHC 12 (6 April 2021)

[2021] ZAMPMHC 12

COURT

Middelburg High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

A05/2020

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THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

06 April 2021

CASE NO: A05 / 2020

In the matter between:

ANDILE BRIAN DLANGAMANDLA

APPELLANT

and

THE STATE

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLI. The date and time for hand-down is deemed to be 10H00 on 06 April 2021.

Summary:

Bail – Appeal against the refusal of – Discretion of the Magistrate – Right of appeal court to interfere with that discretion as contemplated in section 65(4) of the Criminal Procedure Act.

Bail

- Application for - Factors to be taken into account - 'Exceptional circumstances' as contemplated in s 60(11)(a) of Criminal Procedure Act - Approach to determination of – Onus on applicant to show exceptional circumstances that in the interests of justice permit his release.

Bail – Application for – Application on new facts – Facts that existed in the initial application but not disclosed do not qualify as new facts. New facts do not entail reshuffling and repetition of old evidence or embroidering thereon or filling of gaps in initial application.

Evidence

- Adequacy of proof - Bail application - Appellant relied upon affidavit evidence which was not open to test by cross-examination

and therefore, less persuasive

Appellant facing a charge of murder of a taxi owner. At the time of application for bail, he was out on bail on another charge of murder of a taxi owner albeit committed later than the current matter. In applying for bail by affidavit, appellant challenged the strength of State's case without presenting independent evidence on which he could be acquitted. State's case is made out of the confession made by the appellant, evidence that there was an eye witness who was present when he was paid by another taxi owner to kill the deceased, eye witness who saw the motor vehicle whose description matched the appellant's and cell phone records that placed him at the scene of crime. Bail was refused by the Magistrate for lack of exceptional circumstances, which in the interests of justice permit his release. A year later, he brought an application for bail on new facts through a new legal representative. The application on new facts was a repeat of what was contained in his initial bail application. Bail was

refused for lack of new facts. He now appeals against the refusal of bail by the Magistrate.

Held – The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong. Section 65(4) of the Criminal Procedure Act. Appeal was dismissed.

J U D G M E N T

RATSHIBVUMO AJ:

[1]

Introduction:

This is an appeal against the refusal of bail by the magistrate. It came before me in terms of section 65 of Act 51 of 1977 (the Criminal Procedure Act). Upon perusal of the file, it contained notice of appeal and the record of proceedings of bail application on new facts. The application for bail on new facts was heard on 18 November and 29 December 2020 and the judgment refusing bail was handed down on 06 January 2021. The notice for appeal was filed with the Registrar of this court on Friday the 12th March 2021.

[2] When this matter was allocated to me on 15 March 2021, it became apparent that the record of the first bail application upon which the new facts were necessitated was not filed with the appeal. The Registrar had to call on the appellant's legal representative to obtain and file them with his office. The legal representative obliged and filed some 362 pages of record of bail application that was initially heard in respect of the appellant and his two co-accused. Judgment in the initial bail application was handed down on 28 January 2020. When I realised that there were no heads of arguments filed for the appellant and the respondent, I again caused this to be requested by the Registrar. The Appellant and the Respondent respectively filed the heads of argument on 25 and 29 March 2021.

[3] Bail as urgent application

Bail and bail appeals are by their very nature urgent. In *S v Banger*,^[1] the Supreme Court of Appeal held,

“Bail appeals are inherently urgent in nature. An accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary. The majority of appeals, against the refusal of bail by the High Court as a court of first instance, will arise from a court that consists of a single judge and will not require the attention of this court. In these matters application for leave to appeal should generally be made immediately after the refusal of bail and, upon leave to appeal having been granted, a full court of that division of the High Court should generally dispose of these appeals more expeditiously and cost-effectively than was the position before the advent of the Superior Courts Act.”

[4] There is no doubt that with what I referred to above, this bail appeal was not handled with some sense of urgency. No matter how conscious the court can be of the urgency that goes with bail and bail appeals, unless the appellant prosecutes the appeal with a sense of urgency; there is very little that can be done to help him achieve this.

[5] The application for bail.

In the court below, it was common cause that the appellant was arrested on a Schedule 6 offence – murder. Bail application was therefore heard with the understanding that the onus was on the appellant to show that exceptional circumstances exist which in the interests of justice permit his release on bail.^[2] In discharging this onus, the appellant presented an affidavit. The following is summary of facts contained in that affidavit

- [6] He was 39 years old, residing at an address in Springs, Gauteng Province, with his fiancé with whom they had a 4 year old child. He also listed the said address as his immovable property. His fiancé was expecting another child. He was unemployed, having lost his job in March 2019; but he occasionally did odd jobs in transportation business. He has a pending case of which he was released on bail. He owns a passport which he handed over to the police pending the investigations in the pending case. He was out on bail in a case that had been transferred to the High Court. He was released on R5000.00 bail in that matter. He further indicated that he did not know the identity of the State witnesses. He did not have previous convictions. He was arrested while reporting at a police station as part of his bail conditions in the pending case.
- [7] In an attempt to discharge exceptional circumstances, he indicated that there were no eye witnesses against him and that he was not found in possession of the murder weapon. He also indicated that he was linked by a confession and a pointing out that he made to the police. He however indicated that he intended to challenge the admissibility of that confession in a trial. There are two reasons advanced upon which he will challenge the admissibility of this confession. The first reason is that he was threatened by the same police officers who assaulted him in the pending case. Secondly, his legal representative was not present when this confession and a pointing out were made. Had he been given an opportunity, he indicated he would have opted to have his attorney present.

[8] Case for the State

The Respondent led evidence by the Investigating Officer, Sgt Johannes Mahlangu who testified under oath. His evidence relevant to the appellant can be summarised as follows. The Appellant is implicated in a taxi violence murder following the death of a taxi

owner in Middelburg who was shot dead on 20 September 2018. The assailant(s) fled the scene driving a gold Toyota Avanza. The Appellant owns a gold Toyota Avanza. A witness who is a brother to the appellant's co-accused (accused no. 3) gave a statement in which he implicated the appellant and accused no. 3 in the murder of the deceased. He was present when accused no. 3, who is also a taxi owner, paid money to the appellant so that he could eliminate the deceased.

- [9] Cell phone records place the appellant at the scene of crime. They also reflect that there was constant communication between the appellant and accused no. 3 even on the date of the murder. When the appellant was approached, he did not dispute the allegations against him. Instead, he cooperated and made a confession and a pointing out. According to that confession, the appellant was not the hitman. He had hired a hitman who pulled the trigger. Acting on this information, the police arrested the alleged hitman and added him as a co-accused (accused no. 2). Accused no. 2 confirmed all the allegations made by the appellant and he also made a confession of his own.
- [10] The Appellant was unemployed. He resided at the address he gave in his affidavit with his girlfriend. The property is registered in the names of the said girlfriend. The Appellant does not own any immovable property. The computer system reflects that the appellant owns a

Toyota Avanza. The Appellant however did not give the police any information about this motor vehicle. When asked about it, he alleges that he gave it to someone so that he could continue paying its monthly instalments. The Appellant did not give names, contact details or any other information about this person. As a result, they could not locate this motor vehicle. At the time of his arrest, the appellant was out on bail in a case of murder of a taxi owner who was killed in the same manner as the current case. However, the said murder took place in March 2019, some six months after the murder in this case.

[11] The court below was of a view that the appellant failed to show that exceptional circumstances exist which in the interests of justice permit his release on bail. Bail was as such refused.

[12] Bail application on new facts.

The application for bail on new facts was brought through the appellant's new legal representative who clearly was not privy to the original bail application transcripts. Instead of focusing on the alleged new facts, the appellant presented a new affidavit containing all the information he had given in the initial bail application. The only new developments included in the affidavit

was that the investigations were completed and the police could not locate the appellant's motor vehicle or its tracker movements

on the date of the murder. The application for bail on new facts was also refused.

[13] On appeal

The grounds upon which the decision to refuse bail is challenged appear from the notice of appeal and the heads of argument prepared for the appellant. The grounds in the notice of appeal somehow differ from those in the heads of argument. For example, the Appellant submitted in the notice of appeal that the Learned Magistrate erred in finding that the appellant was unemployed instead of finding that he was self-employed. After the original transcript were obtained following the request by the Registrar, it must have become apparent that the accused employment status was presented as unemployed in his own affidavit and taken as such by the court. This

ground was not advanced any further in the heads of argument.

[14] The Appellant further submits that the Magistrate erred in respect of the following aspects. She failed to interrogate the strength of the State's case. She did not consider the factors in section 60(4)(a)-(e) in order to find out if it would be in the interests of justice for the appellant to be released on bail. She rejected that there were new facts upon which the appellant should be released on bail.

[15] The Respondent is opposed to the appeal in that the appellant failed to show that exceptional circumstances exist which in the interests of justice permit his or her release on bail. For this reason, the appeal should be dismissed.

[16] Legal provision.

Section 65(4) of the Criminal Procedure Act provides,

The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.

[17] The provisions above were considered and interpreted by Hefer J in *S v Barber*[3] where he held,

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this

Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised

that discretion wrongly.”

[18] In *S v Porthen and Others*,[4] Bins-Ward AJ (as he then was) focuses on the appeal court's right to interfere with the discretion of the court of first instance in refusing bail when he held,

“When a discretion... is exercised by the court a quo, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong.”

[19] The reliance by the appellant on *S v V*[5] is in my view misguided. In that case it was held that all that section 60 (11)(a) of the Criminal Procedure Act required of an accused was to prove that he or she would stand trial, would not defeat the ends of justice and would not commit crimes if released on bail. It was further held that, all that the Legislature enacted is that a court which is seized of a matter involving a Schedule 6 offence must exercise exceptional care when considering the usual circumstances. The Court must be able to hold with a greater degree of certainty that the detainee will do all that his bail conditions require of him. The court went on to opine that if this interpretation is incorrect, serious

reservations existed about its constitutionality since the right granted in the Constitution to every person, to be regarded and treated as innocent until his guilt has been proved in the prescribed manner, may only be limited if the limitation is appropriate and justifiable in a democratic system.

[20] The interpretation in *S v C*[6] is clearly wrong in that it does not give due weight to the literal interpretation of section 60(11) of the Criminal Procedure Act, which provides,

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release. [Own emphasis].

[21] The literal interpretation of this section makes it clear that as opposed to the approach in *S v C*, the duty is on the accused (to show exceptional circumstances), not on the courts (to exercise exceptional care). Unlike when *S v C* was decided, I have the hindsight privilege in that the constitutionality of the above section was eventually decided by the Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*. [7]

[22] The Constitutional Court found that it was virtually impossible to imagine what would constitute "exceptional circumstances", and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated. Circumstances which may be regarded as 'ordinary' in one case, may be treated as 'exceptional' in another.[8] For the reasons above, Comrie J correctly reasoned out in *S v Mohammed*[9] that what Conradie J said in *S v C* about the meaning of exceptional circumstances is no longer good law.

[23] The precision in *S v C* was also questioned, rightly so in my view, in *S v Mazibuko*[10] when Rall AJ said,

What was held in *S v C* amounts to putting Schedule 6 accused on the same footing as Schedule 5 accused. Subsection (11) clearly distinguishes between the two categories of accused, and to place them on the same footing would render this distinction meaningless. It was expressly held in *Dlamini's* case (in para 65) that, whereas in the case of Schedule 5 accused the only factor which distinguishes those bail applications from those involving less serious offences is the question of the onus, s 60(11)(b) imposes an additional requirement, namely, proving exceptional circumstances.

[24] The Appellant's reliance on authorities decided prior to the amendment of section 60(11) of the Criminal Procedure Act is not helpful either as they were decided before the introduction of both Schedule 5 and 6 into the Criminal Procedure Act.[11] The proper approach on bail application where the applicant faces a Schedule 6 offence laid down by the Supreme Court of Appeal in *S v Mathebula*[12] when it held,

“In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence. Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: S v Viljoen[13] at 561f - g... Despite the weak riposte of the State, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the State case than he had been when the application commenced. It follows that the case for the

appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances.”

[25] I now turn to consider if the Magistrate misdirected herself in finding that there were no exceptional circumstances which in the interests of justice permitted the appellant’s release on bail. I approach this question conscious of the fact that where an accused adduces strong, independent evidence pointing to his innocence, in so doing, he establishes exceptional circumstances.[14] I am also conscious of the fact that the appellant presented his application for bail by means of an affidavit which was not open to test by cross-examination and, therefore, less persuasive.[15]

[26] In his affidavit, the Appellant alleged that he owned an immovable property, which he shared with his girlfriend. This was found to be false by the investigating officer who found the property to be registered in the names of the girlfriend. The Appellant did not challenge this piece of evidence or clarify his assertion. The Appellant was out on bail in a similar case – murder of a taxi driver, although the murder in that case took place after the murder in casu. The interest that the community had in the bail application is manifested when courtroom was fully packed during the bail application. The Appellant chose not to deal with the merits of the case for the State. He instead chose to attack the strength of the case for the State focusing of technicalities than can only be dealt with by the trial court.

[27] The Appellant does not dispute that he made a confession and a pointing out to the police. Nothing in his affidavit suggests that he was forced into making this confession. The closest he comes to insinuating such is when he alleges that he made the said confession

to the same police officers who had assaulted him in the pending matter in which he is out on bail. Both the appellant and his legal representatives bemoan the fact that the confession was not made to a magistrate or in the presence of the legal representative; as if these are the prerequisites for admissibility of a confession, whereas they are not.[16] It appears the appellant is trivialising the value of confession, the strength of State case based on eyewitnesses and evidence on cell phone records and the value of circumstantial evidence.

[28] The likelihood that if the appellant was released on bail, he would endanger the safety of the public or any particular person is more than a just a perception. This is in light of the pending similar case against him, and the fact that Mr. Van Eeden, a legal

representative for accused no. 3, bizarrely swapped his robe to take the witness stand where he disclosed the identity of one of the State key witnesses. This disclosure took place against the expressed wishes of the State Counsel. The likelihood that he would attempt to influence or intimidate the witnesses, that he would undermine or jeopardise the objectives or the proper functioning of the criminal justice system or that he would disturb the public order or undermine the public peace or security also appears to be real. I therefore cannot find any misdirection on the part of the Magistrate in finding that there were no exceptional circumstances, which in in the interests of justice permitted the appellant's release on bail.

[29] New

facts.

The Appellant boldly asserts as new facts that the investigations are complete and that no records of motor vehicle tracking device could be found linking his motor vehicle to the scene of crime. As much as the onus to prove the case against him beyond a reasonable doubt is on the State, and that he does not have to prove his innocence, the test for bail application is somewhat different. The onus is on him to prove the existence of exceptional circumstances which in the interests of justice permit his release. While the tracking records linking his motor vehicle could not be found, there are equally no such records that do not link his motor

vehicle to the scene of crime. According to Carl Dreyer Rothman, a manager at Car Track, this is due to the device not recording data on the date of the murder.

[30] Even as the investigations were completed, the appellant's motor vehicle could not be located. It could as such not be established as to whether there was tampering with the tracking device in the motor vehicle and if so, the date on which it was tempered with. The appellant's silence about the whereabouts of this motor vehicle on his original application for bail and the application on new facts is too deafening for a person who has nothing to hide.

[31] New facts entail a presentation of set of facts that did not exist when bail was applied for at the first given opportunity. Disclosing

facts, which existed at the time of the initial application, but were not disclosed for whatever reason, does not make them new. When the accused relies on new facts, which have come to the fore since the first 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.[17] 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. If the evidence is found to be new and relevant, it

must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.[18] There is therefore no misdirection by the Magistrate in finding that there were no new facts presented by the appellant in this case.

[32] In the result the following order is made:

Appeal is dismissed.

TV RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT

: MR. BM MAPHANGA

INSTRUCTED BY

: BRIAN MAPHANGA INC

FOR THE RESPONDENT

: ADV D ROWLES

INTRUSCTED BY

: DIRECTOR OF PUBLIC

PROSECUTIONS MPUMALANGA

MIDDELBURG

JUDGMENT DATE

: 06 APRIL 2021

[1] 2016 (1) SACR 115 (SCA) para 14.

[2] See section 60(11)(a) of the Criminal Procedure Act.

[3] 1979 (4) SA 218 (D) at 220E - H

[4] 2004 (2) SACR 242 (C) para 4.

[5] 1998 (2) SACR 721 (C).

[6] Supra.

[7]

[1999] ZACC 8; 1999

(2) SACR 51 (CC).

[8] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat at para 76

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- [9] 1999 (2) SACR p507
- [10] 2010 (1) SACR 433 (KZP) at para 12.
- [11] Section 60(11) was substituted by Act 85 of 1997 (Criminal Procedure Second Amendment Act), which came into operation 01 August 1998.
- [12] 2010 (1) SACR 55 (SCA) at para 12-13.
- [13] 2002 (2) SACR 550 (SCA)
- [14] S v Mohammed supra
- [15] S v Mathebula supra. See also S v Pienaar 1992
- (1) SACR 178 (W) and S v Mazibuko supra.
- [16] For the admissibility of confession by accused, see section 217 of the Criminal Procedure Act.
- [17] S v De Villiers 1996
- (2) SACR 122 (T) at 126E-F and S v Petersen 2008
- (2) SACR 355 (C) para 57.
- [18] S v Petersen supra at para 58, S v Mohammed supra at
- p. 511A-B. See also S v Vermaas 1996
- (1) SACR 528 (T) at 531E-G.
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