

SOUTH AFRICA / JUDGMENT

Khuza v S (CA&R81/2024) [2024] ZAECKMKHC 135 (23 August 2024)

[2024] ZAECKMKHC 135

COURT

Eastern Cape High Court, Makhanda

BEFORE

Brody

CASE / FILE NUMBER

CA&R81/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION – MAKHANDA)

Reportable/Not

Reportable

Case

no.: CA&R81/2024

Matter

heard on: 20 August 2024

Judgment

delivered on: 23 August 2024

In

the matter between:

WANINI

KHUZA

Appellant

and

THE STATE

Respondent

JUDGMENT

BRODY AJ

1. The appellant is a 70-year old male who previously worked for the University of Fort Hare, as a driver, for a period of approximately thirty years.
2. Close to his retirement age, he was then requested to continue working until September 2022, after which, he went on pension. He is married and has five children. Some of these children are dependent upon him and he receives a monthly pension of R5 500.00 from Old Mutual.
3. At his incarceration he lived on a small-scale farm where he owned livestock and poultry and he is presently the owner of two houses, one in Mdantsane, and one in Msintini Village. At the time of his initial bail application he had no previous convictions save for a drunken driving conviction in 2003 for which he was fined R2 000.00.

He had no pending cases against him.

4. At his initial bail application, he stated inter alia the following:

"... I will not attempt in any way to evade my trial. I have emotional family, community and business ties within this Honourable Court. I do not have any means and/or documents which may enable me to leave this country. I submit furthermore that the State does not have a strong case against me which may be an incentive for me to attempt to evade my trial should there be one. I respectfully submit that the facts set out above support my contention that I do not constitute a flight risk... I am not familiar with the identity of the complainant in this case, but I am not aware of the evidence which the complainant may bring against me. In any event, I have no intention to interfere with the complainant and/or any witnesses as I have no cause to do so and I undertake not to do so. In any event, the court may impose bail conditions which I will gladly comply with. I am not aware of the status of this matter, whether or not it has been completed. Be that as it may, I undertake not to interfere with any investigation. I submit with respect that, should this Honourable Court grant me bail, any conditions against me will both be effective and enforceable. ..."

5. At that stage the appellant stood arraigned, together with nine other accused persons, in the Magistrate's Court at Alice on various charges in case no: A80/2023 ("the case"). The appellant

is accused number three in that case.

6. The investigating officer testified at the initial bail application and stated the following in regard to the appellant's involvement in the shooting incidents which gave rise to the accused's arrest:

"The following explanation detail how each accused is linked to the shooting incidents: ..."

- [10] Evidence shows that the effected persons comprising of two separate groups, that is, the group of the professors and other senior academic members including Bongani Peter, and another one comprising of again Bongani Peter, Wanini Khuza and Sicelo Mbulawa, sat and planned smearing of the Vice-Chancellor (that is the VC) and his killing if that did not work. This led to the unrest and damaging of property in the university. They [?] also led to the planning of killing of Roets. They believed that his death could reopen the now closed doors in order to line up their pockets again. Mbulawa was given the task of organising hitmen. He promised to bring his Mthatha guys. All three have confessed about the killing of Roets.” ...

“But when police found the hitlist, that is 13 names, in the jeep, three of the victims, that is Vice-Chancellor, Roets and Chief Financial Officer had Bongani Peter’s cellular phone number... They have a common denominator in that they are responsible for closing the financial tap on Bongani Peter, Wanini Khuza and Sicelo Mbulawa.”

7. This is the sum total of the “evidence” against the appellant, as accused number three, and, in addition, the appellant alleged that the so-called “confession” given by him was done after he was tortured by members of the South African Police Services.
8. The appellant, at a stage, abandoned his appeal after he was allegedly threatened by officials while he was in custody and brought a fresh application for bail before the court a quo.
9. In his judgment, the presiding Magistrate gave reasons for his failure to release the appellant on bail and appeared to list all the factors that are listed under section 60(4) of the Criminal Procedure Act (“CPA”) and came to the following conclusion, without analysing the facts as they were relevant to the factors listed:

“I have considered the evidence presented before me in this matter and I find that prima facie the State does not lack of a strong case against the applicants and on the contrary, the applicants themselves have not been able to succeed to show that the case is weak against them. I am therefore not persuaded that there is presence of exceptional circumstances adduced by the applicants.”

10. Mr Ntelwa, who appeared on behalf of the State in the present bail appeal, confirmed that the appellant was not the manager in charge of the department at the university and initially was two levels below the manager, and eventually one level.
11. When Mr Netlwa was asked to point out, in the record, the strength of the State’s case against the appellant, his argument was that the appellant had driven passed the house of one of the deceased and had shown one of the hit men the house of the deceased. Although reference is made in the record to the appellant driving passed the house, by the investigating officer, there is no mention in the record of the appellant pointing out the address of the deceased to any hit men.

12. Mr Ntelwa then alleged that the record was incomplete, and this was disputed by Mr Daubermann, acting on behalf of the appellant. Mr Daubermann confirmed that he in fact had completed the record after a previous failed attempt by previous representatives, and there was nothing missing in the record, and no complaint had previously been received from Mr Ntelwa of an incomplete record, (or a complaint from anyone else).
13. Mr Ntelwa properly conceded that the appellant's personal circumstances are not disputed and that the strength of the State's case against the appellant is the reference by the investigating officer to the driving passed of one of the deceased's house, and the alleged "confession".
14. Mr Daubermann correctly argued, in my view, that no details are given of the alleged confession and it was impossible for the court a quo, or this court, to take into account a "confession" without the necessary details. The confession was referred to in the record in very general terms and the appellant had, in any event, alleged that anything that may have been said by him to officials of the South African Police Services were done in circumstances where he had been tortured. This is an aspect of the matter that will be dealt with in the trial court and before the trial judge in due course. I am inclined to agree with Mr Daubermann that there is no evidence placed before me which allows this court to come to the conclusion that there is evidence of a confession.
15. Although Mr Daubermann raised the issue of the charge sheet in his heads of argument, and which was then motivated in argument, Mr Ntelwa handed in an "amended" charge sheet which apparently was handed in before the presiding Magistrate.
16. The relevance of the charge sheet is whether the charges were schedule 5 or schedule 6 offences in terms of the CPA. Mr Daubermann argued that none of the allegations in the initial charge sheet brought any of the charges within the ambit of schedule 6, in particular, there was no allegation in the charge sheet that the alleged murders were premeditated or committed by a group of persons acting in furtherance of a common purpose. In his view, the presiding Magistrate had misdirected himself in finding that the appellant had been charged with a schedule 6 offence and which then had the consequence of an onus being placed on the appellant to prove the existence of "exceptional circumstances" as envisaged in section 60(11)(a) of the CPA.
17. Section 65(4) of the CPA provides as follows:

"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 will give the decision which in its or his opinion the lower court should have given."
18. In *S vs Barber* 1979(4) SA 218(D) at 220E, the court held as follows in this regard:

"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, he should not substitute his 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."

19. It is therefore clear that a court hearing an appeal against the refusal of bail is at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him in terms of section 60(11)(a) of the Act.
20. In *Chiediebeze vs S* (BA18/20) [2020] ZAMPMMC 34(29 July 2020), at paragraph 13, the court held as follows:

"A court cannot find that the refusal of bail is in the interests of justice merely because there is a risk or possibility that one or more of the consequences mentioned in sub-section (4) will result. The court cannot grope in the dark and speculate; a finding on the probabilities must be made. Unless he can be found that one or more of the consequences will probably occur, detention of the accused is not in the interests of justice and the accused should be released."

21. Section 35(1)(f) of the Constitution provides the principal template against which chapter 9 of the Act must be measured. It reads as follows:

"Everyone who is arrested for allegedly committing an offence has the right...

- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

22. Section 60(1)(a) of the CPA provides as follows:

"60. Bail application of accused in court.

(1)(a) an accused who is in custody in respect of an offence shall, subject to the provisions of Section 50(6) be entitled to be released on bail at any stage of the proceedings of his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."

23. Section 60(4) of the Act provides, in turn, that the interests of justice do not permit the release from detention of an accused, where one, or more, of the grounds set out therein are established.
24. Sections 60(5) – (9) of the Act makes further provisions and factors which are to be taken into account, and these are extensive.
25. In *Tshofoti vs S* (A281/2021) [2022] ZAGPPHC124 (4 February 2022) the following was stated:

"It cannot be in the interests of justice for bail to be denied in circumstances in which it is common cause that none of the likelihoods referred to in Section 60(4) of the CPA exists. The absence of any of the likelihoods referred to in Section 60(4) of the CPA. constitutes, in itself, (exceptional circumstances)".

26. The fundamental objective of the institution of bail in a democratic society based on freedom is to maximise personal liberty and the proper approach to a decision in a bail application is that a court will also grant bail where possible, and will lean in favour of, and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.[1]
27. In *S vs Branco* 2002(1) SACR(W) 532H, and further, the court stated the following:

“It must be borne in mind that any court seized with a problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the Constitution. Such freedom should only be lawfully curtailed if “the interests of justice so require”.”
28. The appellant adduced evidence by way of affidavits in the court a quo and the respondent adduced evidence, opposing bail, by way of affidavits by the investigating officer.
29. In his founding affidavit, the appellant specifically alleged that the State does not have a strong case against him. This was a direct challenge to the State to prove otherwise.
30. In *S vs Mauk* 1999(2) SACR 479(W) 481j – 482d, the court inter alia held as follows:

“An accused will succeed in proving “exceptional circumstances” if he is able to show, by adducing acceptable evidence, that the State’s case against him is non-existent, or subject to serious doubt. Where the accused evidence stands alone, then the suggestion of the State’s case is non-existent or doubt will become almost a foregone conclusion. If the State does not lead evidence in rebuttal, it is difficult to see how it can be said that the accused has not succeeded in discharging the onus. The fact that the evidence before court is infused with probabilities indicating that the accused may have been falsely implicated, especially where the State adduced no significant rebutting evidence (as in casu), can scarcely be regarded as anything other than exceptional.”
31. I have dealt with the investigating officer’s allegations in regard to the appellant’s involvement above, it is clear from the evidence given to the court a quo that the only “evidence” was that the appellant was part of a group that “sat down and planned the smearing of the Vice-Chancellor and his killing if that did not work”.
32. The investigating officer’s reliance on confessions of three “hit men” to show that the appellant was involved in the commission of the alleged offences, also appears to be misplaced because the said confessions cannot be used against the appellant in evidence under the circumstances.[2]
33. The appellant’s evidence also to the effect that he was tortured by the police and instructed to admit that he knew the killers of the late Mr Vesele and the late Mr Roets was also unchallenged by the respondent, and must accordingly be accepted.

34. I am in agreement with Mr Daubermann that if the State had any evidence implicating the appellant in the commission of the alleged offences, the investigating officer would have set such evidence out in detail, which he has failed to do. I am further in agreement that there is no evidence whatsoever implicating the appellant in the commission of the alleged offences.
35. The investigating officer's reasons for opposing bail are also unsupported by any evidence and general remarks. He fails to distinguish between the multiple accused, and the appellant, and generally makes sweeping statements about all of them as a group.
36. The investigating officer's evidence does not show, on a balance of probabilities, that any of the "likelihoods" referred to in Section 60(4) of the Act exist in this matter.
37. In view of the State's poor prospects of success against the appellant there certainly cannot be any suggestion that the appellant is accordingly likely to flee and not stand trial.
38. As the appellant has no relevant previous convictions, or any other cases pending against him, it is not understood how the investigating officer could have alleged that he has a "propensity to commit further crimes" and that "there is a strong likelihood" and that he "will commit crimes at the university". No evidence was given for these sweeping statements.
39. The appellant's personal circumstances, as set out above, in my view, also favour the granting of bail and renders it unlikely that he will abscond and not stand trial.
40. The presiding Magistrate also did not conduct a proper analysis of the evidence as he found that the investigating officer testified that the appellant made a confession, which is incorrect. The appellant's evidence in this regard was as follows:

"Mbulawa was given the task of organising hit-men. He promised to bring his Mthatha guys. All three have confessed about the killing of Roets."
41. There can be no doubt that the investigating officer was referring to the alleged hit men and not the appellant. If the respondent seeks to rely, in a bail application, on a confession then it must at least prove that the confession is prima facie admissible in evidence against the maker thereof.[3]
42. The investigating officer did not say to whom the confessions were made, or even that they will be admissible in evidence against the makers thereof. In fact, his evidence is that the three had confessed about the killing of Roets, and not that they had confessed to killing Roets.
43. In any event, any confession which may have been made is questionable in that the allegation is that it was not made freely and voluntarily.
44. On the 7th of June 2022 my brother Laing J handed down a judgment where one of the appellants' other co-accused appealed against the refusal to grant bail.[4]

45. In that matter the court found that there was no evidence at all, on the record, that the appellant (in that matter) would endanger the safety of the public or particular person, or commit a schedule 1 offence. There was also no evidence that the appellant, in that matter, had a disposition towards violence.

46. Further, Laing J had the following to say:

“[22] Ultimately, the State bore the onus. Very little evidence was placed before the court a quo to indicate that the likelihood that the events listed in Section 60(4) would occur was more than mere speculation. Crucially, the legal representatives for the appellant argued that the latest testimony was, in the main, undisputed. From the record, it seems that the State was focused more on the merits of the case and the fact as listed in Section 60(4) to (9) of the CPA. Consequently, the facts alleged by the appellant must be accepted as true.”

47. In that matter the appeal was upheld and the appellant was released on bail with various conditions attached thereto.

48. In a second matter before my brother Govindjee J, handed down on the 3rd of November 2023, accused number two in this matter, was also released on bail.

49. With regard to the charge sheet Govindjee J stated that following:

“[6] As was the case in that matter, the Magistrate’s decision to apply schedule 6 was erroneous. This is because there was no reference in the charge sheet to the crime of murder “whether planned or premeditated” or when “committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.” The state argued that this might be implied from the bail proceedings and from the very fact that the appellant was charged together with other accused. It was also submitted that the appellant had not suffered any prejudice because of the charge sheet omissions.

[7] Those arguments are, in my view, without merit. A similar occurrence was recently pronounced upon by my brother, Laing J. The learned Judge relied on the constitutional right to be released from detention if the interests of justice permit, subject to reasonable conditions, the accused’s fair trial rights, including the right to be informed of the charge with sufficient detail to answer it, and the essentials of the charge as described in S84(1) of the CPA. The court added that these rights extended to bail application proceedings, so that an accused person could respond appropriately to enable the court to determine whether the interests of justice permitted release.[5]

50. With reference to the personal circumstances of the appellant in that matter, Govindjee J stated the following:

“...the appellant has been in custody since 9 April 2023, alleging brutal treatment, including interrogation and violation of rights. He has no previous convictions or pending cases and there is nothing to suggest that he knows any of the possible witnesses in the matter, or the location of any evidentiary material. He is legally represented and indicates that he will leave matters in respect of State witnesses to the legal team and strictly comply with any bail conditions set.”

51. In regard to the strength of the State’s case, Govindjee J found the following:

“In the present circumstances, especially when considering the limited material contained in the investigator officer’s affidavit pertaining specifically and directly to the appellant, the factors presented in support of the application, and this appeal, are compelling. Reliance on the disputed confession was also appropriate in the present circumstances, and there is little beyond this suggestion of a strong case against the appellant.”

52. Bail was granted in that matter and subject to various conditions contained in a draft order.

53. I can find no evidence, on the record, that the appellant will endanger the safety of the public or a particular person, or commit a schedule 1 offence. I can also find no evidence that links the appellant to the offences charged all indications are that the State has weak prospects of success.

54. There is further no evidence that the appellant has a disposition towards violence and especially in circumstances where he is 70 years old, had worked for the university for thirty years, is a pensioner, and has various dependent children. As an owner of two properties, presently married, and with various vehicles, there is no suggestion whatsoever that he is likely to be a flight risk.

55. I can find no evidence on the record of the likelihood of the events listed in Section 60(4) of the CPA is relevant at all to the appellant.

56. The alleged brutal treatment and interrogation of the appellant also seriously undermines the suggestion of a “confession”, even though the respondent failed to give any details of the “confession”, even on a prima facie basis.

57. Accordingly, the following order is made:

(a) The appeal is upheld;

(b) The order of the court a quo is set aside and replaced with the following:

(i) “The appellant’s application for bail is granted and he is released on bail, pending the completion of his trial;

(ii) The following conditions apply:

(aa) The appellant shall deposit the sum of R15 000.00 in accordance with the provisions of Section 60(13)(a) of the CPA;

(bb) The appellant is granted bail in the amount of fifteen thousand rand (R15 000.00) in the said case on the following conditions;

- (1) The appellant shall attend court at 09h00 on each and every date to which the case is postponed and remain in attendance until he is formally excused;
- (2) The appellant shall report at a police station in NU12, Mdantsane, between the hours of 06h00 and 18h00 on Monday every week;
- (3) The appellant shall reside at his home address in Mdantsane;
- (4) The appellant shall not leave the magisterial district of Mdantsane without the written permission of the investigating officer in the case;
- (5) The appellant shall surrender his passport, if he has one, to the investigating officer and shall not apply for another passport;
- (6) The appellant shall not travel outside of the borders of the Republic of South Africa.
- (7) The appellant shall not communicate, directly or indirectly, with any State witnesses;
- (8) The appellant shall not influence, interfere with, intimidate or harm any State witnesses.

B.B. BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Attorney for the Appellant : Mr. Daubermann

: Peter Daubermann Attorneys

Suite 701

Seventh Floor

Oasim South

Pearson Street

Central

GQEBRHA

Counsel for the Respondent : Adv. Ntelwa

Instructed by

: The Director of Public Prosecutions

Eastern Cape Division

MAKHANDA

-
- [1] Chiedebeze supra and S vs Smith and Another 1969(4) SA 175 (N) at 177E - F
- [2] See Litako and Others vs S (584/2013) [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014(2) SACR 431(SCA); 2015(3) SA287 (SCA) (16 April 2014)
- [3] Motsi vs S(A37/22) [2022] ZAWCHC 151; 2023(1) SACR 218(WCC) at paragraphs 35 - 36
- [4] Elias Cele vs The State, Case No: CA & R 38/2022
- [5] Sicelo Mbulawa vs The State, Case No: CA & R 161/2023
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMKHC/2024/135.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/khuza-v-s-unknown-topic-aecmkhc-2024--6a3ea5203b1caa9129816f08>

Prepared on 10 October 2026 · Esheria