

SOUTH AFRICA / JUDGMENT

Kubheka v S (A176/2018) [2019] ZAGPJHC 542 (13 September 2019)

[2019] ZAGPJHC 542

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mudau

CASE / FILE NUMBER

A176/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A176/2018

DPP REF NO: 10/2/5/1-2018/159

In the matter between:

KUBHEKA, NHLANHLA ARTHUR APPLICANT

and

THE STATE RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This is an application for bail pending the application for special leave to appeal on the merits and sentence to the Supreme Court of Appeal. The applicant, Mr Arthur Nhlanhla Kubheka (first appellant) and the second appellant were convicted in the Randburg regional court on a charge of theft of a cellular phone and an iPod out of a motor vehicle. Consequently, the applicant was on 23 January 2018 sentenced to undergo four (4) years imprisonment of which two (2) years thereof was suspended for a period of five years on customary conditions. The second appellant was sentenced to four (4) years direct imprisonment. Aggrieved with the conviction and sentence, they sought leave to appeal from the trial court. Leave to appeal in respect of both the conviction and sentence was granted by the trial court.

[2] However, on 20 June 2019, the full bench of this Division, per Vally J and Malungana AJ, dismissed the appeal against conviction. The sentences imposed by the trial court were set aside and replaced. The applicant was sentenced to five (5) years direct imprisonment. The second appellant was sentenced to eight (8) years direct imprisonment. The sentences were antedated to the date of the original sentence. The bail had lapsed when the appeal was dismissed. The application to the High Court to extend the bail pending an application for leave to appeal to the Supreme Court of Appeal is therefore a renewed application. In their application for leave to appeal, the appellants criticised the Court of Appeal for its conclusions and increase in sentence.

[3] Briefly stated, the facts leading to the arrest and conviction of the appellants as distilled from the various state witnesses who

testified are as follows. The complainant had parked his motor vehicle, a Mercedes Benz, on the sand lot or overflow area of the

Randburg Magistrate court as the usual parking area was full at about 9:30 am. He proceeded to the second floor of the court building for a particular service but observe from the window of the court building that there was a commotion in the parking area. He decided to go and check what the commotion was about. On his way he came across a security guard stationed at the court who had a piece of paper with his car registration number written on it. He was informed that someone had been caught stealing from his car. Upon arrival at his car he discovered that the car doors which to the best of his knowledge were earlier closed and locked were no longer locked. An iPod and a blackberry cell phone were missing from his car.

[4] The police told him to search the appellants' car, a Chevrolet, which was parked adjacent to his car. Upon searching the Chevrolet,

he found his missing iPod on the front passenger seat amongst other electronic devices but not the blackberry cell phone. A police

officer, Constable Moloto, who responded to the incident, confirmed the gist of the complainant's evidence with regard to how the iPod was recovered.

[5] One of the security guards, Ms Mutavhatsindi, testified that she was stationed at the Randburg Magistrate' court. On the date in question she was operating the CCTV cameras in the control when she saw the Chevrolet which she remembered from a previous incident.

Members of the public visiting the courthouse had often complained of incidents of cars being jammed, cell phones and other electronic

devices been stolen after they had left for the courthouse believing that their cars were locked.

- [6] Upon seeing the suspicious Chevrolet, she had notified her colleagues in that regard. A short while later she noticed through the CCTV cameras a man alighting from the Chevrolet and opening the complainant's car. She later met with the complainant on the way to the scene. It was her evidence that the iPod was pointed out by the complainant on the backseat of the appellant's vehicle. The state witnesses were adamant that although the crowd of people had in time gathered, none of the civilians were involved in the search of the appellants' car.
- [7] The applicant's evidence was to the effect that he had arrived from Durban that morning to attend to his cousin's bail hearing at the Randburg court using a rented Chevrolet and had picked up the second appellant from Sandton. They waited for the attorney at the overflow parking area of the court premises. He was approached by a security guard who accused him of having opened the complainant's car. He confirmed that the police and security personnel searched his hired car. Afterwards the complainant was asked to look into the Chevrolet. It was then that the complainant said he found his iPod in the Chevrolet. The applicant denied having seen the iPod before and so did the second appellant. Both of them denied having committed any offence but were convicted on circumstantial evidence.
- [8] It was contended on behalf of the appellants that they have reasonable prospects of success on further appeal to the Supreme Court of Appeal based on the merits. This is based on the fact that the scene of the alleged crime was allegedly contaminated by the presence of other people and movement of the confiscated items. In addition, it was contended that the state had failed to charge the appellants with or prove common purpose doctrine. Regarding sentence, the argument being that at the most, the applicant is likely to get a sentence as intended in section 276 (1) (i) of the Criminal Procedure Act[1]. It is important to note that the applicant was released on bail during the entire period of his trial. The applicant, a married

father and businessman, asserts his right to liberty. In respect of bail pending a petition to the Supreme Court of Appeal it is trite that the High Court has a common law power to release the would-be appellant.[2]

- [9] Over and above the procedural right is the constitutional right to freedom and security of the person as set out in s 12(1) of the

Constitution, 1996 our courts have always treated matters of personal freedom as matters of importance and urgency. In terms of section 16

- (1) (b) of the Superior Courts Act[3], an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.
- [10] It is however trite that there is a different emphasis in respect of bail pending finalisation of a trial as against bail pending

finalisation of an appeal or special leave to appeal. The presumption of innocence operates in favour of an accused person until his guilt has been established in court.[4] In *S v Masoanganye & Another*[5], the Supreme Court of Appeal held that the granting of an application for leave to appeal does not, per se, entitle a person to be released on bail. There has to be a real prospect in relation to success on convictions and that a non-custodial sentence might be imposed, such that any further period of detention before the appeal is heard would be unjustified.[6]

[11] In the instant case I am in the difficult position of being prohibited from pronouncing finally on contested issues still to be adjudicated by judges in the Supreme Court of Appeal court on the merits of the convictions and sentences; that is, if the applicant was to pass his first hurdle of being granted special leave to appeal. The prospects of success are very relevant in an assessment of whether to release the appellant pending finalisation of an application for leave to appeal.[7] Prima facie however, I do not find fault with the conviction.

[12] The offence for which the appellants were convicted is not only serious but prevalent. It is trite that where offences are not only serious but prevalent the personal circumstances of an offender play a less significant role as compared to the interests of the community. I have come to the conclusion that not only may special leave to appeal be not granted, but a significant custodial sentence is probable. It is accordingly not in the interests of justice that the applicant be released, pending the application for special leave to appeal the conviction as well as sentence.

Order

[13] The application for bail pending special leave to appeal is dismissed.

T P MUDAU

[Judge of the High Court,

Gauteng Local Division,

Johannesburg]

Date of Hearing: 2 & 11 September 2019

Date of Judgment: 13 September 2019

APPEARANCES

For the Applicant: Attorney: JC Kruger

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For the Respondent: Adv. EHF Le Roux

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[1] 51 of 1977

[2] See *S v Hlongwane* 1989 (4) SA 79 (T) at 102A-G

[3] 10 of 2013

[4] Section 35(1) (f) of the Constitution gives arrested persons a right to be released from prison if the interests of justice permit, subject to reasonable conditions. This of course clearly deals with the position before finalisation of a trial. In *S v Acheson* 1991 (2) SA 805 (Nm) Mahomed J said the following at 822A-C: 'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.' See also Du Toit et al Commentary on the Criminal Procedure Act in relation to pre-trial release at 9-2A to 9-5.

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See also Du Toit et al Commentary on the Criminal Procedure Act in relation to pre-trial release at 9-2A to 9-5.

[5] 2012

(1) SACR 292 (SCA) para 14

[6] See also *R v Mthembu* 1961 (3) SA 468 (D) and *S v Scott-Crossley* 2007 (2) SACR 470 (SCA)

[7] *Hlongwane* at 102D-G

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