
SOUTH AFRICA / JUDGMENT

Mfeketho and Others v S (CA&R193/2014) [2014] ZAECGHC 67 (21 July 2014)

[2014] ZAECGHC 67

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen

CASE / FILE NUMBER

CA&R193/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO:CA & R 193/2014

Date heard: 21 July 2014

Date delivered: 21 July 2014

In the matter between

XOLANI MFEKETHO

First Appellant

LAZOLA VOYI Second

Appellant

THEMBISILE CHRISTOPHER MADOLO

Third Appellant

And

THE STATE

Respondent

JUDGMENT

GOOSEN, J.

- [1] This is an appeal against the refusal by the magistrate's court at Queenstown to admit the appellants to bail. The appellants stand charged with four counts of murder. The charges arise from an incident when it is alleged that the three appellants, who are taxi drivers, chased after a rival taxi operator on the N6 road in Queenstown. It is alleged that the three appellants were in a Quantum motor vehicle driven by the first appellant. They pursued an Avanza vehicle driven by the rival operator at high speed on the N6. Whilst the Quantum was driving alongside the Avanza, the Avanza collided with an oncoming vehicle. Four persons died in the collision.
- [2] The appellants brought a formal bail application in which they each filed affidavits setting out the grounds upon which they contend that it is in the interests of justice, in accordance with s60(11) of the Criminal Procedure Act (the "CPA"), that they be admitted to bail. The prosecution opposed the granting of bail and tendered the evidence of the investigating officer. The magistrate, after considering the evidence, refused bail on 4 June 2014.

- [3] Section 65 (4) of the CPA provides that:

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.

- [4] In *S v Barber* 1979 (4) SA 218 (D) Hefer J said (at 220 E – H.):

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. 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 its discretion. I think it should be in 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 but exercised that discretion wrongly.

- [5] This approach has been approved in a number of decisions. In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected him or herself in some material way in relation to either fact or law (see *S v Ali* 2011 (1) SACR 34 (E) at para 14; cf. also *S v Mpulampula* 2007 (2) SACR 133 (E)).
- [6] However, in *S v Porthen and others* 2004 (2) SACR 242 (C) the court came to the conclusion that a bail appeal goes to the question of the liberty of a person and that therefore, section 65 (4) "should be construed in a manner which does not, unduly restrict the ambit of the appeal court's competence to decide that the lower court's decision to refuse bail was 'wrong'".
- [7] In this instance it is submitted that the magistrate erred in not finding that the appellants pose no flight risk; in not finding that there is no evidence which suggests a risk of interference with police investigations and in attaching little or no weight to the evidence of

the investigating officer regarding his reasons for not opposing bail. It was also submitted that the magistrate erred in attaching no weight to the appellants' evidence by reason of it being presented by way of affidavit. It was argued that the magistrate had misdirected herself in regard to the approach to affidavit evidence in bail proceedings and had misdirected herself in not considering whether the prosecution had established the factors set out in s60 of the CPA.

- [8] The record discloses that although the prosecution opposed the granting of bail the investigating officer, whose evidence was

tendered, was equivocal regarding the granting of bail. He testified that the appellants had co-operated with the investigation and had voluntarily reported at the police station when requested. He conceded that they posed no flight risk and that there was no indication of risk of interference with the investigation. He stated also that he had no evidence to suggest that the release of the appellants would give rise to further tensions in the taxi industry or resulting acts of retaliation. He urged the magistrate hearing the bail application however to warn members of the public present at the hearing, which included members of the rival taxi groups, to desist from any acts of violence.

- [9] The magistrate's judgment deals with the fact that the prosecution was not, in effect, opposing bail. She found, relying

upon *S v Mbaleki* 2013 (1) SACR 165 (KZD) that the court was not bound by the attitude of the prosecution relating to bail. It is indeed so. In this respect the magistrate's approach cannot be faulted.

- [10] Having said this, the magistrate appears to have focused upon the relative weakness or strength of the state's case as opposed to that of the appellants, when that issue was, upon a proper reading of the record, not an issue central to the basis on which the appellants contended for bail. In their respective affidavits filed in support of the bail application the appellants stated that they were in the Quantum motor vehicle and that the collision occurred when "the Avanza blocked the way". No elaboration is provided. They nevertheless asserted that the case against them is not a strong one. The evidence of the investigating officer was to the effect that the appellants, as occupants of the Quantum, were involved in a deliberate high-speed pursuit of the driver of the Avanza when the collision occurred. Even accepting that this may be so the investigating officer's evidence does not disclose the circumstances in which the collision occurred.

- [11] Consideration of the strength or weakness of the prosecution case against an applicant for bail is undoubtedly a relevant consideration

in determining whether it is in the interests of justice to admit an applicant to bail (see *S v Kock* 2003 (2) SACR 5 (SCA)).

[12] It is however only one factor to be weighed in determining where the interests of justice lie. The magistrate placed some reliance on the following passage from the judgment in *S v Mathebula* 2010 (1) SACR 55 (SCA) at para 12 where the court said:

But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. 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.

[13] The magistrate went on to analyse the evidence, such as it was, relating to the strength of the state case and concluded that the state case against the appellants was indeed a strong one. In so analysing the evidence the magistrate came to the conclusion, relying on the *Mbaleki* case that little or no weight could be attached to the evidence of the appellants since it was not *viva voce* and therefore not subject to test by way of cross examination.

[14] This approach weighed heavily with the magistrate in concluding that there were no exceptional circumstances shown and given the “prevalence of the offences in the area” that the interests of justice favoured the appellants being held in custody

pending their trial.

[15] In my view, the magistrate misdirected herself as to the enquiry before her. The reliance on the passage in *Mathebula*, referred to above, was misplaced. In the first place the quoted passage makes it clear that it is in circumstances where there is a challenge to the merits of the prosecution case in the bail application that proof on a balance of probabilities is required.

[16] The *Mathebula* case concerned a bail appeal in which the appellant had, in seeking to establish the existence of the interests of justice favouring his release on bail, specifically set out to challenge the strength of the state case against him. Later, in the same paragraph from which the passage was extracted the SCA says, in respect of the requirement to discharge the onus which rests upon an applicant for bail, the following:

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 for him.

[17] That is the situation that pertains in this instance. Apart from a bald assertion that the prosecution case is not a strong one the appellants did not seek to enter the fray in the bail proceedings to challenge the state case. That they were entitled to do. Of course they would have to accept that where the prosecution adduces evidence pointing to a strong case that may determine the interests of justice against them. A failure to challenge the state case, however, does not mean that they cannot discharge the onus which rests upon them. It is in this respect, that the magistrate misdirected herself. She was undoubtedly persuaded that the strength of the state case weighed the scales of justice against granting bail, notwithstanding that there was no evidence to establish that the release of the appellants would jeopardise the investigation or that the appellants would not stand trial. Indeed the

magistrate seems to have considered that in circumstances where the case is a strong one and the offences apparently prevalent, that it would undermine public confidence in the criminal justice system to release the appellants. In this respect the magistrate failed to give consideration to the underlying liberty interest that the appellants have in being released on bail

pending trial.

[18] It remains to consider the magistrate's approach to the evidence adduced by way of affidavit. The magistrate referred to the Mbaleki judgment and also to *S v Sithole* 2012 (1) SACR 586 (KZD) to support a finding that no weight could be attached to the affidavit evidence tendered by the appellants. In the Mbaleki matter the court was concerned with the question whether the applicants had discharged the onus in relation to the existence of

exceptional circumstances where the relative strengths and weakness of the state case was in issue. Steyn J said the following at para 12 (p169 b- c):

The legislature considered it necessary, to burden the accused, with an onus in such sch 6 cases, and hence, the question is very simple, did the appellant succeed in discharging the onus? Neither the appellants, nor the so-called alibi witness adduced any viva voce evidence. I fail to see how they could be convinced that they have discharge the onus that rested on them.

[19] The Sithole matter was also a matter in which the merits of the state case against the applicant was pertinently in issue. The matter was also heard by Steyn J. At p594 b-c of the judgment the learned judge repeats the passage referred to above.

[20] In my view the dictum does not amount to a finding that it is impossible for an applicant in bail proceedings to discharge the onus that rests upon him or her if evidence is tendered by affidavit alone. Nor does it amount to a finding that such evidence as is adduced on affidavit falls to be accorded little or no weight. It may well be, as was found in *Mathebula*, that such evidence is less persuasive. That however does not mean that it is to be disregarded.

[21] In this instance the affidavit evidence tendered by the appellants concerned the full range of factors a court is called upon to consider in deciding whether or not to grant bail. Much of that evidence was not contested by the prosecution at the bail hearing. To the contrary in most respects the evidence of the investigating officer supported the averments made by the appellants. Such

evidence, properly before the court a quo, ought therefore to have been accorded due and proper consideration and weighed in assessing whether the appellants had established that it is in the interests of justice that they be admitted to bail. This, the magistrate did not do. And in not doing so she misdirected herself.

[22] It follows from what is set out above that the magistrate's exercise of the discretion conferred upon her is materially

influenced by misdirection. As such this court is at large to consider the question of bail afresh.

[23] Upon a consideration of the evidence adduced by both appellants and the state it cannot be said that the interests of justice do not permit the release of the appellants on bail. It was common cause at the bail hearing that the appellants pose no flight risk; that there is no risk of interference with the investigation or prosecution witnesses and that there was no evidence pointing to further involvement in offences of this nature, or even that the release of the appellants would engender further conflict or reaction by members of the public. Their personal circumstances, particularly those related to the fact that they breadwinners supporting their families, was not challenged or denied in any way. When all of these factors are considered and when regard is had to the underlying liberty interest that the appellants enjoy, I am of the view that bail ought to have been granted. I therefore conclude that the magistrate exercised the discretion conferred upon her wrongly.

[24] The appeal must therefore succeed. It was not submitted that in the event that this court decides to grant bail on appeal that conditions be imposed other than the setting of the same amount suggested before the court a quo.

[25] I therefore make the following order:

1. The applicants' appeal is upheld.
2. Each of the accused is admitted to bail in the amount of R2000.00.

G. GOOSEN

JUDGE OF THE HIGH COURT

Appearance: For the Appellants

Adv. Siyo

Instructed by Mili Attorneys

For the Respondent

Adv. Mgenge

Director of Public Prosecutions

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