

SOUTH AFRICA / JUDGMENT

Mfini v S (CA&R15/2016) [2017] ZAECHGC 6 (2 February 2017)

[2017] ZAECHGC 6

COURT

Eastern Cape High Court, Grahamstown

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

CA&R15/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

Case

no: CA&R15/2016

Date

heard: 25th

January 2017

Date

delivered: 2nd

February 2017

In

the matter between:

LUTHANDO

MFINI Appellant

vs

THE

STATE Respondent

JUDGMENT

TSHIKI J:

- [1] In the Court a quo the appellant was refused bail by the Port Elizabeth Magistrate Court. He has now approached this Court by way of an appeal with a view to have him granted bail pending the finalisation of his case. In the Court a quo the charge sheet shows that the appellant and three others are provisionally facing charges relating to theft and also conspiracy to commit fraud which has been referred to in the record as a Schedule 5 offence. The appellant was 28 years old when he applied for bail in respect of the current proceedings. During argument of the appeal, Mr Ngqakayi appeared for the appellant and Mr Mvinjelwa represented the respondent.
- [2] The appellant was also represented by an attorney during his bail application. From the record it appears that the appellant informed the Court that he has two children who are seven (7) and four (4) years respectively. At that moment, his children were staying with their mothers but the boy stays with the appellant at his home.
- [3] I must mention at this stage that during the bail application, the appellant was with a co-accused whose application for bail was successful and the State having indicated that it was no longer opposing the release of Ms Bundwini, who was also in custody. He makes a living by helping out his friend who is self-employed running a business for which they pay him money. For his services his friends pay him a sum of R10 000.00 per month.
- [4] The appellant also informed the Court that he has a taxi business generating an income of about R12 000.00 per month. He also undertook to comply with the conditions stipulated in section 60(4)(a) to (e) if released on bail. He has no warrants of arrest pending and has never escaped from lawful custody. He has a pending case of possession of dagga and has previous convictions in respect of theft committed in 1994, 2005 and 2007 as well as theft and malicious injury to property and was released on parole in 2012. He was also released on parole in 2013 after having been sentenced for the offence of fraud and was also released out on parole.
- [5] In his argument for the appellant, Mr Ngqakayi contended that the Court a quo made more emphasis on the fact that the appellant has, inter alia, that he also lied to the investigating officer about his address where he stayed in Humewood. In his view, the learned magistrate misdirected himself in refusing to grant the appellant bail in the circumstances. That the Court a quo put more emphasis on the fact that the appellant did not testify in Court to state his case by way of evidence. Mr Ngqakayi further contended that the fact that the appellant was a first offender is also important especially that he had no pending charges against him.
- [6] On the other hand, Mr Mvinjelwa for the State contended that the appellant was conspicuous by his freshly life style at least from the view of the investigating officer.
- [7] I must say though that this appeal is only relevant to the appellant Mr Luthando Mfini.

[8] During the bail proceedings in the trial Court the State indicated to the Court that it has a strong case against the appellant, who has previous convictions involving fraud and theft. He also has a previous conviction of 20 counts of fraud and or theft committed during the period of suspension. The appellant is linked by a video footage to one incident of card swapping that occurred on 30th December 2015 in Summerstrand Village, where he was seen with other members of the syndicate who are currently in custody. He also has a pending case of possession of dagga in respect of which he was released on warning. He also has the following previous convictions:

[8.1] On the 18th October 1994 he was convicted of theft;

[8.2] On the 3rd of October 2005 he was convicted and sentenced for theft and therefore sentenced to twelve months imprisonment the whole sentence was suspended for three years on appropriate conditions;

[8.3] On the 27th July 2007 the applicant was sentenced to six counts for malicious injury to property which sentences were taken together for the purpose of a sentence of 13 months imprisonment of which five years was suspended on appropriate conditions. In this instant, the accused had damaged an automated teller machine ie. ATM;

[8.4] He was also sentenced to 11 counts of theft which were taken together for purpose of sentence and was sentenced to 24 months imprisonment;

[8.5] On the 13th March 2013, the accused was also sentenced for a contravention of section 86(1) of Act 25 of 2002, which relates to the Electronic

Communication and Transactions Act, in Algoa CAS 154/08/2016 as well as fraud and the sentences were ordered to run concurrently.

[9] At the end of the case the magistrate granted bail to appellant's co-accused and refused it in respect of the applicant. In refusing to grant bail in respect of the applicant the magistrate's reasons were, inter alia, as follows:

[9.1] The magistrate took into consideration the fact that the offences committed by the accused while he was still on bail. The Court also considered the fact that the appellant has a tendency to commit offences while he is out on parole. In the view of the magistrate, the appellant has no regard for the objections of the criminal justice system. For those reasons, his application for bail was refused.

[10] A formal bail application was therefore conducted at the instance of the appellant in circumstances where the provision of section 60(11)(b) which read as follows:

“(b) In Schedule 5, but not 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 satisfied the court that the interests of justice permit his or her release.”

[11] The above provisions of the Act were explained and the difference between subsections (a) and (b) were clarified in the

judgment of *S v Dlamini; S v Dladla and Others, S v Joubert, S v Schieteket* 1992 (2) SACR 51 (CC) here referred to as *S v Dlamini etc*, the Constitutional Court at page 85 para [65] Krieger J remarked as follows:-

“....an accused must satisfy the magistrate that the ‘interests of justice’ permit his or her release. It clearly places an onus upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in ss 60(4)-(9) or required by s 35 (1)(f). It is clear that an accused on Schedule 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant. The additional requirement, of ‘exceptional circumstances’ imposed by s 60(11) (a) is absent. A bail application under s 60(11)(a) is more gravely invasive of the accused person’s liberty right than is more gravely invasive of the accused person’s liberty right than that under s 60(11) (b). To the extent, therefore, that the test for bail established by s 60(11) (a) is more rigorous than that contemplated by s 35 (1)(f) of the Constitution, it limits the Constitutional right.”

[12] What it means is that whatever section 60(11)(a) apply notwithstanding any provisions of the Act there can be no question of

an inquisitorial procedure and the issue of bail has to be decided on the question where the accused has discharged

the burden of proof placed on him or her by section 60(11). In other words where section 60(11) (a) applied there is no onus on the State to disprove the existence of exceptional circumstances. However, with respect, to section 60(11) (b) as it is in this case the accused has to satisfy the Court that the interests of justice do not require his detention in custody. In other words the interests of justice should justify the accused’s release out on bail.

[13] According to the evidence as gleaned from the judgment of the trial Court “the applicant is part of a syndicate members who would work with others each performing a specific function dependent of each other. They would target ATM victims who go to the ATM machine(s) to withdraw money and in the process they steal money from their victims whom they find as their targets. The modus operandi of the syndicates is to wait around an ATM or approach an ATM usually in a group. Each person pretends to be operating on his own. One of them would either be at the ATM and they would manage to either press the cardless transaction button before a customer reaches the ATM or would call back the client or victim with some excuse after performing a successful transaction. A client would be convinced to insert his bank card again and later his pin code. There would be another one standing observing and watching the victim’s “pin code.”

[14] It appears from the evidence as gleaned from the judgment of the trial Court that the applicant is the only one who pursued his application for bail. He was arrested on the charges of theft and conspiracy to commit fraud, offences falling under Schedule 5 of the Criminal Procedure Act 51 of 1977. According to the record of the trial Court, the applicant has no fixed property and he uses rental motor vehicles for his alleged business. During the bail application in the magistrate's Court the applicant just denied that his actual address is number 52 Amadoda Village, Happy Valley Road in Humewood.

[15] The appellant also did not tell the truth when he testified in the bail application. In his evidence in chief he testified that his business is operating and is generating an average monthly income of R10 000 on a good month. He also did not tell the police the truth about his actual address at number [...] Amadoda Village, Happy Valley Road in Humewood which he had earlier owned as his place of residence. He denied he is staying in this address on a permanent basis instead he told the police that he has been renting the place since November 2015 paying a monthly rental of R7000,00. He told the police that he only goes to the place when he feels like fun with one of his girlfriends.

[16] Section 65(4) of the Criminal Procedure Act (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. Section 60 (11)(b) of the CPA provides as follows:

"In Schedule 5 but not 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 satisfied the Court that the interests of justice permit his or her release."

[17] What it means is that whatever section 60(11) (a) and (b) apply, notwithstanding any provisions of the Act, there can be no question of an inquisitorial procedure and the issue of bail has to be decided on the question whether the accused has discharged the burden of proof placed on him or her by section 60(11). In other words where section 60(11)(a) applies, there is no onus on the State to prove the existence of exceptional circumstances. With respect to section 60(11)(b), the accused has to testify the Court that the interests of justice do not require his detention in custody. In other words, the appellant for bail should adduce evidence that the interests of justice should justify the accused's release out on bail.

[18] In *S v Barber* 1979 (4) SA 218 (D) Hefer J stated as follows (at 220E-H)

"It is well-known that the powers of this Court 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.”

[19] Section 65 (4) of the Criminal Procedure Act reads:

“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 [S v Barber 1979 (4) SA 218].”

[20] In my view the magistrate did not only correctly deal with the issues in his application for bail but also dealt with the issues as well. This induces the nature of the offence in circumstances where the syndicate consisting at least 15 members working on a regular basis with the individuals assisting less fragment but also involved in the commission of the offences. Their modus operandi is to wait around an ATM or approach an ATM usually in a group.

[21] I am aware of the appellant’s rights which include that he is presumed innocent until proven guilty, however this is not the stage at which this Court should consider the guilt or innocence of the commission of the actual offence for the reason that it is so because we are not dealing with the main trial but a bail application of the appellant.

[22] Section 60(9) of the CPA provides that in consideration of whether the interests of justice permit the release of an applicant on bail the Court should decide the matter by weighing up the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice which he or she is likely to suffer.

[23] In my view, I am accordingly satisfied that the magistrate correctly found that the interests of justice do not permit the appellant’s release on bail. Therefore, the appeal must fail.

[24] in the result, I make the following order:

[24.1] The appeal is hereby dismissed.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

For the appellant

: Mr Ngqakayi

Instructed by

:

Andile Ngqakayi Inc

PORT ELIZABETH

Ref: L Nqakayi/ns/LMFINI001

For the respondent

:

Adv Mvinjelwa

Instructed by

:

NPA (Specialised Commercial Crime

Unit)

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