

SOUTH AFRICA / JUDGMENT

Mkondo v State (A462/17) [2017] ZAGPPHC 970 (18 October 2017)

[2017] ZAGPPHC 970**COURT**

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

A462/17

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case No: A462/17****NOT REPORTABLE****NOT OF INTEREST TO OTHER JUDGES****18 OCTOBER 2017****In the matter between:**TUMELO PRINCE
MKONDO Appellant
and
THE
STATE Respondent**JUDGMENT****D S FOURIE, J:**

- [1] This is an appeal against the refusal by a Magistrate in Springs to admit the appellant to bail. The appellant, who was the third accused in the Court a quo, was convicted on a count of housebreaking with the intent to steal and theft read with the provisions of section 262(1) and section 264 of the Criminal Procedure Act. He was sentenced to five years imprisonment of which two years have been conditionally suspended.

[2] On 9 June 2017 the appellant applied for leave to appeal in respect of the conviction only. Leave was granted by the Magistrate and subsequent thereto the appellant filed an application for bail pending the outcome of the appeal. On 5 July 2017 this application

was dismissed resulting in the appellant now approaching this Court on appeal against the refusal of the Court a quo to grant him bail.

[3] It appears from the record of proceedings that the value of the stolen goods in question amounts to approximately R55 000.00 which include a laptop computer, amplifier and speakers, a drill and grirlder machine, clothes and a TV set. According to the evidence of a police officer accused number 2 voluntarily pointed out accused number 3 (the appellant) in whose possession the TV set was later found. The appellant, who also testified, initially indicated that he does not know accused 1 and 2. His version is that the TV set was sold to him by accused number 2. This was denied by accused number 2. The appellant later conceded that he knows accused number 2. Needless to say, the Magistrate made a credibility finding against the appellant.

[4] Section 65 of the Criminal Procedure Act regulates the procedure of appeals to Superior Courts with regard to bail. Subsection (4) 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 shall give the decision which in its or his opinion the lower Court should have given."

[5] It was contended on behalf of the appellant that the court a quo misdirected itself on the merits and should not have convicted the appellant. The appellant has reasonable prospects of success on appeal and should have been granted bail. This should also be evident from the fact, so it was submitted, that leave to appeal was granted. It is important to bear in mind that the Court of Appeal may not set aside the decision of the Court a quo unless it is convinced that the lower Court was wrong. If there is any doubt, the Court does not interfere (Hiemstra's Criminal Procedure, Issue 10 of May 2017, pp 9-23 and 9- 24).

[6] In *S v Masoanganye* 2012

(1) SACR 292 (SCA) at par 15 the following was pointed out with regard to an application for bail by a convicted person pending an appeal:

"It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the Trial Judge because that is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case ... But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle."

[7] With regard to the prospects of success, where leave to appeal has been granted, as in the matter before me, I should also take into account that I reasonable chances of success on appeal is on its own not sufficient to entitle a convicted person to bail pending an appeal. As was pointed out by the Supreme Court of Appeal, what is of more importance is the seriousness of the crime, the risk of fright, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed (S v Masoanganye, supra at par 14). In this matter I am not convinced that the appellant has "real prospects of success on conviction" as opposed to "reasonable chances of success on appeal". He contradicted himself in the Court a quo and the Magistrate made a credibility finding against him. This finding is also a factor to be taken into account when considering

the risk of fright together with the seriousness of the crime where the value of the goods stolen amounts to approximately R55 000.00.

[8] In her judgment the Magistrate took into account the appellant's personal circumstances which appear to be of commonplace and not

something out of the ordinary. She also took into account the interests of the community, the prospects of success, the fact that

the appellant was not an honest witness and the seriousness of the crime.

[9] Taking into account all the above considerations, I am not convinced that the decision of the Court a quo was wrong. In the result the appeal cannot succeed.

ORDER :

I make the following order: The appeal is dismissed.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

18/10/17

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