

SOUTH AFRICA / JUDGMENT

Mnguni and Others v S (A875/2012) [2019] ZAGPPHC 587 (31 October 2019)

[2019] ZAGPPHC 587

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela

CASE / FILE NUMBER

A875/2012

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

(1)

REPORTABLE: YES / NO.

(2)

OF INTEREST TO OTHER JUDGES: YES

/ NO.

(3)

REVISED.

A 875/2012

31/10/2019

In

the Matter between:

Cebo
Nkosenhle Mnguni
Appellant 1
Khumbulani
Mthokozisi
Appellant 2
Mndeni
Mondli Mabanga
Appellant 3
Sibusiso
Buyani Sibiya
Appellant 4
And
The
State
Respondent

JUDGMENT

Maumela J.

1. In this case, five, (five), people were arraigned before the Regional court for the district of Johannesburg, sitting in Vanderbijlpark,

court a quo. Their application for bail was refused. Except for accused number 5, in these proceedings, the following 4 (four) accused persons bring an appeal against the decision of the court a quo to dismiss their application for bail pending trial: 1.1. Cebo Nkosenhle Mnguni, who is accused number 1 and who is 35 (thirty five) years of age. 1.2. Khumbulani Mthokozisi Mahlinza, who is accused number 2, and who is 27 (twenty seven) years of age. 1.3. Mndeni Mondli Mabanga, who is accused number 3 and who is 28 (twenty eight) years of age and 1.4. Sibusiso Buyani Sibiya, who is accused number 4 and who is 22 (twenty two) years of age. In these proceedings, accused number 1 brings an appeal against dismissal by the court a quo of his application to be admitted to bail pending trial.

2. The four accused were each charged with seven counts as follows: Count I. Murder, read with the provisions of section 51 (1) of the Criminal Law Amendment Act 1997: (Act No 105 of 1997), "Criminal Law Amendment Act"; Count II. Robbery with Aggravating Circumstances, read with the provisions of section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 1997: (Act No 105 of 1997), "Criminal Law Amendment Act"; Count III. Contravening the provisions of Section 39(1) (l), read with sections 1, 12, 39(2) and 40 of the Arms and Ammunition Act 1969: (Act No 75 of 1969): Pointing of a Firearm. Count IV. Contravention of the provisions of section 3, read with sections 1, 103, 117, 120

- (1) (A), 121 and 151 and scheduled 4 of the Firearms Control Act

2000. (Act No 60 of 2000); “Firearms Control Act” and further read with the provisions of Section 250 of the Criminal Procedure Act – Possession of a firearm. Count V. Contravention of the provisions of section 2; read with sections 1, 12, 39(1) (h), 39(2), and 40 of the Arms and Ammunition Act 1969: (Act No 75 of 1969) further read with the provisions of 51(2) of the Criminal Law Amendment Act. – Unlawful Possession of Ammunition. Count VI. Contravention of the provisions of section 3, read with sections 1, 103, 117, 120
- (1) (a), Section 121 read with Scheduled 4 and Section 151 of the Firearms Control Act. 60 of 2000, and further read with section 250 of the Criminal Procedure Act, 75 of 1969. – Possession of a Firearm. Count VII. Contravention of the provisions of section 3, read with sections 1, 103, 117, 120
- (1) (a), Section 121 read with Scheduled 4 and Section 151 of the Firearms Control Act. 60 of 2000 and further read with section 250 of the Criminal Procedure Act, 75 of 1969. – Unlawful Possession of Ammunition. ALLEGATIONS.
3. The allegations against the accused are as follows: In Count 1, the allegations are that upon or about the 3rd of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused unlawfully and intentionally killed Judith Cecilia Pienaar. In Count II, the allegations are that upon or about the 3rd of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused unlawfully and intentionally assault Surelia Swanepoel and Mussie Gebrehinath and did then and thereby with force and violence, take from her items as in the list attached. In Count III, the allegations are that upon or about the 3rd of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused unlawfully and wilfully point a firearm at Willem Swanepoel. In Count IV, the allegations are that upon the 15th of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused did unlawfully have in his possession a Norinco Pistol without being in possession of a license, permit or authorization issued in terms of the Act 60 of 2000 to possess such firearm. In Count V, the allegations are that upon the 15th of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused did unlawfully have in his possession 11 Norinco magazine with 8 rounds without: (a). being a holder of: (i). A license in respect of a firearm capable of discharging that ammunition; (ii). A permit to possess ammunition; (iii). A dealer’s license, manufacture’s license, gunsmith’s license, import, export or in-transit permit or transporter’s permit, issued in terms of Act 60 of 2000; and/or (b). Without having been authorized in any other way to possess same. In Count VI, the allegations are that upon the 15th of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused did unlawfully have in his possession a 38 Speed Revolver without holding a license, permit or authorization issued in terms of the Act 60 of 2000 to possess such firearm. In Count VII, the allegations are that upon the 15th of August 2018, and at or near Vanderbijlpark, in the District of Emfuleni, the accused did unlawfully have in his possession 13 X 38 Speed Rounds of ammunition rounds without: (a). being a holder of: (i). A license in respect of a firearm capable of discharging that ammunition; (ii). A

permit to possess ammunition; (iii). A dealer's license, manufacture's license, gunsmith's license, import, export or in-transit permit or transporter's permit, issued in terms of Act 60 of 2000; and/or (b). Without having been authorized in any other way to possess same. THE CHARGES.

4. In count 1, the offence of murder is read with the provisions of section 51 of schedule 2 of the Criminal Law Amendment Act. Count 2 entails Robbery with Aggravating Circumstances, read with the provisions of section 1 of the Criminal Procedure Act. It is trite that where it concerns count 1, in order to be admitted to bail, the law places the onus upon applicants for bail to prove that substantial and compelling circumstances are attendant to their persons which justify their admittance to bail. Among the charges the four accused are facing, counts 3 to 7 entail illegal possession and or use of arms and ammunition.
5. Before they applied for bail before the court a quo, the four accused had their constitutional rights explained to them; including their right not to incriminate themselves. They were

alerted to the fact that the evidence they shall give in the course of applying for bail may be used against them in the trial. THE APPLICATION FOR BAIL BEFORE THE COURT A QUO.

6. Accused number 1 gave oral evidence before the court a quo. He argued that the court ought to admit him to bail. He testified that he hails from Nongoma in Kwa-Zulu Natal. He does not know his identity number off at heart. He has four minor children. Two of them stay with their respective mother. He has hired a caretaker for two other children of his. He is unemployed. He stated that he is currently staying at number 2676, Sharpeville. He told the court a quo that he has no previous convictions.
7. He committed to refrain from interfering with investigations in this case. He stated that in arresting him and his co-accused, the police were overly high handed. He said that the residential address in Sharpeville which he provided the police with, belongs to his brother. In KwaZulu Natal, he stands currently charged with murder. He is out on R 5 000-00 bail. He denies complicity in the crimes with which he and his co-accused stand charged.
8. He argued that substantial and compelling circumstances are attendant to his person which justify the court in admitting him to bail. Accused number 2 also gave oral evidence before the court a quo.
9. Accused number 1, Cebo Nkosenhle Mnguni testified under oath. He told court under oath that he, stays at the same address with accused number 2, 3 and 4. He stated that accused number 2 is his brother-in-law and they all stay at his place free of charge. He owns property in Nongoma in Kwa-Zulu Natal. He stays at a rural area. Where he stays, there are no formal streets. As a result, addresses at that place cannot be given in terms of street and house numbers. He said that in the area where he lives in Kwa-Zulu Natal, non-locals struggle to find direction or bearing.

10. Mnguni told the court a quo that he has four children, none of whom stays with him. He stays near a school known as Kolwezi Primary School. Although he argues that he is, he cannot be their primary care giver because there is a lady who was hired to provide primary care for the children while he provides financial support. He is based in Gauteng and he visits the children at Nongoma in Kwa-Zulu Natal about twice per month. He visits them whenever he has deliveries to make in Kwa-Zulu Natal. He stated that the mother to the other two of his children went to stay with another man, leaving the children to stay with him and that is why he had to hire a care-giver for them.
11. Until two weeks before his arrest, the appellant was a taxi-driver. Currently, he is unemployed. His brother-in-law in Vanderbijlpark, who is his co-accused, is his only relative and only connection in Gauteng. He stated that accused number 4 is his uncle. His sister is also in Gauteng. Accused number 2 is adamant that it is not true that there are two more pending cases against him. Accused number 1 said that his aunt will pay bail for him in respect of the case he is facing at Manguzi. He and his aunt agreed that he will pay her back upon release from custody. In another matter, his uncle paid bail for him.
12. The appellant testified that he stayed with accused number 4 in the same room while accused number 2 and 3 stayed in another. He stayed at this place for about two weeks. He has another place in Vaal at Sharpeville Phase 3 where he stayed for a year. He stated that he gave the police only the new address because that is where the police found him.
13. It is not in dispute that some of the offences with which the appellant stands charged fall under Schedule 60 (11) (a) of the Criminal

Procedure Act. This section provides the following:“(11). Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (a). 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 satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;This section requires an applicant for bail where the offence falls under Schedule 60 (11) (a) to prove that exceptional circumstances are attendant to their person, which in the interests of justice permit his or her release.

14. In the case of *S v H*[1], Labe J held as follows: “The onus is clearly on the appellant who is charged with the commission of a crime referred to in the Sixth Schedule to establish that exceptional circumstances or unusual circumstances or circumstances which are out of the ordinary exist which in the interests of justice permit his or her release. I do not think that one should attempt an exhaustive definition of what is meant by the words exceptional circumstances.”

15. In these proceedings, the court is not to consider or to enquire into whether the appellant should be admitted to bail or not. The court is to determine whether the court a quo was correct or not, in refusing the application by the appellant for admittance to bail trial appeal. In so doing, the court is to consider the offences of which appellant stands charged. It has to consider the averments made by the appellant and the affidavit he submitted upon applying for bail pending trial before the court a quo.
16. The Supreme Court of Appeal in *S v Masoanganye and Another*[2] advised that a court on appeal should scrutinize the reasons for the refusal of bail and the evidence it was based on in order to assess the correctness of the lower court's refusal of bail. At paragraphs [17] to [18], the Supreme Court of Appeal further advised that the judgment on conviction, the grounds of appeal and the reasons for granting leave to appeal should also be scrutinized in order to assess the prospects of a successful appeal.
17. It is so that even if this court, on appeal were to hold a different view as compared to that of the court a quo, it does not mean that the court a quo was wrong in refusing bail. In the case of *S v Barber*[3], Hefer J stated the following: "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 but exercised that discretion wrongly.... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one." On the basis of the above reasons, the court dismissed the appeal against the dismissal of the appeal.
18. The court a quo applied its discretion and dismissed the appellant's application for admittance to bail pending trial. Unless it is shown that the court a quo erred and was wrong, or that it misdirected itself in coming to the decision it came to, there is no basis upon which to interfere with its decision. [zRPz]In the case of *S v Fancis*[4], on the aspect of Appellate Powers, the court stated the following: "The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."
19. In this case, the role of the court is appellate in nature. It is trite that appellate courts are not entitled to interfere with decisions of trial courts unless certain criteria are met. As already stated, the question before this court is not about whether it would or would not have granted appellant bail pending trial, given the facts at hand. The question is rather whether or not the court a quo misdirected itself in dismissing appellant's application for bail. If not,

this court may not interfere with the decision of the court a quo. On the other hand, if the court a quo misdirected itself in refusing the appellant's application for bail, this court is entitled to interfere with its decision.

20. It is also trite that in considering applications for bail pending trial, courts have to apply specific standards. The standards

concerned entail the following:

20.1. Whether the granting or refusing of bail pending trial would prejudice the administration of justice; and 20.2. Whether there are reasonable prospects of the accused being acquitted on the charges brought against him or her. See *R v Mthembu*[5] and *S v Nel*[6].

21. The court has to examine the judgement of the court a quo. It should determine whether or not the decision arrived at is sustained by the evidence at hand. Considering the facts put before the court a quo, and the decision at which it arrived, this court finds that the personal circumstances of the appellant do not reflect aspects that are substantial in nature, on the basis of which the court may be justified in admitting the appellant to bail pending trial.
22. Consequently, the court finds that there is no basis upon which to conclude that the court a quo misdirected itself in dismissing appellant's application for bail pending trial. In the result, the appeal against the decision of the Regional Magistrate Vanderbijlpark to refuse the application by the appellant to be admitted to bail pending appeal stands to be dismissed. In the result, the following order is made: ORDER.1. The appeal against the decision of the court a quo; Magistrate Vanderbijlpark, to dismiss the appellant's application for bail is dismissed.

T.A. Maumela.

Judge of the High Court of South Africa.

[1]. 1999 (1) SACR 72 (W), at 77 c – e.

[2]. 2012 (1) SACR 292 (SCA) at [16].

[3]. 1979 (4) SA 218 (D), at page 220 E – H.

[4]. 1991 (1) SACR 198 (A).

[5]. 1961 (3) SA 468 (D), at page 471 A - C.

[6]. 2002 (1) SAR 425 (T), at page 426.

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