

SOUTH AFRICA / JUDGMENT

Molefe and Others v S (A269/2013)

[2014] ZAFSHC 1 (9 January 2014)

[2014] ZAFSHC 1

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale

CASE / FILE NUMBER

A269/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

No.: A269/2013

In

the matter between:

SIKHONYELA

MOLEFE.....First

Appellant

TERREANCE

MOLOI

.....Second

Appellant

SIPHO

NKOSI.....Third

Appellant

and

THE

STATE.....Respondent

CORAM:

LEKALE,

J

HEARD

ON: 18

DECEMBER 2013

JUDGMENT

BY: LEKALE, J

DELIVERED ON: 9 JANUARY 2014

REASONS

- [1] On the 16th February 2013 and at the intersection of Paardeberg Road and Olifantshoek Road at Sasolburg a Protea Coin Security cash delivery truck, which was there and then being driven by the second appellant, was robbed of, inter alia, R2 412 000.00 in cash. The three appellants were, thereafter, arrested separately and appeared together with some three other persons before the Magistrate's Court at Sasolburg on, inter alia, allegations of conspiracy to commit aggravated robbery, aggravated robbery and attempted murder. On the 31st July 2013 the appellants' respective bail applications were dismissed on the basis that they did not show, on a balance of probabilities, that exceptional circumstances exist which, in the interests of justice, permit their release on bail.
- [2] They felt aggrieved by the decision not to admit them to bail and, on the 18th December 2013, approached this court on an urgent basis on appeal against the same. I, thereupon, upheld their respective appeals and undertook to furnish reasons in due course. These are now my reasons as promised.
- [3] On denying them bail the learned magistrate found that they each relied on the ground that the State has a prima facie weak case against them respectively as an exceptional circumstance contemplated by section 60(11)(a) of the Criminal Procedure Act as amended (CPA). In this regard the court below found that they each did not show, on a balance of probabilities, that the case against them is non-existent or that they each would eventually be acquitted on the charges. The court a quo also found that there existed the possibility of the commission of further similar crimes if the appellants were released on bail because some firearms used in the crimes and the stolen cash had not been recovered. The learned magistrate further found that, in the case of the second appellant, there exists a prima facie case based on a confession. Against the first appellant the court below found that there exists a prima facie case in the form of photo identification parade and car tracking records. In respect of the third appellant the learned magistrate found that there exists strong prima facie evidence of cellphone records, photo identification parade and witness statement linking him to the crimes. The court a quo further found that the third appellant had the propensity to commit a particular type of crime regard being had to the cases pending against him.
- [4] On behalf of the first and second appellants it is contended, in the notice of appeal, that the court below erred in, inter alia, finding that they bore the burden of proving that they would eventually be acquitted on the charges preferred against them and,

further, in not accepting the evidence surrounding the making of the confession by the second appellant.

- [5] It is effectively submitted for the appellants that the court below erred in not considering the quality of the state case against each of them together with his respective personal circumstances relative to, inter alia, the provisions of section 60(4) of the CPA when deciding whether or not exceptional circumstances exist which justify their release on bail. Ms Van den Heever for first and second appellants painstakingly refers to case law on the relevance of factors such as the likelihood that an accused person would be incentivised by the strength of the state case against him not to stand trial if released on bail.
- [6] The first and second appellants submitted affidavits in support of their respective applications, while the third appellant gave oral evidence to establish the existence of exceptional circumstances justifying his release on bail. They all denied any involvement whatsoever in the crimes involved and, further, relied on the absence of the factors set out in section 60(4) of the CPA to show that the interests of justice permit their release from detention.
- [7] Save for two affidavits submitted by the State, the only witness who testified in opposition of bail was the investigating officer who, effectively, did not contend that any of the appellants was a flight risk or was likely to commit further crimes. The thrust of his opposition was underpinned by the view that their release would tamper with continuing investigations regard being had to the fact that other suspects were still at large and there existed evidence that some of the applicants were in contact with such fugitives from justice.
- [8] It is correct, as observed by the court below, that the onus in a bail application governed by the provisions of section 60(11)(a) of the CPA is on the bail applicant to prove, by way of evidence and on a balance of probabilities, that exceptional circumstances exist, which in the interests of justice, permit his or her release on bail.
- [9] It is, further, correct as the court a quo pointed out that in a bail application the duty of the court is to assess the prima facie strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a full dress rehearsal for trial. The making of credibility findings of witnesses on the merits of the case against the bail applicant is left to the trial court which is better placed to assess such

witnesses.

(See *S v Van Wyk* 2005 (1) SACR 41 (SCA) at par [6].)

- [10] The court a quo furthermore correctly observed, with reference to case law, that where the bail applicant relies on the weakness of the state case, as an exceptional circumstance justifying his release, he is obliged to prove, on a balance of probabilities, that he will be acquitted of the charge. In that event the prosecution is not obliged to disclose full details of its case prematurely and before the time when the matter is ripe for trial. Until and unless

the bail applicant has established a prima facie case that the prosecution would fail against him, there is no duty on the State to rebut his evidence. The incarceration of an innocent person constitutes exceptional circumstance warranting release on bail of such an innocent bail applicant.

(See *S v Mathebula* 2010 (1) SACR 55 (SCA) at par [12]; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 561f – g and *S v Botha* 2002 (1) SACR 222 (SCA) at par [21])

[11] The need for frequent and lengthy consultations with legal representatives and/or expert witnesses may constitute exceptional

circumstances for bail purposes in an appropriate case.

(See *Van Vuuren v S*

[2011] ZAGPJHC185 delivered on 7 December 2011.)

[12] It is clear from the record that each appellant relied not only on the nature of the state case against him in establishing exceptional circumstances justifying his release on bail. They each also presented facts contemplated in section 60(4) of the CPA either by way of oral evidence or affidavits contending that there existed no likelihood that they would, inter alia, evade their trial or commit further crimes. The court below, thus, misdirected herself to the extent that she approached the applications on the footing that the issue before her only concerned the question whether or not the state case against each appellant was non-existent or weak without reference to their respective personal circumstances relative to section 60(4) of CPA. Where relied upon in a bail application, such facts are relevant and ought not to be ignored.

(See *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*

[1999] ZACC 8; 1999 (2) SACR 51 (CC) and *S v DV and Others* 2012 (2) SACR 492 (GNP).)

FIRST APPELLANT'S CASE

[13] It is common cause between the parties that the first appellant was initially arrested on the 24th May 2013 but the charges were withdrawn by the prosecutor only to be re-arrested on the 31st May 2013. He deposed to affidavit, inter alia, excluding the possibility of abscondment on his part, interference with investigations and witnesses as well as commission of further crimes.

[14] A perusal of the record reveals that the state case against him as outlined by the investigating officer in his oral testimony is that he was identified at a photo identification parade by a section 204 witness who links him to the crimes in that he attended planning meetings in respect of the same and participated by patrolling the relevant roads to keep an eye on the police, among others. It is, further, apparent from the relevant evidence that the State concedes, as at the date of the bail application, that it is not in a position to say that the tracking reports locate the appellant's vehicle in the vicinity of the scene of the crimes. It is,

furthermore, contended by the investigating officer that the appellant is linked to the crimes by cellphone reports.

- [15] The foregoing contention by the State is, however, without merit regard being had to the fact that the investigating officer is quick to point out under cross-examination that the relevant cellphone reports are still being analysed and, as such, no final report is available. It can, therefore, not be said with any degree of certainty that the state case is that the appellant is linked to the crimes by cell phone reports. The effect of the investigating officer's evidence is simply that the first appellant might or might not be linked to the crimes through cell phone reports once a final report has been issued. The witness on whose evidence the State intends to rely in its case against the appellant herein is, in effect, an accomplice. His or her evidence would, therefore, have to be approached with caution by the trial court if and when it is eventually tendered.

(See *S v Francis* 1991 (1) SACR 198 (A) at 205f.)

- [16] In the absence of any corroborating evidence directly implicating the appellant herein, the State would face an uphill battle in its case against him where the onus on it requires that it proves its case beyond a reasonable doubt. It can, in my view, not be said that the state case against the appellant is strong regard, further, being had to the fact that the investigating officer conceded, under cross-examination, that upon his arrest the appellant furnished an innocent explanation for his presence along the relevant road to the effect that he was attending to personal matters viz. that he went to fetch water in the Vaal triangle at the relevant time.

(Compare *S v DV*, supra, at par [19].)

SECOND APPELLANT'S CASE

- [17] The second appellant's affidavit reveals that it cannot be said that it is in the interests of justice to refuse him bail insofar as he negates the likelihood of events set out in section 60(4) of the CPA. He takes the matter further by deposing to the effect that continued detention hampers proper consultation with his legal representatives.
- [18] The state case against him is that he made a confession before a magistrate and that a member of his crew, who was with him in the truck at the time of the robbery, made an additional statement to the effect that the appellant behaved suspiciously, as the driver, during the robbery.
- [19] In my view the relevant statement to the magistrate does not "amount to an unequivocal acknowledgement by the accused that he is guilty... tantamount to a plea of guilty" in order to qualify as a confession as correctly and effectively put to the investigating officer by Ms Van den Heever for the appellant

herein during cross-examination. In this regard it is worth noting that the investigating officer conceded under cross-examination that a reading of the statement as a whole reveals that the appellant acted under duress when he co-operated with the actual perpetrators

of the crimes in that his life and those of his wife and children were threatened. He, further, testified that the appellant mentioned

that he would work with the police and that he was threatened to commit the offence.

(See *R v Becker* 1929 AD 167)

[20] In an appropriate case compulsion to commit a crime, as a state of necessity affecting unlawfulness or culpability, may in law justify a crime or exclude culpability.

(See *S v Goliath* 1972 (3) SA 1 (A) and *S v Mandela* 2001 (1) SACR 156 (C) at 167c – e.)

[21] The evidence of members of his crew to the effect that the second appellant acted suspiciously would, in my judgment, not strengthen

the state case in any manner whatsoever once the statement to the magistrate is admitted by the trial court. At best for the State such evidence would, in my view, be neutral insofar as it would also be in consonance with the fact that the appellant was compelled by threats to participate in the crime.

[22] On the face of the relevant statement to the magistrate it cannot, in my opinion, be said that the state case against the second appellant is strong insofar as it is possible, *ex facie* the same statement, that in law he either did not act unlawfully or culpably when he conspired and co-operated with the robbers.

THIRD APPELLANT'S CASE

[23] Unlike his co-appellants the third appellant gave oral evidence and his evidence could be, and in fact was, tested by way of

cross-examination on behalf of the State. In his testimony he, *inter alia*, denied participation in the crimes and went further to deny that he was in Sasolburg on the day in question. He, further, excluded the possibility of evading his trial as well as interfering with witnesses.

[24] The state case against him is based on cellphone reports, photo identification parade and section 204 witness in the same manner in which the first appellant is allegedly linked to the crimes. Arguments and findings in respect of the case against the first

appellant are, therefore, of equal application to the third appellant insofar as, even in his case, the investigation with regard to cellphone reports is still continuing according to the investigating officer.

[25] Although he was subjected to full and thorough cross-examination by the State it was, surprisingly, not disputed either directly or by implication that he was not involved in the crimes in question. The state case to the effect that he is linked to the crimes through cell

phone reports, photo identification parade and statement of section 204 witness was not put to him to enable him to at least respond thereto. When he closed his case after testifying he had, in my opinion, established a prima facie case that he was being held in detention for crimes he had not committed. It is now trite that such a state of affairs constitutes

an exceptional circumstance warranting admission to bail in the interests of justice. It was only when the investigating officer

testified that his version was refuted. At that stage in the proceedings he had no opportunity to present evidence or comment on

the relevant evidence. It was left to his legal representative to fight the battle for him by way of cross-examination and argument. It is true that the onus was on him and not on the State to establish the existence of exceptional circumstances justifying his release on bail. It is, however, equally true that fairness required of the State to play open cards with him by enabling him to at least know and respond to what it intended to place before the court later in the proceedings. If the State felt that he had not prima facie discharged the onus on him, it was not obliged to place evidence before the court in rebuttal and could simply have closed its case without tendering any such evidence as was pointed out in *S v Mathebula*, supra. Fairness extends to both the State and the bail applicant. Ambush in bail proceedings cannot be tolerated inasmuch as it is not allowed in trial proceedings as the State prosecutor correctly and effectively pointed out during the proceedings before the court a quo.

[26] The court below further found, in respect of the third appellant, that the nature and extent of the cases pending against him, as well as the fact that he was on bail when he was arrested for the instant matter, clearly indicate that he has the propensity to commit a particular type of crime, and if released, that would result in the possibility of him committing further similar offences. In my view it cannot, on the facts before the court below, be said that the fact that he has pending cases against him and that he was on bail when he was arrested, indicate such propensity regard being had to the fact that he undisputedly does not have any previous convictions, let alone of the nature of the crimes involved in the instant matter. Section 60(5) of the CPA clothes the court with the discretion to have regard to, inter alia, the bail applicant's past conduct and evidence that he previously committed an offence referred to in Schedule 1 while released on bail in considering whether or not there exists the likelihood that, if released on bail, he will commit a Schedule 1 offence. It was not the investigating officer's evidence that such a possibility existed. His fear was that the release of any of the appellants would influence the investigation negatively as far as witnesses and other evidence were concerned. The presumption of innocence operates in favour of the accused bail applicant and it cannot, as such, be assumed that, because he is facing particular charges, he is per se guilty of the same.

[27] The court a quo further found that the fact that some firearms, which were used in the instant matter, were still outstanding together with the stolen loot indicated the likelihood that the appellants would commit further similar crimes. With respect the learned

magistrate appears, in this regard, to have moved from the premise that the appellants were guilty of the charges preferred against them and, further, to have concluded that they are in control of the relevant firearms without any factual basis therefor. All the foregoing despite the fact that the court below was expressly alive to her task in a bail application.

[28] I was, therefore, satisfied that all the appellants had proved, on a balance of probabilities, that the cumulative effect of their respective personal circumstances on the weak nature of the state case against each of them is exceptional and permits their release on bail in the interests of justice.

ORDER

[29] In consequence the following order issued:

- (a) the respective appeals succeed;
- (b) bail is granted to each of the (3) three appellants in the amount of R20000-00 on condition that should they each pay bail:
 - (i) they shall each not directly or indirectly interfere with witnesses whose names appear on the list attached to the indictment served on them or those whose names may be added thereto in future;
 - (ii) they shall each not come in contact with erstwhile employers and employees of Protea Coin Security and/or South African Police Services(SAPS);
 - (iii) they shall each appear in the Circuit Court at Sasolburg on 19 May 2014 at 09:30 am and shall remain in attendance until the matter is finalised.

J. LEKALE, J

On behalf of first and second

appellants: Adv Van den Heever

Instructed by:

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JOHANNESBURG

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