

SOUTH AFRICA / JUDGMENT

Motshelanoka v S (Bail Appeal) (CAB15/2024) [2024] ZANWHC 251 (9 October 2024) [2024] ZANWHC 251

COURT

North West High Court, Mafikeng

BEFORE

Motsatsi

CASE / FILE NUMBER

CAB15/2024

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No: CAB15/2024

District Court Case No:A180/2024

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between: -

GODFREY MOTSHELANOKA

APPELLANT

AND

THE STATE

RESPONDENT

Coram:

Motsatsi AJ

Date of hearing:

16 AUGUST 2024

Date of

judgment:

09 OCTOBER 2024

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 09 OCTOBER 2024 at 10h00.

ORDER

(i) The appeal against the Magistrate's refusal of bail is dismissed.

BAIL APPEAL JUDGMENT

MOTSATSI AJ

Introduction

- [1] This is an appeal against the refusal of bail by the Magistrate for the district of Moses Kotane, held in Madikwe. The application comes before me in terms of Section 65(1) of the Criminal Procedure Act 51 of 1977 ("the Act").
- [2] The appellant was charged with murder in that on 2 September 2023 he unlawfully and internationally killed a male person of one year and eleven months by throwing the deceased to the ground twice and suffocating him.
- [3] The appellant applied for bail on 5 October 2023. During bail proceedings, the applicant took to the stand and testified. His testimony is that he was 46 years old and had been residing at his permanent address in Tlokweng village for a period of 30 years. He stated that he was self-employed, taking care of his livestock, had no previous convictions and no pending cases. He testified further

that he was taking care of his sickly mother and was responsible for pumping water for the community, a task that he performed on a voluntary basis.
- [4] During Cross examination it became apparent that he resided six houses away from the complainant, the deceased's mother, who was also his former girlfriend.
- [5] On behalf of the State, the investigating officer opposed bail mainly on three grounds. Firstly, he testified that the State had a strong case against the appellant, in that the totality of the evidence pointed towards him and that there were statements of eyewitnesses to this effect.
- [6] Secondly, he testified that appellant would interfere with witnesses as he had intimidated the deceased's mother by instructing her to inform everybody that the child had fallen and that if she were to tell the truth he would stab her with a knife. He qualified this by testifying

that it was not the deceased's mother who called the police as she was afraid of the appellant and that upon their arrival at the clinic where the deceased child had been taken, she could not disclose what had happened to the deceased as the appellant was next to her all the time. She only managed to disclose to the nurses that the appellant was responsible for the injuries and eventual death of her child when the deceased was being attended to and the appellant was forced to move away from her. It was then that the nurses called the police.

- [7] Thirdly, the investigating officer testified that the safety of the appellant could not be guaranteed because on the day of his arrest, the community wanted to take the law into their own hands. He indicated further that when he informed the complainant of the possibility of bail being granted to the appellant, she became nervous and pleaded that the appellant should not be granted bail, fearing for her life.
- [8] The Magistrate, in considering whether the interests of justice permitted the release of the appellant found that:
- a. The violent degree in the commission of the alleged crime had been established;
 - b. The appellant had threatened an eyewitness; and
 - c. There was likelihood of that he would attempt to influence or intimidate witnesses.
- [9] The court found that the appellant was not a rightful candidate to be released on bail and subsequently bail was refused, and the Appellant was remanded in custody until 4 December 2024.

FIRST BAIL APPLICATION ON NEW FACTS: 14 MARCH 2024

- [10] The record makes reference to an application on new facts which took place on 14 March 2024, however there is no record of the proceedings of this application on the transcript before this court. At the hearing of this matter, both Counsel of the parties had no recollection of this application. It is however clear from the Judgment of the bail on new facts delivered on 24 June 2024 that the application made was a second application on new facts.

SECOND BAIL APPLICATION ON NEW FACTS 20 MAY 2024

- [11] On 20 May 2024, the appellant approached the court for bail on new facts. The judgment thereon was delivered on 24 June 2024.
- [12] I deal with appellant's application as outlined in his Affidavit of Bail on new facts. Appellant states that on 4 December 2024, he was taken from the Mogwase Correctional Services and caused to wait at the waiting area to be fetched by Madikwe Police Station. No one came to collect him, and he was taken back to the cells. On 23 January he was fetched from Mogwase Correctional Services and informed that he had been requisitioned to appear in court as he had missed his previous court appearance. He was brought before court and upon appearance, was informed that he would be released on warning to appear again on 5

February 2024. On 5 February 2024 he attended at court and the matter was postponed to 8 February 2024. He states that he was at all times called solely by his surname, however on 8 February 2024, he noticed that something was wrong when he was not called. Upon investigating, he realised that there was another person on the court roll, with the same surname as his own, appearing on the list. He states that he approached the prosecutor and that was when it was discovered that he had been released by mistake, on a wrong chargesheet and was thereupon taken into custody.

- [13] His further testimony was that during the time when he was so release between the periods 25 January 2024 and 8 February 2024, he met the complainant once and never communicated with her. He submits in the affidavit that during that period, he continued with his business of selling vegetables, and attended to looking after his livestock, and therefore did not pose any danger to anyone. He testified, that he did not interfere with the process of the justice system and had given cooperation to the police. Further he stated that there was no evidence that there was any conduct on his part of jeopardising the functioning of the of the criminal justice system as was initially found by the court in refusing his initial bail application. His further new facts were that his mother was not coping due to his incarceration and that his livestock was left unattended.
- [14] The State in opposition, called the complainant who testified that she was scared that if the appellant was to be released on bail, he would kill her as he had threatened to do so previously.
- [15] The court made the following findings in respect of the bail application:
- a. The application was a repetition of the of the previous bail application.
 - b. The only new factor adduced by the appellant was that he had been released on warning by mistake and that during that period, he met the complainant and did not intimidate or threaten her. His fundamental argument was that he had discharged the onus resting on him in terms of Section 60(4)(c) of the Act.
- [16] The Magistrate stated in her reasons for the decision to deny the applicants bail and mentioned further that that the purpose of bail on new facts should not be to correct an application that was not properly conducted. It is worth mentioning that the Magistrate dealt at length with the incident that led to the applicant being released on bail on 25 January 2024 and concluded that appellant appeared under a name of another accused who was called from the police cells in to appear on a different charge. The Magistrate found that the appellant, knowingly, under the name of Wesley Ezekiel Motshelanoka and under a difference chargesheet, took advantage of the confusion in court as there was no electricity on the day of his release.
- [17] The court found that that the appellant was untrustworthy in that he had capitalised on the fact that there was no electricity on the date of his appearance and mislead the court.

[18] Consequently, the Magistrate found against the appellant under the provisions of Section 60(8)(a) of the Act which reads:

“the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings”.

[19] The Magistrate further found that the ground in section 60(4)(d) was still not discharged. Section 60(4)(d) provides that:

“the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.”

[20] The Court concluded that the appellant could not be trusted and that interests of justice did not permit the release of the appellant on bail.

GROUND OF APPEAL

[21] The grounds of appeal as set out in the Notice of Appeal inter alia reads as follows:

a. The Learned Magistrate erred and misdirected himself in refusing the appellant on bail by heavily relying on the provisions of Section

60(4)(d) as well as Section 60(8)(d) of the Criminal Procedure Act in that:

i. The State did not present any evidence which suggest that appellant supplied any false information to the court while knowing it to be false while during his arrest or during his bail application as well as bail application on new facts as required by Section 60(4)(d);

ii. It will further be submitted that the fact that none of the court orderlies who present (sic) during the release of the appellant on the 31st January 2024 did not make themselves available to explain how he was released, is reason enough to grant a benefit of doubt to the appellant;

iii. Counsel will further submit that the appellant having been released by the court on the 25th January 2024 without any evidence of having deceived the court about his identity, cannot solely be used against him as the court did not also confirm his identity when he appeared;

iv. The fact that the court orderlies who fetched him from Madikwe Police Station cells and brought him to the court holding cells, were not willing to explain as to how the appellant was called, shifts a benefit of a doubt in favour of appellant which does not justify being accused by the court of having provided false information to the court within the meaning of Section 60(4)(d);

v. The Learned Magistrate has erred materially on finding that the appellant is dishonest and that he provided false information to the court when there was no shred of evidence supporting this assertion.

vi. The Learned Magistrate further erred in finding that the appellant indicated that he met complainant constitutes false information when the complainant in her evidence has confirmed that they have seen each other, and the appellant did not pose any danger to her.

vii. The court erred in not relying to its earlier reasons for denial of bail on 5th October 2023 which was (1) that he will attempt to influence, threaten and/or interfere with the state witnesses, (2) that his life will likely be on (sic) danger if released on bail as he says in the same street as the complainant's place;

viii. The court when dealing with bail on new facts failed to consider the fact that the Investigating Officer had confirmed that when the appellant was released by mistake, he continued to live his ordinary life and even, had not interfered with witnesses and was never endangered by the public and that the State does not oppose his bail application on new facts;

ix. The complainant has failed to adduce any evidence which justify that his life would be in danger if the appellant is released on bail as the appellant has never threaten her when they saw each other nor did he ever attempt to come to her place of residence in an attempt to threaten her;

x. The Learned magistrate erred and misdirected himself in finding that the appellant has failed to establish the new facts which, in the interest of justice, justify the appellant's release on bail when all presented evidence clearly confirmed the existence of new facts;

xi. Counsel will submit that the court erred in not considering the facts that SGT MOLOKWANE has filed an affidavit indicating that the risks state relied on when opposing the initial bail application has been extinguished by the erroneous release of the appellant which constitute a new fact.

xii. The court further erred in insulating that contents of the appellant affidavit on new facts misled the court to believing that the appellant was roaming around when he met the complainant while this is not material, complainant has confirmed that they both have seen each other and appellant did not pose any danger to her which was a material factor the court relied on when on when refusing the initial bail application;

xiii. Counsel will therefore argue that the court has drastically failed to determine the consideration of bail on new facts within the proven principle and authorities and misdirected itself to refuse bail on new facts on evidence which was not presented before it;

THE LAW

[22] The offence with which the appellant is charged falls within the ambit of Schedule 5 of the Act and therefore Section 60(11) of the Act took application. Section 60(11)(b) provides that :

“Notwithstanding any provision of this Act, where an accused is charged with an offence — referred to 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 satisfies the court that the interests of justice permit his or her release”.

[23] The factors that the court must in take into consideration when determining the interest of justice are provided for in Section 60(4) of the Act as follows:

“The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established—

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[24] The onus, therefore, is borne by the appellant to establish, on a balance of probabilities that the interests of justice permit his release from detention. The Magistrate found during the initial bail application of 5 October 2024, that the factors in Sections 60(4) (a), 60(4)(b) and 60(4) (c) existed, disqualifying the appellant from being released on bail.

[25] During the application for bail launched on new fact on 20 May 2024, the issue that took prominence was the erroneous release of the appellant on 25 January 2024 until 5 February 2024. The appellant contended that he had not misled the court and that when he found out that there was a mistake, he went to report the matter at the court out of his own free will. He contended that during the time of his mistaken release, he never threatened the complainant. The Magistrate not only found that the appellant had still failed to discharge the onus in respect of the grounds for refusal of the initial bail, but that he was in fact untrustworthy and took advantage of the lack of electricity at court and appeared knowingly, under a wrong name, and further accepted to be released on warning on a wrong chargesheet. The court took a dim note of the fact that all this occurred while the appellant was represented.

[26] The Magistrate found that factors provided for in Section 60(8) had been established, despite the State not opposing the bail application in the new application. Section 60(8) provides that :

“In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.

[27] The determination of appeal relating to bail proceedings in Section 65(4) of the Act. It 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.”

[28] This court must determine, therefore, whether the Magistrate exercised his discretion wrongly, in refusing bail. In *S V Barber*, Hefer J held that:

“It is well known that the powers of this Court are largely limited where the matter comes before it as an appeal and not as a substantive

application. This Court has to be persuaded that the Magistrate exercised the discretion which he has made 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 but exercised the 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.”

[29] The applicant relied in the main, on his conduct following his release on 25 January 2024, this in an effort to discharge the onus in terms of section 60(4)(c). The Magistrate found that the appellant should have picked up, during the two occasions when he appeared in court following his mistaken release on warning, that there should have been a mistake. The court found that he had knowingly, misled the court and therefore that the ground in Section 60(4)(d) had been established.

[30] Regarding the ground of appeal that the court erred in not relying on its earlier reasons for denial of bail on 5th October 2023 which was (1) that he will attempt to influence , threaten and/or interfere with the state witnesses, (2) that his life will likely be in danger if released on bail as he resides on the same street as the complainant, I find that the Magistrate reiterated that the application on new facts did not reach the court's expectations and was a repetition of the initial bail application.

[31] In *S v Mpofana* 1998 (1) SACR 40 at 44(G – I) the court explained the approach to be taken in applications for bail based on new facts as follows:

“In considering an application for bail allegedly brought on the strength of new facts, the court’s approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.”

[32] Having had the opportunity to present new fact to secure his release, the court found that there were no new facts. The court instead, found that the application before it, premised mainly on the conduct of the appellant during his mistaken release, proved the applicant to be untrustworthy.

[33] I found no misdirection in the decision of the Presiding Magistrate in that on new facts, the appellant failed to discharge the onus in terms of Section 60(4) (c) and 60(4) (d) as per the reasons for refusal of the initial bail.

[34] I concur further with the Magistrate that factors in Section 60(8)(c) were established.

[35] This court finds that the appellant failed to discharge the onus as contemplated in section 60(11)(b) that it is in the interest of justice for him to be released on bail.

[36] I find that the Presiding Magistrate’s conclusions in refusing bail was accordingly correct based on inter alia :

- a. The strength of the state case, the likelihood of the appellant to interfere with the State witness who is known to the appellant and the establishment of the factors in section 60(8) (a).

ORDER:

[35] Resultantly, I make the following order:

- i) The appeal against the Magistrate’s refusal of bail is dismissed.

N V MOTSATSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Appellant:

ADV RAKOLA

Attorneys for Appellant PULE ATTORNEYS

C/O MOTSHABI & ASSOCIATES

MAHIKENG

For the Respondent:

ADV KE MAMPO

Attorneys for Respondent: DIRECTOR OF PUBLIC PROSECUTIONS

MEGACITY COMPLEX

MMABATHO

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