

SOUTH AFRICA / JUDGMENT

Ndlovu v S (A270/2017) [2017] ZAGPPHC 461 (22 June 2017)

[2017] ZAGPPHC 461**COURT**

North Gauteng High Court, Pretoria

BEFORE

M J Mosopa

CASE / FILE NUMBER

A270/2017

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Policy**OFFICE****OF THE CHIEF JUSTICE****GAUTENG****DIVISION, PRETORIA****CASE****NO: A270/2017****REPORTABLE:**

YES

OF

INTEREST TO OTHER JUDGES: NO

DATE:

22/06/2017

In

the matter between:

RICHARD

NDLOVU

PLAINTIFF

And

STATE

DEFENDANT

JUDGMENT

MOSOPA AJ

1. This is an appeal against the refusal to grant bail by the Magistrate Mr Cox for the district of Gauteng sitting in Benoni by the Appellant.
2. The Appellant is charged with three
- (3) counts of robbery with aggravating circumstances. The Appellant launched the bail application on the 17th of January 2017 and was legally represented by Mr Modicha.
3. The State on that occasion opposed bail and after evidence was led the Magistrate refused to admit the Appellant to bail.
4. In the bail appeal, the Appellant is represented by Mr Du Plooy and the State is represented by Ms Scheepers. The State is opposing the bail appeal.

BACKGROUND

5. The Appellant who was legally represented during the bail hearing, testified in support of his application to be admitted to bail and following his testimony the following emerged:
 - 5.1. That the Appellant is, 27 years of age, having been born on the [...] 1989;
 - 5.2. He is a South African Citizen and has a valid South African Identification Book and was arrested on the 7th October 2016;
 - 5.3. He has no travelling documents and has not either travelled outside the borders of the Republic nor resided outside the borders of the Republic;
 - 5.4. He does have relatives outside the borders and his grandmother resides in Mozambique;
 - 5.5. He is born in Tembisa and he has been staying at house number [...] E. P., H. S., Midrand since 1996 up until he was arrested.
 - 5.6. The level of education achieved by the Appellant is Grade 11 in 2004-2005 at the Space Age College, Midrand;
 - 5.7. At the time of his arrest he was earning a commission of R2,000,00 to R3,000,00 per month from selling forever living products.
 - 5.8. He is not married with no children but is responsible for the maintenance of his late brother's child who is 4 (four) years of age;
 - 5.9. He does possess assets which include a Renault Megane and household furniture to the value of R40,000,00 to R50,000,0.0

5.10. He does have a previous conviction of possession of unlicensed firearm, discharge of a firearm in public and trespassing in which he was sentenced to 6 years imprisonment in 2010.

5.11. That prior to his appearance at court after been involved in the motor vehicle accident people used to visit him at hospital, who are unknown to him and they will take photos of him, that is the reason he was identified at the identification parade coupled with the fact that at the identification parade he was the only person injured with bandages and walking on crutches;

5.12. On the day of his arrest he was going to sell his clients forever living products at Daveyton and he was offered a lift thereafter, hence the fact that he was found inside the robbed motor vehicle;

5.13. During the commission of the robbery incidents of March and April 2015 he was staying in Rustenburg;

5.14. The names of the state witnesses and their identities are unknown to the Appellant and he will not interfere with them and will not try to influence the investigation of the cases against him;

5.15. His admission to bail will not Jeopardise and undermine the proper functioning of criminal Justice system more especially the bail system;

6. The state also called Peter Ramalobela who is the investigating officer in the cases levelled against the Appellant who is a Detective in the South African Services based at Daveyton who testified that;

6.1. That the Appellant was identified at the identification parade by the witnesses in the robberies of 11th March 2015 and 2nd April 2015 respectively;

6.2. He was found inside or next to the motor vehicle which was robbed on the 6th October 2016 after it overturned and the Appellant was injured, one of the occupants died and one managed to run away;

6.3. All counts of robbery have the same modus operandi in that in all the cases three (3) people are involved and firearms were used;

6.4. He opposed to the bail in that if the Appellant can be admitted to bail he will commit further offences;

THE LAW

7. It was correctly conceded by Mr Du Plooy on behalf of the Appellant that the offences under which the Appellant is charged of falls within the ambit of Schedule 6 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to "The Act").

8. Section 60 (11) of the Act provides that; 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 reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of Justice permit his or her release;"

9. In *S v Dlamini, S v Dladla and others, S v Joubert, S v Schietenkat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) at paragraph 77, the Constitutional Court held that, "the inclusion of the requirement "exceptional circumstances" in Section 60 (11)

(a) limits the right enshrined in Section 35 (1) (f) of the Constitution, it is a limitation which is reasonable and justifiable in terms of the Constitution in current circumstances.

9.1. In *S v Jonas* 1998 (2) SACR 673 at (687 e-j) Horn AJ said that: "The term "exceptional circumstances" is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence e.g he has a cast - iron alibi, this would likewise constitute an exceptional circumstance."

9.2. Personal circumstances which are really "commonplace" can obviously not constitute exceptional circumstances for purpose of section 60 (11)

(a) . See *S v Scott -Crossley* 2007

(2) SACR 470 (SCA) at [12] .

9.3. In *S v Mpulampula* 2007 (2) SACR 133 at (1366) Jones J said" The upshot was that the Magistrate had before him (a) the fact of evidence of confessions against the

appellant which, if proved at the trial, will amount to strong evidence, and (b) the fact that the appellant will contest

their admissibility on the ground that they were induced by a police assault, which may to an extent be thought to take away from

the strengths of the state case. These facts do not give rise to the presence of exceptional circumstances which show that the appellant should be released on bail. "

9.4. In *S v Mathebula* 2010 (1) SACR 55 (SCA) at [12] Heher JA said the following;

"But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test In order successfully to challenge the merits of such a case in bail proceedings applicant needs to go further; he must prove on a balance of probability that he will be acquitted of a charge. *S v Botha* 2002 (1) SACR 222 (SCA) at 230 h, 232c; *S v Viljoen* 2002(2) SACR 550 (SCA) at 55c. That is no mean task, the more especially as an innocent person

cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all But the state is not obliged to show its hand in advance; at least not before the time when the contents of the docket must be made available to the defence. Nor is an attack on the prosecution case at all necessary to discharge the onus, the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it had been held that until the applicant set up a prima facie case of the prosecution in failing there is no call on the state to rebut his evidence to that effect"

10. The standard of proof required from the appellant to establish the existence of "exceptional circumstance" is on a balance of probabilities. See *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266 f-g. Once "exceptional circumstances" have been established by a bail applicant the enquiry must focus on the balance between the interests of the State as set out in Section 60 (4) of The Act on the one hand, and the appellant's interest in his personal freedom as set out in Section 60 (9) of The Act, on the other hand.
11. Section 60 (4) of the Act provides as follows:
 - (4) 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 a likelihood that the accused, if he or she is released on bail will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, or
 - (b) where there is a 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 a 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 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 a likelihood that the release of the accused will disturb the public order or undermine the public peace or security.
12. Section 60 (4) (a) - (e) must be read in conjunction with Section 60 (5) -
 - (8) of The Act.
13. Section 60 (9) of the Act provides as follows;
 - (a) In considering the question in subsection 4 the court shall decide the matter by weighing the interest of justice against the rights of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account where applicable, the following factors;

- (b) the period for which the accused has already been in custody since his or her arrest;
- (c) the reason for the delay in the disposal or conclusion of the trial and any fault on part of the accused with regard to such delay.
- (d) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (e) the state of health of the accused,
- (f) any other factor which in the opinion of the court should be taken into account.

14. Finally Section 65 (4) of the Act provides as follows;

- (4) 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.

14.1. What the abovementioned section basically implies is that where a court a quo. misdirected itself materially on the facts and legal principles, the court of appeal may either set such decision aside or made any other order which may include amongst others to consider the issue of bail afresh. See *S v Mpulampula* 2007

- (2) SACR 133 (E) at 136(e).

THE APPEAL

- 15. It was contended by Mr Du Plooy on behalf of the Appellant that the state's case is not strong against the appellant in that:
 - (a) regarding the robbery incidents of March and April 2015, the Appellant when was identified at the identification parade, the Appellant was the only person with bandages and crutches who was injured.
 - (b) because being the only person being injured at the identification parade the witnesses were influenced to point out the Appellant;
 - (c) as such the identification parade was not properly done and further more pictures of the Appellant were taken by number of people while he was admitted to the hospital injured.
 - (d) if a trial-within-a-trial rules against the admissibility of such identification parade there will be no evidence against the Appellant.
 - (e) further that regarding the October 2016 incident the Appellant gave an explanation as to why he was found inside the motor vehicle.
 - (f) and that the magistrate misdirected himself when he found that the Appellant will evade his trial without any evidence being placed before him that the Appellant is a flight risk.

-
- (g) Finally misdirecting himself by finding that the Appellant started committing offences while he was age 15 years.
16. On the other hand Ms Scheepers, on behalf of the state contended that the states' case against the Appellant is very strong as he was identified at the identification parade relating to the March and April 2015 armed robbery cases. The fact that he was found inside the robbed motor vehicle relating to the October 2016 armed robbery case also proves that the State has a strong case against him. Further that the Appellant in his own version says that he was inside the robbed motor vehicle at 21h00 whereas the robbery took place at 21h30.
- (a) It was further contended that the three robberies were committed in about the same fashion by three people and similar facts evidence is applicable.
- (b) What we currently have is that the Appellant was positively identified at the identification parade and what will happen to the outcome lies with the trial court and not the purpose of bail proceedings.
17. The Appellant has a previous conviction of possession of unlicensed firearm, illegal discharge of a firearm and trespassing to which he was sentenced to 6 (six) years imprisonment. However, I cannot find against his past and punish him for his past conduct by refusing to release him on bail. However, that is not a point that I can easily ignore taking into account that the Appellant completed his parole a year before the hearing of the bail application hearing 2016. This basically means that at the time of commission of the March and April 2015 offences the Appellant was on parole and most probably October 2016 robbery as the Appellant does not know the date in 2016 when he completed his parole.
18. I do not agree with Mr Du Plooy's contention that the state's case against the Appellant is weak. The fact that he was positively identified at the identification parade and the fact that he was found injured inside the robbed motor vehicle after it overturned and was found by the police directly or connects the appellant to the commission of the offences.
- (a) The alibi raised by the Appellant that he was in Tlhabane, Rustenburg for the whole of 2015 cannot be correct and relied on;
- (b) he was asked by his legal representative during the bail hearing where he was staying from 1996 until his arrest and his answer was Tembisa and made no mention that at one stage, specifically 2015 he was staying in Tlhabane.
- (c) Moreover the Appellant failed to provide the address where he was staying in Tlhabane and further failed to submit either an affidavit of the landlord or oral testimony of the landlord that during the period he was staying at his place.
19. In denying the Appellant bail the Magistrate based his judgment on the following:
- (a) that the state's case is strong against the Appellant.
- (b) that in the event of conviction the appellant stand to be sentenced to

45 years imprisonment and that would motivate the appellant to abscond and not stand his trial.

- (c) that the Appellant from the age of 15 years started showing the propensity to commit crimes.
 - (d) his release on bail will pose a threat to the broader community and his release will negatively impact on the public's confidence in the judicial system.
20. The Magistrate incorrectly stated that the Appellant started committing the offences when he was 15 years old. His conviction was in 2010 which shows that the Appellant at that stage was 20 years of age. It is not clear from the record as to when was his offence to which the Appellant was convicted in 2010 was committed; what is on record is only the date or year of conviction.
- (a) It is clear that there is a gap of five (5) years in ages. Even though the Magistrate might have been wrong with the age of the appellant when he was convicted it clearly shows that the appellant had committed of an offence which he was convicted of when he was relatively young.
21. Looking at the charges levelled against the appellant, it shows that they were committed over a period of time. In the event of conviction the appellant stand to be sentenced to a lengthy imprisonment. All the charges levelled against the Appellant and his previous conviction involved the use of firearms.
22. The Warrant of arrest (J50) of the appellant was already issued in April 2015 but the appellant could not be arrested only to be arrested by the police inside a robbed motor vehicle in October 2016. It is clear that if the appellant was not arrested inside the overturned motor vehicle he could still be running away from the police.
23. I therefore find no fault in the Magistrate's decision to refuse to admit the appellant to bail.

CONCLUSION

24. The Magistrate did not misdirect himself both factually and legally in refusing the bail of the Appellant.
25. The Appellant failed to proof on the balance of probabilities that there are exceptional circumstances which permit his release on bail and that he will be acquitted of the charges that he is facing.
26. When all the evidence is considered and weighed against what was submitted in favour of the Appellant. I am satisfied that the Appellant failed to prove that there are exceptional circumstances permitting him to be admitted to bail. In fact the contrary is true. Accordingly, I am of the view

that the court a quo was correct in refusing to grant the appellant bail.

ORDER

I therefore make the following order:

"Appeal against the refusal of bail by Magistrate Cox held on the 17th January 2017 is dismissed."

M J MOSOPA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA (ACTING)

Date of hearing: 20 June 2017

Judgment

Delivered: 22 June 2017

Counsel for the Appellant: Advocate L Du Plooy

Instructed by: Krishna Pillay Attorneys

Counsel for the State: Advocate Scheepers

Instructed by: State

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