

SOUTH AFRICA / JUDGMENT

Ngcobo and Others v S - Appeal (A207/23) [2023] ZAWCHC 272 (3 November 2023)

[2023] ZAWCHC 272**COURT**

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

A207/23

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A207/23

In the matter between SIPHELELE NGCOBO 1ST APPELLANT NKOSOMZI CUBA 2ND
APPELLANT UNATHI MOOI 3RD APPELLANT SIPHUMELELE FIGLAN 4TH APPELLANT AND
THE STATE RESPONDENT

Date of Hearing: 23 October 2023

Date of Judgment: 03 November 2023 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

- [1] This is an appeal against the decision of a magistrate to refuse to grant the appellants to bail. The appellants were charged with one count of unlawful possession of a Smith & Wesson revolver, one count of unlawful possession of an LM 5 rifle, one count of unlawful possession of an R5 rifle, unlawful possession of 22 live rounds and 28 of 5.56 rounds of ammunition.
- [2] The issue is whether the magistrate was wrong to refuse bail.
- [3] The State alleged that on 11 October 2022 members of the Crime Intelligence Agency (CIA) received information that the appellants,

who after arrest appeared in the magistrates courts as accused 1 to 4 respectively, planned to conduct an armed robbery at Eerste River Mall, Clarewood in Eerste River. The appellant were part of a bigger syndicate. All four were present at the planning location in Khayelitsha. The plan

was to rob Fidelity Security Officers (security officers) while the custodian bag man offloaded the money from the Fidelity armoury truck on his way to the ATM. The security officers would be robbed of their firearms and money and if they resisted they would be shot and killed by members of the syndicate. The syndicate would be armed with high caliber firearms like rifles and handguns. The armed robbery was scheduled to take place on Thursday 13 October

2022. The plan was to use a hired vehicle, a white NP 200 bakkie to transport the appellants to the mall, and after the robbery, a Toyota taxi was to be used as a getaway vehicle.

[4] The information included that 4th appellant was in contact with a corrupt security officer working for Fidelity Security Services. That security officer's identity was unknown to the source but would be inside the truck to be robbed. There was another 'inside man' in Fidelity, only known as "Fingers", who would tip off appellant 4 when the truck arrived on the 13th of October. A track undercover operation was planned as envisaged in section 252A of the Criminal Procedures Act, 51 of 1977 (the CPA) and a police agent was identified the infiltrate the syndicate in which the four appellants were part of, to gather more information. The 252A operation was approved by the Director of Public Prosecutions.

[5] On 13 October 2022 the agent reported back that appellant 4 had received a phone call from his inside-man, Fingers, who informed

appellant 4 that there is not a big load of money on the truck and that the robbery must be postponed to the next day, the 14th, when there would be more money on the truck. On Friday the 14th the agent reported back that the robbery would take place on that day as there was a large amount of cash in the truck that was going to Eerste River mall. The CIA and the South African Police Service Intervention Unit (SAPSIU) planned to arrest the members of the syndicate before the robbery took place. This was because the scene of the robbery was a public place and the safety of the civilians and bystanders was a high priority as the appellants' plan was to shoot the security guards if they resisted during the robbery. The CIA and SAPSIU were briefed about the description of the appellants as well as the make, colour and registration numbers of the vehicles used in the crime.

[6] Four members of the SAPSIU, to wit, Coetzee, Nobantla, Mokoena and Matras their backup arrived at about 10am at the mall. Coetzee whilst driving in Plain Street, from which there is an entrance into the mall, spotted two men that fitted the description given. The two were sitting against a fence at Kentucky Fried Chicken (KFC) on the corner of Plain Street and the entrance. Cotzee and Nobantla tactically approached the two men, told them to turnaround and searched them. Coetzee found a Smith and Wesson Reovolver with brown handles, with removed serial number and no ammunition, in the possession of appellant 2. Nobantla approached the second man who carried a black bag over his right shoulder. Nobantla found an LM5 rifle in the bag, which had a magazine loaded with 22 live ammunition. Nobantla then arrested appellant 1. A police officer, Benjamin, who was with Coetzee and Nobantla spotted another person who matched the description given to the police. The man was talking on his cell phone and tried to walk away from appellant 1 and 2 who were arrested.

Benjamin apprehended than man, appellant 4. During the arrest, appellant 4 damaged his cellphone, deliberately to make it difficult for the police to retrieve any information stored on the phone.

- [7] Matras was driving an unmarked police vehicle. He spotted the NP 200 bakkie which matched the description given to the police. It was parked in the parking area in the mall. There was one man inside the bakkie on the passenger side and another man who stood outside. When the man outside spotted Matras, the man ran away. Matras tactically approached the bakkie and ordered the man to get out with his hands above his head. Mokoena assisted Matras. Mokoena searched the bakkie in the presence of appellant 3, who was found inside the bakkie, and found a bag. Inside the bag was a full automatic rifle with a magazine containing 28 5.56m live rounds of ammunition. The serial number of the rifle was removed. The suspect that ran away from the bakkie was not traced. A number of investigative agencies and units of the SAPS arrived at the scene to source evidence like fingerprints, DNA, photographs other possible material. The four suspects were after arrest, detained at Mfuleni SAPS.
- [8] Further investigations revealed that appellant 3 and 4 were previously employed as “third men” or armed security

officers at Fidelity. Appellant 3 was employed between 27 June 2019 and 12 December 2021. Appellant 4 was employed from 19 May 2019 to 30 December 2021. It was alleged that appellant 3 was removed from the Fidelity site in Paarl after he failed a polygraph test concerning his possible involvement in a cash in transit heist. He was a third member of the armed vehicle that was robbed in a case with a Bishop Lavis CAS number. The robbery happened at the Charlesville Mall in Bishop Lavis. R557 810 in cash and a 9mm pistol with 15 rounds and a dashpot rifle 223 with 20 rounds were stolen on 24 May 2021. Appellant 4 was also removed from the Fidelity site in Paarl after information was received by Fidelity that he and other members were involved with a heist on one of Fidelity's vehicle. The amount stolen was over two to three million rands in cash. It related to an incident on 2 July 2020 when Fidelity attended to Capitec ATM at Sanlam Centre in Paarl. R622 000 in cash, and LM rifle with 20 rounds and a Norinco 9mm with eight rounds of ammunition were stolen. He also failed a polygraph test. Appellant 4, whilst still working for Fidelity, serviced the Capitec bank ATM at Eerste River mall and was familiar with the service route. The three firearms found at the time of the arrest of the appellants were scanned by Fidelity with its scanner device and Fidelity's built-in tag number, which could locate the serial number even if it was removed, were found on the firearms. All three firearms were identified as those stolen during cash-in-transit robberies of Fidelity. The Vecto LM5 was stolen during a cash-in-transit robbery reported at Paarl. The revolver was stolen during a cash-in-transit robbery at Stellenbosch. The robbery happened when Fidelity loaded a Standard Bank ATM at Eikestad Mall in Stellenbosch in the afternoon of 25 August 2021. A rifle, two to three Remington with 20 rounds and a Smith and Wesson revolver with six rounds were stolen.

[9] Appellant 1's was 24 years old and had been in custody since his arrest. His address was visited and confirmed. He was unemployed but did casual jobs and had no assets. He was single and had three children. He did not have a passport and had family ties in the Western Cape. He had no previous convictions or pending matters. He intended pleading not guilty. According to him, he and appellant 2 went to Eerste River to meet his homeboy who promised them employment in Stellenbosch. They were waiting for his homeboy when the police arrived, instructed them to lie down and a policeman put a big firearm on his back. He was tied with cables and photos of him with the big firearm on his back were taken. He knew nothing about the firearms and the ammunition. His bail application statement was signed by him and his legal representative. Appellant 2 was 38 years old and had been in custody since his arrest. His address was also visited. It was shack. He was unemployed, had no assets, was single and had two children. In his bail application affidavit he did not disclose his pending cases. The State alleged that he had pending cases. The one was reported under Moyeni CAS number and the charge was an unlawful possession of a firearm. The other was a Kensington CAS, and the charge was robbery with aggravating circumstances. There was a Gugulethu CAS where a theft charge was withdrawn. There was a Harare CAS of robbery with aggravating circumstances which was withdrawn. A Harare CAS murder was withdrawn and a Stellenbosch CAS of unlawful possession of firearm which was also withdrawn. He had a previous conviction of housebreaking and theft at business premises

and was sentenced to 5 years imprisonment. In his bail application statement he confirmed the version of appellant 1. According to him his sister could afford to pay R1000 bail for him.

[10] Appellant 3 was 36 years old. His address was confirmed. He was unemployed but did casual jobs for a foreign national. He had no passport, had no assets, was single and had two children. He had family ties in the Western Cape. He had no pending matters and no previous convictions. On the day of his arrest he was taken by the foreign national who was a subcontractor that usually employed him casually, to do some painting in Eerste River area. They went to the mall. The foreign national alighted and left him in the bakkie. The police suddenly came to the bakkie and searched it. He was on the passenger's side of the bakkie. The police told him that they found a firearm at the back of the driver's seat. At that time he had been made to lie down and he did not see the police getting the firearm in the bakkie. His family members would pay his bail and could afford R1000-00. Appellant 4 was 31 years old and had been in custody since his arrest. His address was confirmed. It was a shack which had no number. He was unemployed but was a money lender and made a profit of about R9000 per month, had no assets, was single and had two children. His girlfriend was pregnant. He did not have a passport and had family ties in the Western Cape. He had no pending cases and no previous convictions. On the morning of his arrest he went to Eerste River to meet another man, Mr Ditho, to discuss forming a business partnership to provide cleaning and security services. Ditho called him and told him to wait near the robot. After about 5 minutes of his arrival near the robots, the police came and arrested him. He was told upon arrival at the station that he was

arrested for possession of firearm and ammunition. He denied the allegations. His money-lending business, which provided for his

family, suffered because of his arrest. His girlfriend could pay R1000-00 bail.

[11] Section 65(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) provided:

“Appeal to superior court with regard to bail

65(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.”

[12] The allegations against the appellant reveal that there had been planning and inside information on the movements of and the amounts in the Fidelity armoured vehicle in the period contemporaneous with the arrest of the appellants. There were vehicles arranged, the one to arrive at the scene and the different other as a getaway vehicle. There were semi-automatic rifles which were intended to be used at a public place used by innocent civilians who were exposed to the risk. If it were not for the proactive action of the CIA and the police, and there was resistance from the honest security guards employed by Fidelity, there was a probability of shooting resulting in serious injuries including loss of lives.

[13] If the allegations against the appellants were proved at trial, it will be an indication that the tide has shifted. It will signal that the South African Police Service especially its deployment of Provincial Gang and Investigation Units, other Specialised Units as well as the Crime Intelligence Agency, working on information from the public which trusts amongst others members of these special units, has a good story to tell. It is the story of a nation's bravery and resilience in rising against the iron fist of armed syndicates and gangs that rule our streets, our businesses, our communities and our very existence through fear instilled by extra-judicial execution of those who speak out, act against and commit to stop lawlessness. The deployment of skilled, ethical and competent police officers especially in settlements commonly referred to as the Cape Flats and townships will surely bring back the legitimacy of the SAPS as an institution bound by the governing principles of national security which includes to reflect the resolve of South Africans to be free from fear and want and to seek a better life. To meet its objects to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law, the SAPS needs the assistance and information from the public. The public trust in the SAPS is essential. That public trust extends to the courts and the administration of justice.

[14] In serious offences which involve violence, for example alleged cash-in-transit heists which ordinarily endanger public safety, and as an example in the present matter where the evidence suggests a disposition of the appellants to violence and to commit violent

offences in a public place indifferent of the danger to innocent civilians which include children and the older persons, using

semi-automatic rifles, against the background of the prevalence of such offence, in my view, the National Prosecuting Authority (the NPA) has an obligation to put its best foot forward in the formulation of the charges to be preferred, even at the bail application stage. In the battle with syndicates and gangs for the security of the inhabitants of South Africa and their property, the NPA cannot be sleep-walking on duty on the charges to be preferred. Against the background of the work done by the SAPS and the Crime

Intelligence Agency and was put up for decision by the Prosecutors, only charges of unlawful possession of firearms and ammunition are too close for comfort. At least, the available evidence suggested a conspiracy to commit robbery with aggravating circumstances. It further suggests a group which may be a syndicate or gang. One appreciates the difficulty, complexity and delicacy of making

decisions which may unwittingly disclose the identity of, expose or risk the lives of informants and secret agents. However, convictions

do follow on reasonable inferences drawn from the available evidence as well as circumstantial evidence.

[15] Section 60(4)(e) of the CPA provides:

“60 Bail application of accused in court

(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:

(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.”

[16] In the prevailing climate in the country, and especially in the Western Cape where communities are tired and in distress because of violent crime, it is incumbent upon the courts of law to guard and maintain the rule of law. Courts have an obligation to ensure that the criminal justice system remain a beacon of hope for communities in distress. In response to the iron-fist of syndicates and gangs involved in serious violent crime where life is cheap and is sacrificed at the altar of greed on the snap of a finger by a gang-leader, courts cannot be found wavering and irresolute. The message must be clear and unequivocal: courts are not weak and vacillating when the communities they serve are under siege because of serious violent crime with offenders cutting off essentials of the authority of the State with the aim of compelling communities and those inside their influence to surrender to unlawfulness. I find, on the balance of probabilities, that the facts of this case present

exceptional circumstances. In my view, there is a likelihood that the release of the appellants on bail will disturb the public order or undermine the public peace or security.

- [17] The message must be loud and clear from the first appearance of an accused. In serious cases involving violent crimes that threaten lives, for greed, bail should not be granted for flimsy reasons. I am not persuaded that the magistrate was wrong to conclude that the interests of justice do not permit the release of the appellants. For these reasons, I make the following order:

The appeal is dismissed.

DM THULARE

JUDGE OF THE HIGH COURT

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