

SOUTH AFRICA / JUDGMENT

Ngwenya and Another v S (CC22/2023) [2024] ZANWHC 146 (20 June 2024)

[2024] ZANWHC 146**COURT**

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

CC22/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CC22/2023

In the matter between:-

THAPELO NGWENYA 1st Applicant SIFISO SYDNEY MASEKO 2nd Applicant and STATE
Respondent

IN RE

STATE v THAPELO NGWENYA 1st Accused SIFISO SYDNEY MASEKO 2nd Accused KABELO
JOSEPH NGWENYA 3rd Accused NTSINDISO ALFRED MTUNZINI 4th Accused**JUDGMENT**

BAIL APPLICATION ACCUSED 1 & 2

- [1] On 12 April 2024 two (2) applications for bail of accused 1 and 2, herein after called the accused, were brought before this Court.
- [2] Adv Shela appears for accused 1 and 2, and Adv Marueme appears for the State.
- [3] The accused are arraigned on the following charges, which are classified as Schedule 6 offences:

3.1. One (1) charge of Murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997;

3.2. Four (4) charges of Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, read with the provisions of section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997;

3.3. Five (5) charges of unlawful possession of a fire-arm Contravention of section 3 of the Firearms Control Act 60 of 2000, read with section 103, 117, 120 (1)(a), Section 121 read with Schedule 4 and Section 151 and section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997;

3.4. One (1) charge of Organised Crime in contravening the provisions of Section 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998, read with sections 1, 10 and 11 of the said act and further read with section 94, 155, 156 and 157(1) of Act 51 of 1977 – gang related offence, alternatively contravention of the provisions of section 9(2)(a) of the Act.

3.5. One (1) charge of Unlawful possession of Ammunition, contravention of section 90 of the Firearms Control Act 60 of 2000, read with sections 1, 103, 117, 120(1)(a), section 121 read with schedule 4 and section 151 of Act 60 of 2000 and further read with section 250 of Act 51 of 1977.

[4] Charge 1, murder, is against accused 1 and 2 only. Charges 11 and 12 (unlawful possession of a firearm and ammunition) is brought against accused 2 only.

[5] In the application for bail, accused 1 and 2 have both presented written statements. Both have confirmed independently the content of the affidavits in support of the bail applications. Since the charges fall under Schedule 6, the court has to determine whether it is in the interest of justice that the accused be granted bail.

These statements were accepted as evidence and marked respectively Exhibit “A” and Exhibit “B” in the bail proceedings.

[6] In opposing the application for bail, oral evidence of the investigating officer Sergeant Tshabalala who is a Police officer for 17 years and working at the Provincial Office, Organised Crime in Gauteng.

[7] The 1st accused Thapelo Ngwenya stated the following in his affidavit in support of bail:

7.1. In terms of Section 60(B) of the Criminal Procedure Act he confirmed that he has never been convicted any criminal offences, SA or other countries and that there are no outstanding warrants or arrest against him.

7.2. He has been residing at his residential address for 2 years and since his arrest and detention, his partner stayed at the address. Prior to living with his partner, he stayed at the family. His partner does not reside there anymore, as she cannot afford the place on her income alone.

7.3. Since the date and time of his arrest, his family confirmed that he can be living at his family home and confirmation thereof is provided in the affidavit.

7.4. He has never traveled abroad and has no passport or other travel documents.

7.5. He has a house in Garankuwa to the value of R300k, which he inherited from his mother. This was the family home, it is bequeathed to me as I am only surviving heir. Since the house is abandoned, the lights and water cut off and the property is left to fall in disarray. He is also the only surviving heir to his brother, inherit his estate but no knowledge to amount of estate.

7.6. He is the owner of movable property to the value of R150k, and a motor vehicle being a Venture Combi worth R75k.

7.7. He is not married and has 3 minor children. The mothers of the children were dependent on his financial assistance, prior to his arrest. None of the mothers are employed.

7.8. His highest academic qualification is standard 9 and he could not complete high school due to the passing of his mother.

7.9. Prior to his arrest he earned approximately R8k pm by being a taxi driver.

7.10. In relation to his health he states that the correctional facility does not provided him with any vaccine to date.

7.11. He was arrested on 23 March 2022 at Nyamankasi stand, where he was renting a room, and initially charged for possession of a firearm without a license. Murder was later added to the charges.

7.12. He is advised, which advice he accepts, that he need not deal with the merits of the charges levelled against him and he is not going to disclose his defence in terms of his rights.

7.13. At the onset of the hearing, he intends to plead not guilty and reserve his right to silence.

7.14. To his mind he has a cast iron defence as an alibi defence and there was no identification parade held that links him to the crimes.

7.15. Whilst he is detained, he is suffering harm in that his property is getting vandalised.

7.16. His aunt is present in court and can vouch for his request for bail.

7.17. He has participated in the investigation and he investigation is finalised. There is thus no prospect that he can interfere with the investigation and the witnesses.

7.18. He is prejudiced in his preparation for his case in that the legal representative cannot bring all the legal documents that he wishes to use at trial, to the jail to consult. His legal representative cannot have access to his computer which hampers the preparation of his defence in the criminal trial.

7.19. He can afford the amount of R2,000 for bail.

7.20. He can report at Soshanguve SAPS near his family house which is a fixed address.

[8] In relation to the second accused applying for bail, the following information is provided in the statement presented in support of bail.

- 8.1. He has no previous convictions no investigations except current matter.
- 8.2. It will be in the interest of justice to be released on bail.
- 8.3. He was arrested on 23 March 2022 around 6am in GaRankuwa where he was renting a room, next to accused 1.
- 8.4. He was charged and made appearances at Ga-Rankuwa Court.
- 8.5. He has been in custody since the day of his arrest.
- 8.6. He has resided at his address for 2 years with his partner.
- 8.7. Partner has advised him that she has moved due to financial difficulties.
- 8.8. If released on bail he will reside with his family.
- 8.9. He has no travel documents such as a passport and has never travelled abroad.
- 8.10. He owns a house at 30294 Soshanguve to the value of R500k, and prior to his arrest he was busy building the house.
- 8.11. He has household affects and jewelry valued at R200k and he has no friends or family outside the country.
- 8.12. He is not married and his living child passed away. The mother of an unborn child was pregnant at the stage that he was arrested and he does not know if the child was born.
- 8.13. Prior to his arrest he was self employed as a certified herbalist and assisted people with traditional affairs.
- 8.14. His health is in good condition but in the detention facility he has received no vaccines to date.
- 8.15. He intends to plead not guilty and reserve his right to remain silent at the trial.
- 8.16. The following exceptional circumstances warrants his release on bail:
- 8.16.1.
- That there was no identification parade held.
- 8.16.2.
- That nothing incriminating was recovered from his possession
- 8.16.3.
- The State would suffer no prejudice should he be granted bail.
- 8.16.4.
- The iinvestigation is finalised and he cannot interfere with the investigation or the witnesses.

8.16.5.

Further detention will hinder him with being adequately prepared for trial, as his attorney cannot bring all documents to jail.

8.16.6.

His aunt is present in court room.

8.16.7.

He cooperated with the police in investigation.

8.16.8.

In terms of section 64 he has no knowledge of any evidence, and undertakes to not interfere with further investigations and will not contact with

8.16.9.

Incarceration will only prejudice hips, not anyone else.

8.16.10.

His release will not disturb public order, it will not be against proper functioning of legal process.

8.16.11.

He stands the risk of losing his assets.

8.16.12.

He can afford R2,000 for bail.

8.16.13.

He can comply with all conditions placed on his bail, should it be granted.

8.16.14.

He can report at Loata SAPS in Soshanguve

[9] The State led the following evidence by the investigating officer:

9.1. Both accused were identified by means of an Identification Parade conducted.

9.2. Both of the accused are linked to the crimes by virtue of the cellphones that were found in their possession, which cellphones are directly connected to the commission of the crimes.

9.3. The modus operandi followed by the accused, were to place Facebook advertisement under Facebook Markeplace for various items. Members of the public would respond and the accused would meet the members of the public, at which point the complainants were either transported to another location, or robbed of their property.

9.4. The count of murder was where a former South African Defence Force officer attempted to defend himself with his own weapon, but was killed with that very same weapon.

9.5. The cellphones of the accused are not registered in their names.

9.6. The cellphones of the accused were confiscated from the person of the accused.

9.7. The cellphone records place the accused's and the complainants on the same vicinity during the time that the offences were committed.

9.8. The investigation of the South African Police has been finalised.

9.9. The investigating officer is against granting the accused bail, on the basis that, inter alia, the case against the accused, especially accused 1 and 2 is so strong and supported with so much real and independent evidence that an escape of failure to adhere to bail conditions is a reality which cannot be overlooked.

Legal position

[10] Prior to the enactment of section 67A of the CPA, which was inserted by section 9 of the Criminal Procedure Second Amendment Act 75 of 1995, the position of bail was described by authors as the enactment of a contract between the accused and the State in terms of which the accused, under certain conditions, undertook to be present at the hearing. Section 9 however, provides that failure to adhere to the bail conditions is to be held criminally liable. This is clear from the legal position as discussed in Joubert (ed) Criminal Procedure Handbook 13 ed (2020) 229; S v Williams 2012

(2) SACR 158 (WCC) at [3]–[4].

[11] Adv Shela argued that the overpopulation by the prisons are a fact that should be taken into account in the decision whether to provide bail or not. the following has been stated in Du Toit: Commentary of the Criminal Procedure Act:

“Overpopulation of a prison poses a threat to the dignity, physical health and safety of its inmates (see generally Cameron 2020 SALJ 32 at 45; S v Nando (unreported, GJ case no A39/2020, 8 May 2020) at [6]). This much has been acknowledged by the legislature by its insertion of s 63A in the Criminal Procedure Act. Section 63A was inserted by s 6 of the Judicial Matters Amendment Act 42 of 2001 and came into operation on 7 December 2001. See Government Gazette 22912 dated 7 December 2001. Section 63A introduced a novelty. It provides for the possible release (or possible amendment of the bail conditions) of accused persons who

fall in a prescribed limited category and who find themselves in a prison where the head of the prison is satisfied that the prison

population of his prison 'is reaching such proportions that it constitutes a material and imminent threat to the human dignity,

physical health or safety of the accused concerned. . .’ See s 63A(1).”

[12] Two (2) issues are relevant on this score. The first issue, is that it is a novelty and should be initiated by the prison head on satisfaction of certain conditions. There is a limited category of accused persons who fall in that prescribed limited category and with the charges levelled against the accused, they are not part of these limited category prisoners. Further, when the accused are imprisoned pending trial proceedings, the head of the prison may apply for the release on bail to be reconsidered upon being satisfied of certain conditions.

[13] The purpose of bail is set out as follows in Du Toit: Commentary on the Criminal Procedures Act, RS 66, 2021 ch9-p5

“The purpose of bail is to strike a balance between the interests of society (the accused should stand his trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his trial, is presumed to be innocent) (Majali v S (unreported, GSJ case no 41210/2010, 19 July 2011) at [17]; Cameron 2020 SALJ 32 59–60). In Nagel (ed) Rights of the Accused (1972) 177–8 the following valid remarks are also made (our emphasis):

'The basic purpose of bail, from society's point of view, has always been and still is to ensure the accused's reappearance for trial. But pretrial release serves other purposes as well, purposes recognised over the last decade as often dispositive of the fairness of the entire criminal proceeding. Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defense [sic] with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble. . . . In the past decade, studies have shown that those on pretrial release plead guilty less often, are convicted less often, go to prison less often following conviction than those detained before trial. This is true even when the study controls for factors such as employment at the time of arrest, retained or assigned counsel, family ties, past record and present charge. The factor of pretrial release alone shows up as a vitally controlling factor in the outcome of the trial and sentencing. . . .”

[14] The granting of bail,' said Roberson AJ in S v Jacobs 2011

(1) SACR 490 (ECP) at [12], 'recognises an awaiting-trial accused's right to liberty while he is presumed innocent.' In S v Panayiotou (unreported, ECG case no CA&R 06/2015, 28 July 2015) at [11] Goosen J stated: 'Bail proceedings . . . concern questions of the liberty interest of a person who is presumed to be innocent until his . . . guilt is proved in a court of law.'

[15] In S v Acheson 1991

(2) SA 805 (Nm) Mahomed J remarked as follows (at 822A–B):

'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.'

[16] In *Du Toit: Commentary on the Criminal Procedure Act* the following is held at RS 66, 2021 ch9-p6:

"The above passage was cited with approval by the Supreme Court of Appeal in Crossberg v S [2007] SCA 93 (RSA) at [13] note 1. At [13] it was also said:

'It is so that there is a different emphasis in respect of bail pending finalisation of a trial as against bail pending finalisation of an appeal. The presumption of innocence operates in favour of an accused until his guilt has been established in court.'

(See also *S v Sambo* (unreported, NCK case no CA 01/2020, 17 June 2020) at [33]; Mokoena *A Guide to Bail Applications* 2 ed (2018) 48.)"

[17] Each case should be considered on its merits and the court should consider the 'totality of the evidence' (*S v Nkuna* (unreported, GNP case no A82/2013, 22 February 2013) at [9]) or the 'totality of the facts' (*S v Mawela* (unreported, GNP case no A713/2012, 30 November 2012) at [20]). A bail court's judgment must account for all the evidence (*S v Mququ* 2019

(2) SACR 207 (ECG) at [16]).

[18] In the matter of *S v Yanta* 2000 (1) SACR 237 (Tk) at 249C-D the court expressed the view that, on a proper construction of Section 60(11) of the Criminal Procedure Act, the interests of the society and the proper and effective administration of the criminal justice system are paramount and the personal interest of the accused must be secondary to the administration of criminal justice.

Analysis

[19] The question of whether the accused would stand trial and should be granted bail, should be weighed against the question of the strength of the State's case against the accused.

[20] The evidence of sergeant Tshabalala impressed this Court as straight-forward and honest. He readily conceded that the cellphones were not registered in the accused's names. He was also very consistent with his evidence that the case against the accused is extremely strong, which included the holding of ID parades during which the accused were identified, and the tracing of the cellphone records that prove that the accused were in the vicinity of the complainants when the charges occurred. Sergeant Tshabalala also conceded that the investigation has been finalised. He conceded that there cannot be interference with the witnesses on the basis that the investigation has been finalised.

[21] This, however is not for the investigating officer to speculate on whether the witnesses can be intimidated by the accused, should they be released on bail. The charges against the accused are serious of nature and the witness list has been made available to the accused. The accused have the opportunity to intimidate the witnesses as identified on the list, should they be released on bail. The seriousness of the charges faced by the accused make this a real possibility.

[22] The version of the accused that no identification parade was held, is in stark contrast with the version of the investigating officer that stood firm under cross-examination that the identification parade was indeed held. The evidentiary value of a statement, which cannot be cross-examined, and the evidentiary value of a witness providing

oral evidence (and has been cross-examined) are not the same. The oral evidence, having been tested under cross examination, has more weight than the statements under oath that was read into the record.

Conclusion

[23] For the reasons above, I find that it would not be in the interest of justice that bail be granted.

[24] As such, bail is denied.

Order:

Bail is refused for accused 1 and 2.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

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