

SOUTH AFRICA / JUDGMENT

Nhantumbo v S (A21 / 2023) [2023] ZAMPMBHC 26 (10 May 2023)

[2023] ZAMPMBHC 26

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

A21 / 2023

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

CASE

NO: A21 / 2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

10 MAY 2022

SIGNATURE:

In

the matter between:

TORNECA
CARLOS NHANTUMBO
APPELLANT
and
THE
STATE
RESPONDENT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 10 May 2023.

J U D G M E N T

RATSHIBVUMO J:

[1]

Introduction:

This is an appeal against the refusal of bail by Magistrate EPJ Hall sitting in the Nelspruit District Court (the court a quo). The Appellant, a 30 year-old Mozambican national, was arrested on 02 March 2023 along N4 Road while driving a Toyota Hilux valued at about R700 000.00 (the motor vehicle), that was reported stolen in Kempton Park on 01 March 2023. In light of the short period that lapsed from the time the motor vehicle was stolen, the State preferred a charge of theft against the Appellant, relying on the doctrine of recent possession. On 13 March 2023, the Appellant brought an application for bail. Bail was refused with the Learned Magistrate holding that it was not in the interests of justice for him to be so released.

[2]

The Appellant now appeals against the decision to refuse him bail arguing that the Learned Magistrate erred in weighing more on the strength of the State case than the interests of justice. In so doing, the Appellant argued, the court a quo convicted him of the crime he faced, at the bail hearing stage. He further submitted that the Learned Magistrate used the refusal of bail, as a form of punishment for the crime he allegedly committed. He also submitted that the Learned Magistrate erred in finding that it was not in the interests of justice for him to be released on bail. According to the Appellant, the evidence led proved that: -

a.

He will attend his trial until the matter is finalised.

b.

He has no family ties within the jurisdiction of South Africa (sic).

c.

He will not evade the trial.

[3]

Evidence in the bail application.

Bail

application took place at the backdrop of the provisions of section 60(11)(b) of the Criminal Procedure Act, no. 51 of 1977 (the Criminal Procedure Act), which provides, “[N]otwithstanding 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.” When he was afforded the
opportunity, the Appellant adduced evidence by way of affidavit
in an
attempt to show that the interests of justice permit his release.

[4]

In essence, the Appellant averred that he
was born in Manyisa in Mozambique. He is a holder of a Mozambican
passport. He resides
in Palm Ridge, Gauteng, at a given address, with
his uncle (although this was read into the record as “the aunt”
by
his legal representative), his wife and his eight years’ old
child who is a scholar. He has been residing in the said address
for
the past seven years. He is self-employed as a barber making about
R4000.00 per month. He is a father of two kids including
the one who
resides with him. He has no immovable property, but owns movables
such as furniture to the value of R50 000.00.

As for the merits
of the case, he chose to remain silent save to say he denies the
allegations levelled against him.

[5]

The State led evidence of the Investigating
Officer, Sgt Johan Mkhathswa. He is a member of the South African
Police Services attached
to the Vehicle Theft Unit. He has been with
that unit for seven years. The Appellant was arrested by Tracker
employees on 02 March
2023 while driving a motor vehicle that was
reported stolen in Kempton Park a day before. The motor vehicle was
being driven towards
the direction of Mozambique.

[6]

Sgt Mkhathswa got in touch with the
Appellant after he was brought to the police station. He obtained a
passport from the Appellant
and managed to verify its validity with
the Department of Home Affairs. He was also able to verify the
Appellant’s residential
address. The residence belonged to the
Appellant’s aunt who was also in court’s attendance. The

Appellant erected a shack in the same yard where he conducts his business as a barber. The only property the Appellant owned, according to the Investing Officer, was his hair-cutting machine. The Appellant informed him that he was instructed over the phone by a certain "Thebu," to drive the motor vehicle to Malelane. No further details were given regarding where it was fetched from, the purpose for taking it there or any reward for doing so.

[7]

He testified further that he was not opposed to the release of the Appellant on bail. His main reason was that the Appellant was willing to point out "Thebu" to him. Understanding the difficulty, the Appellant would encounter as a foreigner, roaming across Gauteng without a passport, he requested the court not only to release him on bail, but to also allow him to have his passport back. He had no issues with the fact that the Appellant would be able to cross the border to Mozambique. He was confident that even if the Appellant goes back to Mozambique, he would come back on his own.

[8]

At the time he gave evidence, he had no details of the circumstances under which the motor vehicle was stolen from its owner in Kempton Park, saying, he was yet to communicate with the Investigating Officer handling the case that side. He also did not have the details as to how often had the Appellant crossed the border in and out of South Africa using his passport.

[9]

Acting in terms of section 60(2)(d) of the Criminal Procedure Act, the court a quo asked the Public Prosecutor, Mr. J Mnisi, who was not opposed to the release of the Appellant on bail, to furnish the reasons for not opposing bail. The reason he gave, at the beginning of the application and in closing argument was that the Investigating Officer was not opposed to bail as he had verified the Appellant's residential address. Despite this position, bail was refused with the court a quo relying heavily on section 60(10) of the Criminal Procedure Act which provides, "Notwithstanding the fact that the prosecution does not oppose the granting of bail,

the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.”

[10]

On appeal.

This appeal is opposed by the Respondent. Adv. Mathebula who appeared for the Respondent, submitted that the court of appeal can only interfere with the quo’s decision if it is satisfied that its finding was wrong. Emphasis was placed on the provisions of section 65(4) of the Criminal Procedure Act provides,

“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.”

[11]

In

S

v Barber[1],

Hefer J interpreted the above provision as follows,

“It

is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has 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 that

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.”

[12]

As

the court a

quo

noted, the Appellant did not only choose to present his evidence by way of affidavit, which is generally less persuasive than viva voce

evidence, as an affidavit cannot be cross-examined;^[2] but he also chose to say nothing about the merits of the case or what his defence shall be when the matter goes on trial. While exercising the right to remain silent remains his prerogative, the challenge an applicant for bail faces when he chooses to say nothing, is when the State presents evidence on merits that shows that there is a strong case for him to answer, as it happened in casu.

[13]

Section 60(4)(b) of the Criminal Procedure Act provides that interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established: "... (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..." Section 60(6) provides further that in considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors, namely, "the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial."

[14]

As

Navsa JA observed in S

v Oosthuizen and Another^[3],

"the seriousness of the offences and the probable sentences militate against releasing the appellants on bail." In

S

v Sibeko and Others^[4],

Mngqibisa-Thusi J evaluated the impact of the strong case against the appellants and said, "taking into account the serious nature of the offence the applicants are faced with, their previous convictions and the likelihood that should they be convicted, they are likely to face long terms jail sentences, I am not convinced that the applicants would not evade their trial."

[15]

The undisputed evidence led by the State was to the effect that the Appellant was found in possession of a recently stolen motor vehicle. In view of the value of the stolen property as per charge sheet, the prescribed minimum sentence to be imposed in case of conviction is 15 years' imprisonment. With

this kind of sentence, the likelihood of the Appellant evading trial is great.

[16]

It is hard to understand how the Investigating Officer decided not to oppose bail at the stage that he had not even established the circumstances under which the motor vehicle was stolen from its owner. A possibility exists, as it often does that the schedule under which the offence was categorized, could easily change once those circumstances are established. At the time of bail hearing, it was unknown if the motor vehicle could have been robbed, if dangerous weapons were used in the process, or if the owner survived the ordeal. The Investigating Officer did not even deem it necessary to ask the court for time to establish this important element before deciding whether to oppose bail or not.

[17]

Other aspects that the court a quo had to consider are the ties the Appellant has in the Republic of South Africa, that may see him standing his trial to the end. In paragraph 8.2 of his affidavit, the Appellant alleges that his whole family is based in Mozambique. He also alleged in the affidavit that he has properties outside South Africa. He however did not elaborate on what kind of properties he meant. It is common cause that the residence which was confirmed by the Investigating Officer belongs to his aunt/uncle whose names or details were not furnished to the court. The type of residence remains unknown as to whether it is a house, a shack or a flat, and whether the aunt/uncle is a tenant or the owner thereof. The details on why the Appellant resides there or whether he is a tenant where equally withheld.

[18]

It is important to note that the Appellant's alleged marriage and the children he has were not proved as no marriage or birth certificate were attached to his affidavit. Furthermore, there is no explanation on how the Appellant ended up residing in the country for seven years while all he has was a passport. The affidavit talks about him working (self-employed) in the country, but is silent on whether he has a work permit. After evaluating all the above, the court a quo concluded that releasing

the Appellant
on bail was not in the interest of justice.

[19]

There is no doubt that the court is
entitled to attach the necessary weight to the State's attitude
towards the release of
an applicant on bail, but this has to be
grounded on the reasons thereof. The reason furnished by the
Investigating Officer for
not opposing bail is in my respectful view,
very flimsy. It suggests that there is a main culprit who should be
arrested with the
help of the Appellant. But the evidence available
in the docket points to the Appellant as the culprit.

[20]

Even if the said Thebu was to be arrested
to stand trial with the Appellant, it does not look like he
considered aspects such as
admissibility of the evidence to be
tendered against him when given by a co-accused. Presuming that Thebu
exists and that he is
the main culprit (which would be peculiar as
the Appellant chose not to mention his existence in the affidavit),
no coherent explanation
was given on why the Appellant cannot assist
the police in getting him arrested while he is in custody.

[21]

In granting bail, a court does not
guarantee that the accused will attend court until the case against
him/her is finalised. Experience
shows that some do come back, while
others do not do so, even after promising under oath that they will
not skip bail. It however
remains the duty of the court to take all
the necessary steps to ensure that in the event the applicant skips
bail, he can be rearrested.

This entails that the police should know
where to arrest him/her in that eventuality. Circumstances of this
case as presented by
the Investigating Officer are somewhat
disturbing as the choice on whether to stand trial or not would be
totally at the Appellant's
hands, without any remedy to have
him re-arrested, in case he leaves the country, never to return.

[22]

It seems the Public Prosecutor may have
been under the impression that the reasons expected from him, as
contemplated in section 60(2)(d) of the Criminal Procedure Act, in
case he is not opposed to bail, should mirror those of the
Investigating Officer, or that he was bound by his views. Even after
evidence was led which clearly demonstrated that the interests of

bail did not permit the Appellant's release on bail, he stood by his pre-hearing submissions because those were the views by the Investigating Officer.

[23]

The Appellant's submissions suggesting that the Learned Magistrate erred in his findings, concern the doubt on whether he will stand trial as he promised. Unfortunately, when it comes to bail, the court is not supposed to merely take the applicant's word and take it as the truth. It has to be evaluated against the personal circumstances and facts of the case for the court to decide if there is the likelihood that he may evade the trial. It is wrong to suggest that the court a quo refused bail so as to sentence him. This argument is not substantiated by facts. Even if the Appellant may have been honest in his undertaking to not evade trial, the court is not called upon to decide on his rectitude. It is called upon to decide on the likelihood for him to evade trial, taking into consideration the totality of facts before it.

[24]

I cannot find with the facts above that the Learned Magistrate was wrong in his finding that the Appellant failed to show that the interests of justice permit that he should be released on bail.

[25]

In the result the following order is made:

Appeal
against the refusal of bail is dismissed.
TV RATSHIBVUMO
JUDGE OF THE HIGH
COURT
FOR

THE APPELLANT:

MR.
MP MASEKO
INSTRUCTED

BY:

MP
MASEKO INC
MBOMBELA
FOR

THE RESPONDENT:

ADV
EC MATHEBULA
INTRUSCTED

BY: DIRECTOR
OF PUBLIC
PROSECUTIONS
MPUMALANGA
MBOMBELA
DATE
HEARD
09
MAY 2023

JUDGMENT

DATE: 10 MAY 2023

[1] 1979 (4) SA 218 (D) at 220E–H

[2] See *S v Mathebula* 2010

(1) SACR 55 (SCA) at para 11 and *S v Mbaleki* 2013 (1) SACR 165 (KZD) at para 4.

[3] 2018

(2) SACR 237 (SCA) at para 38.

[4] (2/2016)

[2016] ZAGPPHC 852 (15 September 2016) at para 20.

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