

SOUTH AFRICA / JUDGMENT

S v Mokone (CA 01/10) [2010] ZANWHC 16 (10 June 2010)

[2010] ZANWHC 16

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

CAB1/2009

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IN THE NORTH
WEST HIGH COURT
MAFIKENG
CASE NO.:
CAB1/2009
In the matter

between:

WINSTON BHEKI
MOKONE

.....APPLICANT

and

THE STATE

.....RESPONDENT

DATE OF HEARING

: 10 SEPTEMBER 2010

DATE OF

JUDGMENT : 30 SEPTEMBER 2010

FOR THE

APPLICANT : IN PERSON

FOR THE

RESPONDENT : ADV MUNYAI

JUDGMENT

LANDMAN J:

[1] The applicant seeks an interdict against the State to prohibit it from prosecuting him on a reconstructed docket or at all. The State opposes the application.

[2] The history of this matter needs to be stated briefly:

(1) The applicant appeared for the first time at the Odi Reception Court on 31 July

2009. He was represented by Mr Makinta. He was charged with:

Possession, on 30 July 2009 at Mabopane, of suspected stolen motor vehicle Toyota Hi-Ace stolen during a robbery on 29 July 2009.

Possession of a firearm and ammunition without a licence or while not being a licensed holder of a firearm.

(2) He was remanded in custody for an identity parade and bail application to be held on 7 August 2009.

(3) The matter was further postponed to 14 August 2009 and transferred to the Bafokeng Magistrate's Court.

(4) On 11 August 2009 the applicant appeared in Bafokeng District Court on Charges of murder and armed robbery were added. The case was postponed to 18 August 2009.

(5) The applicant appeared again in Bafokeng on 14 August. But the case was transferred to the Odi court.

(6) The magistrate was absent on 18 August 2009. The matter was postponed to 2 September 2009 for the bail application. But on 26 August, the applicant represented by Mr Raikane again appeared in court. The matter was postponed for the bail application on 2 September.

(7) On 2 September 2009 the bail application commenced. The applicant was represented by Mr Raikane. The case was postponed for further evidence to 9, 11 and 29 September 2009.

(8) On 29 September 2009 the matter proceeded and was then rolled over to 30 September for further evidence. The case was postponed for judgment on 7 October 2009. Bail was denied. The case was postponed to 6 November 2009 for further investigation.

(9) On 6 November 2009 the case was postponed to 5 February 2010 for the docket to be forwarded to the DPP for decision.

- (10) On 5 February 2010 the State informed the court that the docket was either, mislaid, lost, stolen, sent to DPP or with the prosecutor in Kimberley who was attending a management course. The defence opposed a further postponement. The State was given an indulgence to trace and locate the docket. The case was postponed to 5 February 2010.
- (11) On 5 February 2010 the matter was postponed to 15 February 2010 for the prosecutor to find the docket.
- (12) Mr T C Mphoga says that:

“On the 15th February 2010 it was beyond doubt that the docket was stolen thus confirming our reasonable suspicion of SAPS member’s collusion

and complexity because during bail application defence even though not given contents of docket, had in its possession SAPS confidential copy of the suspect’s profile.

The court postponed the case to 15 March 2010 for reconstruction of the docket.

Upon investigating officer’s return from leave, and to the delight of the State, he indicated that he foresaw such an eventuality of this docket being stolen hence he made and had a duplicate copy of the original docket. Matter was the postponed to the 6th August 2010 for DPP’s decision.”

On 1 April the following two duplicate dockets were received by the DPP’s administration component:

- (a) Phokeng CAS 363/07/2009
- (b) Mabopane 290/07/2009

An office file was opened with reference 9/2/4/1-61/10Ba and handed to Adv L van Niekerk on 10 May for purposes of making a decision on the dockets.

On 13 May Adv van Niekerk directed queries to the investigating officer in order to get the matter ready for court. The dockets were sent back to the investigating officer on 20 May.

- [3] It is common cause that the applicant was arrested more than eleven months later ago. He is still not on trial. He has not been provided with sufficient details to answer to the charge.
- [4] The applicant submits that he will be prejudiced and not get a fair trial since:
- (a) The docket is lost. The new docket which has been reconstructed had been done so without his initial statement to the arresting officer during the arrest and without the statement he had given to the first investigating officer during the period he was charged the first time.
 - (b) Appearing before a trial court without these statements will prejudice him gravely in that it might appear that at the time of the arrest he did not give an explanation of who and where the owner of that car was

- (c) Other exculpatory statements which were submitted would not be in the new docket. He was not approached to submit statements in the first place.
 - (d) The investigating officer has committed perjury knowingly during the bail application to deny him bail. The investigating officer did not want him to get bail at all notwithstanding the facts of the case.
- [5] The applicant says that there is a concerted effort to tamper with his right to a fair trial:
- (a) When one consider the number of requests made to be furnished with transcripts only to be informed that the disc is missing in action frustrated his bail proceedings.
 - (b) The fact that the entire section 342A application was not recorded. That on its own seeks to frustrate this very application.
 - (c) The missing docket not only frustrates his right to a fair trial with regard to a speedy trial but also to destroy his credibility with regards to his defence.
 - (d) The correct procedure was not followed while reconstructing the docket. He submits that the docket is not lost but rather there is an attempt to tamper with the docket to his detriment.
 - (e) There is no certainty that the State would be ready to prosecute on the next date. Further investigation could be ordered which would further prejudice him and the likelihood finding any new evidence is nil.
 - (f) Due to the number of remands in this matter he cannot afford his own legal representation.
 - (g) Due to the delay in this matter the docket was negligently lost.
 - (h) Due to the negligence of the State he has not been able to appeal the decision of his bail appeal as the matter was not recorded.
- [6] The applicant submits that his constitutional right to liberty has been violated and due to that he is suffering irreparable harm as follows:
- (a) His family home is on the verge of being sold as a result of non-payment.
 - (b) All the companies who provided credit are suing him and he cannot honour their payments or appear in court.
 - (c) His family is without a breadwinner and his wife is also threatening to divorce him.
 - (d) He has currently no source of income.
 - (e) He cannot afford to pay for competent legal representation.
 - (f) His illness and his age are not static.
 - (g) His company has since been vandalised and looted due to non-occupation. See Mabopane police case number 95/6/2010 and 0160/01/2010.

[7] The State opposes the application on the following basis:

- (a) The application is not urgent.
- (b) There is no reasonable delay in bringing the prosecution of the applicant to finality.
- (c) There is no prejudice that the applicant has suffered or will suffer as a result of the intended prosecution.
- (d) It is not in the interest of justice that the prosecution be stayed.
- (e) The permanent stay of prosecution sought by the applicant is not the appropriate remedy.
- (f) At this stage of the offences identified are murder, robbery with aggravating circumstances as well as possession of an unlicensed firearm and ammunition which are all very serious offences.
- (g) The State has already made out a very strong case against the applicant in this matter, not only was the accused caught red handed in the hijacked vehicle of which the deceased had been the driver, but he was also found in possession of an unlicensed firearm and a cell phone that was identified as that of the deceased.
- (h) The further investigation that the investigating officer was required to do mostly resolves around the chain statements of the various exhibits (firearm, ammunition, cell phone) that was found in the possession of the accused at the time of his arrest. Furthermore there are a few more statements that need to be obtained from persons who are easily accessible. What is of importance is the fact that the accused is positively linked to the offences and that those statements are already in the docket.
- (i) The statements and investigation outstanding, to get the matter trial ready, is of such a nature that it could be complied with in a short space of time.
- (j) The accused will, after the investigation is finalised, most definitely be arraigned for trial in the High Court since the charges that he faces falls within the ambit of section 51(1) of Act 105 of 1997.
- (k) It was said from the Bar that the DPP will be in a position to take a decision within one or two weeks i.e. by the first week of October 2010.

Evaluation

- [8] I am convinced that the application is urgent. Virtually every case which involves allegations of unlawful denial of liberty is urgent. Except for the lost time caused by the disappearance of the docket it cannot be said that this case is taking unduly long to reach a stage where the indictment will be served on the applicant.

- [9] The applicant complained that the “reconstructed” docket does not contain the statement he made soon after his arrest. I pause to note that the applicant says he had not been given access to the material in the docket but he does not say how he knows that his statement is not included in the docket.
- [10] The applicant submitted that he would be prejudiced if his first statement were not to be considered by the DPP. The applicant could provide the investigating officer with a statement and supply details of his alibi should he wish to do so.
- [11] I accept that the applicant is suffering some prejudice but his circumstances with reference to *Sanderson v Attorney General, Eastern Cape* [1997] ZACC 18; 1998
- (1) SACR 227 (CC) do not justify a permanent stay of prosecution. He has, however, made out a case for alternative relief. I intend to order the State to serve the indictment on him by 31 October 2010.
- [12] In the premises:
1. The application is found to be urgent.
 2. The State is directed to serve an indictment as regards the offences set out above on the applicant on or before 31 October 2010.
 3. Should the State fail to do so, the applicant may re-enrol this application, suitably amplified, for hearing.
 4. There will be no order for costs.

A A LANDMAN

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE RESPONDENT : STATE ATTORNEY

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Prepared on 11 October 2026 · Esheria