

SOUTH AFRICA / JUDGMENT

Shungube v S (BA06/2024) [2024] ZAMPMBHC 73 (1 October 2024)

[2024] ZAMPMBHC 73**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

BA06/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MBOMBELA

CASE

NO: BA06/2024

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE 01/10/2024

SIGNATURE**In**

the matter between:

ELIJAH
SHUNGUBE
APPELLANT

and

THE
STATE
RESPONDENT

This judgment was
handed down electronically by circulation to the parties and/or
parties' representatives by email. The date
and time for
hand-down is deemed to be 01 October 2024 at 10:00.

JUDGMENT

Mashile J

Introduction

- [1] On 9 January 2023, the Komatipoort Magistrate's Court ("the court a quo") per Ms Tsotetsi refused to admit the Appellant ("Shungube") to bail. Dissatisfied with the decision of the Court a quo, on 19 July 2023, Shungube appealed the decision. The apprehension and subsequent detention of Shungube derive from two separate counts, one of culpable homicide and the other, murder as read with section 51(2) of the Criminal Law Amendment Act 105 of 1997.

Factual Matrix

- [2] The facts upon which the court a quo premised its decision to deny admission to bail have been briefly set out in the judgment of the Court a quo from which I proceed to borrow extensively. Shungube is a 37-year-old married man with children who are still minors. He was employed as a security officer guarding people not to illegally cut wood from the forest on the date of the incident. His motor vehicle broke-down. In consequence, he borrowed another motor vehicle from his friend, Mr Mathebula ("Mathebula").
- [3] Acceding to the request, Mathebula provided the vehicle as requested. Shungube left in the company of Mathebula's now deceased son who was also the driver. The two fetched another security officer and a watchman following which, all four drove to the forest. On arrival at the forest, the driver got off the vehicle. Confronted by a wild animal emerging from the bush, he ran back to the vehicle. Shungube took out a homemade gun to shoot the animal. He missed it and inadvertently shot Mathebula's son.
- [4] Suddenly, the watchman who was part of the crew, took-off and ran away. To stop the watchman from doing so, Shungube shot him. Both Mathebula's son and the watchman died at the scene of crime. Shungube and the other security officer ran to the owner of the forest for help but could not find anyone let alone the owner. The two returned to the scene of crime where Shungube took-off his bloodstained shirt, cut it up and threw it into the river. He left the scene of crime to change his clothes and headed straight to the police station to report the case. When doing this, he lied to the police by telling them that they were attacked by strangers from whom they had run away to obtain assistance.

Grounds of Appeal

- [5] Insofar as I could decipher, there are only two grounds upon which Shungube challenges his denial to admission to bail by the Court a quo. One of these grounds is based on the provisions of section 60(11) of the Criminal Procedure Act, 51 of 1977 (“the Act”). The Court a quo is said to have erred in its finding that the admission of Shungube to bail would not be in the interest of justice.
- [6] Although not in so many words, the Court a quo is further said to have erred in finding that there was evidence that, if admitted to bail, Shungube would probably engage in the risks envisaged in section 60(4)(a) to (e) of the Act.

Assertions by the Parties

- [7] Shungube asserted that in denying bail, the Court a quo leaned heavily on the evidence of the investigating officer who stated that if admitted to bail Shungube would, as he has already done, continue to threaten the only eyewitness and other people such as those who protested outside the court.
- [8] The Court a quo, without any critical scrutiny of the evidence of the investigating officer, accepted that it would be unsafe to admit Shungube to bail given the hostility against him. In this regard, the Court a quo pointed out to the fact that Shungube’s house had already been gartered by fire started by members of the community among which he lives. In any event, it was also the Court a quo’s concern that the mere fact that Shungube had made threats to the protesters, is sufficient to think that the other people involved in the case too would not be safe were he to be admitted to bail.

The Court A Quo’s Reasons for Denying Bail

- [9] It is noticeable from the judgment that when denying bail to Shungube, the following weighed heavily on the Court a quo:

9.1 Given the history of the case, the possibility of intimidation of witnesses always lurked. It also could not be ruled out that he would not engage in some other form of interference with the witnesses especially because Shungube knew the only eyewitness, and everyone involved in the case;

9.2 The Court a quo was also concerned that Shungube could conceal and or destroy evidential material, as he had already done by throwing his shirt into the river albeit that it was later recovered and evidence secured;

9.3 Shungube’s life would be imperilled if the burning of his house was anything to determine this;

9.4 Equally, the lives of other people would be endangered as Shungube had allegedly declared that he would deal with protesters;

9.5 Shungube did not reveal his defence during the bail application; and

9.6 The charges involved violence and were serious. As such, there existed a chance of a severe sentence ensuing in the event of conviction.

[10] Perhaps I should indicate at this juncture that the reasons for the denial of bail to Shungube as outlined above include those that the State has put forward as grounds for this Court to uphold the decision of the Court a quo. In the main, those are the reasons put forward by the investigating officer.

Issues

[11] The first obvious issue to confirm is the lack of determination of the question whether the bail was to be decided based on Schedule 5 or 6. It is evident that the Court a quo simply dealt with the matter as one that fell under Schedule 6 without accounting for its decision. It is common cause between the parties that the Court a quo should have properly gone through the exercise and trouble of probing and verifying why it thought Schedule 6 was applicable in

these circumstances.

[12] The second issue is whether the Court a quo misdirected itself by denying to admit Shungube to bail in circumstances where he deserved to have been released. In other words, could it be that the Court a quo regarded its denial of bail as an anticipatory punishment if Shungube is subsequently found guilty and convicted?

Legal Framework

[13] To the extent that admission to bail is governed by Section 60 of the CPA, it will be instructive to cite some of the provisions in full. Section 65(a) provides:

“An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by imposition by such court of

condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

[14] Section 65(4) provides that:

“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.”

[15] Section 60(11)(b) provides that:

“Notwithstanding 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.”

[16] Section 60(4) deals with instances where it will not be in the interest of justice to admit an accused person to bail. It provides as follows:

“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 the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (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; or
- (c) where there is the 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 the 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 the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

[17] Turning to case law on the subject of bail, counsel for Shungube referred this Court to the matter of *S v C*,^[1] where the Court held that “it could not have been the intention of the Legislature that an alleged offender must be detained when he has established conclusively that he will attend his trial, that he will not interfere with the administration of justice, and that he will commit no further wrongdoing... As soon as more is required of him, the procedure becomes punitive”.

[18] This Court per Legodi JP in the unreported matter of *Petrus Khoza v The State*,^[2] commenting on the strength of the case of the State had this to say at Para 8 of the judgment:

“The fact that there is a strong case against an accused person, does not mean the end of the road for an accused person in a bail application. The critical issue is whether he or she will stand his trial despite the strength of the state case and the resultant punishment if found guilty. For this purpose, the accused’s flight risk was to be considered.”

[19] Commenting on the provisions of section 60(4)(a) to (c), Kubushi J in the case of *S v Diale and Another*,^[3] held that:

“A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released”.

Analysis

[20] The starting point must be the issue concerning the characterisation of this case as falling under Schedule 6 and not 5 by the Court a quo. I note that both parties agree that to the extent that the Court a quo treated this matter as a Schedule 6, it has misdirected itself. In other words, no exceptional circumstances need be establish as though this were a Schedule 6 before Shungube can be admitted to bail. It will suffice to demonstrate on a balance of probabilities that it will be in the interest of justice that he be admitted to bail, as intended in section 60(11)(b) of the Act. Save to agree with the parties that given the facts, the Court a quo should have proceeded on the basis that it was a Schedule 5.

Intimidation and/or Interference

- [21] The Court a quo found that it was disquieting that the possibility that Shungube could interfere with and/or intimidate the only eyewitness could not be excluded. While this concern is genuine, the Court a quo ought to have considered it against what had already happened. It is useful when engaging in this exercise to bear in mind that it will be futile for Shungube to intimidate the eyewitness because the latter's testimony has already been secured in the form of a sworn statement, which has also been supplemented. Thus, the allegation of intimidation or interference is irrational considered against that backdrop.
- [22] The allegation that the eyewitness is distraught and fears that Shungube may attempt to take his life cannot be correct. This must be so because the eyewitness did not display such fear when he narrated what transpired on that eventful day when the lives of two people were cut short especially because he did so before the arrest of Shungube. I therefore agree with Counsel for Shungube that the issue relating to fear is contrived and this Court should not entertain it.
- [23] Other than the above, the Court a quo seem to have disregarded the testimony of the investigating officer that the eyewitness has moved from his usual address and that he has changed his contact numbers. Shungube will not be able to find the eyewitness unless of course the investigating officer discloses his whereabouts, something that the eyewitness specifically requested the investigating officer not to do. The intimidation or interference mentioned in the judgment is therefore misguided.
- [24] Lastly on this issue, Shungube testified that he would relocate from Tonga to Matsulu where he would stay with his daughter. His evidence, corroborated by his daughter, was not challenged at all. It was also not contested that Matsulu is approximately 70 Kilometres away from Tonga. The distance allays fears that the witnesses and/or the eyewitness will be

intimidated. I agree that the Court a quo should have considered placing appropriate conditions that would ensure that Shungube would not leave Matsulu or that he would not be allowed to visit Tonga.

Destruction and/or Concealment of Evidence

- [25] I note the argument of Shungube that the State did not contend or levy any evidence that Shungube was likely to destroy or conceal evidentiary material if admitted to bail. That said, this Court must deal with it as it is one of the matters that distressed the Court a quo. It appears from the testimony of the investigating officer that the exhibits have been acquired, protected, booked into the SAP 13 register and sent for analysis. It is against that background that Shungube asserted that it is not possible to interfere with evidentiary material that is not within his reach anymore.
- [26] Insofar as there remains outstanding investigation, I need to indicate that the evidence of the investigating officer was that it pertains to forensic results, pathology results and photo albums. The nature of the unresolved investigation is such that Shungube cannot interfere with any of the processes or procedures involved in securing the outcome. The argument of the State in this regard does not find favour with this Court.

Fear for the Safety of the Community and Shungube

- [27] It was asserted on behalf of the State that Shungube's life would be in danger if admitted to bail. In this regard, the State pointed out that his house had already been brought down by fire. Besides, the State also argued that Shungube on his own threatened to get to the members of the community who protested him once released. This should not have been a concern to the Court a quo because the evidence is that Shungube's house was set on fire by the family of one of the deceased individuals and not the general community.
- [28] The evidence of Shungube is that he will not endanger the safety of the community nor his own. In this regard, it is worth reiterating that, if released on bail, he has said that he would stay in Matsulu with his daughter. The trick here is to set conditions that would prevent him from visiting the area of Tonga to avoid confrontation. It was also Shungube's testimony, even though not confirmed by his employer, that he could be moved to work for the same company at a different location away from the area of Tonga. In the circumstances it is improbable that both the lives of the community and Shungube would be in danger were he to be admitted to bail.

Shungube's Failure to Disclose his Defence

- [29] The finding of the Court a quo on this issue is somewhat startling. I say so because, as pointed out by counsel for Shungube, there was no duty on Shungube to disclose his defence during bail proceedings. The finding goes against Shungube's testimony before the Court a quo though. There is an indication that he will deny the charges preferred against him.

The State's case against Shungube is strong and a lengthy sentence may ensue in the event of conviction

- [30] It is proper to revert to the matter of Petrus Khoza decided by this Court supra. A consideration of the strength of the case of the State against an accused person is misguided if the Court does not ask itself whether the accused person will attend court the strength of the case against him and possible lengthy sentence that may follow in the event of conviction notwithstanding. It could be that the case of the State is very strong but that does not necessarily imply that Shungube will not attend court for trial.
- [31] I agree that reference to the strength of the case of the State and possible lengthy period of incarceration against Shungube undermines the presumption of innocence until proved otherwise beyond reasonable doubt. With all the above points having been legitimately shown to be unfounded, fallacious and without a finding that Shungube was a flight risk, it is confounding that the Court a quo refused to admit Shungube to bail.
- [32] Given that Shungube is married with minor children and that he is a breadwinner for his family, it will be prejudicial not only to him but to those who depend on him to perpetuate his incarceration. This will be aggravated by the length of time it may take to have the investigation concluded.
- [33] It is against the above background that I have concluded that the interest of justice demands that Shungube be admitted to bail. As such, I make the following order:

The order of the Court a quo is set aside, and it is substituted for the following:

- "1. Shungube is granted bail in the amount of R3 000.00;*
2. Shungube shall, for as long as the case against him remains outstanding, stay with his daughter in Matsulu;
 3. Shungube shall report to the Matsulu Police Station every morning at 7:00 and every evening at 7:00;
 4. Shungube is prohibited, for the duration of his case, to visit the area of Tonga."

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

Counsel for the Applicant: Adv R Kriel Instructed by: Vusi Segodi Attorneys
Counsel for the Respondent: Adv IM Phathudi Instructed by: Director of Public Prosecution
Date of Judgment: 01 October 2024

[1] 1998 (2) SA 721 (C) at 722G-H.

[2] Case number A 09/2017.

[3] 2013

(2) SACR 85 (GNP) para 14.

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