

SOUTH AFRICA / JUDGMENT

Sibanyoni v S (A32 / 2022) [2023]

ZAMPMBHC 7 (14 February 2023)

[2023] ZAMPMBHC 7

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

A32 / 2022

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

CASE

NO: A32 / 2022

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
14
February 2023
In

the matter between:

NKOSINATHI
NELSON SIBANYONI
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 14 February 2023.

J

U D G M E N T

RATSHIBVUMO

J:

[1]

Introduction:

The Appellant was the man behind the steering wheel in an Inyathi motor vehicle on 16 February 2022 in Mayflower. He used this motor vehicle for transportation of children to and from school. On that day, he had collected the kids from school like he had always done before. Unfortunately, due to breaks failure, the vehicle rolled back and fell over the bridge causing the death of nine kids whose ages ranged from 4 to 13 years old. He was arrested on the scene and was kept in custody until he applied for bail before the Chief Albert Luthuli Magistrate Court, held at Elukwatini (court a quo), on 22 March 2022. Bail was refused. This is an appeal against the refusal of bail by the court a quo.

[2]

Although

the Appellant signed the special power of attorney authorising Legal Aid South Africa to appeal against the refusal of bail on the same date bail was refused, for some unexplained reason, it took over nine months for the appeal to be prosecuted.

The slow pace at which the appeal was prosecuted has to be discouraged because bail by its very nature, is inherently urgent and should be treated as such.[1]

Failure to adhere to this may easily result in injustice when people who should have been released on bail, are incarcerated longer than

necessary. A detention for a period of nine months can cause undue injustice. This period is long enough for one to lose employment and/or have his/her family displaced. It should only be allowed when the interests of justice demand it.

[3]

Basis for the appeal.

The Appellant submitted

that the court a quo erred when it refused bail as it placed emphasis on aspects that should not have been considered for purposes of bail. In this regard, the following passage- from the court's

order in refusing bail was cited:

“Now the court has to ask this question, because money is a thing that is always in need and clearly if this is the type and the manner which Mr. Sibanyoni brings his application in this court, the community out there is in danger. According to the State, you did not have a PDP, you post-matric you are well also educated in GS College, surely I have indicated earlier that you were able to distinguish between the right thing and you know the right thing it is a person who do things as a legal professional citizen. The court will not go to the facts of the matter, but at this point in time because the money is always a thing that you need, you will always want to supplement your money, saying here in your affidavit, by transporting people, you are not candidate suitable to be considered for purposes of bail and as a result, your bail application is refused Mr. Sibanyoni. Money is always in need, it is not a thing that must push people to do the wrong thing.”[2]

[4]

The Appellant had said in an affidavit in support of the application for bail, “I am self-employed as a motor mechanic making R4 000.00 a month. I also supplement my earning by transporting people.” It would appear that it is this statement that prompted the remarks above which form the basis of the appeal.

[5]

The Respondent agrees that the court a quo erred in its findings when it refused bail for the Appellant. The appeal is therefore supported by the State. The Respondent submitted in the heads of arguments that the court a quo “captured the arguments of both the Appellant and the prosecutor in its judgment, but then failed to give a clear and coherent reasons for its decision.” A similar assertion was again made by the Respondent saying, “The court makes reference to subsection 6 [of Section 60 of Act 51 of 1977] ‘the nature and gravity of the charge on which the accused is to be tried.’ In this regard the court stated, ‘that is why the State is objecting to the bail...

that is the factor that the State has considered.' The court however, does not take this point further as to whether it upholds this submission by the State or whether it rejects it. In other words, whether the nature of the offence and the gravity thereof did play any role in the final evaluation whether the accused should be admitted to bail. On the same page (page 75 para 23-26) the court makes reference evading trial but then again, in page 76 para 7, the court states that 'that is what led the State to oppose bail.' The court did not take this aspect any further but only said it is the State's submission."

[6]

I am in full agreement with the Respondent's observations in this regard. The bulk of the judgment by the court a quo is the summary of evidence and submissions by the legal representatives without the court's actual findings on those submissions.

The court did however quote some of the submissions with strong emphasis, especially those from the State. This leaves a reader

to speculate that the court's emphasis on those submissions could be indicative of its position as the judgment makes no findings.

[7]

On appeal.

Judging from the emphasis made by the court a quo to the submissions made by the State, it would appear the court may have given weight to the following

aspects- which persuaded it to refuse bail:

a)

The nature and gravity of the offence – nine lives lost. The court went on to stipulate the age of the youngest victim although it was not part of the evidence given, relying on what was written on the charge sheet.

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. Emphasis

was made on the laws of the country that are so relaxed so much that people could cross the borders illegally as they wish. The Appellant was regarded as one of those who could easily cross the border even without a passport.

c)

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. The court seemed to have been persuaded that the fact that the Appellant did not have a driver's licence and a PDD meant that the State's case was strong against him.

d)

The impression in the mind of the court that the Appellant desire for money in supplementing his income through transporting the children, reflected him as a danger to the community. This suggested that the community needs to be protected from his continuous endeavours to supplement his income.

e)

Giving evidence by means of an affidavit is support of the application for bail. Although no finding was made in this regard, a remark to the effect that "you cannot ask questions to the affidavit" reflects a displeasure at its usage.

[8]

It seems sight was lost of the fact that this was bail application in which the Appellant faced Schedule 1 offences. The applicable legal provisions would be those in section 60(1)(a) of Act 51 of 1977 (the Criminal Procedure Act) which provides,

"[A]n

accused who is in custody in respect of an offence shall, subject to the provisions of section

50 (6),

be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that

the interests of justice so permit."

[9]

Unlike the bail applications in which the applicants face Schedule 5 or 6 offences, who bear the onus to show that the interests

of justice permit their release on bail or

exceptional circumstances exist, as the case may be; the onus is rather on the State

to show that the interests of justice do not

permit the release of an accused person who faces a Schedule 1 offence. Even if hypothetically

speaking, it is true that everyone

can cross the South African borders illegally, it cannot be a reason to refuse the Appellant

bail as no evidence was led to demonstrate

the Appellant's ability, willingness or even past conduct in crossing the border illegally.

[10]

Driving a motor vehicle without a licence or a Public Driver's Permit, the so called PDP, is a statutory offence for which traffic officers usually hand give fines through traffic summons to the offenders. No evidence was led as to the actual driving or conduct by the Appellant for the court to conclude that the State's case was strong. To the contrary, the investigating officer gave evidence to the effect that the accident took place due to mechanical failure when the breaks would not work. It remained unknown to the court a quo as to what investigations was done to reach this conclusion, for how long was the problem of the car breaks in this motor vehicle, who is the owner thereof, is the accused an employee to the owner or whose responsibility was it to attend the motor vehicle's breaking system. Driving without a licence does not mean that one's driving would be negligent, as much as licensed drivers can and do drive negligently. The two are different offences and it is the negligent element that would be necessary for the conviction of the Appellant in a trial. Facts regarding the said negligence were not before the court a quo.

[11]

Thus

in S

v Humphreys[3],

the accused had driven a taxi over a railway line controlled by the boom gates that were lowered with flashing red lights, thereby colliding with a train and causing the death of ten passengers. The actual act of negligence was well established in deliberately crossing where one was forbidden. Again, in S

v Maarohanye and Another[4],

the appellants were found to have committed culpable homicide when they deliberately got engaged in a race on a public road, thereby losing control and causing the death of four pedestrians. It is this kind of evidence of the Appellant's conduct or failure to act

where there is a legal obligation to act, that is missing from the evidence led before the court a quo.

It may be necessary to also mention that both Humphreys and Maarohanyane

were admitted to bail pending their trials. Refusal of bail should

not be used as a punishment for the crimes committed before one is convicted thereof.

[12]

Other aspects raised by the court a quo such as upbraiding the Appellant for supplementing his income were uncalled for, irrelevant and misguided. What is worse is that we remain in the dark as to why supplementing an income should be condemned. Another person may view that as hard working deserving to be commended as an act of a bonus pater familias in providing for his family.

[13]

In light of the above, I find that the court a quo misdirected itself when it handed down a judgment without making a finding on submissions made by the State and the Appellant.

In as far

as the court may have been persuaded by the State's submissions, it erred in finding that the State had a strong case,

and/or that the Appellant was likely to cross the South African borders illegally and/or that the need for money made him a danger to the community.

[14]

In the result, the following order is made.

[14.1] The order of the

court a quo is set aside and replaced with the following:

[14.1.1] Bail is fixed

for the accused at R1000-00 (One thousand rand).

[14.1.2] Once bail is

paid, the accused should appear in court on all the dates to which the case is postponed, stay present until he is excused by the court.

[14.1.3] Should the

accused fail to appear in court on dates to which the case is postponed, his bail shall be cancelled forthwith.

TV

RATSHIBVUMO

JUDGE

OF THE HIGH COURT

FOR

THE APPELLANT:

MR. P MAFADZA
INSTRUCTED

BY:

LEGAL AID SOUTH AFRICA, NELSPRUIT
FOR

THE RESPONDENT: ADV EC MATHEBULA
 INTRUSCTED

BY: DIRECTOR OF PUBLIC
 PROSECUTIONS
 MPUMALANGA, MBOMBELA

JUDGMENT

DATE

: 14 FEBRUARY 2023

- [1] See S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC) at 63E-F.
- [2] See p. 78-79 of the paginated bundle.
- [3] 2015 (1) SA 491 (SCA).
- [4] 2015 (2) SA 73 (GJ).
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