

SOUTH AFRICA / JUDGMENT

Sithole v S (CA&R23/2017)

[2017] ZAECGHC 78 (6 July 2017)

[2017] ZAECGHC 78**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Beshe

CASE / FILE NUMBER

CA&R23/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GRAHAMSTOWN)****CASE****NO.: CA&R23/2017****In**

the matter between:

GCOBANI

SITHOLE Appellant

And

THE

STATE Respondent

JUDGMENT**BESHE J:**

- [1] This is an appeal against the refusal by the Magistrate, Sterkstroom, to admit the appellant to bail. The appellant and two others are facing a charge of robbery with aggravating circumstances that occurred on the 13 February 2015 at Pep Stores, Sterkstroom. The said offence is listed under Schedule 6 to Criminal Procedure Act number 51 of 1977 (The Act). Section 60 (11) of the Act provides that:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

- (a) 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 exceptional circumstances exist which in the interest of justice permit his or her release.”

[2] Appellant together with his co-accused applied for bail in June

2015. The Magistrate was not persuaded that they had discharged

the onus of showing that they were deserving of being admitted to bail. That there were exceptional circumstances which permit their release. The Magistrate considered the strength of the case against the appellant and his co-accused. He took into account that the accused were apparently linked to the commission of the offence through video footage from surveillance cameras. Appellant and accused number two in the matter were identified at an identification parade. There are witnesses who saw the offence being committed. There are goods that were recovered from appellant which link him to the offence – a cellular phone from Pep Stores where the robbery was committed. According to Warrant Officer Blandile who testified during the bail application, appellant also led them to a certain Mr Kafu to whom he had allegedly sold cellular phones. Nine such phones were recovered from Mr Kafu.

- [3] Appellant had, put forward inter alia the following factors as amounting to exceptional circumstances justifying his admission to bail:

He testified that he owns two vehicles he uses as metre taxis and a stand from which I believe he sells goods. He has children to

support. His mother is not well. He will suffer financial loss because his businesses will not be run the way he would if he was

around and that in turn will affect the livelihood of his family.

- [4] As indicated earlier in this judgment, the Magistrate was not persuaded to grant bail and turned down the application.

- [5] Appellant once again approached the Magistrates’ court with another application for bail on the basis that new facts had arisen which amount to exceptional circumstances.

- [6] This time around an affidavit that he deposed to was placed before court. The state did not place any evidence before court to controvert what was contained in appellant’s affidavit.

- [7] Appellant states that both his metre taxis are out of commission / not in working order, his stand business is not operating. There is no longer any income. As a result his girlfriend with whom he was staying has left their home. He used to assist his mother by driving her vehicle to transport workers to and from work. His mother cannot secure a reliable driver to drive her vehicle for this purpose. This has added to the family’s financial woes.

- [8] He also asserts that the case against him has been weakened by inter alia, the passing away of one of the state witnesses, Mr Kafu. The video footage apparently does not show him doing anything or committing the robbery at Pep Stores. Although I understand that it shows him inside the said store during the robbery. That one of the witnesses who purportedly identified him at the identification parade had not mentioned him in an earlier statement. In this regard, appellant states “The name of the witness is Lovemore Qaqambile. He has made a statement in the docket, he does not implicate me in this statement, nor does he speak about the robbery”. The gun that was allegedly used in the commission of the offence has not been recovered. He has been in custody for ± two years awaiting trial.
- [9] The Magistrate found that these factors did not amount to exceptional circumstances and once again dismissed the application.
- [10] Section 65 (4) of the Act 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”. The Magistrate’s decision is assailed on the basis that he misdirected himself in accepting the prosecutor’s ipse dixit about what the video footage contains or shows as he is not a witness in the matter. Further that he misdirected himself by not accepting the unchallenged evidence of the appellant regarding factors that render the case against him weak as well as his personal circumstances.
- [11] As to what constitutes exceptional circumstances the following was stated in S v Rudolf[1]:

“Exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in subsection 60 (4) – (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.”

Amongst reasons for refusing bail on the second bid; the Magistrate stated that the fact that the firearm had not been recovered did not constitute a new factor. That was the case when the initial bail application was heard. There appeared to be a reasonably strong case against the appellant – there was enough evidence to link him with the offence even though one of the state witnesses had passed away. He also found that appellant’s personal circumstances as well as those of this family, the hardship that his family is enduring as a result of his incarceration, is not exceptional. As this is common in a case where a person is detained, these hardships can be expected. They usually follow.

- [12] I can find no fault with the reasoning of the Magistrate. In S v Mathebula[2] the appellant in that case had raised the fact his wife was struggling to maintain his taxi business in his absence. She was pregnant, unwell and under stress. The present appellant also raised hardship suffered by his family and his business. The court in Mathebula’s matter held that the personal circumstances the appellant had urged on the court “are neither unusual nor such as singly or together warrants the release of the appellant in the interest of justice”. As far as the strength or weakness of the state’s case is concerned, the court in Mathebula[3] had this to say “But a state case supposed in advance to be frail may

nevertheless sustain proof beyond doubt when put to the test". I am not suggesting that the state's case in casu is weak. It does not appear to be so. Even with the passing away of Mr Kafu, there appears to be several other pieces of evidence that link the appellant with the commission of the offence. As regards the delay in finalising the matter (the trial has apparently not started), counsel for the state Mr Mgenge argued that the delay has partly been caused by the appellant.

[13] In my view the court a quo was correct in refusing bail based on a combination of the initial and new facts. No exceptional circumstances exist, which in the interest of justice permit appellant's release on bail.

[14] Accordingly the appeal is dismissed.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant : Adv: JR Koekemoer

Instructed by : ZEPE & CO. ATTORNEYS

C/o YOKWANA ATTORNEYS

87 High Street

GRAHAMSTOWN

Tel.: 046 – 622 9928

Ref.: Mr N Yokwana/S82

For the Respondent : Adv: S Mgenge

Instructed by :

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

94 High Street

Tel.: 046 – 602 3000

Ref.: Ms Van Heerden

Date Heard : 5 July 2017

Date Reserved : 5 July 2017

Date Delivered : 6 July 2017

[1] 2010 (1) SACR 262 at 266 [9] h.

[2] 2010 (1) 56 SCA at 59 – 60 a.

[3] Page 59 [12] e.

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Prepared on 23 October 2026 · Esheria