

SOUTH AFRICA / JUDGMENT

Skhosana v S (BA16/2020) [2020] ZAMPMHC 10 (27 May 2020)

[2020] ZAMPMHC 10

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

BA 16/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG

(LOCAL

SEAT)

CASE

NO: BA 16/2020

In

the matter between:

TSHEPO

COLLEN

SKHOSANA APPELLANT

And

THE

STATE RESPONDENT

JUDGMENT

BRAUCKMANN AJ

- [1] This is an appeal against the refusal of bail by the Magistrate Singh in the Magistrates' Court in Bethal. The Appellant ("Mr Skhosana") who was accused no. 3 brought two bail applications. The judgement in the first bail application was handed down on 12 July 2019. After bail was refused in the first application, he brought the second bail application on, what his new legal representative called "new facts". The ruling in the second application was handed down on 3 December 2019 by the Magistrate, and it is against this ruling that Mr

Skhosana now appeals.

- [2] Mr Skhosana was arrested on 2 July 2019 and charged with four counts of Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 read with the provisions of section 51(2) of Act 105 of 1997, one count of possession of an unlicensed firearm, one count of possession of a prohibited firearm to wit a fully automatic AK47 firearm, one count of possession of unlicensed ammunition and one count of attempted murder. He will stand trial in the regional court together with six other co-accused.
- [3] It was common cause that the application fell under the ambit of Schedule 6, and therefore Mr Skhosana, in terms of section 60(11) (a) of Act 51 of 1977, had to adduce evidence which satisfies the court that exceptional circumstances exist to persuade a court that it would be in the interests of justice for the court to permit his release.
- [4] During the first bail application Mr Skhosana, duly represented by an attorney, chose not to testify under oath, but to submit an affidavit only. He did not testify under oath. The Respondent opposed the application by calling the investigating officer, Captain Mlotswa, to testify under oath, and to subject him to cross-examination by Mr Skhosana's Attorney, Mr Mavhimbela.
- [5] For reasons will become apparent in this judgment the Court is not going to repeat the evidence led during the first bail application,

or the content of the Magistrates ruling, save to say that it is the Court's view that her first ruling was correct and in

accordance with justice.

- [6] In the second bail application Mr Skhosana changed horses, and appointed Mr Essa, an attorney from Middelburg to represent him.

Before the application was heard Mr Essa addressed the Court, and informed it that the basis of the application was that "new

evidence" that was available at the time of the first bail application. Irrespective of what the nature of the evidence was, the application should have been terminated there and then by the Magistrate. She however allowed Mr Essa to proceed on the very

limited "new" ground being an alleged alibi that Mr Skhosana had. The Court will not be unduly critical about the Magistrates ruling to hear the application, as from her ruling it became apparent that Mr Skhosana was afforded the benefit of the

doubt, and allowed to testify in order to afford him an opportunity to explain why the evidence about an alibi was not disclosed during the first application.

- [7] Mr Skhosana testified in his second bail application, but not a single reason was given, under oath, as to why the alleged alibi-defence was not disclosed during the previous application. Although his attorney proffered some vague explanation, it did not amount to evidence that could assist him to acquit the onus that burdened him. Mr Essa tried to explain that during the first bail application Mr Skhosana was represented by an attorney that appointed for him by:

“...I think SAPU and as a result the accused did not instruct the practitioner personally except for the fact that when he appeared before the court he just found the legal representative here.”

Mr Essa also informed the court:

“And in the circumstances I do not know what the reasons were for this evidence (the alibi-evidence) not to be brought to the attention of the court.”

- [8] Mr Skhosana was obviously not satisfied with his previous attorney's services, which resulted in his application to be released on bail being refused. He then appointed Mr Essa with a mandate to attempt to remedy the "lacuna" in his case before the court, but apparently failed to provide the new representative with proper instruction. That much can be inferred from Mr Essa's statement to the court that he did not know why the evidence was not presented. Then Mr Essa is allowed by the court to call Mr Skhosana to testify, but this very important aspect is not even dealt with in his evidence. Not even one iota is tendered in that regard. Mr Skhosana is a Warrant Officer, employed by the South African Police Services. The court cannot accept the inept explanation as to why the evidence was not tendered at the first application, or why he failed to interrupt his attorney, or drew the court's attention to the fact that the correct, and full version of his defence was not disclosed by the attorney. His failure to explain this is most concerning, and leads to an inevitable inference that he did not take the court a quo into his confidence,
- [9] The court a quo, in her ruling found that there was no evidence from which it could be established that the evidence did not exist at the time of the first application. The evidence did indeed exist, and the alleged alibi evidence was also not disputed by the respondent. Mr Skhosana is connected to the robbery, not by being present when it physically took place, but in a video recording made prior to the date of the robbery where he could be seen in the guesthouse where he, and his co-accused were arrested, with the other accused, as well as the fact that just before he was arrested he was seen with a specific bag that contained an AK47 fully automatic rifle. According to the evidence by the investigating officer, circumstantial evidence connects him with the crime, and the state will prove that Mr Skhosana and his co-accused acted with common purpose when the crimes were perpetrated.
- [10] The Magistrate, on page 289 of the transcribed record in her ruling, stated:

“The court allowed the evidence to be heard. However upon reading the previous application together with this application there is not much change in the evidence adduced at the initial bail application. In a situation where evidence was known and available to the bail Applicant, but was not presented by him at the time of his earlier application such evidence cannot for the purpose of a renewed bail application be relied upon as new facts.” And further she concludes on page 290 of the record that: “Regarding consideration of new facts it is clear that none of the facts raised by the Applicants are new.”

[11] The appeal, having regard to both the power of attorney to Mr Skhosana’s attorney as well as the Notice of Appeal, was noted against the ruling of 3 December 2019 only. This Court is of the view that the Magistrate was correct in her argument. The application was a poorly disguised attempt at a “second bite at the cherry”. Allowing Mr Skhosana to testify was the only way in which the court could establish whether the evidence actually constituted new facts. Having found that it did not, she correctly refused Mr Skhosana’s application.

[12] In *S v Petersen* 2008

(2) SACR 355 (C) the court discussed the question of reliance on so-called new evidence to justify a renewed application for release on bail. The court aptly stated the law as it currently is, and this court aligns it with the law as stated therein, as follows:

“57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See S v De Villiers 1996

(2) SACR 122 (T) at 126 e - f. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

[58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See *S v Le Roux en Andere* 1995

(2) SACR 613 (W) at 622 a - b. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. See *S v Vermaas* 1996

(1) SACR 528 (T) at 531 e - g ; *S v Mpofana* 1998

(1) SACR 40 (Tk) at 44 g - 45 a ; *S v Mohammed* 1999

(2) SACR 507 (C) ([1999] 4 All SA 533) at 511 a - d . “[Own emphasis]

[12] In *Davis and Another v S* (unreported KZDLD case no. 2888/15, Dated 8 May 2015) at (para 3) the following was held;

“new facts should be facts discovered after the bail application was heard and not merely an elaboration of facts presented at the first bail application”

[13] In *S v Barber* 1979 (4) SA 218 (D) at 220E to F, Hefer J (as he then was) stated in regard to the court of appeal's power to interfere with the court a quo's

findings 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 for bail. 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 exercised

that discretion wrongly.

[62] This approach was endorsed in cases such as *S v Nqumashe* 2001

(2) SACR 310 (NC) ([2001] 4 All SA 471) para 20 at 314 f ; *S v Branco* 2002

(1) SACR 531 (W) at 533 i ; and *S v Porthen and Others* 2004

(2) SACR 242 (C) paras 3 - 7 at 246 b - j . In the Porthen case, however, Binns-Ward AJ (in para 16 at 249 f - h) expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of s 60(11) (a) of the Act."

[14] The Court, taking into account the evidence at the first bail application, as well as the second application cannot fault the Magistrate in her finding. The facts underlying Mr Skhosana's defence of an alibi was known to him at the first application stage. As alluded to earlier herein, the defence will also not assist Mr Skhosana, as it is not the respondent's case that he attended the crime scene when the robbery was perpetrated, He was waiting in the wings, and was unfortunately caught in the act of assisting his co-accused.

[15] Accordingly the following order is made:

[15.1] The appeal is dismissed.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

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