THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 431/2009

A S MATHEBULA Appellant

and

THE STATE Respondent

Neutral citation: *Mathebula and The State* (431/09) [2009] ZASCA 91 (11 September 2009)

Coram: HEHER, PONNAN JJA and BOSIELO AJA

Heard: 2 September 2009

Delivered: 11 September 2009

Updated:

Summary: Criminal Procedure – Criminal Procedure Act 51 of 1977 s 60(11)(a) – bail - exceptional circumstances – weakness of state case – necessary proof.

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ORDER

In an appeal from the High Court, Pretoria (Makhafola AJ sitting as court of first instance).

The following order is made:

The appeal is dismissed.

JUDGMENT

HEHER JA (PONNAN JA and BOSIELO AJA concurring):

[1] This is an appeal against a judgment of the North Gauteng High Court, Pretoria in which the learned judge dismissed an appeal against the refusal by the magistrate at Bolobedu to grant bail to the appellant pending his trial.

[2] On 17 March 2008 the appellant, a man of 45 years, and a co-accused were arrested on charges of murder and possession of arms and ammunition. Apparently two other co-accused had been taken into custody days earlier.

[3] On 7 April 2008 the appellant and accused no 3, one Maswanganye applied to be released on bail. They employed an advocate in common. As the main charge against them was a offence in Schedule 6 to the Criminal Procedure Act 51 of 1977 they undertook the task of adducing evidence which would satisfy the court that exceptional circumstances existed which in the interests of justice permitted the court to release them (S 60(11)(a) of the Act).

[4] They sought to discharge the onus by producing affidavits deposed to by each of them. (The content of the affidavit made by Maswanyange was exculpatory in nature and did not then or subsequently bear on the appellant's case.)

[5] The appellant's statement contained the following averments which are contended to be of relevance in the discharge of the onus:

1. He resides in a house in a village in Giyani.
2. He is married with three school-going children.
3. He is self-employed as a taxi owner, one of three such vehicles being driven by him also.
4. He is the breadwinner of the household and has a net income of about R15 000 per month. His estate (which includes fixed assets) amounts to about R500 000.
5. He does not possess a passport and has no relatives outside South Africa.
6. He does possess a firearm (of which the police had taken possession) but denies its use in the commission of the crime. (At the appeal hearing counsel for the State informed us that ballistic tests on the firearm had not established any such connection.)
7. He has no relevant previous convictions.
8. He was arrested on a Saturday, the day following the alleged crime. On the Friday he was engaged in driving his taxi in the course of business on a route between Giyani and Polokwane between 14h45 and 20h40 at which hour he arrived home and retired for the night. He therefore intends to plead not guilty and raise an alibi.
9. After his arrest he was severely tortured in order to extract a confession.
10. At the time of his arrest he had in his possession cash amounting to about R7500 to be deposited in the bank: money due on his kombi and a further R2000 paid to him by a creditor.
11. He was told by his co-accused that they too had been severely assaulted apparently with the intention of persuading them to say that he had hired them to commit the murder.
12. He averred that

'The state case against me is weak and . . . for the state case to stand they will be forced to turn the co-accused into state witnesses.'

The appellant submitted that the cumulative effective of these circumstances rendered them 'exceptional' for the purpose of justifying his release on bail. He added that he would not pose a danger to the public, evade his trial, interfere with witnesses or evidence, and that his release would not jeopardise the functioning of the criminal justice or bail system or public peace or order.

[6] After the applicant's case was closed the prosecutor intimated that he would call the investigating officer to testify in opposition to the application. When the trial resumed four days later, however, he too submitted an affidavit in which that officer, Kgabo Masoga, an Inspector in the SAPS deposed as follows:

'The offence with which the accused has been charged is a schedule 6 (six) offence in that it was planned or premeditated and that it was committed by a group of persons or syndicate acting on the execution or furtherance of a common purpose or conspiracy.

4.

The interests of justice do not permit the release from detention of the accused on the ground that there is the likelihood that the accused, if they are released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system, because of the nature and gravity of the charge on which the accused are to be tried.

5.

The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charge against them should be taken into account. The DPP has already decided that this is a matter justiciable in the High Court of South Africa.

6.

The victim was shot at, when he was about to enter into his yard, at close range. The circumstances under which the offence was committed are likely to induce a sense of shock or outrage in the community where this offence was committed should they be released on bail. The shock and outrage of the community might lead to public disorder if the accused are released on bail. The safety of the accused might also be jeopardized by their release.

7.

The release of the accused will undermine or jeopardize the public confidence in the criminal justice system, in that the community may take the law into their own hands. The state has a strong case against the accused and there is a likelihood of the accused being convicted.

8.

During January 2008 a court order was made against accused number 4(four) by the High Court of South Africa (Transvaal Provincial Division) under Civil Case No. 25270/2006.

In the matter between Molototsi Taxi Association and Giyani Taxi Association being 2nd respondent and accused being a member of 2nd respondent. The deceased in this matter was a member of Molototsi Taxi Association being applicant. The order by the Honourable Judge of the High Court of South Africa was given in favour of applicants. The accused has therefore a resentment which he harbours against members of Molototsi Taxi Association of which the deceased is also a member.'

[7] On 15 April 2008 the magistrate dismissed the application. He found that the appellant had failed to discharge the onus.

[8] On 23 May 2008 the defence applied to renew the application on new facts. On behalf of the appellant his wife Victoria gave evidence under oath. In so as is relevant she added the following facts:

1. Since the detention of the appellant she had struggled to maintain the taxi business formerly run by him. Little income was being generated and creditors were pressing.
2. At the date of testifying she was 4 months pregnant, unwell and under stress. The pregnancy was under threat.

[9] The State led no additional evidence. The magistrate again dismissed the application.

[10] The appellant appealed to the High Court. For reasons which are unexplained the appeal was not heard until 7 April 2009. Judgment was delivered on 16 April.

[11] In the present instance the appellant's tilt at the state case was blunted in several respects : first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive: cf *S v Pienaar* 1992 (1) SACR 178 (W) at 180h; second, both the denial of complicity and the alibi defence rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them. The vulnerability of unsupported alibi defences is notorious, depending as it does, so much upon the court's assessment of the truth of the accused's testimony. In so far as the appellant suggested that the police had extracted an inadmissible confession from him (or his co-accused), he

provided no detail which might have enhanced either his or their reliability or credibility.

[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha* 2002 (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala & Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g.

[13] As will be apparent from the paucity of facts in support of his case, the appellant fell substantially short of the target. Despite the weak riposte of the state, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the state case than he had been when the application commenced. It follows that the case for the appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances.

[14] The reliance on his wife’s physical and psychological problems was directed mainly to her pregnancy and its effects. Whatever its merits at the time of the application it was in essence a temporary consideration which has long since been overtaken by the lapse of time in bringing this matter to a conclusion. Accordingly it is no longer relevant to a decision of the issue.

[15] The remainder of the personal factors urged on us, are neither unusual or such as singly or together warrant release of the appellant in the interest of justice. Parroting the

terms of subsec (4) of s 60, as he did, does not *establish* any of those grounds, without the addition of facts that add weight to his *ipse dixit*.

[16] The appeal is dismissed.

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J A HEHER
JUDGE OF APPEAL

Appearances:

For appellant:	R C Krause (Attorney)
Instructed by:	BDK Attorneys, Johannesburg
	Symington & De Kok, Bloemfontein
For respondent:	L A More
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein