

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

**CA&R 31/2016**

In the matter between:

**NDIMBULELE SINKU**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

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**BAIL APPEAL JUDGMENT**

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**MBENENGE J:**

[1] The appellant is facing a charge of armed robbery with aggravating circumstances. He is in custody. His application to be admitted to bail was refused by the Magistrate, Mdantsane on the ground that he did not discharge the onus resting upon him in terms of section 60(11) (a) of the Criminal Procedure Act 51 of 1977.

[2] In support of the application, the appellant placed before the court *a quo* evidence by way of affidavit wherein he stated that he resides at [...] N. P., W. T., Mthatha, which he regards as his permanent home. He is a student at the Zamukulungisa Campus of the Water Sisulu University (WSU), where he is registered

for a Diploma in Public Management which he hopes to complete this year. His mother whom he visits from time to time is an employee of the Department of Public Works in Queenstown, where she resides. The appellant fathers a child over whom he exercises guardianship and with whom he stays at his W. T. home. He claims to have no relatives outside the Republic of South Africa. He has no passport, and has no intentions of relocating to another country.

[3] The appellant has previously been convicted of having been in possession of suspected stolen property (a remote control device) in respect of which he paid an admission of guilt fine of R300.00 in Mthatha during the year 2014. He has a pending case before the Magistrate's Court, King William's Town. He is out on bail in that case. There are no outstanding warrants of arrest against the appellant.

[4] Sergeant Jonathan Izak Pieters testified in pursuit of the State's opposition to the bail application. He is not the investigation officer in the relevant case. His testimony concerning how the alleged robbery involving a British American Tobacco (BAT) employee was based solely on a video footage and what he was told by the investigating officer; after watching the video footage, the investigating officer became of the view that the appellant was one of the persons who committed the subject robbery.<sup>1</sup> As a further basis for opposing bail, Sgt Pieters placed reliance on the appellant's pending King William's Town case wherein a firearm (a toy gun resembling a Z88 firearm) is said to have been used. On the day of his arrest, the appellant tried fleeing "*because he drove at a high speed.*" Stg Pieters opined that, due to the strength of the State's case and the possibility of the appellant facing a long term imprisonment sentence (in the event of a conviction), the appellant may evade the trial; the appellant's previous conviction points to him as having a propensity to commit crime.

[5] Under cross examination Sgt Pieters stated that the only evidence implicating the appellant is that gleaned from the video footage. He had viewed the relevant snapshots taken from the video footage and in his view 18 of the photos clearly depict the appellant. The questioning in this regard unfolded as follows:

"I put it to you Sergeant that all those photographs that you allege...show the[appellant], they are not clear all of them ---Photographs were taken of the [appellant],Your Worship, and have been sent to a facial expert who is going to confirm that that is the [appellant] ...Your Worship.

Do you have a report from the expert? --- Not yet, Your Worship"

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<sup>1</sup> It is alleged that the appellant at some point drove the BAT vehicle during the commission of the offence

Why was the video footage sent to the expert?---As I'm standing here, Your Worship, I am no expert to come to a complete conclusion, Your Worship, it is only the facial expert."

[6] Sgt Pieters harbours no fear that the appellant will, in the event of being released on bail, interfere with police investigations. He also conceded that this case was not one where, upon his release on bail, the appellant has committed another offence. The residential address and occupation of the appellant were also verified as having been correct by the police.

[7] The Magistrate found that the State was not sure whether it was the appellant who appeared on the video footage; confirmation from an expert would bring completeness to the investigations regarding the identity of the appellant.

[8] The Magistrate also found that no weight could be attached to the evidence tendered by the appellant by way of affidavit and that, therefore, the appellant had not discharged the onus of "*adducing strong and dependant evidence pointing at his involvement*" and of establishing the existence of exceptional circumstances justifying his release. The Magistrate concluded thus:

"There is likelihood that if the [appellant] is released on bail he will further commit Schedule 1 offence as is evident from his past conduct that he has got a previous conviction and a pending case, out on bail, although he is innocent until proven guilty by the Court of law. There is also likelihood that if he is released on bail will undermine or jeopardise the proper function of justice system including the bail system because of his past conduct. There is also likelihood that he will evade trial as to the nature and gravity of the charge on which the accused to be tried and the nature and gravity of punishment is likely to be imposed should the accused be convicted." Sic

[9] The Magistrate's conclusion that no weight could be attached to the evidence tendered by way affidavit by the appellant is not substantiated. The evidence embodied in the affidavit related to the factors a court is normally called upon to consider in its decision whether or not to grant bail. That evidence was neither controverted nor contested by the prosecution. Those factors were elicited by the accused's attorney and not placed in dispute when Sgt Pieters testified. For this reason, the Magistrate ought to have accorded the evidence due and proper consideration, and weighed the evidence in determining whether the interests of justice warranted the appellant's admission to bail.

[10] In *Xolani Mfeketho & 2 Others v The State*<sup>2</sup> Goosen J held that it is not impossible for an applicant in bail proceedings to discharge the onus resting upon him/ her if evidence is tendered by affidavit alone. The fact that such evidence may be less persuasive does not mean that it has to be disregarded.

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<sup>2</sup> (CA& R 193/2014) [2014] ZAECHGHC 67 (21 July 2014)

[11] In light of what I have said above, the Magistrate misdirected herself in the exercise of the discretion conferred on her, with the result that this court is at large to consider the matter afresh.

[12] The Magistrate's conclusion that if the appellant were to be released on bail he is likely to commit a Schedule 1 offence appears to be based on the appellant's previous conviction and the pending criminal case against him. The previous conviction relates to a charge of possession of stolen property, which is not a Schedule 1 offence. Moreover, the appellant has been released on the robbery charge pending in the King William's Town Magistrate's Court. He committed no offence whilst so released. The conclusion is therefore speculative. A possibility or suspension that if released on bail the accused will commit further offences is not sufficient.<sup>3</sup>

[13] There is no factual support for the conclusion that if the appellant is released on bail he will undermine or jeopardise the proper function of the justice system including the bail system because of his past conduct. On Sgt Pieters's own showing, the appellant will not interfere with investigations.

[14] It is common cause that the appellant is a permanent resident of Mthatha, where he was arrested; he has no passport and is currently a student at WSU. It was not the case of the prosecution that the appellant is a flight risk. The prosecution's contention is rather that there is a strong case against him which would encourage him not to stand trial, if released on bail, for fear of imprisonment. It remains to be seen whether a strong case was made out. Sgt Pieters's mere *ipse dixit* that the person appearing on the photos, without confirmation from the relevant expert whose opinion is being awaited, can hardly be considered as constituting *prima facie* evidence of the appellant's involvement in the commission of the offence in question.

[15] I am in the circumstances of the view that the Magistrate exercised her discretion wrongly and that, therefore, the appeal must succeed.

[16] The State made no submissions regarding the amount of bail or conditions to be imposed in the event of the appeal being successful. Sgt Pieters contented himself with merely saying that would be a matter for the court to decide.

[20] I accordingly make the following order:

- (a) The appeal is upheld.
- (b) The decision of the Magistrate, Mdantsane refusing to admit the appellant to bail is set aside and substituted with the following:

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<sup>3</sup> *S v Dlamini; and Othes Cases* 1999 (2) SACR 51 (CC) 79 f-g

“1. The applicant -

- 1.1 is admitted to bail and shall be released upon payment of R1000.00;
- 1.2 shall present himself at court at 08:30 or such time as the presiding officer may dictate, on every date to which the case may be postponed;
- 1.3 shall report to the Ngangelizwe Police station at Mthatha between 06:00 and 18:00 on each every Friday, except on the days on which he is required to appear in court;
- 1.4 shall remain residing at [...] N. P., W. T., Mthatha until such time as the trial is finalized; and
- 1.5 is precluded from leaving the Magisterial of Mthatha until the pending criminal trial is finalized.

2. Should the applicant wish to -

- 2.1 change his residential address, he is obliged to advise the investigating officer of his intention to do so; and
- 2.2 leave the Mthatha Magisterial District for any period of time, the permission of the investigation officer shall be obtained beforehand.”

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**S M MBENENGE**

**JUDGE OF THE HIGH COURT**

Counsel for the appellant :

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c/o Pope Attorneys  
King William's Town

Counsel for the respondent:

C de Kock

Office of the DPP  
Bhisho

Date heard

14 December 2016

Date Delivered

21 December 2016