



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 162/12

In the matter between:

Siyabonga Mooi

Appellant

and

The State

Respondent

Neutral citation: *Mooi v The State* (162/12) [2012] ZASCA 79 (30 May 2012)

Coram: NAVSA, VAN HEERDEN AND SNYDERS JJA

Heard: **16 May 2012**

Delivered: **30 May 2012**

Summary: Bail – Criminal Procedure Act 51 of 1977 s 60(11)(a) – delay by State in concluding its case taken together with deduced weakness of State’s case constituting exceptional circumstances which in the interests of justice permit the release of accused.

ORDER

On appeal from: Western Cape High Court, Cape Town (Hlophe JP sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below is set aside and substituted as follows:

‘a The appeal is upheld.

b The order by the Magistrate is set aside and substituted as follows:

“The applicant is released on bail in the amount of R5 000 (five thousand rand) subject to the following conditions:

i That the applicant report at the Lingeletu West Police Station every Monday, Wednesday and Friday between 06h00 and 08h00;

ii Should the applicant change his address he must inform the investigating officer, Detective Constable S Chaphiso accordingly and supply the new address;

iii Attend his trial on each date the matter is postponed to and remain in attendance until excused by the court.”

JUDGMENT

SNYDERS JA (Navsa and Van Heerden JJA concurring)

[1] This is an appeal against the dismissal of a bail appeal by the Western Cape High Court, Cape Town (Hlophe JP sitting as court of appeal).¹ At the conclusion of the hearing of the matter an order was made releasing the appellant with an indication that the reasons for the order were to follow. These are the reasons.

¹ This matter commenced as an application for leave to appeal referred for the hearing of argument in terms of s 21(3)(c) of the Supreme Court Act 59 of 1959. At the hearing leave to appeal was granted and the matter proceeded as an appeal.

[2] The appellant is standing trial in the Regional Court for the Regional Division of the Cape, held at Wynberg, on several counts of robbery with aggravating circumstances, attempted robbery with aggravating circumstances, attempted murder and the unlawful possession of a firearm and ammunition. All the charges arise from an incident on 24 December 2008, during which a service station in Muizenberg was robbed. The appellant was arrested on that day and has been in custody ever since. The trial commenced on 12 November 2009 and the State has not yet concluded its evidence. During March 2011 the appellant applied to be released on bail. He brought the application in the Regional Court, Wynberg (not the trial court). Bail was refused and he appealed the refusal of bail to the Western Cape High Court, Cape Town. On 19 September 2011 his appeal was dismissed.

[3] The parties were in agreement that the bail application resorted under s 60(11)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) and therefore the appellant has to adduce evidence that satisfies the court that 'exceptional circumstances exists which in the interests of justice permit his release'.² In terms of s 65(4) the appellant needs to persuade this Court that the decision to refuse bail was wrong.³

[4] Section 60(4) lists several grounds which, if shown to exist, would have the effect that the interests of justice would not permit the release of an accused. Those are:

'(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

(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; or

(c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt

² Section 60(11)(a) of the CPA: '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 interests of justice permit his or her release;'

³ Section 65(4): '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.'

to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

[5] The magistrate refused bail because 'there is evidence linking the accused to the offence' and therefore that 'it will not be in the interests of justice to grant bail'. In this Court it was accepted that in the circumstances the determining factor whether to grant or refuse bail is the strength of the State's case against the appellant. Section 60(6) lists several factors which a court may take into account, amongst other relevant things, in order to consider whether the ground stated in ss (4)(b), namely the likelihood of an accused evading his trial, has been established. Those include the emotional and occupational ties of the accused; his assets and where they are situated; his means of travel and available travel documents; whether he can afford to forfeit the amount of money paid in relation to bail; prospects of extradition; the nature and gravity of the offences charged with; the strength of the case against him; the nature and gravity of the likely punishment in the event of the accused being convicted; the binding effect of possible bail conditions and the ease with which they could be breached, and any other factor which in the opinion of the court should be taken into account.

[6] The appellant is 32 years old, single and the father of two minor children, aged 11 and 6 respectively. The children reside with and are supported by their respective mothers, one in the Northern Cape and the other one in the Western Cape. The appellant has been in custody for a period of three years and almost five months, since the day of the incident. He has no previous convictions and no other pending criminal cases. Before his arrest he used to work as a bouncer at a tavern and would be able to take up such a position again should he be released. Since 1992 he has been living in Eersterivier with his mother in her house, which house he stands to inherit upon her death as he is her only son. The appellant has previously faced criminal charges. He was charged with robbery with aggravating circumstances, murder and the unlawful

possession of firearms in the high court. He was granted bail in that matter, apparently after the investigating officer had an accident and was incapacitated. He was ultimately acquitted. Whilst he was on bail he was arrested in the current matter. Although the details are scant he was also previously charged in a regional court in the Eastern Cape, granted bail and those proceedings were withdrawn.

[7] The garage where the incident occurred is equipped with closed circuit television cameras (CCTV), specifically for security purposes. During the robbery the system was functioning and the State had been furnished with the recording of the events. The State has that recording available for purposes of the criminal trial and has still photographs printed from it. According to the investigating officer, who testified for the State in opposing the bail application, the events recorded on the CCTV recording accord with the accounts of witnesses and incriminate the appellant. Although the recording was not shown to the court, nor to the appellant or his legal representatives, the investigating officer testified that it shows that, prior to the robbery, a white Volkswagen Polo motor vehicle arrived at the garage and caused an obstruction. One of the appellant's co-accused, number 4, alighted. He was asked to move the vehicle. Later, the Polo returned to a position close to the garage and three men disembarked, allegedly the appellant, his co-accused 2 and 4. The Polo then departed. Accused 4 entered the shop at the garage and made a purchase. The appellant, armed with a firearm, entered and pointed the firearm at the owner and all the customers. Whilst inside, accused 4 forced all the attendants and patrons on the forecourt into a cubicle and they were searched by accused 2. One of the accused then made a phonecall, presumably to the driver of a get-away vehicle, but received no response. They attempted to escape in a Ford Fiesta, without success, and then threatened the driver of a Toyota Hilux with a firearm, took control and possession of his vehicle and drove off. Members of the South African Police Service were quick to arrive on the scene and were pointed in the direction of the Hilux. They went in pursuit. Both the Hilux and the police vehicle came to a stop and the occupants started shooting at each other. The Polo, that was at the garage initially, returned and stopped between the police and the suspected robbers. The driver disembarked, walked towards the police who stopped shooting, and he complained to them that he had been hijacked. The suspected robbers got into the Polo and sped

away. It ultimately crashed against a wall and the occupants ran away. Bystanders pointed the police to where the occupants were allegedly hiding and the police arrested the appellant and accused 2 as a result of the reports from the bystanders. The police found a firearm buried at the house where accused 2 was arrested and this firearm was ballistically linked to the scene of the shootout between members of the police and the robbers. A fingerprint of the appellant was found in the Polo, which he identified as a vehicle of a friend.

[8] Despite the confidence of the State in its evidence against the appellant it was evident that the investigating officer over-stated that case during the course of his evidence. Cross examination revealed that the fingerprint of the appellant was found on the Polo motor vehicle and not in it, that there were some issues around the reliability of the identification of the appellant during an identification parade and in court, that the photographs made from the CCTV recording (these are not part of the record of the proceedings before us) did not show the facial features of the robbers and revealed a dispute about whether the person that the State alleged was the appellant was wearing a multi-coloured striped T-shirt or a black and white striped jersey, similar to a rugby jersey. It is necessary to record that the owner of the Polo was allegedly known to the appellant and that was the reason for the possible presence of the fingerprint, which the appellant has not yet acknowledged was his.

[9] Despite the investigating officer stating that the State has a strong case against the appellant, his evidence did not reveal this. The State has not managed, in a period of two and a half years, to complete the evidence of their alleged strong case in the trial court. The State did not baulk at the accusation that it caused most, if not all, the delays in the matter. At the time that the magistrate heard the bail application, it was envisaged that the State was going to close its case after a further three day hearing during May 2012. That date has now come and gone and this Court was informed that the State did not proceed with its case against the appellant, but postponed it again until the end of May 2012. Counsel appearing for the State before us, who is not counsel appearing at the trial of the matter, was in the unenviable position that she was unable to give the assurance that the State's case is going to proceed and be completed during the

postponed hearing at the end of the month. She was also unable to indicate, despite the fact that she enquired about it, what the evidence was that the State still intended to lead.

[10] According to the investigating officer's evidence, the source of all of the evidence against the appellant became known on the day of the incident and therefore there could not have been any difficulty gathering it. No difficulty was pointed to on behalf of the State. The inordinate delay in presenting this asserted strong case on behalf of the State is unexplained. In the circumstances the delay since the trial started in November 2009, is significant and calls for an explanation that has not been forthcoming. On the contrary, when asked for one during his evidence, the investigating officer displayed an arrogant and obstructive attitude.

[11] The finding contended for on behalf of the appellant that there is no case at all against him, is overly optimistic. The evidence on behalf of the State, at the very least, discloses a link between the appellant, the Polo at the scene of the shoot-out between the police and the robbers, and the place where the appellant was arrested. However, the delay in concluding its case, the lack of explanation for the delay and the absence of evidence of the alleged strong case, undermines the assertion by the State and the finding by the magistrate that there is such a substantial case against the appellant that it would serve as motivation for him not to stand his trial were he to be released on bail.

[12] The appellant has faced previous prosecutions, in the high court for a variety of charges, including murder, and also in a regional court in the Eastern Cape, for robbery. In each instance he was granted bail and he stood trial until its conclusion. These facts reveal an inclination contrary to reluctance to stand trial. In the circumstances the apparent weakness of the State's case, taken together with a history of not avoiding his trial, the court below was wrong in not concluding that the appellant has succeeded in showing that exceptional circumstances are present that, in the interests of justice, permit his release.

[12] The appellant was released on bail on the following terms that were agreed between the parties. The following order was made:

1 The appeal is upheld.

2 The order of the court below is set aside and substituted as follows:

‘a The appeal is upheld.

b The order by the Magistrate is set aside and substituted as follows:

“The applicant is released on bail in the amount of R5 000 (five thousand rand) subject to the following conditions:

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iii Attend his trial on each date the matter is postponed to and remain in attendance until excused by the court.”

S SNYDERS

Judge of Appeal

APPEARANCES:

For the Appellant: J van der Berg

Instructed by:

Bern Rautenbach Attorneys; Brackenfell

Lengau Attorneys, Bloemfontein

For the Respondent: S M Galloway

Instructed by:

The Director of Public Prosecutions, Cape Town

The Director of Public Prosecutions, Bloemfontein