

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : PORT ELIZABETH

CASE NO. CC 16/13

In the matter between:

LUYANDA NJOKWENI

Applicant

and

THE STATE

Respondent

BAIL JUDGMENT

GRIFFITHS, J.:

[1] The applicant in this matter is at present standing trial along with six other accused in the High Court, Port Elizabeth. He is charged with robbery with aggravating circumstances, statutory conspiracy to commit robbery with aggravating circumstances, unlawful possession of firearms including a fully automatic firearm, unlawful possession of ammunition, three counts of attempted murder, six counts of murder and three counts of theft. He has come before me today on an application for bail, supported by an affidavit deposed to by himself.

[2] It is common cause that the appellant was arrested on 28 November 2011 after he had handed himself over to the police. He applied for bail on 15 March 2012 in the magistrates' court, which application was refused. There appears to be a dispute as to whether or not this refusal was taken on appeal, the state contending that it was withdrawn and the applicant contending that it was argued and a judgment granted by Schoeman J. The trial commenced on 10 June 2013 and continued to 27 June 2013 when it was postponed to 17 February 2014 for continuation. According to an affidavit by the investigating officer the reason for the postponement was not that the state was unprepared to proceed, but it was due to the fact that defence counsel was unavailable to proceed beyond 27 June 2013 and, due to other commitments, would only be available once again on 17 February 2014.

[3] It is trite, in view of the fact that there has been a previous bail application, that the applicant is required to show that there have been changed circumstances since that application for bail was refused. As I understand the application before me, and as argued by Mr. Price who appeared for the applicant, these changed circumstances are, firstly, the lengthy time that the applicant has remained in custody coupled with the fact that, although the state case has not yet been closed, the evidence of some three or four state witnesses have been completed. It is the submission of the applicant, based on his affidavit, that where the magistrate on an analysis of the evidence then available to the state came to the conclusion that the state's case was reasonably strong against the applicant, that situation has changed and, in his submission, the state evidence is weak. In this regard the applicant has stated that in his view

the evidence of the state is just strong enough to place him on his defence.

[4] Whether or not there exist changed circumstances as contended for, there is no doubt that the applicant still bears an onus, pursuant to the provisions of section 60 (11) (a) of the Criminal Procedure Act (number 51 of 1937) to produce "*evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release*";". This is so by virtue of the fact that, as is common cause, certain of the charges which the applicant faces fall within the purview of schedule 6 to the Act. Furthermore, even if I conclude that there are indeed new facts or changed circumstances, it is clear that I am obliged, in entertaining this application, to consider all the facts before me both new and old and on that basis to conclude whether or not exceptional circumstances exist which justify the release of the applicant on bail. (**S v Vermaas 1996 (1) SACR 528 (T); S v Petersen 2008 (2) SACR 355 (C)**). Furthermore, in order to successfully challenge the merits of the state's case in bail proceedings, the applicant must prove on a balance of probability that he will be acquitted. (**S v Botha 2002 (1) 222 (SCA) at 230h**)

[5] With regard to the question of delay, there is absolutely no evidence to gainsay the assertion by the investigating officer that it is not the state, but the defence, that has precipitated the lengthy adjournment of the matter. Whilst I accept that the applicant personally could not have had any control over this, this is not a case where, as in the matter of **Mooi v S (unreported SCA case 162/12)**, the state was responsible for the delay and failed to give any explanation therefor, or provide sufficient evidence of its allegedly strong case.

[6] I believe it is necessary to consider this question of delay in conjunction with the question of the strength of the state case. The state case in this matter relies largely on the evidence of an undercover agent, together with a number of video recordings which he made whilst so under cover. The agent and the video recordings were to a degree supported by the evidence of the investigating officer himself. He testified as to the background events leading up to the arrest of, *inter alia*, the applicant as also the role that the undercover agent had played. Apparently the applicant appears on a number of the video recordings made by the agent in which he incriminates himself with regard to the commission of the robbery and the conspiracy charges. Furthermore, it appears from the evidence of the investigating officer that whilst there is no evidence that the applicant was in fact at the scene of the robbery, he was indeed one of the main conspirators. It apparently appears from one of the videos that he, that is the applicant, was present in the flat of the agent and "*can be clearly seen on the video busy finalizing the execution of the robbery*".

[7] The applicant maintains in his affidavit that it is common cause that he was not at the scene of the robbery, that he was not found in possession of any firearms or explosives that might be used in the robbery and that he cannot be linked to any of the vehicles apparently used by the robbers. He however concedes that the videos do show him in discussion with others relating to the robbery but he states that that he was not on the scene when the conspiracy was hatched or when the actual robbery took place. Regarding the videos taken by the agent, he states that they are "*very poorly taken and are, in numerous places, extremely difficult to hear or to properly see what is going on. In addition, these videos are*

being challenged in court on the basis of their not being authentic and original and the provisions of section 222 of the Criminal Procedure Act will have to be applied by the court."

[8] What is notably absent from his affidavit is a clear indication as to whether he clearly denies any involvement whatsoever in the matter or not. He sets about, as an accused person, criticizing the evidence of the state but does not state that he was indeed not involved in the matter. Strangely enough, it appears from the affidavit of the investigating officer that the defence advanced by the applicant at the time of the initial bail application was as follows and I quote:

“The case put forward on behalf of the Applicant is that he was approached to take part in the robbery and attended various meetings where the planning of the robbery took place. He then withdrew from the conspiracy. He learned that the robbery took place which we know happened on the 8th of November 2011. During this time, he states, that he was in Durban. On the 6th and the 8th he purchased clothing in Durban and produced receipts to corroborate this. From this it is clear that he could not have been in Port Elizabeth on the 6th, 7th or 8th of November 2011.”

[9] During the course of the trial and whilst the undercover agent was under cross examination by the applicant’s counsel, the following occurred:

“ And he is going to say that that could not be possible because on the 6th and the 7th in fact the 8th he was in Durban .
COURT Sorry, the 6th, 7th and 8th or just the 8th ?

MR NGQAKAYI The 6th, M'Lord, the 7th and the 8th. Yes. He was in Durban. Sorry M'Lord, my client wants to talk to me.

May I approach him ?

COURT Certainly.

MR NGQAKAYI Thank you M'Lord, the consultation needed more time! No fine, we are going to proceed M'Lord. Now I just want to withdraw, it seems as if I didn't take the instruction properly on the date of the 6th and 7th and 8th, alright, he was not in Durban M'Lord. - - - You are welcome."

[10] Is clear from this that whilst the applicant apparently advanced a defence during the course of the initial bail application to the effect that he was, at the time of the robbery, in Durban purchasing clothes and was not present in Port Elizabeth, this defence will not longer be advanced indicating a change in his stance.

[11] In view of the conflict between the investigating officer's opinion with regard to the evidence presently on record which is in contradistinction to that of the applicant to the effect that the evidence is not at all strong, I have difficulties with the notion that the applicant has established on a balance of probabilities that he will not be convicted. This is compounded by the fact that the applicant's defence as punted during the course of the initial bail application appears to have changed and the fact that the applicant has not placed me in his confidence as to what his evidence in this matter will be.

[12] Because of these factors, I am of the view that it cannot be said that the effluxion of time and the commencement of the trial has resulted in a situation where it can be said that the evidence for the state is any weaker than it was as at the time of the previous bail application. Indeed, as I see

the situation, if anything the evidence of the state against the applicant with regard to the conspiracy and the robbery has been strengthened by the fact that the applicant appears to contradict himself as to his whereabouts as at the time of the robbery. Furthermore, the applicant has advanced no reason at all as to why the undercover agent might be inclined to falsely implicate him.

[13] Although the circumstances of the applicant are, in many regards, very similar to the appellant in the Mooi case to which I have already referred, and in which the SCA overturned the lower court's decision effectively refusing bail, there are distinct differences between this and that case which are expressed in the following statement by Snyders JA:

"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."

[14] In the circumstances, the applicant has not persuaded me on a balance of probabilities that he will be acquitted. Accordingly, I do not regard the fact that the state case has commenced and evidence led as leading to any changed circumstances for the purposes of bail.

[15] The applicant has stated under oath that he will not evade trial in that he is resident in this area and has family connections here. Furthermore, he has indicated that he does not have a passport and does not intend to apply for one. He has also denied that he will attempt cross borders into neighbouring countries and has stated that, in any event, he does not have the financial wherewithal to do so. He has also indicated, which is apparently common cause, that he indeed handed himself over to the investigating officer at the time of his arrest. In view of my earlier mentioned finding that the state case has, if anything, strengthened since the last bail application, I am of the view that this could well be a factor which might persuade the applicant to act otherwise and attempt to evade trial should he be granted bail. Furthermore, all this information was available to the magistrate at the previous bail hearing.

[16] Even though there has been some delay since the refusal of bail by the magistrates' court, it does not seem to me that this is unduly lengthy especially when coupled with the fact that such delay is not the fault of the state but due to the unavailability of defence counsel. In any event, I do not believe that a delay of this order can bend to my finding that there is a likelihood that the applicant might evade trial owing to the strength of the state case.

[17] Finally, Mr. Price has pointed to the fact that both accused three and accused four have, since the trial was adjourned, both been granted bail. Apparently accused three was given bail without opposition from the state, the reason being, according to Mr. Le Roux who appeared for the respondent in this matter, that there was no evidence as to the fact that he was part of the conspiracy and planning of the events. I do not regard this

as of great relevance to this matter. As regards accused four, I have been provided with the judgment granting bail delivered by my sister Beshe J from which it appears clearly that the state placed no evidence before the court in opposition to the allegations made by accused four. Accordingly, as she stated in her judgment, she was obliged in the absence of any evidence to the contrary to accept accused four's evidence with regard to the strength of the state case. His application accordingly differs substantially from the present.

[18] I am accordingly of the opinion that no new facts have been placed before me to persuade me that the applicant should be granted bail or that exceptional circumstances the purposes of section 60(11) of the Act are present.

Accordingly, the application for bail is refused.

JUDGE OF THE HIGH COURT

HEARD ON : 07 AUGUST 2013

DELIVERED ON : 07 AUGUST 2013

COUNSEL FOR APPLICANT : Mr Price

INSTRUCTED BY : Sikiwe Attorneys

COUNSEL FOR RESPONDENT : Mr Le Roux

INSTRUCTED BY : Director of Public Prosecutions

