

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

REPORTABLE/NOT REPORTABLE

Case No: CA&R 07/2020

LUVUYO MABEQA

First Appellant

LUKHANYO XEGO

Second Appellant

and

THE STATE

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The two appellants are appealing against the refusal of bail by the Magistrate, New Brighton. Bail was refused on 13 March 2020. The appellants were arrested on or about 28 November 2019 on a charge of armed robbery with aggravating circumstances in terms of section 1 of the Criminal Procedure Act 51 of 1977 (the CPA). The offence is alleged to have occurred on 27 November 2019. Bail was opposed by the State on the basis that the offence fell under Schedule 6 of the CPA. It was not in dispute in the court below that the appellants were facing a Schedule 6

offence. As a result thereof the onus was on the appellants to prove exceptional circumstances that necessitated their release on bail.

[2] In order to discharge the onus both accused elected to testify. Having heard the evidence of the investigating officer as well, the court below dismissed the application. As a consequence thereof, the appellants appealed to this court.

B. Grounds of Appeal:

[3] The appellants presented separate applications for leave to appeal. I shall consolidate the grounds of appeal as they mostly overlap. The grounds span over three pages for each appellant. I shall attempt to summarise them as follows.

- that the court *a quo* failed in attaching due weight to the *viva voce* evidence of the appellants;
- no plausible evidence was presented by the State to gainsay the evidence of the appellants;
- the fact that the complainants failed to identify the appellants in that he did not provide the description of the appellants and his identification of them is suspect having regard to the circumstances under which he pointed the appellants, his evidence in that regard was not corroborated;
- the court *a quo* erred in not finding out that the State case was weak and non-existent against the appellants; and

- that the personal circumstances of the appellants taken cumulatively constituted exceptional circumstances. In respect of the appellant Mr Mabeqa that he has no pending cases;

[4] The appeal is opposed by the State on various grounds.

C. The Facts:

[5] There are three witnesses who testified before the court *a quo*. The two appellants testified and the Investigating Officer Warrant, Officer Cynthia Williams (Warrant Officer Williams).

[6] Warrant Officer Williams testified that she was 28 years in the South African Policer Service (SAPS) and was stationed at Kwadwesi Police Station. Her evidence is common cause in many respects except for when the appellants were pointed out by the complainant at the police station. In fact it would be more prudent to state that it was challenged when it came to the arrest of the appellants. She testified that the complainant is an Uber Taxi driver. On 27 November at 15h00, he was telephoned to fetch a passenger at Mbaba Street, Kwadwesi Township, Port Elizabeth. As he was approaching No. 6 Mbaba, he noticed a Suzuki motor vehicle with GP registration plates (Suzuki motor vehicle) approaching. It was only the driver. It drove past him. He telephoned Lukhanyo, who was the person who had summoned him. Lukhanyo told him to drive to 44 Mbaba, which he did. On arrival, two males and a female

approached his car. One male got to the passenger seat and the other sat behind him with the female behind the passenger. Before anything else, the male seated behind him cocked a firearm and ordered him to move to the passenger seat. He complied. The person in the passenger seat got round to the driver's seat. He took the complainant's E6 Hisense cellular phone and wallet from the complainant's pocket. He drove down the street. He again saw the Suzuki motor vehicle. They drove past it as it was moving slowly. They went to a shop where there were ATM machines. The driver demanded his pin number which he gave to him. He knew that he had no money, so he gave him the correct pin number. The driver came back and swore at the complainant. He ordered him to get out of the motor vehicle. They drove off in his motor vehicle leaving him behind. He went on foot up Nkwenkwezi Street on his way to Kwadwesi Police Station. He spotted his motor vehicle at the bus stop. He approached it. It was deserted but the car keys were in the ignition. He drove to report at Kwadwesi Police Station. The police refused to open a case. He left. Later at about 20h00, he went to report the incident at the Algoa Park Police Station. A docket was opened. He went home thereafter.

[7] On 28 November 2019, the complainant attended a meeting of Uber taxi drivers which was held at Kwazakhele. The meeting was prompted by the robberies which were on the increase involving the Uber taxis. It became apparent at the meeting that in recent robberies, a Suzuki motor vehicle with GP registration was always in the various scenes. After the meeting, the complainant decided to check progress at the Algoa Park Police Station. Whilst he was still at the Community

Service Centre (CSC), police came in company of two male persons. He immediately recognised that those two males were the ones that robbed him the previous afternoon. He immediately informed the police officers that those were the people that robbed him. He told the police that the Suzuki motor vehicle with GP registration plate looked like the one that passed him twice on the day he was robbed. Warrant Officer Williams testified that the two males pointed to by the complainant were the appellants. According to her, they were arrested by Kwazakhele police officers on information received after the meeting at Kwazakhele.

[8] Warrant Officer Williams stated that both appellants had no previous convictions. However, the second appellant Mr Xego had a pending case of robbery which involved an Uber robbery. She testified that she had completed her investigations. She further testified that it transpired that although the complainant had no money at the time they had taken him to the ATM, later on there was money that was transferred to his account. The people who took the complainant's card withdrew a sum of R500.00 from the Kwadwesi Siyabuya Complex from an ABSA ATM. Later that afternoon, the complainant's card was swiped to purchase at Mavela's Tavern.

[9] Warrant Officer Williams testified that the Suzuki motor vehicle was hired by a person called Mandisa on behalf of the second appellant and his co-accused in the other pending case. Of relevance to the matter at hand is that the tracker of the

Suzuki motor vehicle puts it at Kwadwesi Siyabuya Complex at the time the R500.00 was withdrawn and further at Koyana Street at the time the complainant's bank card was used to pay at the Mavela Tavern. The Suzuki motor vehicle was hired on 24 November 2019. She testified that when the appellants were arrested, the second appellant was the driver of the Suzuki motor vehicle. She further testified that since the arrest of the appellants, no Uber taxi robbery occurred.

[10] Under cross-examination Warrant Officer Williams stated that the complainant did not give a description of the appellants in his statement. She stated that she obtained a statement from Mandisa who had hired the Suzuki motor vehicle and in it she mentioned Suyabulala File and Lukhanyo as the people who she assisted in hiring the Suzuki motor vehicle. Mandisa knew them to be friends. The Lukhanyo she referred to is the second applicant, so she stated. Mandisa telephoned the second appellant on 29 November 2019, and they could not answer. At the time a certain daughter (it is not clear from the record whose daughter) informed Mandisa that the second appellant and File had been arrested. It made sense to Warrant Officer Williams that they did not answer their phones because they had been taken by the police.

[11] He was asked how the complainant got to identify the appellants at the police station. Warrant Officer Williams stated that the appellants were arrested together at Gwadela Street. The first appellant was the driver of the Suzuki motor vehicle and the

second appellant was a passenger. She conceded, in the backdrop of her evidence that robbery of Ubers stopped after the arrest of the appellants, that the first appellant has no pending cases involving the robbery of Uber drivers.

[12] In respect of the second appellant, she stated that he has two surnames. In the warning statement, he used Xego and he also uses Shaba.

[13] The first appellant testified that he was 21 years old, unmarried, with no children and is unemployed. He resides at 2 Mahabeni Street, Zwile Location, Port Elizabeth. The house belonged to his mother and he is dependent on her for support. He left school in Grade 11 in 2017. He does not have previous convictions nor pending criminal cases. He was arrested on 29 November 2019 at his home. He did not avoid being arrested. He did not possess a firearm nor was he arrested in possession of stolen property.

[14] He stated that he saw the complainant at the charge office. He was seeing him for the first time on that day. He testified that the complainant “pointed at them and said he did not know them. When the police heard the complainant, the police officials then spoke alone on the side”. He did not hear what they were saying. At that juncture, they were at the parking lot at Algoa Park Police Station. From there, they were taken to Kwadwesi Police Station. They appeared in court on 26 November 2019. He testified that he did not know who the State witnesses were and therefore

would not interfere with them, he was going to attend court and would abide by any conditions the court may impose. He could afford a sum of R 1000.00.

[15] Under cross-examination he elected not to respond to almost all the pertinent questions. The following are but some of the issues he did not want to response to:

- He refused to answer whether he knew the Suzuki motor vehicle with Gauteng registration that he was allegedly found driving.
- He did not want as to answer whether he was the driver of the Suzuki motor vehicle at the time of his arrest.
- He could not answer as to why the complainant pointed at them and in the same breath say he did not know them as he had testified in his evidence in chief.
- He was asked – “you said you were at the parking lot when the complainant pointed you out”? The answer was “can I respond to that at trial”.
- The follow up question was “Even though you had responded to your attorney. Answer: That is correct”.

[16] The second appellant is 21 years, unmarried, unemployed and resides at 15 Jisana Street in Zwide Township, Port Elizabeth. It takes him ten minutes to walk from his home to that of the first appellant so he testified. The house he lived at belonged to his grandfather. He lives there with his mother, younger sister and his grandfather. He left school after matric. He is unemployed. He survives by doing part-time jobs. He worked in Mpumalanga for three months before his arrest. He

testified that he did not have previous conviction. He has one pending case of robbery. His co-accused in that matter is Siyabulela File. The latter was released on R2000.00 bail. He has yet to apply for bail. He is going to plead not guilty when this matter goes on trial.

[17] He was arrested on 26 November 2019. He was on his way to the shop. He received an SMS from his brother informing him that police were looking for him. On his way home, he came across the first appellant. He proceeded with to the latter's house. They found the police present and were arrested. They took them to Algora Park Police Station. The police did not tell them why they were taking them to the police station. He testified that he did not see the complainant at the Algora Park Police Station parking lot. He testified that he was to plead not guilty to the charges. He stated that he only knew the complainant as a witness but undertook not to interfere with State witnesses, he was going to abide by the bail conditions and any other conditions the court may impose. He would be able to afford R500.00 towards bail.

[18] Under cross-examination the second appellant changed his evidence to say that he met with the complainant at the parking lot. When quizzed on this, he said he thought he was being asked about the other pending matter where he is charged with Mr File. His evidence must be viewed in that light he finished with his evidence in chief on 14 February 2020. His cross-examination began on 25 February 2020.

[19] In a nutshell he responded as follows regarding his change of heart in respect of this aspect:

“Well Your Worship because he had mentioned that previous case or the other matter. My thought was I did not understand or was confused whether he was talking about the complainant in this matter or the other matter”. (*Sic*)

The second appellant did not want to comment when it was put to him that he became aware after the adjournment of the matter that the first appellant had said he saw the complainant at the parking lot. The second appellant lied in this respect. The questions posed by his legal representative about the pending matter occurred early in his evidence in chief. The aspect of meeting with the complainant flowed from him telling the court about when how and where he was arrested in this matter. He thereafter testified about how he and the first appellant were taken to Algoa Park Police Station. The question by his legal representative went as follows:

“Mr Macgear: So, you were not informed why you really going to Algoa Park? For what matter you going.

Accused 2: No, were never informed.

Mr Macgear: At Algoa Park Police Station the parking lot there is evidence from applicant number one about complainant. Did you see the complainant there on this case now, not the other case?

Accused 2: I did not see the complainant”. (*Sic*) (Emphasis added).

[20] Therefore, the second applicant could not have mistaken this and ascribed it to the pending case when the questioning categorically referred him to this matter. He

therefore lied in this regard. He changed his evidence after the matter had been adjourned as stated above.

[21] He was asked by the prosecutor whether the complainant said anything when he pointed him out. His response was that he did say something but he would answer that during the trial. He explained his reason to refuse to answer as follows:

“Your Worship, it is not that I do not want to answer your question. It is just that it is my right to answer and not answer any questions. So, I am choosing not to answer that question and rather it at trial”. (*Sic*)

[22] Based on the summary of the evidence above, the court *a quo* reasoned that the appellant’s failed to discharge the onus rested on them and refused to release them on bail. As a consequence thereof, the appellants appealed to this court basically on similar grounds.

D. Grounds of Appeal:

[23] The appellants submitted separate applications for leave to appeal. I shall consolidate the grounds of appeal as they mostly overlap. The grounds span over three pages for each appellant. I shall attempt to summarise them as follows:

- That the court *a quo* failed in attaching due weight to the *viva voce* evidence of the appellants.

- No plausible evidence was presented by the State to gainsay the evidence of the appellants.
- That the complainants failed to identify the appellants in that he did not provide the description of the appellants and their identification having regard to the circumstances under which he pointed the appellants. His evidence in that regard was not corroborated, so it is argued.
- The court *a quo* erred in not finding out that the State case was weak and non-existent; and
- That the personal circumstances of the appellants taken cumulatively constituted exceptional circumstances especially the first appellant who has no pending cases.

E. Analysis:

[24] The appellant's grounds of appeal are repetitive and overlap. The court *a quo* in its judgment highlighted all the personal circumstances of the appellants as they were presented by them in their *viva voce* evidence. Furthermore, it dealt with the substantive evidence presented by them in respect of the appellants' undertaking to abide by the bail conditions the court *a quo* might set. The court *a quo* analysed the evidence of the investigating officer and the appellants and concluded that the appellants failed to discharge the onus vested on them to establish the exceptional circumstances justifying their release on bail. The court *a quo* did so after it had analysed the legal requirements for establish such circumstances. It further balanced

its finding with the constitutional imperative that everyone has a right to be released from detention if the interests of justice so permit. The court *a quo* referred to the provisions of section 60(11)(a) of the CPA in evaluating the evidence before it. Relying on the law, the court *a quo* reasoned that the exceptional circumstances must be understood not to mean unique circumstances above, beyond and entirely different from those enumerated in section 60(4)(a) to (e) of the CPA.

[25] However, the application of the principles relevant to bail was not without fault on the part of the court *a quo*. For example its reasoning in the following regard is flawed:

“The court knows without doubt that both applicants before court intend pleading not guilty to the charge preferred against them, but the court is in the dark, for example as to the possible motive or the possible reason that the complainant would had to falsely implicate both”.

[26] In respect of the first ground Mr *Harker* argued that the State failed to establish that the appellants were arrested together and were found in possession of the Suzuki motor vehicle. He submitted that the evidence of the investigating officer and that of the first appellant conflict and therefore, the State should have produced fingerprints or photographs which would establish that indeed the appellants were arrested in possession of the Suzuki motor vehicle. He submitted that there is lack of detail from the State to establish this fact.

[27] The criticism is unfounded and the submissions are not sound. The test at this stage is not beyond reasonable doubt. It is a balance of probabilities. The probabilities in this matter favour the State. Throughout the evidence of Warrant Officer Williams, the Suzuki motor vehicle featured prominently. From the time the complainant was robbed until the time he identified the appellants at Algoa Park Police Station Warrant Officer Williams was not shaken in this regard under cross-examination. When the issue of the Suzuki motor vehicle was canvassed by the State under cross-examination both appellants elected to remain silent by electing not to answer questions relating to it. It did not assist the appellants to deny under cross-examination of Warrant Officer Williams that they were not found in possession of the Suzuki motor vehicle and say nothing when their turn came. The appellants cannot be heard to say the State did not establish this issue. The election by the appellants to remain silent did not establish that Warrant Officer Williams lied neither did it assist them in establishing that they were not in possession of the Suzuki motor vehicle as alleged.

[28] Mr *Harker* argued that the second ground of the appeal is important because no cash nor property were found in the possession of the appellants in spite of the fact that both the car and the house were available to be searched. No application “for a warrant for search and seizure in accordance with the CPA” was made, so he argued. This to me, is stretching the matter too far. I do not see the relevance of the search and seizure application in the application for bail especially in the circumstances

where the appellants themselves did not want to respond to any questions relevant to the Suzuki motor vehicle. Such information would only be pertinent at trial.

[29] The appeal is also premised on the fact that the State has failed to establish the identity of the appellants as the people who robbed the complainant. It is contended by Mr *Harker* that “(t)he appellants has raised the issue of identification in the court proceedings together with his co-accused” (*sic*). He further submitted as follows in his heads of argument:

“Based on the reasoning as it flows where the identification was an issue of dispute the court was obliged to exercise its inquisitorial powers”.

. . .

There is no evidence before the court that section 48 of the CPA was complied with which together with no description before the arrest, no crime scene, that the vehicle was not searched one has to query how the court concluded that the arrest and entry to the premises were lawful or that the arrest was unlawful”. (*Sic*)

Section 48 of the CPA deals with “breaking open premises for purpose of arrest” and thus is irrelevant in the circumstances of this matter.

[30] In respect of the identification the submissions made with respect, do not hold water. The uncontroverted evidence is that the complainant out of his own pointed out the appellants upon them entering the Community Service Centre. The appellants did not gainsay that, instead they elected to keep quiet and would deal with that at trial.

There was no need for the court *a quo* to have gone beyond uncontroverted evidence before it in this regard and I find no misdirection on its part.

[31] I do not agree with the appellants that the State case is weak. The evidence reveals that the complainant was able to point out at the appellants on his own. There is no suggestion of a coalition between him and the police. The circumstantial evidence also augments the findings by the court that there is a strong *prima facie* case the appellants are likely to face. Running the risk of repeating myself, there is no evidence on the part of the appellants to gainsay the *prima facie* evidence presented by the State except for them to defer their answers, even to non-committal issues, to the trial court.

[32] It is not correct further that the court *a quo* did not have regard to the personal circumstances of the appellants. The court *a quo* reasoned as following in this regard:

“When all factors, including the personal circumstances of the applicants are weighed up, the court is of the view that both applications have not proved on a balance of probabilities that exceptional circumstances exist. That permit their release from detention, and in the circumstances both applicants individually as well as cumulatively do not amount to exceptional, their circumstances, and as such the court is refusing the bail application in respect of both applicant 1 and applicant 2”. (*Sic*)

[33] The court *a quo* did not just do lip services to the above. It evaluated the strength of the State case, the evidence of the appellants and their election to

exercise their right to remain silent. The court below, dealt with the presumption of innocence and the interests of the appellants not to be arbitrarily detained pending trial.

[34] It is common cause that the complainant, through the investigating officer's evidence, did not place the appellants inside the Suzuki motor vehicle. It was not necessary for the complainant to have done so as suggested by the appellants. Furthermore, it is not the evidence of the State in opposing bail that the appellants were seen inside the Suzuki motor vehicle. The submission by the appellants in this regard is misplaced. The relevance of the Suzuki motor vehicle is circumstantial as can be gleaned from the summary of the evidence. I need not repeat the evidence in this regard.

[35] This is an armed robbery matter hence it falls under Schedule 6. It is trite that it carries a lengthy term of imprisonment in the event of a conviction. The court *a quo* was correct in having regard to that in exercising its discretion whether to release the appellants. It is a factor that is considered in instances where an applicant faces serious charges.

[36] I cannot find fault in the outcome the court *a quo* arrived at in refusing bail. The appeal in respect of both appellants should not succeed.

Court: Yes, I understand. But it is not about speculate. You cannot ask her and then you are going to hold to the investigating officer to whatever distance she is speculating on. Which is not allowed.

Mr MacGear: In a bail application hearsay evidence [in between]

Court: It is not hearsay, this is speculation. There is a difference.

Mr MacGear: Give me time to reply.

Court: But you are putting words in the court's mouth.

Mr MacGear: You do not give me an opportunity to address you.

Court: Because you are putting words in the court's mouth Mr MacGear.

Mr MacGear: Can I address you? Yes or no?

Court: Yes, you may address me now but you wait until the court has finished speaking and then you can address me.

Mr MacGear: Okay, fine. Can I speak now?

Court: Yes, you may.

Mr MacGear: Now in a bail application hearsay evidence is admissible. There is no hard and fast rule. It is an inquiry where you can lead any evidence.

Court: Yes. I understand that.

Mr MacGear: So, the witnesses are entitled also to speculate about how far [in between]

Court: No Mr MacGear.

Mr MacGear: She knows where the places is.

Court: Mr MacGear I think you have it wrong. Witnesses are not entitled. You are trying to put words in the witness mouth.

Mr MacGear: I put it her then. I put it to her.

Court: You can put it to her. She can answer yes or no.

Mr MacGear: I know where Kwazakhele Police Station and I know where Algoa Park Police Station is, about a few kilometres.

Warrant Officer Williams: Yes Your Worship, a few kilometres.

Mr MacGear: It is not going to take you very long to get from point A, that is Kwazakhele Police Station to Algoa Park Police Station. You agree with me?

Warrant Officer Williams: Yes Your Worship. It depends where you go in between.

Mr MacGear: It is going to take you less than half an hour. I travel is a lot of times. I know where it is and I know where Algoa Park is. So, it takes you less than half an hour.

Warrant Officer Williams: Ja, except if you stop by the garage and buy something to eat or Your Worship, then it can take more time.

Mr MacGear: [Indistinct] I did not ask you to very sarcastic about.

Court: Court will not allow swear words please. Language.

Mr MacGear: I am putting it to her.

Court: No.

Mr MacGear: It is not [in between]

Court: Mr MacGear do not talk when the court is talking. Relax please. You said a word that is a swear word now.

Mr MacGear: What is it?

Court: I do not want to repeat it.

Mr MacGear: What is the swear word?

Court: It starts with a B?

Mr MacGear: No, no, I did not say any swear words. I said, talked about sarcastic.

Court: No, Mr MacGear I heard the exact word that you said. But, I do not know where you are going with this. What – you are actually harassing the investigating now.

Mr MacGear: No, I am entitled to ask a question.

Court: And she is entitled to answer you and she said if you stop at a shop it will take you longer. She cannot speculate how long the complainant took to get there and if he did not make a stop.

Mr MacGear: I am entitled to put to her that she is sarcastic because I never asked about stopping.

Court: No, if you do not like her answer does not mean she is sarcastic if it is not the answer that you want.

Mr MacGear: Are you going to give me opportunity to cross-examine this witness?

Court: Are you going to give the opportunity for the court to speak?

Mr MacGear: I am asking you a question.

Court: And I am asking you a question Mr MacGear.

Mr MacGear: The court is entitled to speak but are you giving me opportunity to cross-examine this witness?

Court: I will give you an opportunity to cross-examine the witness but not harass the witness, okay. And if the witness answers and it is not in your favour it does not mean that you can say she is sarcastic.

Mr MacGear: You raising your voice now to me.

Court: Because you are doing it to the court.

Mr MacGear: I notice you are raising your voice to me.

Court: Yes, I am Mr MacGear.

Mr MacGear: If you raise your voice then I am going to ask that you recuse yourself from this matter because you are totally [in between]

Court: You are raising your voice to the court and you used a swear word. So, if you do not like the answer that the investigating officer is giving you do not say she is being sarcastic, it is just not the answer that you want. You may continue Mr MacGear.

Mr MacGear: I am entitled to put it and will put it to the witness. You are sarcastic. Nobody asked you about if you pull off and you go to a shop, I will do something else. I am asking if you travel from the one station to the other station; that is what I am asking you.

Court: Do you have an answer?

Warrant Officer Williams: No Your Worship.

Court: Move on Mr MacGear.

Mr MacGear: Now just tell me in the police statements of the arrest did they arrest the applicants?"

[38] Consequently, I make the following order.

1. The appeal is dismissed.

M MAKAULA
Judge of the High Court

Appearances:

For the Appellants: Adv BC Harker

Instructed by: Wayne MacGear, Aneesah Campbell Attorneys, Port Elizabeth

For the State: Adv R Ahmed
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Date of hearing: 19 June 2020

Date judgment delivered: 28 July 2020

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