



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A61/2024

In the Appeal between:

MADODA NXUMALO	1 st Appellant
VUSI DAVID ZITHE	2 nd Appellant
BONGINKOSI THEMBINKOSI SIBIYA	3 rd Appellant
MAKHOSONKE DUBE	4 th Appellant
MDUDUZI MAKHEZA MATHENJANE	5 th Appellant
and	
THE STATE	Respondent

HEARD ON: 12 JULY 2024

JUDGMENT BY: DANISO, J

DELIVERED ON: 17 JULY 2024

- [1] The appellants were arrested on 10 December 2022 and subsequently charged with two counts namely, the tampering, damaging or destroying of essential infrastructure to wit: Transnet fuel pipeline thereby contravening the provisions of section 3(1) (a) read with sections 1, 3(1) and 3(2) of the Criminal Matters Amendment Act 18 of 2015 read with of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (count 1) and theft of fifty thousand litres of Transnet diesel worth R1 236 500.00 (count 2).
- [2] The charges arise from the incident which occurred on 9 December 2022 at a farm known as Kiesbeen in Harrismith in the Free State where the Transnet underground fuel pipeline is situated. The pipeline runs all the way from Kwa-Zulu Natal to Northwest, Gauteng and Mpumalanga and is used to supply fuel (diesel, petrol and crude oil) to different companies.
- [3] The State alleges that at all material times hereto Bidvest Protea Coin security guards were contracted by Transnet to patrol the pipeline. On the day of the incident the security guards observed a group of men tampering with the pipeline, siphoned the fuel and deposited it into two tanker trucks. The men then drove away with the two tanker trucks, a Toyota Hilux and a Toyota Fortuner towards the N3 freeway. The security guards mobilised for reinforcements as well as the police and gave chase tracking the movement of the vehicles through the surveillance cameras situated on the nearby farms and the road leading towards the N3 freeway. The tanker trucks were ultimately stopped on the N3 freeway. The first appellant was found driving the first tanker truck. Mr. Thabiso Gabriel Molieling who is charged with appellants as accused number 2 (he is not part of these proceedings) was found driving the second truck. At that time, the tanker had been extricated from the truck as it was incinerated after it caught fire on the N3 freeway. The Toyota Hilux was stopped at Standerton. It was driven by the second appellant and he was travelling with the rest of the appellants.

- [4] It is the State's case that when the appellants were pulled over by the police they tried to flee. Mr. Molieling also attempted to bribe the arresting officer by offering him R10 000.00 in exchange for not arresting him. Mr. Molieling is facing an additional charge of corruption in that regard. The driver of the Toyota Fortuner managed to evade arrest. A variety of equipment used for drilling into the valves of the pipeline as well as siphoning fuel was recovered days later in the veld near the scene of the crime including a grinder, two spades, a portable generator, cutting torch, a "monkey wrench" and a fuel draining device referred to as a "fitting." The preliminary laboratory report confirmed that the fuel found in the tanker trucks was the diesel siphoned from the Transnet's pipeline.
- [5] On 9 January 2023 the appellants launched an application by way of affidavits to be released on bail.
- [6] It was common cause that the offences which the appellants were charged with fell within the offences listed under schedule 5 of the Criminal Procedure Act (the "CPA")¹ and that given their nature, the appellants were not entitled to be released from custody pending trial unless they adduced evidence to convince the court on a balance of probabilities that the interests of justice permitted their release on bail.² The learned magistrate Pratt was not so convinced. He dismissed the application on 16 January 2023. Their subsequent bail application on new facts suffered the same fate on 16 February 2024.
- [7] The appellants are aggrieved by the learned magistrate's refusal to admit them to renewed bail on new facts, they contend that his decision was wrong.
- [8] This appeal is against the learned magistrate's refusal to admit the appellants to bail. The appeal is opposed by the State.

¹ Act 51 of 1977.

² Section 60 (1) (a) of the CPA.

[9] It has been held that new facts must be “sufficiently different in character from the facts presented at the earlier unsuccessful bail application and must not constitute simply a reshuffling of old evidence.”³

[10] The new facts upon which the bail on new facts was predicated were essentially that the State's case against them is weak and the delay in the commencement of the trial including the impact of prolonged incarceration pending trial.

[11] In the grounds of appeal the appellants contend that the learned magistrate misdirected himself by:

- “1.2. finding that, no new facts were presented to warrant the release of the applicants on bail;*
- 1.3. finding that, the State did not have an opportunity to cross-examine the applicant (sic) whilst they testified under oath in the application for bail on new facts;*
- 1.4. not having due regard to the new fact that the State did not have video footage that link the applicants despite the evidence from the State in the initial bail application that such footage exists; and*
- 1.5. not having sufficient regard to the legal principle that an accused person is presumed innocent until proven guilty.”*

[12] The learned magistrate also erred by:

- 1.6. not having due regard to the absence of fingerprints, DNA results and no expert evidence on cell phones more than a year after the arrest of the applicants;*
- 1.7. not releasing the appellants on bail after making the following finding: “Although not as strong as the Court believed during the bail application, during the main application”; and*

³ *S v Mohamed* **1999 (2) SACR 507** (C) at 512; *S v Petersen* **2008 (2) SACR 355** (C) at 57.

1.8. *by not having due regard to the cumulative effect of a weaker State's case, the delay in the commencement of the case and the impact of prolonged incarceration of the appellants."*

- [13] Counsel for the appellants Mr. Simpson, argued that post the refusal of the initial bail, the defence was provided with copies of the docket and it was then that the defence discovered that the State did not have the video footage linking the appellants to the crimes including DNA, fingerprints and cell phone evidence and this is despite the State's testimony at the initial bail hearing that there was such evidence. As regards the appellants' prolonged incarceration, Mr. Simpson confirmed that the matter has been set down for trial to be heard in a month's time from 5 to 7 August 2024. He however argued that there are many issues that can hamper the finalization of the matter during that period such as load shedding and the unavailability of water in that area.
- [14] On the other side, Mr. Harrington was adamant that the magistrate's decision was correct. It was his submission that the onus was on the appellants to provide sufficient evidence that the State's case is weak but the appellants simply made the allegations regarding the purported weakness of the State's case without providing any evidence. He stated that the appellants had ample opportunity to do so when they testified during the renewed bail hearing. They placed themselves in the area of Harrismith and except to aver that they were in that area to look for work they deliberately avoided to explain why they chose to come so far away from their respective residences to look for jobs in a small rural town of Harrismith. They did not even call witnesses or submit affidavits of the people they went to when looking for the supposed jobs. With regard to the absence of video footage identifying the appellants, DNA and fingerprints evidence Mr. Harrington countered that the appellants have misinterpreted the testimony of the State's witness, warrant officer Zwane because he clearly stated the reasons why that evidence was unavailable namely that: the video footage was of bad quality, fingerprints were not lifted and the DNA and cell phone evidence was still not yet available.

- [15] It was his submission that there is nothing untoward about the video footage identifying the vehicles at the scene of the crime hence the security guards were able to track the movement of the motor vehicles and followed them till the appellants were arrested. Mr. Harrington pointed out that the appellants are silent regarding this piece of evidence including the witnesses' statements obtained from the security guards who observed the crimes being committed and also assisted in tracking the appellants.
- [16] Mr. Harrington maintained that despite the absence of the video footage identifying the appellants, DNA, fingerprint and cell phone evidence the State has a strong case against the appellants and this also evidenced by the fact that trial dates have since been allocated. The appeal must accordingly fail.
- [17] In his judgment it is clear that the learned magistrate considered the State's contention that despite the unavailability of the video footage identifying the appellants and the fingerprint, DNA and cell phone evidence the State's case against the appellants was strong as the situation could change during trial. I cannot fault him for this conclusion. It must be borne in mind that on the available facts, aside from the video footage identifying the appellants at the scene including fingerprint, DNA and cell phone evidence there are other pieces of evidence which the State intends to rely on to link the appellants to the crimes namely, eye witness evidence and the evidence confirming that the fuel found in the tanker truck matches the fuel in the Transnet pipelines- therefore, the appellants failed to discharge the onus of proving their assertion that they will probably be acquitted at the trial on a preponderance of probabilities.⁴
- [18] In quoting the learned magistrate's reasoning that: "*although not as strong as the Court believed during the bail application...*" Mr Simpson ignored the

⁴ *S v Mathebula* **2010 (1) SACR 55** (SCA) at 59 para 12.

magistrate's basis for this finding because immediately above this finding the learned magistrate reasoned as follows:⁵

"...but apart from that the public prosecutor is certain that the State has a case, has a strong case despite that evidence, that some evidence will not be represented (sic). This might of course change should the defence cross-examine the witnesses, and I have to accept that the state has a case, although not as strong as the Court believed during the bail application..."

- [19] Evidence tendered at the initial bail must be compared the evidence relied upon in the renewed bail application to judge whether the renewed bail hearing raises new facts. In *Davis and Another v S*⁶ it was pointed out that: *"If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately."*
- [20] Evidence carries more weight when its veracity has been tested under cross-examination. In this matter, the appellants elected to submit affidavits instead of leading oral evidence at the initial bail hearing. Evidence relayed by way of affidavits is less persuasive⁷ for that reason the learned magistrate was correct in taking into account the fact that the appellants' evidence was not tested under cross-examination when he was judging whether the evidence raised at the renewed bail application was new evidence or not.
- [21] There is no truth to the appellants' contention that: "no single word" pertaining to the legal principle that an accused person is presumed innocent until proven guilty is mentioned in the learned magistrate's judgment. The record of the proceedings, page 3802, line 16 to 20 reflect that the magistrate made the following remarks:

⁵Record of the proceedings page 360 line 20 to 25.

⁶ (2888/2015) [2015] ZAKZDHC 41 (delivered on 8 May 2015).

⁷ Para 11 to 13 supra at fn 4.

"In his address Mr Thusi said the presumption of innocence is still part of the law. That is correct but for certain types of offences there has been made exceptions" (sic).

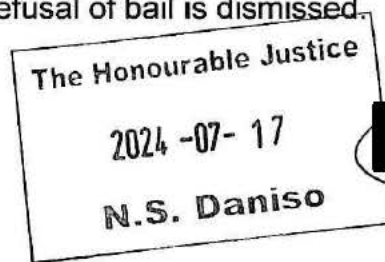
- [22] Regard must be had that as with all the other rights enshrined in the Bill of Rights, the right to be presumed innocent until proven guilty is not absolute.
- [23] I agree that a prolonged period of incarceration pending trial is a factor that must be taken into account when considering whether the interest of justice permits the appellants' release on bail. The bail proceedings were finalized during February this year, 2024. In the record of the proceedings it is does not appear that the delay in the commencement of the case is attributable to the State. Instead, there was a period where one of the appellants' erstwhile legal representative was unavailable due to being highly expectant. Nevertheless, the delay is not extreme.
- [24] I am alive to the issues raised by Mr. Simpson pertaining to electricity and water shedding that may hamper the finalization of the matter however, it is my view that these are some of the hazards of trials which cannot discount the seriousness of the offences the appellants have been charged with and the probability of mandatory long prison sentences in the event of conviction.
- [25] In conclusion, I am not persuaded that the magistrate exercised his discretion wrongly in refusing the appellants' bail. There is thus no basis to overturn the decision of the magistrate.⁸

⁸ *S v Barber* **1979 (4) SA 218** (D); *S v Faye* **2009 (2) SACR 210** (TK).

ORDER

[26] I make the following order:

1. The appeal against refusal of bail is dismissed.



NS DANISO, J

On behalf of appellants:

Instructed by:

Adv. A. Simpson

Richter van der Watt Attorneys

FRANKFORT

C/O Mariechen Martins Attorneys

BLOEMFONTEIN

On behalf of respondent:

Instructed by:

Adv. J. Harrington

Office of the Director: Public Prosecutions

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