



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A58/2022

DPP REF NO: 10/2/5/2-2022-026

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
8 July 2022.	
DATE	SIGNATURE

In the matter between:

KHOZA; LEHLOHONLOLO

First Appellant

THELEDI; GIFT

Second Appellant

MDLULI; HLANGALALA

Third Appellant

and

THE STATE

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The appellants were arrested on 8 February 2022. The State proffered charges of robbery with aggravating circumstances as envisaged in section 1 of the Criminal Procedure Act, 51 of 1977 ('CPA') and kidnapping against them.

[2] The appellants brought an application for bail on 11 April 2022 under case number RC22/2022 before the Randburg Regional Court. The application was determined on the basis of the absence of 'exceptional circumstances.'¹ The appellants thereafter launched this appeal of their denial of bail in terms of s 65(1)(a), heard by me on 24 June 2022. The respondent opposed the grant of bail in the court *a quo* and this appeal.

[3] The learned magistrate found that the appellants failed to establish or adduce evidence demonstrating the existence of exceptional circumstances that would justify their release on bail.

[4] The appellants had legal representation in the court *a quo* and this appeal. They relied on affidavit evidence rather than oral evidence.

[5] Section 65(1)(a) of the CPA provides that:

"(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail ..., may appeal against such refusal ... to the superior court having jurisdiction ...

(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."

[6] The respondent referred to *S v Barber*² to the effect that the powers of a court hearing a bail appeal are constrained. This court may not alter the decision of the lower

¹ Record P61 para 10.

² *S v Barber* 1979 (4) SA 218 (D) at 220E-H ('*Barber*').

court unless that court exercised its discretion incorrectly, being a failure to exercise its discretion in terms of s 60(11) of the CPA³.

[7] Accordingly, I am obliged to find that the learned magistrate exercised his discretion incorrectly or not at all before I may change the order granted by that court.

[8] The standard of proof is on a balance of probabilities.⁴

[9] Essentially, the appellants submitted that the court *a quo*, on the facts before it, misapplied itself in determining the bail applications all three appellants on the basis of offences falling within schedule 6 of the CPA.

[10] Whilst the parties before the court *a quo* did not dispute that the charges proffered against the appellants, robbery with aggravating circumstances and kidnapping, fell within the provisions of schedule 6 of the CPA, the appellants' counsel took issue with the schedules in this appeal, in the light of the variance between the applicable onus and the tests as regards offences falling within schedules 1 to 4 and those under schedule 5 or schedule 6.

[11] In the bail applications of accused persons charged with offences under schedule 6 of the CPA, the accused bears the onus to demonstrate exceptional circumstances pursuant to which the accused should be admitted to bail. In respect of offences falling under schedule 5, the accused bears the onus to demonstrate that the interests of justice permit his / her release on bail.

³ *S v Porthern and Others* 2004 (2) SACR 242 (C); *Fourie v S* (A107/2020) [2020] ZAGPPHC 260 (8 June 2020) ('*Fourie*').

⁴ *Fourie* id para 9.

[12] In respect of offences falling within schedules 1, 2, 3 or 4 of the CPA, the state bears the onus to show why the accused should not be released on bail.

[13] Counsel submitted in respect of all three appellants that the aggravating circumstances alleged by the state did not fall within the definition thereof in s 1 of the CPA. The appellants did not possess a firearm or dangerous weapon, no injuries to any victims were demonstrated by the respondent and there was no evidence of any threat to inflict grievous bodily harm injuries. I deal further hereunder with the sufficiency of a threat as constituting aggravating circumstances.

[14] Thus, the appellants' submitted that the first appellant's application should have been considered under schedule 1 and the second and third appellants under schedule 5. Accordingly, that the respondent bore the onus to show why the first appellant should not be released on bail and the second and third appellants carried the onus to show that the interests of justice permit them to be released on bail.

[15] The respondent submitted that the argument in respect of the applicable schedules was a 'non-issue' and on the facts before the court *a quo*, the decision to deny the three appellants bail was correct and should be upheld by this Court.

[16] The appellants are regarded as innocent until proven guilty whatever the schedule under which they are charged.

[17] The appellants' versions were the same. They alleged that they were informed of an employment vacancy at a courier company in the Fourways / Sunninghill area and proceeded to look for that company. They were arrested together allegedly whilst

talking to the driver of the courier vehicle, asking for directions, along Cedar Drive in Fourways.⁵

[18] The state's case was that the appellants were caught in an operation mounted to locate perpetrators committing offences against courier vehicles in the area. Accordingly, the South African Police Service ('SAPS') had members in the area. The SAPS received intelligence regarding a red VW Polo ('Polo'), hijacked in Sunnyside, Pretoria the previous day, occupied by three men.

[19] The respondent's witnesses saw the Polo stop alongside a yellow courier bakkie ('bakkie') and hoot at the courier. Furthermore, the three appellants were together in the Polo driven by the first appellant, prior to the events described below.

[20] Two occupants, the second and third appellants, alighted from the Polo and ran towards the bakkie. They opened the bakkie's driver and passenger doors. The crew of the bakkie immediately jumped out of the bakkie and fled. The second and third appellants got into the bakkie with the driver sitting between them. The bakkie sped off, driven by the third appellant with the SAPS in pursuit. The Polo followed the bakkie at speed obliging the SAPS to chase it. The bakkie eventually stopped, as did the Polo, albeit some distance from the bakkie.

[21] The third appellant was found in possession of a mobile telephone. The second and third appellants were both arrested for robbery. The driver of the Polo, the first appellant, was arrested for robbery. None of the appellants were found with firearms in their possession or in either vehicle. Firearms were not found in either the Polo or the bakkie.

⁵ CaseLines 003-32 L19.

[22] According to the investigating officer, the first appellant has no previous convictions or pending cases. The second appellant has one previous conviction for theft in 2018 in respect of which he was convicted to three years imprisonment.⁶ The third appellant has one previous conviction for possession of an unlicensed firearm and ammunition in 2011 and was sentenced to three years' direct imprisonment.

[23] The investigating officer verified the addresses given by each appellant.

[24] The appellants' counsel contended that the investigating officer did not object to the appellants being admitted to bail on strict conditions. The record of the proceedings does not support that submission. The record reflects that the investigating officer requested that the appellants be remanded in custody as the charges were serious and the investigations were not complete.⁷

[25] In respect of the first appellant, the appellants' counsel argued that the first appellant was not part of and/or involved in the commission of the kidnapping as the state did not place him on the scene of the kidnapping. The state had not charged the first appellant with common purpose and thus it could not be inferred. On the first appellant's version, he was arrested some distance from where the second and third appellants were arrested. Accordingly, the first appellant ought to have been charged with common robbery and his bail application assessed on the basis of schedule 1.

[26] The first appellant, indeed all the appellants' versions were that they were all together (allegedly looking for the courier company offering employment).

[27] The first appellant however was arrested driving the Polo that was used by the appellants and that he followed the bakkie at speed after it drove off, forcing the police

⁶ CaseLines 003-37.

⁷ CaseLines 003-38 L5-9.

to chase after him. Whilst he did not approach the bakkie, he was driving the Polo in the vicinity of the kidnapping.

[28] Hence, the arrest of the first appellant in the Polo directly contradicted and undermined his version. The question arose as to why, in the event that the first appellant was asking for directions as contended by him, he drove after the bakkie being driven by the second and third appellants in a manner that caused the SAPS to have to chase him. The first appellant's conduct undermined his version that he was applying for directions. The first appellant's version was far less probable than that of the state. Accordingly, I am not persuaded that the first appellant's application ought to have been considered under schedule 1.

[29] As regards the alleged conflict in the version of the three appellants and the respondent, the appellants' versions reflected a paucity of details and the probabilities favour the respondent's case. I am not persuaded that a true conflict existed between the versions of the appellants and the respondent as argued by the appellants' counsel.

[30] In respect of the first appellant, counsel submitted that the following factors ought to have been taken into consideration by the learned magistrate in granting the first appellant bail: the first appellant's personal circumstances, the first appellant had no pending charges against him, no previous convictions and no charges were pending against him in respect of the stolen Polo.

[31] In respect of the second and third appellants, counsel contended that given the absence of factors falling within the definition of grievous bodily harm, the charge of kidnapping and the charge of robbery ought to fall within schedule 5. Even if the offences were considered as falling within schedule 5 as submitted by counsel, the second and third appellants bore the onus to demonstrate that it was in the interests of justice to permit them to be admitted to bail.

[32] In terms of annexure A⁸ to the charge sheet, the aggravating circumstances of which the appellants were charged constituted pushing the complainant into the vehicle. The appellants' counsel contended that such conduct did not fall within the definition of grievous bodily harm and that the appropriate charge was common robbery in terms of schedule 1. However, in the light of the second and third appellants' previous convictions, the appropriate schedule was schedule 5.

[33] Counsel's submissions however overlooked the fact that the second and third appellants made off with the bakkie with the driver sitting between them. Furthermore, the investigating officer stated in his affidavit that the crew of the bakkie fled when the second and third appellants approached the bakkie, leaving the driver alone in the vehicle.

[34] Whilst it was evidence of a circumstantial nature, the question arose as to what was it that caused the passengers to flee.

[35] Objectively, it was surprising that if the second and third appellants were simply seeking directions that they would open two doors of the bakkie. Furthermore, the third appellant then drove the bakkie with the driver forced to sit in between the second and third appellants.

[36] A threat of violence is sufficient to constitute aggravating circumstances. Accordingly, I disagree that the robbery comprised common robbery.

⁸ CaseLines 002-3.

[37] However, whatever the applicable schedule, the overarching test is whether it is in the interests of justice for the appellants to be released on bail.⁹

[38] I agree with the appellants that the learned magistrate ought to have considered the personal circumstances of each appellant separately and demonstrated how they contributed to his determination.¹⁰

[39] The personal circumstances of the appellants, placed on record in the lower court, reflected that all three appellants are South African citizens.

[40] The first appellant was born and lived in Soweto. He did not have a travel document or passport and had not travelled beyond the borders of the Republic. He did not have relatives living outside of South Africa and did not own property or have financial interests outside of the Republic.

[41] The first appellant was engaged and living with his fiancé and their three children aged 8, 7 and 4 years respectively. His fiancé was 6 months pregnant. The first appellant was responsible for the maintenance of the family. They lived together with the first appellant's parents and sibling.¹¹

[42] The first appellant passed Grade 12 and did a 2-year diploma. Prior to his arrest, he was self-employed earning a profit allegedly of approximately R10 000.00 per month. No proof of the income was before the court.

[43] The first appellant intended to plead not guilty to the charges, undertook to stand trial and not to interfere with the witnesses.

⁹ *Toritsueju Gabrieleal Otubu v Director of Public Prosecutions Western Cape* A54/2022 dated 16 May 2022 ('Otubu').

¹⁰ *Otubu* id.

¹¹ CaseLines 003-3 to 003-4.

[44] Given the probability of the first appellant's involvement in the events that gave rise to the serious charges in this matter, I am not persuaded by the submission that the first appellant's application ought to have been considered in terms of schedule 1.

[45] Notwithstanding that the first appellant is the bread winner in respect of three young children with a fourth expected imminently, given the serious nature of the charges he is facing and the probability of his involvement in the events that gave rise to the charges in this matter, I am of the view that the learned magistrate did not exercise his discretion incorrectly. Accordingly, there is no basis for me to interfere in the decision to refuse the first appellant bail.

[46] As regards appellants' counsel's submission, correctly made, that there was nothing to indicate that the learned magistrate considered that appropriate conditions might be made applicable to the grant of bail in respect of the first appellant in particular, in terms of Section 60(6) of the CPA.¹² I disagree that the learned magistrate misdirected himself in failing to consider the appropriate conditions, in the light of the serious nature of the offences with which the appellants, including the first appellant, were charged.

[47] The second appellant was born in Kagiso, West Rand where he lived to date. He did not have a valid travel document or passport, and had never travelled beyond the borders of the Republic. He did not have relatives or financial interests outside of the Republic.

[48] The second appellant is married under customary law, living with his wife and their four children aged 14, 3 and 2 years and 3 months respectively. The second appellant was responsible for their financial upkeep.

¹² *S v Branco* 2002 (1) SACR 531.

[49] The second appellant, resided with his parents and family in the family home. He completed Grade 12 and underwent a 2-year diploma course. Prior to his arrest, the second appellant was employed as a taxi driver earning approximately R3 800.00 per month. He did not own immovable property, or a motor vehicle but did own household goods and furniture.

[50] The second appellant intended to plead not guilty to the charges, undertook to stand trial and not to interfere with the witnesses.

[51] I refer to that stated afore in respect of the assessment of the second and third appellants' version. That version is improbable in the light of the respondent's facts.

[52] Notwithstanding that the second appellant is the bread winner in respect of four young children, given his previous convictions and the very serious nature of the charges he is facing, I am of the view that the learned magistrate did not exercise his discretion incorrectly. Accordingly, there is no basis for me to interfere in the decision to refuse the second appellant bail.

[53] I am not persuaded that the learned magistrate erred in refusing to allow bail in respect of the second appellant.

[54] The third appellant was born and raised in Soweto, Gauteng. He is a breadwinner,¹³ unmarried but lived with his partner and their two children¹⁴ aged 10 and 11 years respectively, that depend on him for their upbringing and care. He lives in a family home including his wider family members.

¹³ CaseLines 003-32 L9.

¹⁴ CaseLines 003-30 L23.

[55] The third appellant does not have a valid travel document, had not travelled outside of the borders of South Africa and had no financial interests outside of the Republic. The third appellant passed Grade 12 and studied further doing a 1-year diploma in Business Styling. Prior to the third appellant's arrest, he was employed as a driver earning approximately R3 500 a month.

[56] Whilst he owned household goods and furniture, the third appellant did not own immovable property or a motor vehicle.

[57] Similarly, the third appellant undertook to stand trial and to not interfere with the State's witnesses.

[58] I refer to that already set out by me in respect of the assessment of the third appellants' version. That version is improbable in the light of the respondent's evidence.

[59] Despite the third appellant being the bread winner of two young children, his previous convictions and the very serious nature of the charges he is facing, I am of the view that the learned magistrate did not exercise his discretion incorrectly.

[60] Accordingly, there is no basis for me to interfere in the decision to refuse the third appellant bail.

[61] In my view, it is not in the interests of justice, in the circumstances outlined herein, for the first or the second or the third appellant to be admitted to bail.

[62] In the circumstances, I grant the following order:

1. The appeal is dismissed.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 July 2022**.

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DATE OF THE HEARING:

24 June 2022

DATE OF JUDGMENT:

8 July 2022