

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

In the matter between:

LUCKY GWEBU

and

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	Case Number: A647/10
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
08/10/2010	Appellant
DATE	SIGNATURE

Respondent

8/10/2010

JUDGMENT

MNGQIBISA-THUSI, J

[1] This is an appeal against the refusal by the magistrate at the Nigel Regional Court to release the appellant on bail pending the finalisation of the criminal proceedings against him.

[2] The police arrested the appellant on charge of robbery with aggravating circumstances as defined in section 1 of the **Criminal Procedure Act** 51 of 1977 (**the CPA**) read together with sections 51(2), 52(2), 52A and 52B of the **Criminal Law Amendment Act** 105 of 1997. It appears from the evidence of Inspector Phillemon Mlambo, the investigating officer, that on 25 February 2010, two men had accosted two other men who were fishing at the Nigel dam, pointed them with a firearm and ordered them to hand over the keys to their vehicles and to jump into the dam. The two men then drove away with one of the vehicles, a Toyota Run-X. On coming out of the dam and collecting their belongings, the

complainants discovered a cell phone which was handed to the police when they reported the robbery.

[3] On 27 February 2010 the appellant was arrested for the robbery at the Tsakane police station after he had been advised by the police at the Duduza Police Station, where he alleges he had gone to report that he had been robbed of his cell phone on 25 February 2010 at Sotho Street, Tsakane, that his cell phone had been found and was at the Tsakane police station.

[4] On 15 March 2010 the appellant made an application for his release on bail in the Nigel regional Court (**the first bail application**). During the hearing it emerged that at the time the appellant was arrested he was on parole after having been convicted in 2002 on an armed robbery charge and sentenced to 18 years imprisonment. After hearing evidence, the magistrate postponed the proceedings pending the holding of an identity parade.

[5] In postponing the proceedings the magistrate commented as follows (I quote from the judgment)

“As rightly pointed out by Mr Ngele, it is not this court’s purpose today to decide upon your guilt or innocence and the trial court will be tasked to do that. However it is very difficult if not impossible for the court today to make a decision as to whether there is a strong case to be made against you, due to the fact that the majority of investigation has not as yet been completed.

It would appear that there is an ID parade to be held. It would also appear that certain information from the cellular networks must be obtained and without that information being placed before court, the court would not be able to exercise its discretion judiciously to consider the question of your release on bail sir.

For this reason in terms of Section 60(3) the court is going to postpone these proceedings for the court to hear evidence from the investigating

officer pertaining to an ID parade and pertaining to information obtained from the cellular networks as far as the cell phone in question, is concerned. Only thereafter will the court be in a position to consider the strength and weaknesses of this case and decide whether the weakness in the state case, constitutes exceptional circumstances."

[6] At the resumption of the bail proceedings and after the results of the identity parade were made available, the Inspector Mlabo testified to the fact that at the identity parade, although the state witness had pointed out the appellant, it was discovered that he (i.e the appellant) had swapped names with another awaiting trial prisoner who participated in the identity parade. When this was discovered the person who had swapped names with the appellant was questioned about the detail in the docket and a suspicion arose when he gave a different address and age from the information in the docket. On further questioning the prisoner admitted that the appellant had asked him to assist him by participating in the identity parade and that he had swapped names with the appellant. With regard to the cell phone results Mlambo testified that although he had received them they were in a disc which was not compatible with the computers they use and was therefore unable to read it.

[7] Magistrate refused to grant the appellant bail on the ground that the appellant had not shown provided sufficient evidence that there were exceptional circumstances justifying his release in the interest of justice.

[8] The magistrate in the first bail application said the following (I quote from the judgment):

"Your attorney instructed informed the court that the exceptional circumstances are to be found in the fact that there is a non-existing or extremely weak state case to be made against you. The court cannot with the greatest respect agree with this contention especially seen in the

light of the fact that at an ID parade held, you were identified by one of the witnesses as the person responsible for this offence.

The court also heard evidence that during the ID parade, certain events occurred in which you and another person, it would appear, changed identities or swapped identities. Although the court cannot at this stage find that as a fact, it would appear that there are witnesses who can substantiate that fact. The purposes of these proceedings are not today to decide upon your guilt or innocence and the admissibility of whatever happened or transpired during the ID parade, it will be tested thoroughly during your trial.

The court cannot find that there are today any exceptional circumstances which may warrant your release on bail. Even if the court were today to misdirect itself in its finding, the court must still decide if there are exceptional circumstances to be made up, whether it would be in the interest of justice to allow you bail.

Section 60(4) of the Criminal Procedure Act clearly states that interest of justice will not allow for any person's release on bail if there is a likelihood that that person, if that person were to be released on bail, would try and influence the outcome of the trial or the intention of a proper function of criminal justice system and deciding upon that fact the court must be guided by the provisions of Section 60(8) which reads That the court should consider whether an accused or an Applicant knowing to be false, gave false information during his or her arrest or during bail proceedings.

In the light of the evidence of inspector Mlambo today, it would appear that was indeed the case and that is what exactly transpired during the ID parade. For that reason the court cannot find it to be in the interest of justice to release you on bail either."

[9] On 1 June 2010 the appellant brought a second bail application. He placed new facts before the court.

[10] At the hearing (the second bail application), two witnesses, Charles Matthys Van der Merwe and Joseph Nhlamo, testified on behalf of the appellant.

Van der Merwe, a Correctional Services officer at the Nigel prison, testified that he was present at the identity parade and that the appellant was not the one who was pointed out by the witness. He alleged that another prisoner was the one pointed out as the suspect in the robbery. Under cross examination and when confronted with a statement he had made to the police two months after the identity parade was held in which he had deposed to the fact that at the time the identity parade was conducted, he was busy escorting the prisoners and was not paying any attention as to what was happening in the parade. He further testified that at the time the statement was taken he could not clearly remember the incident and could not recall what happened since he was dealing with a lot of awaiting trial prisoners. He testified that he now could clearly remember the events of the day when that parade was held.

[11] Nhlamo testified that he was part of the line-up and that he, and not the appellant was pointed out.

[12] The State called Sibongile Ncingwana, the officer responsible for conducting the identity parade. She testified that during the parade the appellant and Nhlamo had swapped their names. Further that the appellant was the one who was pointed out at the parade.

[13] Appellant's counsel submitted that the court should find in favour of the appellant for two reasons. Firstly, that the court should accept the evidence of both van der Merwe and Nhlamo to the effect that the state witness did not identify the appellant at the parade. Secondly, that the only fact that linking the appellant to the robbery is the cell phone, making the State's case against the appellant weak. Since the appellant had given an explanation as to how he had lost his cell phone, his evidence should be accepted.

[14] The magistrate in the second bail application said the following (I quote from the judgment):

"Regarding the first question as to whether there are new facts which were not available to court during the first hearing of the bail application, the court must find in the affirmative. On 7 April 2010 when the court initially heard the bail application, it was alluded to by the investigating officer, a witness that there was some confusion pertaining to the identity of people during this ID parade.

Today the court heard evidence from Mr Van der Merwe and Mr Nhlapo to substantiate that. The court must emphasise at this stage that its duty today is not to decide upon the guilt or innocence of the accused. The trial court, competent trial court will have to make that ruling and finding upon the fact.

Whether the correct procedures were indeed followed during the ID parade, whether there were any irregularities, the trial court will be tasked with to make a finding upon that fact. The court has heard evidence from the person responsible for the ID parade sir, that you were indeed pointed out during the ID parade.

This was contradicted by a witness Mr Joseph Nhlapo and Mr Johannes Matthys van der Merwe. At this stage in the light of EXHIBIT A before the court, the court must place a question mark behind the evidence of Mr Van der Merwe. He comes to court and testifies with a great amount of certainty that he can clearly remember that on the day in question, you were not pointed out as the person responsible for this offence, however in his statement before this court, he contradicts himself by saying I was not concentrating as to who was pointed but only there to see to it that prisoners are returned safely to the cells.

Although the court finds that there are indeed new facts before court, the court must find that those facts are exceptional in the circumstances and the court cannot do that today. At this stage it would appear that there is evidence linking you with the offence and the court cannot today in the light of the evidence of Mr Nhlapo and Mr Van der Merwe, find that there is a non-existing state case to be made against you.

In the light of that fact, although there are new facts before court, the court cannot find those to be exceptional circumstance."

[15] The appellant appealed against the refusal of his bail application on the following grounds: (I quote from the record)

- 15.1 That the Magistrate erred in finding that there is a strong case against the Applicant based on the unsubstantiated allegations by the investigating officer.
- 15.2 The learned Magistrate erred in not taking into account that the Applicant's address was confirmed and the Applicant's evidence that he will not evade his trial.
- 15.3 The learned Magistrate erred in finding that there is a prima facie case against the Applicant viewed in the light of the denial of any involvement by the Applicant and the explanations tendered by the Applicant.
- 15.4 The learned Magistrate erred in not finding that the case against the Applicant is weak and the Applicant has shown on a balance of probabilities that there are exceptional circumstances that justifies his release on bail.
- 15.5 The learned Magistrate erred in not finding that the weakness of the State's case read cumulatively with the personal circumstances amount to exceptional circumstances.
- 15.6 The learned Magistrate erred in not finding that it is in the interest of justice that the Applicant be released on bail.
- 15.7 The learned Magistrate erred that the release of the Applicant on bail will jeopardise the proper administration of justice."

[16] The offence with which the appellant is charged is mentioned in Schedule 6 of the CPA. The provisions of section 60 (11) (A) of the CPA are applicable to the matter. The section provides that:

"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 which in the interest of justice permit his or her release."*

[17] At the first bail hearing the appellant did not allege that exceptional circumstances exist. I agree. In the second bail hearing, although new facts were placed before the court, the court did not consider the new facts to be exceptional circumstances, which in the interest of justice permitted appellant's release on bail. In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schieterkat* 1999 (4) SA 624 (CC) at paras 75-76, Kriegler J said the following with regard to exceptional circumstances:

"An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent.... In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case."

[18] This court can only interfere with the decision to refuse bail if I find that that decision was wrong. See section 65(4) of the CPA and *S v Barber* 1979 (4) SA 218 (D & CLD). However Binns-Ward AJ in *S v Porthen and Others* 2004 (2) SACR 242 (C) expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him in terms of section 60(11)(a).

[19] The appellant's personal circumstances appear from the record to be the following:

19.1 he is a South African and living in Tsakane within the Gauteng Province;

19.2 he is single and has no dependants;

19.3 at the time of his arrest he was doing piece jobs at an Islamic institution and was also being trained;

19.4 he has a previous conviction of armed robbery for which he was sentenced to 18 years imprisonment in 2002. At the time of his arrest he was on parole.

[20] In *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) the court state that an accused personal circumstances which are common place do not necessarily constitute exceptional circumstances for the purposes of section 60(11)(a). I agree that the sentiment expressed by the appeal court apply in this matter.

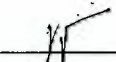
[21] It was submitted on behalf of the appellant that the case against the appellant was weak and non-existent. I am of the view that this view is incorrect. A weak state case will not necessary result in the granting of bail. The state witnesses have testified that the appellant was identified at the identity parade . Further the circumstances under which the appellant's cell phone was found does in a way link the appellant with the offence, establishing a *prima facie* case against the appellant.

[22] Taking into account the facts adduced at the first bail hearing and the new facts taken together, I am of the view that they do not sufficiently constitute exceptional circumstances which warrant the release of the appellant on bail in the interest of justice.

[23] I am satisfied that the court *a quo* correctly found that no exceptional circumstances existed which would in the interest of justice permit the appellant's release.

[24] Accordingly the following order is made:

"The appeal is dismissed."



MNGQIBISA-THUSI J