

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

APPEAL CASE NO: A1030/10

Regional Case number: 14/1119/06

In the matter between:

22/12/2010

DELETE WHICHEVER IS NOT APPLICABLE	
DIALE PHILEKGAU	APPELLANT
(1) RELEVANT: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2010/12/22	
DATE	SIGNATURE
THE STATE	RESPONDENT

JUDGMENT

MAVUNDLA. J.

[1] This is an appeal against the judgment of the magistrate Mr Makgoba on 26 October 2010 refusing to admit the appellant to bail. The relevant bail application was the third one and was premised on alleged new facts.

[2] The grounds upon which the appeal is brought as tabulated on the notice of appeal are that the magistrate:

2.1 "erred and misdirected himself in finding that the appellant has not discharged the onus of adducing evidence which satisfy the court that exceptional circumstances exist

which in the interest of justice permit his released on bail;
Section 60(11)(a) of Act 51 of 1977; S v Dhlamini 1999
(2) SACR 15 (CC); Botha 2002 (1) SACR 222 (SCA) S v
Mauk 1999 (2) SACR 479 (W).

2.2. 'in failing to consider that the appellant only needed to
discharge the *onus* in terms of Section 60(11)(a) of Act 51
of 1977 on a balance of probabilities Mauk 1999 (2)
SACR 479 (W); S v Maki 1994 (2) SACR 630 (EC)."

[3] It is common cause that the appellant was arrested in April
2006 and has been in custody since. He pleaded not guilty to
24 counts in court 8 at the regional court in Pretoria. The case
started in 2007. He is facing the following counts:

3.1 x 7 housebreaking with intent to steal and theft read with
s262 (1) and S264 of the Criminal Procedure Act;

3.2 x 1 housebreaking with intent to rob and robbery with
aggravating circumstances as defined in s1 of Act 51
of 1977 read with s51(2), 52(2), 52A and 52B of the
Criminal Law Amendment Act 105 of 1997, and read
with s262(1) and S260 of the Criminal Procedure Act;

3.3 x 3 theft of a motor vehicle;

3.4 x 4 robbery with aggravating circumstances defined in s1
of Act 51 of 1977 read with s51(2), 52(2), 52A and 52B
of the Criminal Law Amendment Act 105 of 1997;

3.5 x 3 kidnapping;

3.6 x 2 attempted murder;

3.7 x 1 possession of a firearm;

3.8 x 1 possession of ammunition;

3.9 x 1 escaping.

[4] It is also common cause that the appellant is facing various
schedule 6 offences which attract the provisions of s60 (11) (a).
Bail in such situation must be granted if the appellant satisfies
the court that the interest of justice so permit. I shall revert to
this issue in due course.

[5] As indicated earlier, this appeal relates to a third bail application
on new facts brought by the appellant. He was first refused bail.
He subsequently brought two bail applications on new grounds

to no avail. I do not intend to focus on the previous aborted bail applications.

[6] It is common cause that this appeal emanate from the refusal of the magistrate to permit on bail in respect of the case where he is facing 24 counts in court 8 in the regional court Pretoria. He was also facing another count in court 10 also in the regional court in Pretoria. He was and is still facing other charges in Ladysmith. He has not applied for bail in the Ladysmith matter. He has not been granted bail in the last mentioned case. He has since been discharged in terms of s174 in the court 10 matter. It is common cause between the parties that the discharge of the appellant in court 10 constituted a new fact, especially because this became the position after all the previous bail efforts failed.

[7] It was submitted on behalf of the appellant that the magistrate misdirected himself in that after finding that the fact that the appellant was discharged in terms of s174 of Act 51 of 1977

this was a new fact¹, he however at his conclusion found that there were no new facts². It is submitted that the magistrate after finding that there was a new fact should have proceeded to examine the other facts to determine whether the appellant has not acquitted himself of the *onus* placed on him that the interest of justice permits that he be released on bail.

[8] It was further submitted on behalf of the appellant that the Constitution of the Country places emphasis on civil liberty and that the Court should consider granting bail to the appellant since the magistrate failed to interrogate whether the appellant has acquitted the *onus* resting on him, which must be done on a preponderance of probabilities.

[9] The evidence of the appellant in respect of the bail application can be summarised as follows. His counsel representing him in the matter in court 8 has advised him that the State's case against him is weak. There is no affidavit by his counsel or his attorney filed to buttress this alleged opinion of the weakness of

¹ Page 37 line 12-16 of the record.

² Page 45 line 24 of the record.

the case against. The State in opposing bail previously had contended that it has a strong case against him, relying on the case in court 10 as well. Notwithstanding the alleged strength of the case against him he has since been discharged in terms of s174 in respect of the court 10 case. The case in Ladysmit started in 2006 in Kwa-Zulu and it has not been finalized as yet. This Ladysmith case has been taken on review at Pietermaritzburg High Court. The court 8 matter was delayed on account, *inter alia*, the prosecutor having taken ill. The case was heard on 11, 12 and 13 January 2010. The case has since been set down for hearing on 11, 12 and 13 January 2011. He has been advised by his counsel that it would be difficult for the State to prove the case against him, because there were certain technical difficulties regarding the fingerprint evidence

- [10] When he initially brought the bail application in this matter he was a man of strong means, strong emotional status, strong financial means and strong family ties with his wife. The relationship with his wife has since deteriorated to such an

extent that his wife has instituted divorce proceedings against him because his absence from home makes it impossible for him to assist in the upbringing of their twin boys who are now 6 years old. His mother is assisting him in running his business which is now going down as the result of his incarceration. He wants to be released on bail so that he can save his marriage and be present for his boys to grow with two parents.

- [11] Under cross examination he conceded that he is linked with fingerprints in respect of counts 1, 2,3, 5, 6, 7,8 and 18. He said that he cannot remember being identified in respect of counts 9 and 12. He conceded that there was an expert witness who testified that his DNA was found on a balaclava linked to the scene of crime. He conceded that there were almost 50 witnesses whose evidence has been led. He however disputed that there was a chain of evidence that would secure his conviction. He conceded that he has not brought a bail application in the Ladysmith matter.

[12] The only witness called by the State was captain Mashabela. He read into the record his affidavit opposing the bail being granted to the appellant. The essence of his affidavit is to confirm that fact that the appellant is facing various counts, *inter alia*, armed robbery, house robbery and theft of motor vehicle. The appellant is linked in the Ladysmith case by a s204 witness and he must appear at Escort on 7 December 2010. His experience is that the police struggle to trace suspects once they have been released on bail in respect of serious cases against them.

[13] The magistrate, in considering whether to or not to grant bail accepted that he had to decide whether the appellant has placed substantial facts that are new, relying on *S v Armas* 1996 (1) SACR and *S v Van Wyk* 2005 (1) SACR 41 SCA.

[14] With regard to the Ladysmith matter the magistrate took into account the fact that the appellant had not applied for bail in that case. With regard to the strength or otherwise of the merits of the case he took the view that there were no facts placed

before him. He could not decide whether the fact that the appellant had not applied for bail in that case is a new fact.

[15] The magistrate accepted, quite correctly in my view, that the fact that the appellant was discharged in the court 10 matter is a new fact.

[16] The magistrate considered the marriage and his business and concluded, relying on the *S v Van Wyk* case (*supra*) that these are not new facts. I agree with the finding of the magistrate in this regard. An incarceration of a married person has the very potential of placing strains on the marriage right from the very moment of the arrest. This is an inherent and perennial problem those who expose themselves against the law face. The appellant was arrested in 2006. He has on more than one occasion brought bail application. The fact that there is now a divorce case pending cannot be regarded as a new fact.

[17] The appellant's mother is running his business. It would seem that the business has been running ever since his arrest in

2006. The appellant has not placed any financial statements to demonstrate that the business is having a downward spiralling effect as the result of it being run by his business since his arrest. The magistrate in my view cannot be faulted in his finding that this is not a new fact.

[18] The magistrate accepted the evidence that according to an expert there is DNA of the appellant found on the balaclava linked to a scene of crime. He concluded that the appellant has not placed substantial evidence to show that this evidence will not stand. He concluded that the appellant was relying on pure speculation and hearsay evidence that the DNA evidence would not stand.

[19] *In casu* the magistrate quite correctly held the view that the appellant must place substantial facts that persuade the court that there are new facts. In this regard the court must also have regard to the *prima facie* strength of the State's case.

[20] In the matter of Van Wyk (supra) it was pointed out that the appellant under s60(11)(a) involving schedule 6 offences the appellant bears the onus of proving that there exists exceptional circumstances that in the interest of justice permit his release on bail. With regard to s60(11) (b) the *onus* is lighter as there is no need for the appellant to prove the existence of exceptional circumstances but that the interest of justice permit that he be released on bail.

[21] The contention that the magistrate contradicted himself in first finding that the discharge of the appellant is a new fact and later finding that there were no new facts is in my view misplaced. The magistrate quite correctly accepted that it is a new fact that the appellant was discharged in count 10. He however proceeded to interrogate the other factors, as I have already pointed out herein above. In my view, a single new fact cannot be considered in abstract. It must be viewed in the totality of all the other factors placed before the court. The magistrate considered all the other factors as well and concluded that there are no new facts of substance. But

assuming that indeed the magistrate misdirected himself in this contradiction, that would only mean that this court must then consider whether the appellant has placed enough evidence that demonstrate that there exists exceptional circumstances that in the interest of justice permit that he be released on bail.

[22] The appellant faces, *inter alia*, a count of escaping. The appellant has not addressed this charge in his bail application. But an offence of this nature reveals the inclination on the part of the appellant to avoid being brought to book. The appellant is indeed facing long imprisonment in the event he was to be convicted on any of the other charges. Further, the trial of the appellant is scheduled for January 2010.

[23] I am conscious of what was said in *S v Jonas* 1998 (2) SACR 677 at 678h-l and 679g-h; *S v Schietekat* 1999(1) SACR 100 h; *S v Thornhill* 1998 (1) SACR 177 at 180h-181d. I am conscious of the fact that:

“12(1) everyone has the right to freedom and security of person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause." In my view, the very fact that the appellant has been arrested on certain allegations, it is the "the just cause" that has to be adjudged during the trial. It then requires that in deciding whether such liberty must remain encroached and restricted, pending the finalization of the criminal case requires to be approached with a measure of some flexibility, not rigidity, guided by the peculiar circumstances of that particular case.

'35(1) everyone who is arrested for allegedly committing an offence has the right—

(f) to be released from detention if the interest of justice permit, subject to reasonable conditions.' The inclusion of the phrase "...if the interest of justice permit" dove tail to the limitation of rights in accordance with section 36 of the Constitution, which provides for such rights as entrenched in the Bill of Rights to be limited to the extent such limitation is reasonable."

[24] The appellant is facing serious offences which were committed between 5 February 1999 and 25 May 2005, a total of 24

counts. This is in my view, an aspect that demands that a stricter approach be taken in balancing the interest of the appellant against that of society. Certainly the interest of society is that those who engage themselves in wholesale criminal activity must be brought to book. Where the case as in *casu* has progressed to an extent that there are about 50 witnesses who have already testified and the case is scheduled to be proceeded with in due course, it certainly cannot be in the interest of justice that the appellant should be released on bail.

[25] Expressing a personal opinion, I am of the considered view that bail in cases where a person is facing a multitude of counts; bail should not be lightly granted. There is in, my view, a need to force a paradigm shift on the mind of the citizenry as a whole, to accept that criminal activity, especially wholesale criminal activity will no longer be tolerated and that bail will not be granted under these circumstances.

[26] In the circumstances, I am unable to find that the magistrate materially misdirected himself in refusing to admit the appellant

on bail. Assuming that I am wrong on this aspect, which is not conceded, I find that the appellant has not shown that there exists exceptional circumstance that warrant in the interest of justice he be released on bail.

[27] Consequently the appeal against refusal of bail is dismissed.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 21 – 12 - 2010

DATE OF JUDGMENT: 22 – 12 - 2010

APPLICANT'S ADV : B MATOME

DEFENDANT'S ADV : MRS C CARSTEIN-SMIT