

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

Case No: A1030/10

In the matter between:

21/10/2011

DIALE PHILEAS KADU
DELETERIA
APPELLANT

And

THE STATE
RESPONDENT

DELETERIA
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
2011-10-21
DATE
SIGNATURE

JUDGMENT

MAVUNDLA J.

[1] The appellant brought three unsuccessful bail applications before a magistrate court, respectively on 15 June 2006, 15 October 2007 and 21 November 2008. The third bail application was brought on the grounds that there were new facts. However, as indicated already, the third application was equally unsuccessful. The appellant then approached this court on

appeal against the decision refusing bail for the third time. I however found against the appellant and dismissed his appeal and refused to release him on bail. He now seeks leave to appeal the latter decision.

[2] The appellant was arrested in respect of various serious offences falling under schedule 6, which include, *inter alia*, 4 (four) armed robbery with aggravating circumstance as defined in s1 of Act 51 of 1977 and read with s51(2) , 52(2) and 52B of the Criminal Law Amendment Act 105 of 1997; 3 (three) kidnapping charges; 3 (three) motor vehicle theft, 2 (two) attempted murder charges.

[3] The attack against the dismissal of his bail appeal by this Court, are that this Court misdirected itself, *inter alia*, in failing to have regard to the wider interpretation of section 65(4) of the Criminal Procedure Act 51 of 1977, as stated in *S v Porthen and Others*¹ and not examining whether the facts relied upon by

¹ 2004 (2) SACR 242 (par 16 at 249b),

the appellant were new and relevant for purposes of being entertained in the bail application.

[4] The appellant further contends that this Court erred and misdirected itself in not having regard to section 28 (2) of the Constitution, which guarantees the constitutionally protected right to family and parental care and emphasises that Courts, as upper guardian of the minor children, must ensure full compliance and protection of these rights. In this regard reliance is made of *S v Petersen*².

[5] Further ground is that this Court erred and misdirected itself in refusing bail without making a finding on whether any of the subsections in 60 (4) (a)-(d) of the Act were applicable against the appellant.

[6] The applicant further contended that this Court erred and misdirected itself in elevating its personal views against the Constitutionally enshrined right of the appellant to be presumed

² 2008 (2) SACR 356 (C).

innocent until proven guilty. I will in due course refer to the relevant remarks.

- [7] The State strenuously argued against the application for leave to appeal, contending, inter alia, that there are no prospects of another court coming to a different conclusion and find that the appellant should be released on bail.
- [8] After both the appellant and the State made their submissions, the Court requested both legal representatives for the respective parties to advise Court in writing of certain aspects. The National Prosecutions Service per letter dated 18 October 2011, has since responded to the queries of the Court.
- [9] The relevant facts that have since been placed before the Court per the aforesaid letter, that the State has since lead 45 witnesses; The matter has since been postponed to 30 November 2011 for formal evidence of the last two State witnesses, where after the State will close its case; during 2010 all the case dockets as well as the prosecutor's notes

disappeared from her office at the Magistrate Court, Pretoria. There was further delay as a result of the complexity and long duration of the trial in having transcription of the record. The Registrar of the Supreme Court has advised the legal representatives of the appellant that bail matters are treated as urgent at the SCA.

- [10] Although the issues in the last paragraph, are not relevant in the consideration of an application for leave to appeal. I, however, sought this information, so that I can know whether, granting leave to appeal would not be academic, in the sense that, in the event I were to grant leave to appeal, the finalization of appeal might have been overtaken by the finality of the trial. What is, however, cause for concern, is the seemingly inordinate delay in finalizing the case, after the appellant was arrested 4 (four) years ago. This fact, in my view, should be factored in the consideration of whether leave to appeal should be granted.

[11] I am conscious of the fact that in an application for leave to appeal, the question is whether another court might arrive at a different conclusion.

[12] In the matter of *S v Barber*³, in respect of an appeal against the refusal by the magistrate, the test is whether the magistrate exercised his discretion properly. The Court of appeal must not impose its view, as if it is that of the magistrate.

[13] This Court, in dismissing the appellant's appeal, remarked as follows: "[25] Expressing a personal opinion, I am of the considered view that bail in cases where a person is facing a multitude counts of charges, 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 bail will not be granted under these circumstances."

[14] Another court, reading this statement, might come to the conclusion, that, the Court did not dispassionately consider the appeal before it, but in arriving at its decision, was blurred by its

³ 1979 (4) SA 218 (D & CLD) at 220 E-G

strong views as reflected by its comments, which is not conceded, and under the circumstances might arrive at a different conclusion. I am of the view that, this application for leave to appeal can be disposed off only on the ground dealt with herein above. In the premises, I deem it not necessary to traverse the rest of the other grounds advanced by the applicant.

[15] In the circumstances, I am of the view that it is proper that leave to appeal should be granted.

[16] In the result the following order is made:

1. That leave to appeal to the Supreme Court of Appeal, against this Court's decision on 22 December 2010, dismissing the appeal of the appellant against the decision of the magistrate, Mr. Makgoba on 26 October 2010, is granted.



N.M. MAVUNDLA

Heard on 12 October 2011.

Delivered on 21 October 2011.

JUDGE OF THE HIGH COURT

APPELLANT'S COUNSEL ; ADV M LEDWABA

RESPONDENT'S COUNSEL : ADV P VORSTER