



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

CASE NO.: CA&R32/2022

In the matter between: -

WANGA NGOZI

APPELLANT

and

THE STATE

RESPONDENT

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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Signature

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Date

BAIL APPEAL JUDGMENT

SMITH J:

Introduction

[1] The appellant was arrested during December 2017 in connection with two counts of murder, five counts of attempted murder and several counts of unlawful possession

of firearms and ammunition. The charges arose from incidents that occurred at the Lower Mjika Locality, Tsolo, on the 1st and 3rd of December 2017, respectively.

[2] The appellant and his co-accused subsequently applied for bail and their application was heard in the Tsolo Magistrate's Court on 21 December 2017. On 22 December 2022, the court delivered its judgment, dismissing the application. The matter was thereafter transferred for trial to the Mthatha High Court.

[3] On 5 May 2022, the appellant lodged his appeal against the Magistrate's refusal to grant bail. Although his failure to note and prosecute the appeal timeously was flagrant, he proffered a reasonable explanation for the delay. The state also did not oppose his application for condonation, and I accordingly granted an order condoning his failure to comply with the prescribed time periods.

[4] Mr. Tshitshi, who appeared for the appellant, accepted that the appeal must be decided on the evidence that served before the Magistrate, since no application was made to admit new evidence. It is common cause that the trial has been postponed on several occasions, and that it has now been provisionally postponed to October 2022. It is also common cause that the postponements were variously caused by the state or by the appellant and his co-accused. Neither of the parties is therefore solely to be blamed for the delay in the commencement of the trial.

[5] In dismissing the bail application, the magistrate found that: there was a likelihood that the appellant would interfere with and intimidate state witnesses; the state's case against him is strong; and there was a likelihood that there would be a disturbance of the public peace if he were released on bail. The magistrate accordingly concluded that the appellant had failed to establish exceptional circumstances that would allow his release on bail.

[6] The appellant appeals against the Magistrate Court's judgment on the following grounds:

- (a) the magistrate failed to have proper regard to the appellant's personal circumstances and the negative consequences for him and his family if he were not released on bail;
- (b) he failed to have regard to the fact that the appellant stated that he would relocate to Mount Fletcher in order to avoid any retribution from the community; and
- (c) he erred in finding that the state case is strong; and
- (d) by failing to have regard to the fact that any admissions which the appellant may have made were called into doubt by his compelling allegations of assault and coercion by police officers.

The Law

[7] A court sitting on appeal in terms of s. 65 of the Criminal Procedure Act, No 51 of 1977 (the Act), must undertake its own analysis of the evidence and on the basis thereof decide whether or not the court *a quo* has made the correct decision regarding the discharge of the onus in terms of s. 60(11) of the Act. (See **S v Pothern and others 2004 (2) SACR 242 (C)**). It is common cause that the appellant had been charged with Schedule 6 offences. Thus, in terms of s. 60(11) (a) of the Act, the court must therefore order that he must be detained in custody, unless he adduces evidence of exceptional circumstances, which in the interests of justice permit his release.

[8] In deciding whether or not the interests of justice permits the release of the appellant on bail, the court must have regard to the considerations mentioned in paragraphs (a) to (e) of s. 60 (4). In terms of that section the interests of justice would not permit the release of an accused person on bail if any one of the grounds mentioned therein are established. They are:

- (a) where there is the likelihood that the accused, if he or she were released on bail will endanger the safety of the public or any particular person or will commit a schedule 1 offence or

- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is a likelihood that the accused, if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security”

[9] After taking into account these broad considerations the court must do a final weighing up of factors for and against the granting of bail as contemplated in ss. 60 (9) and (10). (**S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (4) SACR 623 (CC)** where Kriegler J held that these sections should be read as:

“Requiring of a court hearing the bail application to do what courts had always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty of the individual and the interest of justice are given full value according to the Constitution.”

[10] With regard to the meaning of the phrase “exceptional circumstances” mentioned in s. 60(11) of the Act, it has been held in a long line of cases that in order for circumstances to be exceptional, the subsection does not require them to be generically different, or to go above and beyond those numerated in subsections (4)-(9). See in this regard **S v Botha and another 2002 (1) 222 (SCA)** also **S v Dlamini 1999 (4) SA 623 (CC)** and **S v Yanta 2000 (1) SACR 237 (Tk)**.

The evidence

[11] It is with the abovementioned legal principles in mind that I now turn to analyse the evidence. The appellant testified that he was 41 years old at the time of the application. He was married and has two children. He was self-employed and owned a tavern. He was also involved in the taxi industry. His wife was unemployed and he was the family's only breadwinner. He was aware of the fact that the community had been angered by the incident and had burned down his home and business. He conceded that his life would be in danger if he were released on bail, but said that he would relocate to Mount Fletcher in order to escape retribution from members of the community. However, he refused to divulge the address in Mount Fletcher where he would be residing. He undertook to comply with all conditions imposed by the court if he were allowed on bail. He also undertook not to interfere with any state witnesses and would attend court whenever ordered to do so.

[12] The investigating officer, Mr. Wayi, testified that the state has a strong case against the appellant. He said that the state would call witnesses who saw the appellant's vehicle parked outside the premises where the incident took place. The appellant was sitting inside the vehicle. Immediately after the shooting someone exited the premises and boarded the appellant's vehicle. The vehicle then sped off and drove in the direction of the appellant's home. He asserted that this evidence, in addition to other evidence which the state will adduce, will present a strong and compelling case against the appellant.

[13] He also testified that there was a real likelihood that there would be further attempts on the lives of the survivors if the appellant and his co-accused were granted bail. He said that the attacks on the 1st and 3rd of December were revenge attacks and followed a fight between the appellant and some of the young men who were targeted in the attacks. One of the victims, who was still in hospital at the time, expressed his fear that an attempt would be made on his life, since he had been threatened that the assailants would return 'to finish him off'. Mr Wayi also said that the fact that the second incident was directed at some of the young men who were present during the first shooting, clearly justifies the inference that it was a revenge shooting. Therefore, whoever had attacked them on 1 December 2017, was determined to finish the job.

[14] He also handed into court a letter from members of the community wherein they expressed their outrage at the cruel and brazen manner in which the attacks were perpetrated. He asserted that there was a real likelihood that the public peace would be disturbed if the appellant and his co-accused were released on bail. He said that the outrage of the community has already resulted in two of the appellant's properties being destroyed. The fact that the appellant himself is of the view that his life would be in danger if he were released on bail and exposed to the wrath of the community, supports this contention.

Discussion and findings

[15] The appellant's main contention on appeal was that the state case against him was weak. That fact, coupled with the dire consequences for him and his family if he were not granted bail, constituted exceptional circumstances. It was therefore in the interests of justice that he be granted bail, or so the argument went.

[16] In my view the magistrate's factual findings and reasoning cannot be faulted. His finding that the state case against the appellant was strong, was supported by the evidence of the investigating officer. The appellant appeared to emphasise the fact that the incident had taken place at night and that the state was unable to produce eyewitnesses who had seen him inside the premises where the attack had taken place. It was contended on his behalf that this presents a lacuna in the state's case. I do not agree with these contentions. As mentioned, the investigating officer testified that the appellant was positively identified by witnesses who had seen him waiting in his vehicle outside the premises where the attack took place. The assailant was also seen running away from the premises and boarding the appellant's vehicle, which then drove in the direction of his house. These compelling circumstantial facts would, at the very least, present a *prima facie* case that will require the appellant to provide an explanation that is reasonably possibly true. The magistrate's finding regarding the strength of the state case was therefore based on sound reasoning.

[17] I am also of the view that the magistrate's finding that there was a likelihood that the public peace would be disturbed if the appellant were released on bail, was based on facts which were common cause. The appellant himself testified that he feared for his life and that he would relocate to Mount Fletcher in order to escape

retribution from members of the community. His home and business had been burned down, and the investigating officer had introduced a letter from members of the community expressing their outrage and anger at the crimes and urging the court not to grant bail. Although that letter on its own was not sufficient for the magistrate to refuse the application, it served to support his fear that the appellant's release on bail may spark public unrest.

[18] The investigating officer was understandably also concerned about the fact that the attack on the 1st of December was followed up by another attack on the survivors on the 3rd of December. His assertion was that this lends credence to his view that the attack was motivated by revenge and that whoever had perpetrated the first attack was determined to kill the survivors.

[19] In any event, apart from his contentions regarding the strength or weakness of the state's case, the appellant has not been able to proffer any facts that could by any stretch of the imagination constitute exceptional circumstances as envisaged by s. 60 (11) (a) of the Act. The contentions regarding the prejudice that he and his family would suffer if he were not released on bail are in themselves not exceptional in nature. It is difficult to conceive of any circumstances where a detainee applying for bail would not be able to point to some economic and other suffering for himself and his family if he were not granted bail. My finding in respect of the strength of the state case thus means that there were no exceptional circumstances which could have justified the granting of bail.

[20] At the outset of the appeal hearing I did raise with the appellant's legal representative the wisdom of appealing against the refusal of bail five years after the judgment was delivered. I pointed out to him that the appellant's interests may have been better served by making a fresh application on new facts. Although Mr. Tshitshi agreed with the logic of such an approach, he emphasised that he had been instructed not to bring a new application, but to appeal against the judgment.

[21] Nevertheless, in determining whether or not the magistrate was wrong to refuse bail, I am constrained to consider only the evidence that was before him in 2017 and his reasoning.

[22] For the abovementioned reasons I am unable to find any basis to criticise the magistrate's findings and reasoning. The appeal must accordingly fail.

Order

[24] In the result the appeal is dismissed.

J.E. SMITH

Judge of the High Court

APPEARANCES

Date of hearing : 19 August 2022

Date of delivery : 1 September 2022

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