



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: CA & R 40/2021
Heard: 28/09/2021
Delivered: 08/10/2021

In the matter between:

GEORGE PIENAAR
ELTON NOAH

First Applicant
Second Appellant

and

THE STATE

Respondent

JUDGMENT ON BAIL APPEAL

Mamosebo J

[1] This appeal is against the refusal by Magistrate K Padayachee in Kimberley to admit the appellants to bail on 06 August 2021. The first appellant, Mr Pienaar, was arrested on 23 July 2021 and the second appellant, on 26 July 2021 on a charge of robbery with aggravating circumstances. The appeal is brought in terms of s 65(1)(a) of the Criminal Procedure Act, 51 of 1977 (the CPA).¹ The State is opposing the appeal.

¹ Section 65(1)(a) stipulates: "An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of

[2] Section 65(4) of the CPA stipulates:

"(4) *The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such a 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 [or her] opinion the lower court should have given.*"

[3] The appellants are represented by Adv. MMA Mafaro while the State is represented by Adv. SK Weyers-Gericke. It is common cause that the bail application resorts under Schedule 6 of the CPA. The appellants bore the *onus* to persuade the Court that exceptional circumstances exist which in the interests of justice permit their release on bail.²

[4] Before Magistrate Padayachee the appellants did not testify, but opted to file affidavits in support of their bail application. In opposing the application the State led the evidence of the investigating officer, Sgt Neil Jacobs, attached to the Organised Crime Unit. The record of proceedings of the bail hearing forms part of the bail appeal.

[5] What falls for determination is whether the decision of the Magistrate not to admit the appellants to bail was wrong.

[6] The appellants contend that there was a misdirection on the part of the Magistrate in refusing them bail. The grounds set out in the Notice of Appeal are that the Magistrate erred:

6.1 In finding that the State has a *prima facie* case against the second appellant;

bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting."

² Section 60(11)(a) of the CPA

- 6.2 In not placing any value on the inadmissible evidence relating to the second appellant;
- 6.3 In finding that the personal circumstances of the first appellant do not qualify as exceptional circumstances;
- 6.4 In its finding that inadmissible evidence may be cured by investigations; and
- 6.5 In failing to properly consider the factors listed in s 60(4)(a) to (e) and ss (9) of the CPA.

[7] The following was considered by the Court *a quo* on behalf of the first appellant: He is 42 years old, unmarried with eight (8) children. He is self-employed, running a tavern and courier services. His highest academic qualification is Grade 12. He has a previous conviction of theft for which a suspended sentence was imposed in 2020. On the day of the alleged robbery he travelled from Upington to Kimberley to buy motor vehicle parts for the VW Golf hired by his girlfriend. He drove to Boshof and picked up hitchhikers along the way. He can afford to post bail of R500.00. If realised on bail he would support his family; manage his business; undergo a covid-19 test and consult with his legal representative. He also believes the investigations are going to take long.

[8] The second appellant is 40 years old, married with six (6) children. He is not gainfully employed but does casual jobs. His highest academic qualification is Grade 12. He has a previous conviction of theft for which he was sentenced to 6 years direct imprisonment in 2015. He denies any involvement in the case of robbery with aggravating circumstances. He can afford to post bail in the amount of R500.00. He denies knowing the first appellant and only met him in the police cells. He did not wish to comment on the merits of the case.

- [9] The evidence of the State is briefly the following: The complainant in the robbery case, Mr Lucky Mkhize, was transporting three boxes of concentrated diamonds in a bakkie from Upington to Kimberley when he noticed that he was being followed at the Boshof Road. According to the Tracker reports the appellants had been following the complainant from Boshof. The bakkie following him had blue lights on and signalled to him to pull over from the road, which he did. Two armed men emerged from a VW Golf and boarded his vehicle, sandwiching him. When they reached the Eskom turn off they tied him up, took off with the three boxes, his firearm, wallet, cash, driver's and firearm licenses and bank cards.
- [10] Sgt Neil Robert Jacobs testified that the appellants were linked to the robbery through CCTV footage. The hired Golf VW was traced back to the first appellant. His house was searched by the forensic members of the South African Police Services and mining sand was found on the floor. The complainant has identified both appellants through photo identification. The State was still awaiting copies of the video footage, DNA results, cellphone records and statements from other witnesses. Sgt Jacobs believes the State's case is strong against both appellants and that further arrests were expected.
- [11] According to Sgt Jacobs, should the appellants be released, they may interfere with the investigation and the state witnesses. The firearms, blue lights and the police uniforms have not been recovered.
- [12] The Magistrate found Sgt Jacobs to be a credible witness and was satisfied that the appellants have a case to answer to. In considering the likelihood whether the appellants would, if released on bail, commit a Schedule 1 offence, the Court answered in the affirmative; regard also being had to their previous convictions. A

further concern related to the missing firearms, blue light and police uniforms posing a risk for the commission of further offence(s) or destroying or concealing evidence.

[13] Further considerations by the court *a quo* pertained to the peace and security of the public against the backdrop of the missing blue lights, firearms and police uniforms. The court did not rule out the possibility of the SAPS members being involved considering the extent to which the crime was planned and the nature of its seriousness. The Magistrate found that the appellants failed to discharge their *onus* that exceptional circumstances existed and dismissed their application.

[14] It is trite that when a court is required to exercise its discretion to allow a detained person to bail, it has to balance his or her right to liberty against the interests of justice. The correct approach is as stated by Harcourt J in *S v Smith and Another*³:

"The Court will always grant bail where possible and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby."

See also *S v Acheson*⁴.

[15] The remarks by Hefer J in *S v Barber*⁵ are apposite:

"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his

³ 1969 (4) SA 175 (N) at 177E - F.

⁴ 1991 (2) SA 805 (NMHC)

⁵ 1979 (4) SA 218 (D &CLD) at 220E – F

discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

- [16] Mr Mafaro, invoking *S v DV*⁶, contended that based on the appellants' personal circumstances, that some doubt pertaining to the State's case, and how long the investigation might still take to reach completion, considered cumulatively, make up exceptional circumstances. Counsel further urged the Court to take into account the concession by the State at para 38 of its heads of argument that the Magistrate had erred by refusing bail because "*there is a likelihood that the applicant*", who is not specified in the heads, "*if released on bail may endanger his own safety or the safety of the public*". Ms Weyers-Gericke submitted that this concession was an error and should not have been made. The ConCourt has already decided in *Matatiele Municipality and Others v President of the RSA and Others*⁷ that the court is not bound by a concession by counsel erroneously made. See *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*⁸.

- [17] The following pronouncements by the Supreme Court of Appeal in *S v Scott-Crossley*⁹ are insightful:

"[7] The prospects of success does not in itself amount to exceptional circumstances as envisaged by the Act – the Court must consider all relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release (S v Bruintjies [2003 (2) SACR 575 (SCA)]). In evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court a quo in great detail. If the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow: cf S v Viljoen 2002 (2)

⁶ 2012 (2) SACR 492 (GNP) at para 8

⁷ 2006 (5) SA 47 (CC) at para 67

⁸ 1996 (4) SA 671 (CC) at para 16

⁹ 2007 (2) SACR 470 (SCA) at paras 7 and 12

SACR 550 (SCA)([2002] 4 All SA 10)at 561g-i. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits."

[18] The appellants' reasons advanced for bail to be granted, even if taken cumulatively, do not amount to exceptional circumstances for purposes of s 60(11)(a). Mindful that 'exceptional circumstances' have not been defined in the legislation, however, in *S v Petersen*¹⁰ the court held that 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. Mr Mafaro also argued that Covid-19 constitutes an exceptional circumstance. Covid-19 is indeed a global pandemic with devastating effects but it cannot be a free ticket to lawlessness either. The relevant authorities in all workplaces, including the prisons and police stations, have a constitutional obligation to promote occupational health and safety standards. Testing for Covid-19 and receiving vaccination can also be administered at police stations and prisons. To merely state that bail must be posted for the appellants without any context is unprincipled.

[19] I am not persuaded that the Magistrate misdirected herself in refusing to admit appellants to bail. The Magistrate has considered all factors placed before her. Even cumulatively they do not constitute exceptional circumstances. The SCA further said:

"[12] As far as the appellant's personal circumstances are concerned, they are commonplace and not out of the ordinary."

[20] It follows, therefore, that the Court *a quo* correctly dismissed their application for bail. **The appeal cannot succeed and stands to be dismissed.**

¹⁰ 2008 (2) SACR 355 (C) at para 55

[21] Resultantly, I make the following order:

The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'M.C. Mamosebo', is written over a horizontal line.

**M.C.MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Appellants:
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