

REPUBLIC OF SOUTH AFRICA

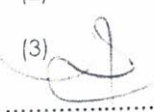


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 04/19

SH17/19

DATE OF HEARING: 23 MAY 2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER
(3)	JUDGES: YES
	REVISED.
	2019-05-24
.....	
SIGNATURE	DATE

In the matter of:

SIPHO THOMAS MOLOI

APPELLANT

and

THE STATE

RESPONDENT

JUDGEMENT

N N Bam AJ

1. This is an appeal against the decision of the regional magistrate refusing bail.
2. The record of proceedings demonstrates that the appellant, a 26 year old man, had been arrested on robbery with aggravating circumstances read with section 51 (2) of the Criminal Law Amendment Act 105 of 1997. The state alleged that the appellant had unlawfully and intentionally assaulted, using a firearm, two people, at or near Posta Road in the area of Evaton, and stealing their property or property in their lawful possession to wit, two Nokia mobile phones valued at R3000 and R2600, cash amounting in total to R5000, airtime vouchers of R4000 and an assortment of cigarettes valued at R2000.
3. Two more people were said to have been in the company of the appellant at the time of the offence however, they were still at large at the time of the hearing of the bail proceedings in February 2019.
4. On 11 February 2019, the appellant launched a bail application in the Regional Court for the Division of Gauteng held at Sebokeng. In order to

discharge the onus placed upon him by section 60 (11 (a))¹, that exceptional circumstances existed and that it was in the interests of justice that he be granted bail, the appellant testified that:

- a) He had a fixed address and had a wife and two children. In addition to looking after his two children who are 14 and 3, he also cared for his neighbor's three children who had lost their father.
- b) He and his wife are unemployed. They sustain themselves by selling cooked food from which they make income of about R4000 per month;
- c) He had no pending cases and, he had once been fined R300 following a conviction of being found in possession of suspected stolen property;
- d) He did not know the witnesses to the case and could therefore not interfere or intimidate witness/es and had no history of intimidating state witnesses or interfering with the evidence. He also placed before the court that he would not unlawfully jeopardize the proper administration of justice.
- e) He had no travel documents, he lived in his mother's house and had no family outside the country and he was therefore not a flight risk.
- f) As to the offence with which he has been charged, the appellant denied knowledge of the offence. He further declined to provide his plea

¹ of the Criminal Procedure Act 51 of 1977, as amended

explanation proffering to the magistrate that he would like to do so during trial.

The charge, and the identification parade

5. Appellant however, went on to place before court three issues, suggesting that the state's case was weak, namely, the charge he faced when he first appeared before court and the validity of the identification parade. Later in cross examination of the investigating officer, the defence queried of the appellant's identification by two witnesses leading up to his arrest.
6. As to the charge, appellant raised questions about the charge he first faced when he appeared in court, which is that of unlawful possession of a firearm and ammunition and the investigating officer was questioned extensively on this by the defence. Although conceding that the appellant should have been charged with robbery from the onset, the investigation officer's view was that it was only because he was still busy with the investigations into the charges of robbery. Regarding the description of the appellant by the two witnesses, the investigating officer testified that of the two witnesses who followed the appellant after the robbery, one had actually witnessed the robbery in action, while the second had only seen the appellant as he passed his salon, which is next to the tuck-shop. The witness who had seen the robbery had informed the arresting officer that the appellant had in his person airtime, (referring to airtime vouchers) and a fire arm. As they followed the appellant on a distance of about 3 kilometers, the witnesses came across a marked flying squad vehicle and reported the incident to that officer. It was the evidence of the

investigating officer that the witnesses had not only pointed the appellant just as he was about to board a taxi, but that they had informed the arresting officer that the man wearing a black t-shirt, grey jeans and Adidas shoes was seen walking out of the tuck shop after a robbery and had a fire arm on him. The arresting officer followed the taxi and stopped it. He got inside and searched a man with a black t-shirt, grey jeans and Adidas shoes and found a firearm between his thighs. It was common cause that no airtime and no money were found on the person of the appellant.

7. On the question of the validity of the identification parade, the appellant testified that upon being arrested he was taken to the charge office in Evaton. It appears from the evidence of the investigating officer that Evaton charge office does not have holding cells. Appellant testified that he was left to sit for more than two hours in the charge office. Directly opposite him sat three people who identified him during an identification parade on the very next day. When asked about the issue of the identification parade and why it was necessary to hold an identification parade, the investigating officer testified that he could not testify about what had occurred before he got to the police station. That the arresting officer had informed him that he had taken the appellant to the charge office and could neither dispute nor agree with the appellant's testimony regarding the sitting at the charge office including who did or did not see the appellant. As to the reason behind the identification parade, the investigating officer said he had received a call from the Senior Public Prosecutor.
8. The appellant was asked to state why he should be granted bail to which he responded that his children and the wife were struggling to cope in his

absence. He added that the wife usually attended to the children and that he was responsible collecting stock. These then are the circumstances placed before the court quo for its consideration of the bail application.

9. Having considered the factors adduced by the appellant and taking into account the strength or otherwise of the state's case, the magistrate concluded that the appellant had failed to discharge the onus place on him in terms of 60 (11) (a) in that he had demonstrated no exceptional circumstances which warranted his release on bail.

10.The law

11. Section 60 (11) (a) of the Criminal Procedure Act² provides:

'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 exist which in the interests of justice permit his or her release;'

The appellant's case on appeal

² 51 of 1977 as emended

12. Before this court, counsel for the appellant suggested, in the first instance, that the learned magistrate had erred in finding that the appellant had failed to adduce exceptional circumstances. In support, counsel pointed that the evidence of the appellant that there was no evidence linking him to the commission of the offences in question could not be refuted. It was further common cause that the appellant had not been found with anything on his person that belonged to the complainant. These grounds when looked at together weakened the state's case, argued appellant's counsel.
13. In the second instance, it was argued that the learned magistrate erred in not taking into account the investigating officer's evidence that he was not opposed to bail and that he did not consider the appellant a flight risk. It was further suggested that the decision by the state to first charge the appellant with unlawful possession of a firearm and ammunition instead of robbery pointed strongly to a very weak case on the count of robbery. Looked at cumulatively, these factors amounted to exceptional circumstances, suggested counsel for the appellant.
14. Counsel for the appellant further reminded the court that the investigating officer had testified that he had no opposition to the court granting the appellant bail, he knew the family of the appellant, had verified his address, and had confirmed that the appellant resided with his wife and children in his mother's house.
15. With regard to the factors listed in section 60 (4) (a) to (e) of the Criminal Procedure Act, it was suggested that the magistrate erred in not finding that those factors were in favor of the appellant. On the basis of the aforesaid, counsel urged the court to find that the magistrate had misdirected himself. He

asked that the appellant be granted bail. His client can afford R3000 bail, he said.

16. Counsel for the state argued that there was no merit to the appellant's point regarding the decision to charge him with unlawful possession of a firearm and ammunition and not robbery in the first instance. She dismissed the point as nothing more than the normal progression of an investigation. It was early stages she said.
17. As to the strength of the state's case, she submitted that the state had made a prima facie case for the appellant to answer. She pointed to the firearm the evidence provided in the court a quo which was said to have been found on the person of the appellant. As to the investigating officer's testimony and his attitude to the court granting the appellant bail, counsel correctly pointed that it was for the magistrate to apply the law correctly and given that the charges brought against the appellant were those specified in schedule 6, it was for appellant to adduce exceptional circumstances. In the state's view, this the appellant failed to discharge such onus.
18. The jurisdiction requirements for the appellate court to interfere with the decision of court a quo are set out in section 65 (4). The section reads:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such 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 opinion the lower court should have given."

19. In reasoning the bail application, the court a quo noted:

'..... What are the exceptional circumstances.[?] That is the question that the court should answer in deciding on the bail application. The court have (sic) actually taken it as an exceptional circumstance if the state's case is weak, and it may lead to an acquittal. It is clear from Mr Twala's [the defence attorney] address that the defence is going to challenge the identification parade in a trial, and that it was not a proper identification parade, since the witnesses have seen the applicant before the parade. This court should actually avoid substituting itself as a trial court.....Therefore I am not going to delve into the merits. But there is evidence that the applicant was arrested in possession of a firearm, according to what they say, and the the applicant came from the shop, and one of the victims who is a Somali business person, who was a victim, pointed out the applicant during the parade. Therefore, I conclude that there is nothing that shows that the state does not have a case at all against the accused.I find that the applicant has not succeeded in adducing evidence on a balance of probabilities to satisfy the court that exceptional circumstances do exist that in the interests he will be permitted to bail. (sic)'

20. In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H it was said:

"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 it would be an unfair interference with the magistrate's exercise of his 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 ...'

21. In *S v Faye*³ where the court referred to *S v Porthen & Others 2004 (2) SACR 242 (C)* at para 7:

'Binns-Ward AJit necessary to point out that a court hearing a bail application (i.e the court a quo exercises a wide as opposed to a narrow (or strict) discretion. At para [16] the learned judge remarked as follows with reference to *S v Botha en 'n ander 2002 (1) SACR 222 (SCA)*:

'Insofar as the quoted dictum in *S v Barber (supra)* might be amenable to be construed to suggest that the appellate court's power to intervene in terms of s 65(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him- or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s 60(11)(a) of CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case *supra*. See paras [21]-[27] of the judgment. It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA. (The fact that the appeal in Botha's case was an appeal from a decision of a bail application by the High Court as the court of first instance does not affect the principle in issue.)'

³(A122/2008) [2008] ZAECHC 211; 2009 (2) SACR 210 (Tk) (24 December 2008 para 12

22. '[13] At para [17] in *S v Porthen & Others*, supra, the learned judge continued ".....[i]t remains necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong". See s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996."

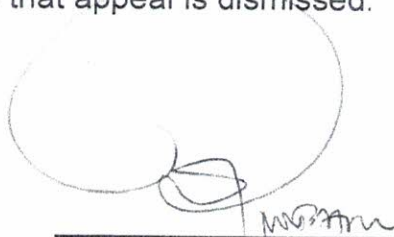
23. In *Mathebula v The State*⁴ it was held that:

'[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha* 2002 (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala & Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g'.

⁴(431/09) [2009] ZASCA 91 (11 September 2009) para 12

24. I have considered the record in light of the considerations of the cases quoted in the preceding paragraphs. I have also noted the sum total of the appellant's testimony. It appears to me that the thrust of the appellant's case are the alleged vulnerabilities in the state's case. I could not ignore that in recognizing the exceptional circumstances, the magistrate had taken into account what the defence highlighted as vulnerabilities in the state's case. He, after considering the circumspect of evidence before him concluded that the appellant had a case to answer. I agree. I am further fortified in my view by the comments of the SCA in Mathebula and note that the appellant did nothing that could be summed up as going further to establish a likely acquittal. His tilt at the state's case was met, at times, with equally formidable riposte in particular on the question of the witnesses who had followed the appellant all the way to the point where they reported the case to the member of the flying squad. It may well be the view of the defence that the state's case appears weak, but as Mathebula suggests, the appellant had the responsibility to go further and demonstrate probabilities of an acquittal. This, the appellant has not done. Even if I were to be charitable in viewing the appellant's case, the conclusion is ineluctable that he failed to adduce exceptional circumstances. It is my judgement that the appeal falls to be dismissed.

25. Accordingly, the order is made that appeal is dismissed.

A handwritten signature in dark ink, appearing to read 'NN Bam', is written over a large, faint circular stamp. The signature is fluid and cursive.

NN BAM
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

DATE OF HEARING : 23 May 2019

DATE OF JUDGMENT : 24 May 2019

APPEARANCES

Appellant's Attorney :G Mohohlo (Phehello Molise Attorneys)

Respondent's Counsel :Adv S Mahomed (Office of the DPP,Pretoria)