

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A11/2019

In the matter between:

MOLEFO AUBREY SESING

Applicant

and

THE STATE

Respondent

CORAM:

DAFFUE, J

JUDGMENT BY:

DAFFUE, J

HEARD ON:

18 & 25 JANUARY 2019

DELIVERED ON:

25 JANUARY 2019

INTRODUCTION

- [1] Appellant, a 34-year old South African male, was arrested on 2 November 2017. He, together with his six co-accused, unsuccessfully applied for bail. On 28 March 2018 their bail applications were dismissed by magistrate LM Bothma of Botshabelo.
- [2] Being dissatisfied with the outcome of the bail application, appellant filed a notice of appeal on 15 January 2019, 10 months

after the dismissal of the bail application. The matter was heard by me on 18 January 2019, but postponed to today as the magistrate's reasons in terms of s 65(3) of the Criminal Procedure Act, 51 of 1977 ("the CPA") were not obtained. These have now been received.

- [3] It is common cause that appellant and his co-accused face a serious charge, to wit robbery with aggravating circumstances read with s 51 of the Criminal Law Amendment Act, 105 of 1997 in that R100 000 was taken with force from the person in charge of a cash loan business whilst he was also threatened and pointed with firearms. Several people were involved in the robbery and it is alleged that appellant provided transport to two of the robbers to and from the crime scene. R10 000 was found in the possession of his girlfriend on the day of his arrest which coincided with the date of the robbery. The prescribed minimum sentence for such an offence is 15 years' imprisonment. The offence falls within the ambit of schedule 6 of the CPA and therefore exceptional circumstances had to be proven by appellant why he was entitled to be released on bail.

THE ISSUES

- [4] The grounds of appeal can be summarised as follows, *i.e.* that the court *a quo* erred in

- 4.1 finding that appellant failed to prove exceptional circumstances, bearing in mind his personal circumstances and the fact that he voluntarily attended to the police station when called upon to do so;
- 4.2 failing to individually consider the circumstances and factors relevant to appellant and to paint him with the same brush as the others;
- 4.3 relying on unsubstantiated evidence by the investigating officer;
- 4.4 not dealing with the requirements of s 60(4) of the CPA.

[5] I do not intend to canvass all arguments raised by the parties, save to mention that I have considered these as well as the judgment of the court *a quo*, the further reasons and the evidence placed before it.

THE JUDGMENT OF THE COURT A QUO

[6] The court *a quo* considered the following to be major grounds why appellant should not be released on bail, to wit

- 6.1 his personal circumstances do not qualify as exceptional circumstances;

- 6.2 some of the accused were pointed out on identity parades whilst damning video footage identifying them exists;
- 6.3 accused 4's Mercedes vehicle was positively identified, accused 5 fired a shot outside the offices where the robbery was committed and accused 6 and 7 had contact with employees of the cash loan business prior to the robbery and also threatened employees;
- 6.4 the possibility of evading trial is real, especially where there are several accused, causing the remaining accused to put the blame on those that absconded;
- 6.5 accused 2, 3, 4 and 5 have previous convictions and some even committed crimes in the past when released on bail;
- 6.6 robbery with aggravating circumstances in Botshabelo is rife;
- 6.7 as set out in the additional reasons, appellant used his vehicle to transport some of the suspects to the crime scene, that he and accused 7 waited in the vehicle during the robbery and drove off with two suspects after the robbery had been committed – consequently a *prima facie* case exists.

LEGAL PRINCIPLES

- [7] Section 60(11)(a) of the CPA stipulates, pertaining to schedule 6 offences, that

“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 interest of justice permit his or her release;”

- [8] The functions and powers of a court of appeal hearing a bail appeal is similar to those in an appeal against conviction and sentence. Section 65(4) of the CPA stipulates that the court of appeal shall not set aside the court *a quo*’s decision unless such court is satisfied that the decision was wrong. Therefore, in the case of doubt, the court of appeal should not interfere. Hefer J (as he then was) considered the issue as follows in **S v Barber** 1979 (4) SA 218 (D) at 220E – H:

“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 discretion.”

Binns-Ward AJ (as he then was) stated in **S v Porthen and Others** 2004 (2) SACR 242 (C) at para [17] after discussing the aforesaid dictum of Hefer J that it remains necessary:

“to be mindful that a bail appeal, including one affected by the provisions of section 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'."

The court of appeal may only consider the issue of bail afresh where the court *a quo* misdirected itself materially on the facts or legal principles. See **S v Mpulampula** 2007 (2) SACR 133 (E) at 136e and **S v Jacobs** 2011 (1) SACR 490 (ECP) at para [18]. See also Van der Berg, **Bail, A Practitioner's Guide**, 3rd ed p. 232-4.

[9] It is important to note that for purposes of section 60(11)(a) an accused shall be detained in custody until dealt with in accordance with the law, unless he/she after having been given a reasonable opportunity to do so, satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release. The standard of proof is on a balance of probabilities. See Van der Berg, *loc cit* p. 97 and **S v Dlamini; S v Dladla; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC) at paras [61], [78] and [79].

[10] Once exceptional circumstances have been established by a bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – (8)A on the one hand and the appellant's interest in his personal freedom as set out in section 60(9) on the other. See Du Toit *et al* **Commentary on the Criminal Procedure Act**, p 9-48B. The following dictum of Vivier ADCJ in **S v Botha en 'n Ander** 2002(1) SACR 222 (SCA) para [19] is apposite:

“Gewoonlik, maar nie noodwendig nie, sal dit (“with reference to ‘exceptional circumstances’”) omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a) - (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerkt kan word... Dit is vir die hof om in elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerkt kan word.”

See also **S v Scott-Crossley** 2007 (2) SACR 470 (SCA) at paras [7] and [12]. Section 60(4)(a) – (e) concern the likelihood that the accused, if released, (i) will endanger the safety of the public or a particular person, (ii) will attempt to evade his trial, (iii) will attempt to influence or intimidate witnesses or to conceal or destroy evidence, (iv) will undermine the proper functioning of the criminal justice system or (v) will disturb the public order or undermine public peace or security.

- [11] There is no onus on the State to disprove exceptional circumstances. The accused must on a balance of probabilities prove that the State’s case was non-existent or subject to serious doubt. See again **Mathebula**, *loc cit.* In **S v Petersen** 2008 (2) SACR 355 (C) at para [55] the Full Bench concluded as follows on the meaning and interpretation of exceptional circumstances:

“Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different... This may, of course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.”

- [12] An accused who alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a balance of probabilities. See **S v Mathebula** 2010 (1) SACR 55 (SCA) at paras [11] – [13]. Where an accused, confronted with allegations that he has committed a schedule 6 offence, does not make out a *prima facie* case of the prosecution failing, there is no duty on the prosecution to present evidence in rebuttal. See **S v Mathebula**, *loc cit*, para [12] and **S v Viljoen**, 2002 (2) SACR 550 (SCA) at para [15].
- [13] Personal circumstances which are really “commonplace” cannot constitute exceptional circumstances for purposes of section 60(11)(a). See Du Toit *et al*, *loc cit* at 9-62 and **S v Scott-Crossley**, *loc cit*, at para [12].
- [14] It is not the function of the court considering bail to make a provisional finding of guilt, but to assess the *prima facie* strength of the State case. See **S v Van Wyk** *loc cit* at para [6].

EVALUATION OF THE APPEAL

[15] I indicated that I would not venture into a full evaluation of the arguments, the evidence and the reasons of the court *a quo*. However I need to point out that the following aspects are important to substantiate the finding that the bail application be dismissed. Appellant's counsel strenuously argued that the mere fact that appellant went to the police station when called upon to do so is indicative of his innocence. I disagree. It is clear that the information relied upon by the investigating officer enabled his colleague to identify appellant as the driver and owner of the one get-away car. It would not be possible to contact appellant telephonically if he was not positively identified by someone who personally knew him and informed SAPS of his identity and contact details. Appellant admitted that R10 000 was found in the possession of his girlfriend. His version in this regard is improbable. If he received the money to buy material, he would have been in possession thereof and not his girlfriend. When he received the telephone call, he was with her. Obviously, when he went to the police station, he left the money with her and one may ask why he did that if he was totally innocent and on his way to buy material.

[16] It cannot be disregarded that the police would not have been aware of the R10 000 if that was not conveyed to them. On

appellant's version the money was obtained from a reliable person for whom he worked as he was supposed to buy material. He failed to call the person who had given him the money to testify on his behalf and also failed to call his girlfriend to corroborate his version. According to the investigating officer the appellant took them to his girlfriend's residence after he had made certain admissions.

[17] It appears from the evidence of the investigating officer that Adv J Nel, who initially appeared for appellant, suggested to him that appellant should become a state witness. However, when he approached the appellant, he was unwilling to co-operate. No cross-examination took place in this regard and this must be accepted as the truth. The obvious question that arises from this is why counsel would make such a suggestion if his client did not know the other accused and could not offer any meaningful assistance in support of the state's case. The seriousness of the allegations and the evidence pertaining to previous convictions by some of the other accused are relevant factors which have an adverse effect on appellant's case. The version that he was the driver of the one get-away car place his circumstances within the ambit of the others and the submission that he should have been dealt with differently is rejected.

[18] I am satisfied that the court *a quo* was correct in finding that a *prima facie* case exists. I cannot find that the decision to dismiss the bail application was wrong, or that any misdirections occurred,

and therefore, in accordance with s 65(4), I shall not set aside that decision.

ORDER

[19] Consequently, the appellant's appeal is dismissed.

J. P. DAFFUE, J

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On behalf of respondent: Adv R Hoffman
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