

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

CASE NO. CA&R 101/18

In the matter between:

XOLANI RALA-RALA

1ST APPLICANT

WILLIAM M. MOLOI

2ND APPLICANT

MTHEO J. SNYMES

3RD APPLICANT

VS

THE STATE

RESPONDENT

BAIL APPEAL JUDGMENT

DAWOOD, J:

1. The appellants herein are appealing against the refusal of their bail by the Mount Fletcher District Court Magistrate.

2. It is common cause that some of the offences they are charged with fell within the ambit of Schedule 6 offences and is accordingly section 60 (11) is applicable.

3. Section 60 (11) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the Act) reads as follows:

“(11) 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;

(b) in Schedule 5, but not 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 the interests of justice permit his or her release.”

4. In the matter of *S v Mabena and Another*¹, Nugent JA cited with approval in the case of *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC):

*“(Section) 60(11) (a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by ss 60(4)-(9) (and required by s 35(1)(f) [of the Constitution]) in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in **denying the accused bail, will be resolved in favour of the denial of bail unless "exceptional circumstances" are shown by the accused to exist.***

***This exercise is one which departs from the constitutional standard set by s 35(1) (f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the "interests of justice" were to be applied.”**(my emphasis)*

¹ 2007 (1) SACR 482 (SCA) at 486.

5. The appellant's counsel submitted that there is no closed list of factors that constitute exceptional circumstances under section 60 (11). He stated that what constitutes exceptional circumstances is determinable from the facts of each particular case.
6. In requiring that the circumstances proved must be exceptional the subsection does not say they must be circumstances in addition to, above and beyond and generally different, from those enumerated in section 60 (4)-(9) of the Act.
7. He relied on the cases of *inter alia*:

A) *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* ²—

“The subsection says that for those awaiting trial on the offences listed in Schedule 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss (4) (9) has to be applied differently.”

B) *S v Najoe*³:

“It is trite that there is no closed list of factors that constitute exceptional circumstances under s 60(11). What becomes evident from the numerous cases in which the courts have considered applications for bail, where the applicants face charges listed under sch 6 of the Act, is that what constitutes exceptional circumstances is, in each case, determinable from the circumstances of the particular case. The following are some of the guidelines laid down by the courts for determination of exceptional circumstances:

‘An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. . . . In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.’”

C) *S v Vanqa*⁴:

“For this submission he placed heavy reliance on decisions of this Court in Tandwa and Others v The State case No A374/98 and

² 1999 (4) SA 623 (CC) at 663 C-D.

³ 2012 (2) SACR 395 (ECP) at 397 B-C.

⁴ 2000 (2) SACR 371 (Tk) at pages 374-5 H-A; 377F–H.

Madwantsi v The State case No A375/98 (both unreported judgments) as well as *S v Yanta* (supra). In the latter case Van Zyl J stated at 243h-244a:

*‘The approach adopted by Kriegler J in the Dlamini case suggest that the exceptional circumstances as envisaged by ss (11)(a) are not to be construed as requiring an accused to place before a court factors or circumstances in addition to those provided for in ss (4), (9) and (10) of the Act. The enquiry remains the same, namely a weighing up of the considerations referred to in ss (4), (9) and (10) of s 60 and then to exercise a value judgment according to all the relevant criteria on the facts placed before a court.
...’*

Although the Constitutional Court has, during June 1999, laid down a clear approach in matters of this nature in the Dlamini case, it appears that many magistrates within the jurisdiction of this Court still find it difficult to apply the principle. Many of them still believe that ss (11)(a) requires an applicant to prove factors which are exceptional in the sense of being unusual and different to those enumerated in ss (4)-(9). The greatest temptation appears to be an attempt to attach the ordinary grammatical meaning to the phrase ‘exceptional circumstances’. An interpretation other than this is both perplexing and frustrating to them. Consequently they find the ‘exceptional circumstances ghost’ still lurking in the woods ready to haunt them at every corner of their judicial path to invoking the provisions of the subsection.”

And

D) *S v Rudolph*⁵:

“Exceptional circumstances do not mean that ‘they must be circumstances above and beyond, and generally different from those enumerated’ in ss 60(4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.”

8. This application is to be determined in terms of section 65 of the Act.

9. Section 65 (4) of the Act provides as follows:

⁵ 2010 (1) SACR 262 (SCA) at 266 H-I.

“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.”

10. In the context of this case, the appellants accordingly rely on the fact that the magistrate was wrong in not finding exceptional circumstances warranting the grant of bail.

11. The learned Magistrate in this matter had extensively dealt with the personal circumstances of each of the appellants and did not find anything exceptional in those.

12. The first appellant *inter alia* had stated:

- i) He was 29 years of age;
- ii) Was married and had 2 children aged 13 and 6.
- iii) That he owned a home, 3 sheep and 2 horses;
- iv) Did not possess a passport;
- v) Had a Grade 9 level of education;
- vi) Was a self-employed bricklayer and earned R3000-00 a month with which he supported his family.
- vii) Is in good health and has one previous conviction of housebreaking and theft in 2015 and was sentenced to 12 months imprisonment. He was out on parole when these offences were committed.
- viii) He stated that he would be pleading not guilty and that the statement that he made to the magistrate admitting the commission of the offences was made under duress and he was told what to say by the investigating officer after he had been tortured.
- ix) He stated that the state's case against him was weak without elaborating why he says so, the *onus* being on him.
- x) It was put to him that the police have statements from eye witnesses who implicate him in the commission of the offences and say he took part in the killing and that their statements are in the docket.

- xi) It was also put to him that the investigating officer would say that he threatened to kill and even burn their horses if they come and give information to the police.

13. The second appellant testified *inter alia*:

- a) That he was 63 years of age;
- b) Had no previous convictions;
- c) Was married with 9 children;
- d) One in grade 3 and another in standard 5 and 2 in standard 9, the others are unemployed.
- e) He owns his home, 250 sheep, 50 goats, 5 horses, 25 cattle, chicken, dogs, tractors, 3 quantum mini buses, 2 bakkies and a private car.
- f) He is a taxi operator.
- g) He has no passport.
- h) He is diabetic and asthmatic and was receiving treatment in Cape Town.
- i) He alleges that the state's case against him is weak.
- j) He alleged that he was told by the investigating officer that a witness named Xolani stated that the accused had given him a gun and he had shot a person.
- k) He confirmed that he could be taken to the doctor by the police if he fell ill.
- l) It was put to him that *inter alia* a witness places him at the scene where the deceased were killed.

14. The third appellant testified *inter alia* that:

- a) He was a 71 year old pensioner;
- b) He was married
- c) He had 8 adult children eldest 40 youngest 25.
- d) He has no previous convictions.
- e) He owns 113 sheep, 13 cattle a tavern with stock and 3 cars.
- f) He is managing a vegetable project run by social development as the deputy chair.

g) No one is running his tavern that he knows and his wife is running the project.

He is the third person responsible to the Treasury so were will be a hindrance to the project.

h) He has no travel documents.

i) He is asthmatic since 2013 but does not take any medication currently.

j) His livestock and tavern are not safe now that he is incarcerated.

15. The age of the second and third appellant and the fact that they have no previous convictions is a relevant factor but cannot be elevated to an exceptional circumstance. The court took due cognisance of the medical complaints of the second appellant and stated why these would be treatable even in prison.

16. The appellant's personal circumstances were in the main common place.

17. The state counsel referred *S v Scott-Crossley*⁶ where it was held that personal circumstances which are really commonplace can obviously not constitute exceptional circumstances for purposes of section 60 (11) (a).

18. He further referred to the case of *S v Ali*⁷ where it was held that the court could not interfere with the magistrate's decision, unless it was shown that he misdirected himself in some way.

19. The appellant's counsel alleged that the magistrate misdirected himself by:

a) Finding that the role of each appellant was clearly stated by the investigating officer and that the state has clearly established that there is a strong prima facie case against all three appellants where the investigating officer had failed to provide any details regarding the circumstances of the shooting.

⁶ 2007 (2) SACR 470 (SCA) at para 12.

⁷ 2011 (1) SACR 34 (ECP) at para 14.

b) He argued that he had failed to spell out exactly what each of the appellants did in relation to the various counts.

c) He further argued there is nothing indicating which appellant shot which deceased, how many times, where on the body, at what stage, what was robbed from whom and how.

20. The investigating officer's testimony could have been clearer.

21. The investigating officer was uncertain of how many persons were allegedly shot by the appellant but was quite clear that **each of them were identified as having shot at least one deceased clearly demonstrating that they were implicated in at least one murder by eye witnesses.**

22. Appellants had contented themselves by merely stating that the state's case against them was weak.

23. I accept that they were not in possession of the docket content and may have been somewhat hamstrung in cross-examining fully but this would not have precluded them from asking the very questions that are now being posed by counsel regarding details of which deceased was shot by whom and how.

24. The magistrate took due cognisance of all the relevant factors and the testimonies when he made his findings that there was no exceptional circumstances present warranting the grant of bail.

25. The criticism was levelled against the magistrate's findings that despite the admission made by the investigating officer that there were no threats made, the magistrate wrongly found that the investigating officer persists that they were clearly made without any basis for that finding.

26. There was a great deal of inaudibles in the investigating officer's testimony particularly with regard to this aspect as well as in the magistrate's ruling in this regard.

27. However, from my reading of her testimony she had in fact persisted that these threats were made and thus the witnesses' reluctance to make a statement, what she conceded was that these threats were not recorded in writing **not** that they were not made at all.

28. The magistrate accordingly did not misdirect himself in this regard either.

29. The fact that she said that these threats were contained in the written statement and then conceded that it was not recorded in writing does not constitute an exceptional circumstance. There are eye witnesses' statements which provide nicknames and clan names which the investigating officer could not have known pertaining to the appellants. This led to the arrest of the appellants. The first appellant further had made a statement to a magistrate regarding the offences, although he states it was under duress. These factors cannot be ignored nor can her testimony as a whole be rejected having regard to the foregoing. Her evidence has to be viewed in totality.

30. I am not satisfied that the magistrate's decision was wrong. He correctly found that there were no exceptional circumstances warranting the grant of bail and there is accordingly no basis for interfering with his findings.

31. The magistrate took due cognisance of all the testimonies led and properly considered all relevant factors in arriving at his decision. That the appellant had failed to discharge the *onus* resting upon them.

32. The appeal is accordingly dismissed.

F. B. A. DAWOOD

JUDGE OF THE HIGH COURT

DATE HEARD:

08 MARCH 2019

DATE HANDED DOWN:

28 MARCH 2019

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