

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



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

Case No: CA & R 4/18
Heard on: 22/02/2018
Delivered on: 02/03/2018

In the matter between:

MBUYISELO ASHLEY MPHETSHENI

Appellant

and

THE STATE

Respondent

JUDGMENT ON BAIL APPEAL

MAMOSEBO J:

Introduction

- [1] On 22 January 2018 the appellant brought a formal application for bail in the Postmastburg magistrate court before Magistrate P Mulder. His

application was refused. He now appeals against that decision in terms of s 65(1) (a) of the Criminal Procedure Act¹ (CPA).

- [2] The appellant, in the magistrate court, was represented by his attorney Ms J Lofty-Eaton while the State was represented by Adv Zazo. The appellant, on appeal, was represented by Adv IJ Nel while the respondent was represented by Adv Q Hollander.

- [3] Mr Mbuyiselo Mpetsheni, the appellant, testified at the formal bail application and no other witnesses testified on his behalf. Constable Christine van der Westhuizen testified on behalf of the State.

- [4] In the proceedings that served before this Court Mr Hollander submitted that the court a quo had been correct when it refused to grant the appellant bail while Mr Nel held a contrary view.

- [5] It was common cause that the charges that the appellant faces are referred to in Schedule 6 of the CPA. This was because he had a pending case of theft in Kimberley involving goods to the value of R1.2 million rand listed in Schedule 5 and is now charged with Schedule 5 offences of one count of murder read with the provisions of s 51 of the Criminal Law Amendment Act, 105 of 1997 and four counts of attempted murder.

¹ 51 of 1977 as amended. 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 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 that court is not then sitting.

- [6] The personal circumstances were placed and considered by the Magistrate. The appellant is a 42 year old South African citizen born at Postmasburg. He is not married but has a life partner with whom he has two children aged 13 and 7 years old. They reside in Galeshewe, Kimberley. His life partner is employed by the Department of Health and earns about R19 000.00 per month while he assists at his brother's guest house and he receives R5000.00 every month. He denied having a passport. He owns a motor vehicle and some furniture. In as far as previous convictions are concerned, he said he paid a R200 admission of guilt for common assault and denied having any other previous conviction. He has a pending criminal case of theft in the Regional Court in Kimberley for which he was released on bail. He knows two of the state witnesses in the current matter.
- [7] The respondent opposed the application. Constable Christine Van der Westhuizen testified. She based her evidence on, inter alia, the contents of the statements she obtained from some of the witnesses. She testified that the appellant used his vehicle to chase the victims at the street, killed one and attempted to kill the others by colliding and/or driving over them. This she said, happened after an altercation between him and the Mooki family.
- [8] The investigation is incomplete. The investigating officer envisaged that a period of four months is required to complete the investigations since forensic investigations are also underway.
- [9] Const Van der Westhuizen explained that the appellant's profile reflects an aggressive person. She says when she enquired from the appellant

whether he has any previous convictions, he denied having any. The appellant testified to having paid R200 admission of guilt fine for assault. However, his SAP 69's, that is record of his previous convictions, speaks something else. He was convicted of assault and of discharging a firearm in an urban area. Both offences were committed in Postmasburg under CAS 35/3/2001 and CAS 40/3/2001.

- [10] The State did not dispute the fact that the appellant had a fixed address in Postmasburg and Kimberley. However, the appellant had failed to disclose his Kimberley residence to the investigating officer. This resulted in the address verification being conducted by the investigating officer only at the Postmasburg address.
- [11] The appellant vehemently denied ever having a passport. He testified that he only obtained a temporary passport once and crossed the border to Swaziland to attend a funeral. However, evidence revealed during cross-examination that the appellant also crossed the border to Namibia more than once. Const Van der Westhuizen confirmed that the records show that the appellant's passport expired in 2014. The Department of Home Affairs records show that he exited the country but there is no record of his return to the country.
- [12] The family of the deceased and the victims of these offences, the Mooki family, wrote a letter to the Director of Public Prosecutions, whereat they expressed their concerns in respect of how the police and the legal system treat the appellant. They demanded intervention by the office of the Director of Public Prosecution.

[13] The Magistrate did not specify the factors as he dealt with them but it can be said that he conducted that exercise in his judgment. I will elaborate more hereunder. First, it is apposite to highlight the view expressed by the Supreme Court of Appeal on exceptional circumstances.

[14] The Supreme Court of Appeal has clarified what is meant by exceptional circumstances in *S v Bruintjies*² where Shongwe AJA had the following to say:

“what is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence”.

The court further remarked as follows at 577I :

“If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail”. See also *S v Rudolph*³.

² 2003 (2) SACR 575 (SCA) at 577f

³ 2010 (1) SACR 262 (SCA) at 266g - h

[15] The Magistrate refused to admit the appellant to bail and dismissed the application. In doing so, it followed an approach of on its own searching for exceptional circumstances without specifically making reference to the factors as outlined in s 60(4). This is said based on the following findings by the Magistrate:

15.1 The appellant is not a flight risk and he will not evade trial. This finding is on the basis of s 60(4)(b).

15.2 The fact that the appellant will not interfere with state witnesses is doubtful (“twyfelagtig”). This is in line with s 60(4) (c).

15.3 That the appellant’s personal circumstances are not exceptional.

15.4 That the failure by the appellant to disclose his ‘forgotten’ previous convictions could not be ignored but it will be left to the State to decide on any further steps on this aspect.

15.5 The fact that the appellant intends to plead not guilty to the charges. The evidence of the appellant was that he was attacked and had to flee the scene. The evidence of Const. Van der Westhuizen was to the effect that the appellant could have proceeded straight as he ‘sped off’ and would have left the scene. It is incomprehensible how the appellant, fleeing from an emergency situation, would turn his vehicle instead of proceeding straight. The Magistrate found that what was presented by const. Van der Westhuizen watered down the appellant’s version.

15.6 The Magistrate was satisfied, at least prima facie, that the State case against the appellant was strong .

15.7 In finding no exceptional circumstances justifying the appellant’s release on bail. The appellant’s evidence contained only usual circumstances, which, in his view, did not assist him to discharge his onus and dismissed the bail application.

[16] The Magistrate overlooked s 60(4)(a) to determine whether there is a likelihood that the appellant, if released on bail will endanger the safety of the public or any particular person or will commit a Schedule 1 offence. Mr Hollander submitted that the factors listed in s 60(5)(a) –(h) are apposite in making this determination. Mr Hollander submitted that the factors are present in this matter as follows:

16.1 It is the respondent's case that the appellant used his vehicle to chase victims around and drove over one of them while he drove straight into the others. This meets the provision of s 60(5)(a) in terms of the implicit degree of violence towards others.

16.2 The appellant uttered threatening words to the people who walked him out of the Mooki family home saying "he will show them, he fears no one and they were nothing in his eyes". This happened before he went into his vehicle and went amok. Section 60 (5)(b) requires any threat of violence made by the appellant to be considered.

16.3 Sight should not be lost of the fact that the appellant was prevented from confronting the person who allegedly assaulted his son. That person, submitted Mr Hollander, is now known to him and it is that very incident that caused him to find himself in conflict with the law. Worse still, while on bail in another matter. This means that being on bail failed to deter him from committing further offences. Sec 60(5)(c) requires the court to take into consideration any form

of resentment that the appellant is alleged to harbour against any person.

[17] The grounds of appeal as contained in the notice of appeal dated 08 February 2018 are essentially that the magistrate failed to attach any weight or sufficient weight:

- 17.1 to the favourable grounds testified to by the appellant which cumulatively show that the interests of justice permit his release on bail;
- 17.2 by not weighing up the interests of justice against the prejudice likely to be suffered by the appellant should he not be admitted to bail.
- 17.2 to the averment that the appellant's version was not materially disputed by the respondent;
- 17.3 to the provisions of s 60(4) (a) to (e) of the CPA;
- 17.4 To the likely prejudice the appellant would suffer if his bail is refused;
- 17.5 to the submission that his previous convictions were over 10 years and s 271A of the CPA found application;
- 17.6 the possibility that the appellant may only be convicted of culpable homicide and/or negligent or reckless driving instead of making a finding that the respondent's case was strong against him;
- 17.7 that exceptional circumstances were shown by the appellant.

The legal position

- [18] Kriegler J made the following remarks in *S v Dlamini: Sv Dladla and Others; S v Joubert: S v Schietekat*⁴ :

“What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.”

- [19] Section 65(4) of the CPA stipulates that an appeal court shall not set aside the decision against which the appeal is brought, unless such Court or Judges is satisfied that the decision was wrong. This principle was enunciated in *S v Barber*⁵ where Heher J pronounced:

“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 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.”

- [20] Bail applications of accused persons are regulated by s 60 of the CPA. Sec 60(1)(a) stipulates:

⁴ 1999 (2) SACR 51 (CC) at 88h – i; 89e and 90b – d.

⁵ 1979 (4) SA 218 (D) at 220E - H

“(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit”.

[21] Section 60(11)(a) provides:

“(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”.

Section 60(11)(a) places the burden or the onus on the accused to satisfy the court by way of evidence that exceptional circumstances exist which, in the interests of justice, permit his release. This burden seems to me to be heavier than the burden in terms of s 60(11)(b).

[22] Section 60 (4) of the CPA provides that:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (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 the 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 jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

The issues

- [23] The issues to be determined are whether the appellant has discharged the burden placed on him by s 60(11)(a) of the CPA to be admitted to bail and whether the Magistrate has indeed erred by refusing to grant the appellant bail.
- [24] It is not discernible how the Magistrate would easily dismiss the aspect of the passport and the information by the Department of Home Affairs that the records show that the appellant went out of the country and yet there is no information that he is back in the country. This, in my view, cannot just be dismissed without ascertaining facts. These allegations required further interrogation or investigation. The Magistrate simply said he thought it was an administrative fault on the part of the Department of Home Affairs because since the first temporary passport in 1999 subsequent temporary passports were issued to the appellant in 2000, 2004 and in 2014 he was given an emergency passport. In my view, the issue around the passport is exacerbated by the concealment of

information that the appellant had travelled out of the country on more than one occasion and to different countries. It was misleading and dishonest of him to emphatically state that he only left the country once to attend a funeral in Swaziland and has never used the temporary passport again.

- [25] In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*⁶ the Constitutional Court made the following instructive pronouncements:
- “It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates – and sanctions – the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that unless the equilibrium is displaced, an arrestee is not to be released.”
- [26] In my view the Magistrate has indeed dealt with some of the considerations in s 60(4) and the submission that he has failed to do so or not attached adequate weight to the factors thereat cannot be correct. This is what the Magistrate said:
- “Nou die Staatsaanklaer het die bepalings van Artikel 60(4) van die Strafproseswet mooi uiteengesit waarin sy dan nou sê waarna die Hof moet kyk en dan het die Strafproseswet ook dan nou die bepaalde sub-artikels opgebreek in ander artikels waarna die Hof moet kyk.”

⁶ 1999 (2) SACR 51 (CC) ; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 79

- [27] While the appellant's counsel submitted that the offences which he committed in the past are old and should remain in the past, for these purposes I am of the view that they show that he has at least made himself guilty of Schedule 1 offences on several occasions. The Magistrate did not even consider them to be serious because the appellant paid admission of guilt for them.
- [28] I am not satisfied that the Magistrate has exercised his discretion wrongly by not admitting the accused to bail. There was no misdirection by the Magistrate in expressing a finding that there was a *prima facie* strong case against the appellant.
- [29] The appellant has failed to show the exceptional circumstances which, in the interests of justice, permit his release on bail. I am satisfied that the Magistrate applied the provisions of s 60(4), 60(5) and 60(9) of the CPA. Section 60(4) of the CPA clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of s 60(4) are established.
- [30] Although the Magistrate found that the appellant was not a flight risk and will not evade trial, he still found it doubtful whether his release on bail may create that opportunity for him to interfere with state witnesses. I am not convinced by the appellant's explanation around the passport and having relatives outside the borders of the country as well as the number of occasions when he has left the country. He chose to be evasive and suffered some memory loss when it came to those aspects during the formal bail application. It is still necessary, in my view, for the

investigating officer to follow up on the issue of the Home Affairs records in respect of the status of the appellant and find the true position.

[31] What is disturbing and inexplicable is how the appellant expects to be afforded yet another opportunity to be out on bail when he is currently on bail in another matter and these offences are committed during that indulgence.

[32] It cannot be said that the Magistrate was wrong in refusing to admit the appellant to bail. There is no basis for the appeal court to interfere with the discretion exercised by the Magistrate. The appeal must therefore fail.

[33] In the result, the following order is made:

ORDER

The appeal is dismissed.



MAMOSEBO J

JUDGE OF THE HIGH COURT

For the Appellant:

Adv I Nel

Independent Bar

For the Respondent:

Adv QH Hollander

Director of Public Prosecutions