



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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 27 / 2015**
Datum verhoor / Date heard: **20 / 05 / 2015**
Datum gelewer / Date delivered: **05 / 06 / 2015**

In the matter between:

**CHRISTOPHER MAKWADI MASHALANE
TSHIDISO BODIGELO**

Applicant
Second Applicant

and

THE STATE

Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

[1] The appellants lodged an appeal to this Court against the refusal by the Magistrate, Galeshewe, to release them on bail pending trial. The appellants are accused number 1 and 2 in the Magistrate's Court and they, together with

another accused (hereinafter referred to as “accused number 3”) face charges of attempted murder and theft. Accused number 3 however did not appeal against the refusal of his application for bail pending trial.

- [2] The appellants were arrested on 31 March 2015. The bail application commenced on 13 April 2015 and was concluded on 15 April 2015, when bail was refused.
- [3] At the onset of the bail application the prosecutor placed on record that this was a ‘Schedule 1-offence for Accused number 1 and 2’. No reference was made to the provisions of section 60(11) of the Criminal Procedure Act, No. 51 of 1977 (hereinafter referred to as “the CPA”). From the record it appears as if the parties, as well as the Magistrate accepted that the bail application fell outside the ambit of s 60(11) of the CPA. The respondent thus accepted the *onus* in the bail application to prove that the interests of justice do not permit the release of the appellants on bail.
- [4] Although it was common cause that the appellants are members of the South African Police Services and thus law enforcement officers facing a charge of theft, the issue of whether the alleged offence of theft fell within the ambit of Schedule 5 of the CPA was never considered.

- [5] The respondent commenced proceedings by calling the investigating officer who gave evidence to the effect that on 29 March 2015 the appellants, driving a police vehicle, stopped at the house where the complainant resides. They created the impression that accused number 3 was a suspect and while the first appellant searched the said house, the second appellant and accused number 3 stood watching. After the appellants and accused number 3 had left, the complainant found that his wallet containing R10.00, his bank card and pin number, as well as his cell phone and other documents had been stolen. The appellants and accused number 3 later returned, looking for the complainant. A female occupant of the house accused them of theft, after which they threatened her. Later during the day money was withdrawn from the bank account of the complainant – two transactions of R1,200.00 each. Video footage showed the first appellant and accused number 3 at this scene. The following day, after the complainant had laid a charge and pointed out the first appellant at the police station, the appellants allegedly committed the crime of attempted murder by knocking the complainant from his bicycle with a police vehicle. The complainant ran away and entered a Pick 'n Pay in order to escape the appellants' attack. He was forcefully pulled from the shop by the appellants. There is video footage covering the incident at the said Pick 'n Pay. According to the investigating officer the complainant fears for his life.

- [6] From the facts set out above the respondent appears to have a strong case against the appellants. No oral evidence was adduced by the appellants. Affidavits in support of their bail application were handed in. In these affidavits, the appellants merely denied the factual allegations pertaining to the charges against them.
- [7] In his judgment the Magistrate indicated that he was satisfied that it is not a 'Schedule 5 bail application'. He correctly held that, for the charge of attempted murder to qualify as a Schedule 5 offence, it had to involve the infliction of grievous bodily harm and that the respondent had not adduced evidence to that effect. The Magistrate further held that, because of the value of the stolen items, the offence of theft also did not fall within the ambit of Schedule 5. He concluded that the bail application thus did not fall within the provisions of section 60(11)(b) of the CPA. The fact that the appellants are law enforcement officers facing a charge of theft and the circumstances under which the offence had allegedly been committed, appear not to have been considered by the Magistrate.
- [8] In bail applications, other than those envisaged in section 60(11) of the CPA, there is a burden on the prosecution to adduce evidence or furnish information to show a likelihood

that circumstances, as envisaged in s 60(4), existed.¹ The refusal to grant bail and the subsequent detention of an accused shall be in the interests of justice where one or more of the grounds listed in section 60(4) of the CPA are established. This is subject further to the provisions of section 60(9) and the due consideration of an accused's constitutional rights.

[9] The Magistrate, after evaluation of all the evidence, found that it was not in the interests of justice to release the appellant and accused number 3 on bail. Although not stated as such, the Magistrate appears to have refused to grant bail because the respondent had proved that there is the likelihood that the accused, if released on bail, '*will attempt to influence or intimidate witnesses*', as envisaged in section 60(4)(c) and/or '*will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system*', as envisaged in section 60(4)(d) of the CPA.²

[10] The appellants appeal against the order of the Magistrate on the basis that he had misdirected himself in disregarding the favourable personal circumstances of the appellants and that he had further failed to take into account or properly

¹ *S v Tshabalala* 1998 (2) SACR 259 (C) at 269e-f

² *S v Acheson* 1991 (2) SA 805(Nm HC) at 822; *S v Hlongwa* 1979 (4) SA 112 (D) at 113H; *S v Yanta* *Supra* at 247g-h;

take into account the factors set out in section 60(4)(a) to (e) of the CPA. It is alleged that the Magistrate also failed to weigh up the interest of justice against the right of the appellants to their personal freedom and in particular the prejudice that they are likely to suffer if they were to be detained in custody, as envisaged in section 60(9) of the CPA. Mr. Nel, for the appellants, in detail addressed the issues raised in the Notice of Appeal.

- [11] During argument Ms. Van der Byl, on behalf of the respondent, raised the issue that the charge of theft in *casu* falls within the ambit of Schedule 5. This issue had not been raised in her heads of argument. During argument she submitted that the bail application should have been approached on the basis of the provisions of section 60(11)(b) of the CPA and that the appellants therefore should have been burdened with the *onus* to adduce evidence which satisfied the Court that the interests of justice permit their release on bail. She referred to the case of **STATE v GCWABE**³. In this matter the bail application proceeded in terms of section 60(1)(a) of the CPA. The State assumed the *onus* and commenced adducing evidence. On appeal the Court came to the conclusion that the bail application should have been proceeded with in terms of section 60(11)(b) of the CPA.

³ 2012 JDR 0688 (ECP)

The court, in this matter, had dismissed the appeal on the facts and found that the magistrate was correct in his decision that the interests of justice do not permit the release of the appellant.

[12] Mr. Nel was obviously caught by surprise by this new argument advanced at the hearing of the bail appeal. After perusal of the relevant schedules, he conceded that the charge of theft in this instance falls within the ambit Schedule 5 and that section 60(11)(b) of the CPA is indeed applicable. Mr. Nel also referred to certain unreported decisions of this Division, where the parties and Court *a quo* had erred in respect of the *onus* in a bail application. In the first matter⁴ the magistrate misdirected himself in finding that section 60(11)(a) of the CPA was applicable. The learned Judge then, after her own assessment of the evidence, came to the conclusion that the appellant was entitled to be released on bail and proceeded to give the decision which, in her opinion the lower court should have given.⁵ In the other matter⁶ the learned magistrate regarded the offences facing the appellant to fall under Schedule 5 of the CPA and that section 60(11)(b) was thus applicable and Lacock, J was not convinced that the magistrate was correct in accepting that the offences fell under Schedule 5, but approached the appeal on that basis.

⁴ *Eden Harmse v S CA & R* 13/07 delivered on 30 March 2007

⁵ Section 65(4) of the CPA

⁶ *Charles Kasinja Modise v S CA & R* 22/08 delivered on 23 May 2008

After his own assessment of the facts, he found that the appellant had nonetheless discharged the onus placed on him and ordered the release of the appellant on bail.

[13] The offence of theft falls under Schedule 5 if it is alleged that the offence was committed by any law enforcement officer as a member of a group of persons, syndicate or any enterprise acting in the execution of furtherance of a common purpose or conspiracy.

[14] Given the facts, as set out above, I agree with the submissions of both counsel that the charge of theft falls within the ambit of Schedule 5 of the CPA. In my view the evidence, as presented by the respondent, shows that the appellants and accused number 3 acted together when committing the offence of theft, in the furtherance of a common purpose. The *onus* would thus have been on the appellants to satisfy the Court *a quo* that the interests of justice permit their release on bail. The sequence of evidence would also have been affected because of the shift in the *onus* in that the appellants and accused number 3 would have had to adduce evidence before there was any need for the respondent to do so.

[15] In terms of section 65(4) of the CPA a court of appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was

wrong. In such event the Court shall give the decision which, in its opinion, the lower court should have given. This does not necessarily mean that a Court of Appeal should merely order that appellants should or should not be released on bail. In my view, the order to be given will depend on the circumstances of each case.⁷

[16] In this matter the misdirection of the Magistrate (and legal representatives) in respect of the *onus* and the application of the provisions of section 60(11)(b) of the CPA operated in favour of the appellants. The Magistrate, after an assessment of the evidence before him, found that the respondent had discharged its *onus*. I am not allowed to interfere with his factual findings unless I am convinced that it was wrong.⁸ I am only to interfere with the exercise of his discretion if I am satisfied that he was wrong.⁹ After my own assessment of the evidence, I am not convinced that the Magistrate was wrong in the evaluation of the evidence and his refusal of bail.

[17] On the other hand, it cannot merely be accepted that the appellants would have approached their case on the same basis, had they been aware of the correct legal position. In terms of section 60(11)(b) the court shall order that the accused be detained in custody until he or she is dealt with

⁷ *S v Green and Another* 2006 (1) SACR 603 (SCA) par [23] and [25]

⁸ *R v Dhlumayo* 1948(2) SA 677 (A)

⁹ *S v Barber* 1979(4) SA 218 (D) at 220E-H

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 release. The appellants should be given the opportunity to do so, given their fundamental right to be released on bail, as envisaged in section 35(1)(f) of the Constitution of the Republic of South Africa, 1996.

[18] Counsel for the appellants, as well as counsel for the respondent submitted that the bail application should be remitted to the Magistrate. I agree. The appellants should be given the opportunity to supplement their evidence. Should they elect to do so, then obviously the respondent should be given the opportunity to adduce further evidence in response thereto.

[19] Legally there appears to be no objection to an order that the bail application be remitted to the court *a quo*.¹⁰

WHEREFORE I MAKE THE FOLLOWING ORDER:

- 1. THE DECISION OF THE MAGISTRATE, GALESHEWE, IN THE BAIL APPLICATION UNDER CASE NUMBER GAL 538/2015 IS SET ASIDE.**

¹⁰ *S v Kock* 2003 (2) SACR 5 (SCA) par [25]

2. THE BAIL APPLICATION IS REMITTED TO THE MAGISTRATE, GALESHEWE, TO BE ADJUDICATED IN TERMS OF THE PROVISIONS OF SECTION 60(11)(b) OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977.
3. THE APPELLANTS ARE TO BE AFFORDED THE OPPORTUNITY TO ADDUCE FURTHER EVIDENCE IN SUPPORT OF THEIR BAIL APPLICATION.
4. THE RESPONDENT IS TO BE AFFORDED OPPORTUNITY TO ADDUCE FURTHER EVIDENCE IN RESPONSE TO ANY FURTHER EVIDENCE PRESENTED BY THE APPELLANTS.
5. THE APPELLANTS SHALL REMAIN IN CUSTODY PENDING THE FINALIZATION OF THE BAIL APPLICATION BY THE MAGISTRATE, GALESHEWE.

SL ERASMUS
ACTING JUDGE

For the Applicants: Adv. I.J. Nel (oio Legal Aid Board)

For the Respondent: Adv. A.P. van der Byl (oio NDPP)