

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 19 March 2013

Case Number: A168/13

In the matter between:

S S N LESHILO

Appellant

and

THE STATE

Respondent

JUDGMENT

A B ROSSOUW A J

[1] This is an appeal against the refusal by the magistrate at Tzaneen to grant bail to the appellant pending his trial. The bail application was brought on 11 December 2012 and the appellant was legally represented.

- [2] On 8 December 2012 the appellant, a man of 32 years and a co-accused were arrested on charges of armed robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 ('the Act'). It is alleged that the appellant and his co-accused robbed the complainant of R300 000 in cash, a watch valued at R60 000 and that a firearm was used in the commission of the crime.
- [3] Section 60 (11) (a) of the Act obliges the court in the case of a Schedule 6 offence to order that an accused be detained in custody, until dealt with in accordance with the law, unless he adduces evidence to satisfy the court that exceptional circumstances exist, which in the interest of justice permit his release on bail.
- [4] As the main charge against the appellant was a Schedule 6 offence, he undertook the task of adducing evidence, which would satisfy the court that exceptional circumstances existed, which, in the interest of justice, would permit the court to release him.
- [5] He sought to discharge the onus by adducing *viva voce* evidence, without calling any other witnesses to corroborate his version. The evidence given by the appellant can be briefly summarised thus:

1. He resides at [...], [...] Street, C[...] and he occasionally visits his mother at M[...] in the M[...] district. He was also arrested at the latter address.
2. He is 32 years old and married with one child.
3. He generates income by selling fruit and clothing and his income is between R6000 and R7000 per month.
4. He has no assets.
5. He possesses no passport and he has no relatives outside the Republic of South Africa.
6. He met the co-accused in prison, but after his release, he never met or communicated with him.
7. After his arrest he was 'heavily assaulted' by the police, but no confession could be extracted from him. The day after the assault he was taken to hospital for treatment.

8. The appellant has never been in Tzaneen where the crime was allegedly committed.
9. The appellant was charged on different occasions for theft of a motor vehicle, possession of stolen property and other charges, but all these charges have been withdrawn. The appellant was found guilty of an offence and sentenced to 25 years imprisonment. His appeal against the judgment and sentence was successful and he was released after having served one year in prison.
10. On 10 November, ie the day of the alleged crime, the appellant was in Cullinan and that there was no cellular communication between him and his co-accused.
11. His cellular phone number is 072 [...] and that is his only phone.
12. On the day of his arrest, the police also confiscated his brother's phone, which the appellant had with him. (It is the latter phone that is linked to the alleged crime). In this regard, the appellant testified as follows during cross-examination:

'So after your arrest the police confiscated that cell phone from you? --- Yes.

What type of phone was it that was taken by the police? --- 1100 and then the other one belongs to my younger brother.

So you deny that the E63 was confiscated from you by the police? --- Yes they took it from me yes.

That it was checked from a cell phone and the number was 076 [...] ? --- Since I got it from the Indian shop in August the one E63 it was used when it was a demo.'

13. He has no previous convictions, he is not going to plead guilty, he does not know the witnesses, he will not pose a danger to the public, evade his trial, interfere with the witnesses or evidence and his release will not jeopardise the functioning of the criminal justice or bail system or public peace and order.

[6] The state called the investigating officer who testified that the appellant was implicated by his co-accused and that the appellant was also linked to the offence with cellular phone records. Regarding the E63 cellular phone, the investigating officer testified, *inter alia*, as follows under cross-examination:

'I am coming to that, one thing at a time. Now this cell phone which you mentioned ever so many times, all right, according to you it was not found in possession of accused 2 the accused before court? --- Correct your worship the accused before court when I interviewed about this cell phone he said it got lost while he was on board of a taxi from Kimberley.'

- [7] Mr Pitso, who appeared for the appellant relied heavily on the fact that the phone in question was not found in possession of the appellant. The fact that the said phone was, on the appellant's own version, taken from him could not be explained by Mr Pitso, save to argue that it was possibly a misunderstanding on the part of the appellant when he answered the aforesaid question.
- [8] Although the evidence given by the investigating officer regarding the link between the appellant and the E63 cell phone is not very clear, there appears to be some link between the E63 cellular phone, the appellant and his co-accused.
- [9] The investigating officer also testified that the appellant does not reside at [...], [...] Street, Cullinan and that he could not find any proof of the appellant's alleged business. He further testified that the appellant was unable to take him to his wife and child. These facts were however never put to the appellant.
- [10] The gist of the appellant's grounds of appeal is that the cumulative effect of the aforesaid circumstances, with particular emphasis on the weakness of the State's case, renders them exceptional for the purpose of justifying the appellant's release on bail.

- [11] Exceptional circumstances must be circumstances, which are not found in the ordinary bail application. Generally speaking, 'exceptional circumstances' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. (See *S v H* 1991 (1) SACR 72 (W) and *S v Peterson* 2008 (2) SACR 355 (C)).
- [12] The court's powers are largely limited when the matter comes before it on appeal. The court should not substitute its own view for that of the magistrate, because that would be an unfair interference. No matter what the 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. (See *S v Barber* 1979 (4) SA 218 (D))
- [13] The appellant's defence is in essence an *alibi*.
- [14] The vulnerability of unsupported *alibi* defences is notorious, depending as it does, so much upon a court's assessment of the truth of the accused's testimony. In order successfully to challenge the merits of the State's 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. This 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. (*S v Mathebula* 2010 (1) SACR 55 (SCA)).

[15] The appellant's denial of complicity and his *alibi* defence rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them. The appellant gave very little information regarding his movements on the day of the alleged offence in support of his case. The appellant's evidence regarding the E63 cellular phone was also vague and sketchy. In the absence of witness corroboration, or at least an explanation as to why corroborating evidence could not be produced, regarding his *alibi* and in the absence of full details regarding the history and use of the two phones that were taken from the appellant, the magistrate was left no wiser as to the strength or weakness of the State's case. In this regard the appellant did not contribute anything to establishing the existence of exceptional circumstances.

[16] The remainder of the factors were neither unusual nor such as to singly or together warrant the release of the appellant in the interest of justice. (See *S v Scott-Crossley* 2007 (2) SACR 470 (SCA))

[17] In view of the aforesaid, this court cannot find that the magistrate exercised her discretion wrongly.

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

The appeal is dismissed.

A B ROSSOUW A J

DATE: 2013-03-19