FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A310/2012

In the appeal between:-

LUCKY MEMEZA & OTHERS Appellant

and

THE STATE Respondent

CORAM: MOLEMELA J, *et* DA ROCHA-BOTLNEY, AJ

JUDGMENT BY: MOLEMELA, J

HEARD ON: 18TH & 22nd FEBRUARY 2013

DELIVERED ON: 14 MARCH 2013

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[1] This is a bail appeal in terms of s 65 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act). The appeal was argued on the 18th February 2013 and, by agreement between all the parties, a memorandum setting out the history of the postponements of the trial was handed in on the 22nd February 2013. The six appellants have all been arraigned on five charges, viz two counts of robbery with aggravating circumstances, one count of housebreaking with intent to steal and attempted theft, and two counts of possession of unlicensed semi-automatic firearms. Charge 1 relates to robbery with aggravating circumstances committed on the 25th April 2010 at the Spar Supermarket in Universitas, Bloemfontein. Charge 2 pertains to robbery with aggravating circumstances committed on the 30th April 2010 at Cashbuild in Vooruitsig Street, Bloemfontein. Charge 3 relates to a burglary that was committed at the Post Office in Kagisanong,

Bloemfontein. On the 11th June 2011 the appellants unsuccessfully applied for bail. An appeal against that refusal of bail was unsuccessful. On the 12th November 2012, another bail application was brought on the appellant's behalf on the basis of the existence of new facts. In a judgment delivered on the 12th November 2012, bail was refused. The appellants now approach this court on appeal against the second refusal of bail. Both counsel advised that the magistrate who denied bail, viz Ms Soomaroo, was aware of this bail appeal and had orally apprised them that she had no reasons to add to the judgment that she had already delivered on the 12th November 2012.

[2] The nature of the two counts of robbery form part of a category of offences falling under Schedule 6 of the Criminal Procedure Second Amendment Act 85 of 1997 (CPA). Section 60(11) of the CPA 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. . . .'

[3] It is clear from the aforesaid provisions that where a suspect is charged with commission of a Schedule 6 offence, a court will be entitled to grant bail only in those instances where the suspect in question can advance exceptional circumstances why he should be released. The effect of this provision is to shift the onus to the accused to convince the court on a balance of probabilities that such exceptional circumstances exist.

[4] As stated before, the bail application under consideration resorted under s 60(11)*(a)* of the CPA. The second bail application was brought after a few state witnesses had testified at the trial but before the closure of the state case. Its basis was that new facts had come to the fore which required a re-consideration of the matter. The new facts

relied upon by the appellants were captured as follows in the magistrate's judgment:

> "The defence has brought a bail application on new facts in this matter, citing in his address the fact that identification was not strong enough in the trial. Secondly the fact that the pointing out done by accused no 2 was ruled inadmissible in a trial within a trial, and thirdly the defence wants the court to consider the poor quality of the evidence given by the section 204 witness in that he was also unable to point out the relevant scene of crime that the applicants are alleged to have been involved with".

Having considered a number of aspects the magistrate concluded as follows:

> "The issue of identification. This court at this point in time cannot make any kind of definitive ruling of its probative value in the trial court as the state has not closed its case yet. The same applies to the evaluation of the evidence of the section 204 witness. This court cannot step into the shoes of the trial court and determine whether or not his evidence will be acceptable or not in respect to what he has testified to. **The strength of the state case at this point in time cannot be determined by this court because the state case is not yet closed.** There is still the issue of the cell-phone records and so forth that has to be adduced. Had the pointing out by applicant 2 been the only evidence in the state case that would have been a different story with regard to the strength of the state case, but that is not the position.
> So although I find that the non-admissibility of the pointing out in the trial court is indeed a new fact, the court however further finds that when taking it into account with all the other factors like identification and the section 204 witness, the court cannot at this stage say that to an extent the strength of the state case against all the applicants in this matter has become somewhat weakened and will amount to an exceptional circumstance that will warrant the court to re-look at the bail application where the bail was denied. At this point in time although finding it is a new fact, the non-admissibility of the pointing out, but it is not sufficient to be an exceptional circumstance and once more the court denies the applicants' bail." (My emphasis)

[5] In terms of s 65(4) of the Criminal Procedure Act 51 of 1977 the court hearing the appeal may not set aside the decision against which the appeal is sought unless such Court is satisfied that the decision was wrong. The grounds of appeal are set out as follows in the notice of appeal:

"1. The learned magistrate erred and misdirected herself in stating that it was the appellant's case that the identification was not strong enough at the trial, as the appellants' case is that no evidence was led by the state connecting them to the robbery crimes.

2. The learned magistrate further erred and misdirected herself in stating that
she was asked to consider the poor quality of the section 204 witness, as it was the appellants' case that the section 204 witness did not place any of them on the scene of the crime.

3. The learned magistrate therefore misdirected herself as her findings are premised on wrong assumptions.

4. The learned magistrate erred and misdirected herself in finding that the strength of the state case cannot be determined as the state case is not yet closed."

[6] The unreported judgment of the Supreme Court of Appeal in the case of **Mooi v The State** under case no 162/12 demonstrates that a court adjudicating a bail application can in fact determine the strength of the case even where the state case has not yet been closed. This is not surprising at all. Clearly, the fact that the state case has not yet been closed serves as no bar to the assessment of its strength. If this assessment can be done in a bail application launched before the beginning of the trial, on the basis of evidence adduced by or an affidavit deposed to by the investigating officer, there is no reason why it cannot be done after the commencement of the trial but before the closure of the state case. In making the aforesaid conclusion that she made, the learned magistrate obviously erred. The fourth ground of appeal must accordingly succeed.

[7] In **S v Vermaas 1996(1) SACR 528(T)** it was held that in a bail application brought on the basis of the alleged existence of new facts, the court entertaining that application should consider all facts before it,

new and old and on the totality come to a conclusion in deciding whether the bail refusal was wrong or not. The same view was echoed by the court in the case of **S v Mohamed 1999(2) SACR 507** (C). These two cases were cited with approval by the full court in the case of **S v Petersen 2008(2) SACR 355 (C)**. This court will accordingly consider the new facts as well as all other facts contemplated in section 60 of the CPA which are of relevance whenever a bail application is adjudicated upon, with a view to determining whether exceptional circumstances exist which, in the interests of justice, permit the appellants' release. Suffice it, at this stage, to only mention that the magistrate found, correctly in my view, that the ruling of inadmissibility of the pointing out made by the second appellant indeed constituted a new fact.

[8] Perusal of the record reveals that at the second bail application, the magistrate was furnished with the transcribed record of the evidence of the four witnesses that testified at the trial. No evidence or affidavits of the appellants were presented. The record placed before this court consists of the judgment of the magistrate in respect of the first bail application, the evidence of these four state witnesses and the magistrate's judgment in respect of the second bail application. It would seem that at the first bail application, the 2nd and 4th appellants testified while the rest of the appellants handed up affidavits.

[9] Mr Phalatsi, on behalf of the appellants, submits in his heads of argument that at the hearing of the first bail application, the magistrate relied on an affidavit deposed to by the investigating officer, which was not handed in as an affidavit at those proceedings. I have already alluded to the fact that the refusal of bail pertaining to the first bail application was unsuccessfully taken on appeal and the appellants apparently did not file a petition to the Supreme Court of Appeal against the High Court's dismissal of that appeal. I am therefore reluctant to express myself on that aspect, especially because the transcript relating to that first bail application does not form part of the

record filed by Mr Phalatsi on behalf of the appellants, save for the magistrate's judgment. Significantly, the magistrate in her judgment stated that all the affidavits were read into the record and formed part of the recording.

[10] The question is whether the new facts significantly weaken the strength of the state case to such an extent that, when all the facts are considered in totality, the court is satisfied that exceptional circumstances exist which, in the interests of justice, permit the appellants' release. Section 60(4) lists several grounds which, if shown to exist, would have the effect that the interests of justice would not permit the release of an accused. Those are:

'*(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 jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

[11] Section 60(6) lists several factors which a court may take into account, amongst other relevant things, in order to consider whether the ground stated in ss (4)(b), namely the likelihood of an accused evading his trial, has been established. Those include the emotional and

occupational ties of the accused; his assets and where they are situated; his means of travel and available travel documents; whether he can afford to forfeit the amount of money paid in relation to bail; prospects of extradition; the nature and gravity of the offences he is charged with; the strength of the case against him; the nature and gravity of the likely punishment in the event of the accused being convicted; the binding effect of possible bail conditions and the ease with which they could be breached, and any other factor which in the opinion of the court should be taken into account.

[12] It is clear from the record that at both bail applications, the main reason why bail was refused was the strength of the state case. As mentioned before, the state case has not been closed yet. With regards to Charge 1, the state led the evidence of Mr Makite, the security guard who had, at an identification parade, identified the 3rd appellant as the person that pointed him with a firearm during the robbery and the 1st appellant as one of the two people that accosted him at the premises of the Spar.

[13] The state further relies on the evidence of a witness who was warned in terms of the provisions of section 204 of the CPA, viz, Mr Jansen. He was initially arrested with the appellants as an accomplice but charges against him were subsequently withdrawn on condition that he would testify truthfully on behalf of the state. In a nutshell his evidence is that he knew the 1st – 6th appellants prior to the robbery that took place at Spar Supermarket. There were no ill-feelings between him and any of the six appellants. He and the 6th appellant were close friends and used to live in the same house. He is originally from Port Shepstone but was in East London with the 5th and 6th appellants when the 5th appellant received a phone call inviting them to Bloemfontein. Accused no 5 also invited accused no 1 and 2 to Bloemfontein. They travelled to Bloemfontein and all congregated at the 4th appellant's house. At some point a certain Spar Supermarket was targeted for a burglary. On a Friday evening Mr Jansen (section 204 witness) went to the premises of the Spar Supermarket with the 1st and 2nd appellants to inspect its

security system. They also monitored the premises and concluded that there was no security guard that was in charge of the premises.

[14] On Saturday he, together with the 1st, 2nd, 4th, 5th and 6th appellants went to the Spar Supermarket, where the 1st and 2nd appellants were dropped off. It was only then that they discovered that there was a security guard posted at the premises. The 4th appellant said he would organise someone to take care of the security guard. The 3rd and 6th appellants then went to the premises and later reported that they had taken care of the security guard. After the 1st and 2nd appellants had gained access to the premises, they phoned to report that they were inside and that the tools could be brought to them. He and the appellant then dropped the 5th appellant with the tools (grinders and hammers) at the premises of the Spar Supermarket. They then left the 3rd and 6th appellant at the vicinity of the Spar Supermarket so that they can keep a look-out.

[15] He and the 4th appellant then drove to the parking area of a nearby hospital, where they waited for the rest of the group. The vehicles used by the group on that night was the 4th appellant's vehicle, a Voyager model with a Lesotho registration number, as well as his own vehicle, a Mercedes Benz model. After a while the 5th appellant phoned the 4th appellant to let him know that the grinder had stopped working. The 4th appellant obtained another grinder and he (Jansen) and the 4th appellant dropped it off at the Spar premises, where they handed it to the 5th appellant. After a while they (Jansen and the 4th appellant) learnt that the job had been executed and they went to fetch the rest of the group. They then went to the 4th appellant's house, where they shared the proceeds obtained from the Spar Supermarket. He testified that on the night in question he made and received calls to and from 4th, 5th and 6th appellants. The six appellants played different roles in the planning and execution of the robbery at the Spar Supermarket, culminating with all of them sharing the proceeds of the robbery at the fourth appellant's house. He basically incriminated all the appellants

but pin-pointed the 4th appellant as the kingpin**.** He was asked to describe the 4th appellant's house and he stated that it had close circuit TV cameras and a lot of artificial crocodiles. He was shown still photographs obtained from the closed circuit television cameras' recording of the robbery and he identified appellant 1, 2 and 5 as some of the persons depicted in those photographs. He identified the 2nd appellant from five different photographs while the 1st appellant and 5th appellants were identified from two photographs. Under cross-examination he conceded that he had made a mistake with regards to the 2nd appellant's identification in two photographs. He also stated that at the time of his arrest, he could see injuries on the 1st and 4th appellants' bodies and they told him that they sustained those injuries when they were assaulted by inspector Basson and other members of the organised crime unit. He testified that he was arrested on the 25th May 2010.

[16] Mr Makite also testified that at about 02h00 on the 25th April 2010 he was accosted by two people while patrolling the premises where the Spar supermarket is situated. He identified the persons that accosted him as the 3rd and 6th appellants. He further testified that he could hear them taking telephonic instructions from someone else while pointing him with a firearm and tying him up. Thereafter more people arrived at the scene.

[17] Mr Kruger testified that he was a manager of Eric Spar in Bloemfontein. On the 24th April 2010 he worked at the supermarket until 21h00. The next morning he discovered that the Supermarket had been robbed and that the police were already at the premises. He, *inter alia,* saw a grinder in the safe of the supermarket. He recognised the grinder as well as the safe from the photographs he was shown by the prosecutor during the trial. He also confirmed that he looked at the CCTV footage of the previous night and could see the footage of the robbers moving around in the supermarket between 01h00 and 03h00. Copies of the

footage were handed to the police. Still photos were also made from the footage.

[18] The main criticism against Mr Jansen's evidence is that he could not say at which Spar Supermarket the robbery took place. In his evidence, he stated that it was situated in a residential area close to a hospital. This criticism is without merit because the state is clearly not relying exclusively on the evidence of Mr Jansen pertaining on the identification of the specific Spar that was robbed, but also on circumstantial evidence. The manager of the Spar Supermarket that was robbed on the night in question also testified and confirmed that he obtained close circuit video footage of the robbery. Mr Jansen was able to positively identify some of the appellants from the still images made from the video footage. The evidence of the security guard, Mr Makiti who identified the 3rd appellant as the one who pointed a firearm at him is also key here. Mr Makite and Mr Kruger corroborated certain aspects of Mr Jansen's evidence. It can therefore not be concluded that the state was unable to identify the Spar in question. The sum total of Mr Jansen, Mr Makite and the manager of the Spar results in a very strong case against all the appellants in respect of charge 1. This is so despite the ruling that the 2nd appellant's pointing out was inadmissible. The state relies heavily on the evidence of a section 204 witness (Mr Jansen) whose evidence was not controverted to any serious extent under cross-examination. This weighed heavily with the court.

[19] Mr Phalatsi's argument that the fact that Mr Makiti testified that he had no keys that were taken by force by the robbers reduced the robbery in respect of charge 1 to a schedule 5 offence holds no water, as the state has been able to prove that Mr Makite was in control of the premises of the Spar Supermarket on the night of the incident, that he was overpowered by the appellants at gunpoint and then tied up, after which the appellants proceeded to steal the complainant's property. The evidence adduced by the state in respect of charge 1 proved all

the elements of robbery with aggravating circumstances. Furthermore, Mr Jansen made reference to the use of cellular phone contact with the appellants. The state intends using cellular data as corroboration. I am satisfied that despite the ruling made in respect of the 2nd appellant, i.e. that the pointing out he made was inadmissible, the evidence adduced by the state so far can be described as strong enough to sustain a conviction. The appellants have not shown that this evidence is not strong.

[20] It is settled law that the appellants bore the onus of showing that the state case has been so weakened that it will not sustain their conviction. They did not discharge this onus. In the case of **S v Mathebula** 2010 (1) SACR 55 (SCA) at par 12, the court had the following to say:

> "But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a 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... that is no mean task…. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: S v Viljoen at 561f – g".

[21] With regards to charge 2, i.e. the robbery at the post office, the investigating officer stated in his affidavit that the 1st appellant was found by the police on top of the roof of the post office. The 2nd and 3rd Appellants were arrested in the vicinity of the post office. The state was apparently in possession of cellular phone data that showed that the 1st appellant was in constant contact with the remaining five appellants in the area where the crimes were committed. However, the state advocate conceded that the cellular records the state was in possession of would merely confirm that the other appellants were within a 10km radius of the 1st appellant when he phoned them. I would agree with Mr Phalatsi that in respect of charge 2, the state only has a strong case against the 1st, 2nd and 3rd appellants on the basis of

their arrest in the vicinity of the post office, as the evidence of the 2nd appellant's pointing out has been ruled inadmissible. On this charge, the state does not have a strong case against the 4th, 5th and 6th appellants.

[22] As at the time of the bail application, no evidence had yet been adduced with regards to charge 3, viz housebreaking with intent to steal and attempted theft. The evidence the state relied upon at the time of the first bail application was the pointing out made by the 2nd appellant and as well as the evidence of identification of one of the appellants by a security guard who was guarding the premises in question. The security guard in question has already testified and did not identify the person he was alleged to have identified at the identification parade. The state advocate submitted that evidence of the person who was in charge of the identification parade would be led and it would show that one of the appellants was positively identified by the security guard in question. It also needs to be mentioned that the confession allegedly made by the 6th appellant with regards to this charge is diluted by Mr Jansen's evidence that after his arrest he saw injuries on this appellant and upon enquiry, learnt that they were inflicted during an assault by the police. This obviously impacts adversely on the voluntariness thereof. Considering the evidence of the security guard, and considering that the evidence of the 2nd appellant's pointing out has been ruled inadmissible and the likelihood of the confession also being rendered inadmissible, I am of the view that the state does not have a strong case in respect of any of the appellants on this charge, notwithstanding the evidence of cellular records that is yet to be adduced by the state.

[23] Whereas the state was previously believed to have a strong case against all six appellants in respect of the three charges mentioned above, it would appear that the current situation is that the sate has a strong case against all the appellants in respect of charge 1 and a strong case against 1st, 2nd and 3rd appellants in respect of charge 2.

It would seem that it has a *prima facie* case against the 4th, 5th and 6th appellants on the basis of the cellular phone evidence that placed them within a 10km radius of the 1st appellant. It is true, as was correctly submitted by Mr Phalatsi, that the mere fact of a strong *prima facie* case against an accused, in itself, will not constitute a sufficient reason for refusing bail. I have already mentioned that the previous denial of bail was on the basis of the overall strength of the state case. In my view the weakening of the strength of the state case against the 4th, 5th and 6th appellants counts in their favour as they are no longer faced with the prospect of lengthy imprisonment in respect of two charges but only in respect of charge 1. Having said this, I must also point out that the strength of the state case is just but one of many factors that stand to be taken into account. I have already alluded to all other factors that need to be taken into account when adjudicating an application for an accused person's release on bail.

[24] According to the charge sheet, all the appellants are South African citizens. However, the 1st appellant apparently furnished conflicting addresses and this unfortunately impacts negatively on any acceptance that he would not evade trial. The 3rd and 4th appellants were considered to be flight risks on account of their conduct just before their arrest. The 3rd appellant apparently tried to evade arrest by running away from the police in the vicinity of the scene of the robbery. He was then chased and caught. The 4th appellant apparently hid from the police when they visited his house with the intention of arresting him. He was only apprehended an hour later during a search. He also has another case pending against him. The same applies to the 5th and 6th appellants. In an unreported case of the Supreme Court of Appeal under case no 162/12 **MOOI v THE STATE**, an accused person was released on bail on a schedule 6 offence, inter alia, on account of the fact that it had not been shown that he had, during his previous trials for various offences, including murder, shown a reluctance to stand trial. Similarly, in this case, although some of the appellants have pending trials, they have not been shown to have a history of evading

their trials. The same reasoning is equally applicable to the 6th appellant, who has a previous conviction. I have also taken into account that the 6th appellant apparently has some health problems of a confidential nature for which he has to receive treatment. His access to adequate healthcare was addressed by the court that considered the first bail application. It would seem that his health problems improved after he had received treatment.

[25] This court is aware that a delay in the trial is one of the factors to be taken into account in terms of section 60(9) of the CPA. In the case of **MOOI V THE STATE (supra)** the court considered the unexplained delay in finalisation of the trial as one of the factors constituting "exceptional circumstances" warranting the accused person's release on bail. The court stated as follows at par 11: "However, the delay in concluding its case, the lack of explanation for the delay and the absence of evidence of the alleged strong case, undermines the assertion by the State and the finding by the magistrate that there is such a substantial case against the appellant that it would serve as motivation for him not to stand his trial were he to be released on bail".

[26] The court has noted with great concern that most of the appellants in this case have been in custody since May 2010. The trial only commenced on the 12th December 2011 and by the date of the last postponement, i.e. 19th January 2013, the state had still not closed its case. Counsel was requested to submit a joint memorandum explaining the reasons for the numerous postponements. Apparently changes in legal representation contributed to the long delay before the commencement of the trial. The appellants have been represented by Mr Phalatsi since the 27th June 2011. Thereafter, there were delays in transcription of the record for purposes of a bail appeal and these apparently impacted on the trial. On the 31st October 2012 the matter was postponed at the request of the state, as the prosecutor was attending a course in Pretoria. On the 18th January 2013 the matter was postponed at the instance of the defence. The state case has still not been closed yet. At the hearing of the appeal, the state counsel,

who is the same counsel that is representing the state in the trial, assured the court that he envisages that the state will close its case after a further four-day hearing. The matter has now been postponed to the 8th, 15th and 22nd April 2013. Considering that there are six accused persons in this matter, the likelihood of the matter being finalised on the 22nd April 2013 is relatively slim. While the delay in finalisation of the trial cannot be attributed exclusively to the state, the fact that the trial has still not been finalised after such a long time is largely through no fault of the appellants. Such excessive delays are deplorable, indeed. It has been submitted on behalf of the appellants that their funds for the defence of this matter have now been depleted, to the extent that they now wish to sell or pledge their assets to raise more money.

[27] Having considered all the circumstances, I am of the view that there are exceptional circumstances that, in the interests of justice, permit the release of the 5th and 6th appellants on bail. The magistrate erred in denying them bail. Consequently, the appropriate order is the following:

27.1 The appeal in respect of the 1st to 4th appellants is dismissed.

27.2 The appeal in respect of the 5th (Mr David Musimeke) and 6th appellant (Mr Frankson Sifiso Cele) is upheld.

27.2 The appropriate order in respect of the 5th and the 6th appellants is the following:

The order by the Magistrate is set aside and substituted as follows:

"The 5th – 6th appellants are released on bail in the amount of R5 000 (five thousand rand) subject to the following conditions:

i That the 5th appellant report at the Soshanguve police station every Monday, Wednesday and Friday between 06h00 and 08h00;

ii That the 6th appellant report at the Margate police station every Monday, Wednesday and Friday between 06h00 and 08h00;

iii Should any of the appellants change his address he must inform the investigating officer accordingly and supply the new address;

iv That the appellants attend their trial on each date the matter is postponed to and remain in attendance until excused by the court."

MOLEMELA, J

I concur.

DA ROCHA-BOLTNEY, AJ

APPEARANCES: For the appellant: Mr N W Phalatsi (N W Phalatsi & Partners)
For the Respondent: Mr J. Roodman (DDPP, FS)