

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



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: CA &R 51/13

In the matter between:

KGOTSO VICTOR PUTSWANE

1ST APPELLANT

AND

JOHN MOTLHAGENG KHUTLEDI

2ND APPELLANT

V

THE STATE

RESPONDENT

Date of hearing: 22 August 2013

Date of judgment: 06 September 2013

JUDGMENT: BAIL APPEAL

PHATSHOANE J

1. Mr Kgotso Victor Putswane and Mr John Motlhageng Khutledi, the first and the second appellants, applied for bail on 31 May 2013 which was refused on the same date by Mr Scorgie in the Magistrates' Court for the District of Barkly West. They face a charge of robbery with aggravating circumstances. It is alleged that on or about 24 May 2013 at or near Barkly West they unlawfully and intentionally assaulted Mr Motsemoleele Mogongwa and took his R17 000 with force. They are before this Court on appeal against the refusal of the Magistrate to admit them to bail.

2. What appears to be a facsimile record of appeal initially placed before me was incomplete. For example, the exhibits that were submitted in evidence during the bail proceedings and the indictment were missing from the record. On 13 August 2013 I directed the parties to file a complete record. It was only on the date of the hearing, 22 August 2013 that the record was complete. It is remarkable that it took two months to put together no less than 50 pages of the record of appeal.
3. The first appellant has a previous conviction of possession of stolen goods in contravention of s 36 of the General Law Amendment Act, 62 of 1955. The second appellant has no previous conviction. At the court *a quo* the defence and the state agreed that the first appellant faced a schedule 5 offence while the second appellant's offence, it was said, fell under schedule 1.
4. On 27 August 2013, having heard argument, I directed both parties to file supplementary heads on the question of whether Robbery with Aggravating Circumstances as reflected in the indictment is a schedule 6 offence or not; if not whether the Court should be bound by the said agreement.
5. Ms Mabaso, for the state, explained in her supplementary heads that the appellants were not charged with a schedule 6 offence. She stated that the charge sheet was defective in that it did not specify the nature of the aggravating circumstances involved. She further intimated that there was no evidence that the complainant sustained serious or grievous bodily harm or that there was any threat to inflict grievous bodily harm. Mr Kgalo, for the appellants, did not file supplementary heads.
6. Robbery, involving, *inter alia*, the infliction of grievous bodily harm by an accused or any of the co-perpetrators or participants falls within the ambit of schedule 6 of the Criminal Procedure Act, 55 of 1977 (the Act). In this case it is alleged that the appellants used tear-gas to subdue the complainant which resulted in his eyes being badly burned. Tear-gas is defined as any substance,

whether solid, liquid, vapour or gas, or any combination of such substances used or intended to be used as a lachrymator¹.

7. Aggravating circumstances', in relation to robbery or attempted robbery, means (i) the wielding of a fire-arm or any other dangerous weapon; (ii) the infliction of grievous bodily harm; or (iii) a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence². In terms of the Dangerous Weapons Act 71 of 1968 'dangerous weapon' means any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit an assault;
8. In *S v Dhlamini and Another* 1974 (1) SA 90 (A) at 94A Holmes JA remarked:

"The requirement of grievous bodily harm, in the definition of aggravating circumstances, supra, goes beyond the offence of robbery, in which mere violence (or threat thereof) is sufficient. Furthermore, in robbery the violence must precede and induce the taking."
9. Without enquiring, the Magistrate simply associated himself with the proposition advanced by counsel on the classification of the offences alleged to have been perpetrated by the appellants. It is now settled that the role of a judicial officer in bail proceedings is not that of a spectator or umpire. It is imperative that charges against an accused person be formulated properly at the onset for the accurate determination of the procedural aspects.³ For the purposes of this appeal I will accept that the first appellant faces a schedule 5 offence while for the second appellant a schedule 1 offence.
10. In *S v Mohamed* 1977 (2) SA 531 (A) at 542A-B Trollip JA stated the following:

"To sum up: the appeal by an aggrieved accused under (precursor) s 97 of the Code to a Superior Court against a decision of a Magistrate in respect of his application to be released on bail, is an appeal in the wide sense, that is, it is a complete re-hearing and re-adjudication by the Superior Court of the merits of the application, with or without additional information, in which it can, in the exercise of its own discretion, make such order as to it seems just; an appeal against its decision lies to this Court under

¹ Section 1 of the Tear-Gas Act 16 of 1964

² Section 1 of the Criminal Procedure Act 51 of 1977

³ A Guide to Bail Applications, MT Mokoena, JUTA, First edition at page 90.

ss21(1), (2), and (3) of the Supreme Court Act, but only with the leave of the Court a quo, and, if it is refused, with the leave of this Court; on such an appeal this Court will only interfere if the Court a quo committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision."

11. The appellants submitted no less than 10 grounds of appeal against the finding of the Magistrate. To condense them: They contended that the Magistrate erred in finding that it was in the interest of justice to deny them bail; that the Magistrate did not refer to their personal circumstances; that he erred in finding that the state had a strong case against them and in having put much emphasis on the circumstances in which they were arrested. It was further contended that the Magistrate wrongly relied on the evidence of the investigating officer that there was a pending case of housebreaking with intent to steal and theft against the appellants and that of theft of a motor vehicle. It was argued by the appellants that they stated in their affidavits in support of the bail application that they were only charged of malicious damage to property. Mr Kgalosubmitted that the latter charge is a continuation of the main charge. In any event, the appellants have not appeared before Court for housebreaking and theft or malicious damage to property, the argument went.
12. During their bail hearing the appellants handed in affidavits in support of their applications. The first appellant is 25 years old, unmarried father of two children aged three and four years old. He is self-employed as a car washer and earns R250.00 weekly which he spends on his family. He stays with his grandparents. The second appellant is also aged 25. He is an unmarried father of a two year old child. He intimated that he is a taxi driver employed on a casual basis and earning R400 per week. He supports his family with his earnings. He stood to lose his job or forfeit his salary should he not be released on bail.
13. For the state, the investigating officer, W/O Frank Titus Mouton, testified that the appellants had allegedly robbed a 68 year old man of an amount of R17 000.00. The complainant identified his assailants even though no formal identification parade was held. There was information that there had been fire-arms in the vehicle which the appellants drove in but upon a search none were found. The complainant's money was also not found. The appellants were

arrested on 24 May 2013, the same date of the robbery. Prior to their arrest some hospital security personnel are said to have recorded the registration numbers of the vehicle that they drove and raised alarm with the police. The police spotted a vehicle driving at high speed passing them. They chased after it from Barkly West to Warrenton where the appellants abandoned their vehicle and fled on foot. The record is silent on whether the vehicle that the appellants drove bears the same registration numbers recorded by the security personnel. The appellants were arrested at the house they broke into and used as a hideout. The house does not belong to them.

14. W/O Mouton intimated that a case of house-breaking and theft was opened against the appellants in Warrenton. Under cross-examination he explained that the charge was later changed to malicious damage to property. He stated that there was a further investigation conducted that the owner of the vehicle (which the appellants drove) has pressed a charge of theft of a motor vehicle against them. The vehicle was attached on the same day of the arrest. According to Mouton the first appellant's finger prints were lifted from this vehicle. Mouton further explained that the appellants operate like a syndicate. Their *modus operandi* is to randomly commit this type of crime at different places, although they have not been convicted. The crime is prevalent in Barkley West and in the neighbouring areas. He intimated that should the appellants not be held in detention, pending their trial, the public's safety is at risk and that there were three more suspects on the run who are still to be joined in the charge sheet.
15. The Magistrate did not deal comprehensively with the evidence. In his brief reasons for refusing bail he came to a conclusion that the state had a strong case against the appellants. That in view of the fact that the appellants attempted to flee from the police there were strong indications that they will evade their trial. He puts it thus:

"Ek is tevrede dat daar op hierdie stadium 'n redelike sterk saak teen die beskuldigde is. Daar is dan ook die getuie niss dat daar verdere beskuldigde waarskynlik gevoegsal word. Die ondersoek is in die begin stadium en dit is duidelik, dit is verlede week vrydag gepleeg.

Soosek reeds gesê het, ek is tevrede dat daar op hierdie stadium 'n sterksaak teen die beskuldigde is; datek is ook oortuig dat die wyse waarop hulle probeer wegkom het van die polisie deur weg te jag vir hulle, by 'n huis in te breek, daartoe aan weegkruip vir die polisie, is vir my 'n aanduiding dat dit niemense is wat hulle verhoor gaan staannie.

Ek is van mening dat dit in belang van die regspleging is dat die beskuldigde se danaaengehou word totdat die saak syn normale loop geneem het. Beide se aansoekomborg word dan van die hand gewys."

16. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) at 78f-para 49 the Court made the following pronouncement:

"[49].....Subsections (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution. In this regard it is as well to remember that s 35(1)(f) itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrestee therefore does not have a totally untrammelled right to be set free. More pertinently than in the past, a court is now obliged by s 60(2)(c), (3) and (10) to play a proactive role and is helped by ss (4) to (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail."

17. The appellants had to satisfy the Court that the interests of justice permit their release on bail. An accused on a Sch 5 charge, while obliged to adduce evidence, need only satisfy the court that 'the interests of justice' permit his or her release. See *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* (supra) at 84b para 60. The appellants did not testify during their bail hearing. In my view it was not sufficient for the appellants to simply aver in their affidavits:

"I shall in no way attempt to evade my trial or any court appearance in this regard. I shall in no way temper or attempt to tamper with any of witnesses by influencing or intimidating them or hide or destroy any evidence. There is no probability that should I be released on bail I shall undermine the goal or the proper functioning of the criminal law system. I will further plead not guilty on this offence."

18. Section 60(4)(b) provides that the interests of justice do not permit the release from detention of an accused, *inter alia*, where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her

trial. Section 60(6) enumerates factors which, where applicable, the Court is to take into account in considering whether the ground in ss (4)(b) has been established, this includes, amongst others: the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried; the assets held by the accused and where such assets are situated; the means, and travel documents held by the accused, which may enable him or her to leave the country; the nature and the gravity of the charge on which the accused is to be tried; and the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial. Some of these factors were traversed during the hearing and in argument.

19. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*(supra) the Court states at 79d-g para 53:

“[53]...But s 35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial-related factors are to be taken into account. The broad policy considerations contemplated by the 'interests of justice' test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, ie a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds.”

20. It appears from the evidence of the W/O Mouton that the probable risk that members of the public may be robbed is forever present should the appellants not be held in detention pending their trial. In his evidence-in-chief W/O Mouton merely testified that the complainant identified the appellants. What perhaps evokes debate is the manner in which the identification of the appellants was conducted. This is what appears on record during W/O Mouton's cross-examination:

"When you say he identified them what do you mean-----Ek het die beskuldigdesgenaderom 'n ID parade temaak. Toe het die beskuldigde 1 vir my gesê maar die klaer het homdanklaargesien, hoe kanhy 'n ID parade gaanstaan en hy het my verduidelik hoe die omstandighede was, hoe hygekry was. Ek het toe nabeskuldigde 2 gegaanomtevra. Hy het my ookgesê hoe die omstandighede was waar die person homgesien het.

Were they identified as my clients instructed me that they were arrested and taken to this complainant and said these are the two people who robbed you and he said yes, is that the parade?--- Die inligting tot my beskikkingisbeskuldigdenommer 1 was in 'n kantoorwaaronsaltydvingerafdrukkeneem.

Alone?---Nee, hy was saam met konstabelOliphant. En toe is die klaerblykbaarnahom toe gebring en toe geवादit is die man watonsgearresteer het, is dithywatjougeroof het. Ek het dit met my kapteinopgeneem. Beskuldigdenommer 2 was direkna die selle toe geneemnabewering en daar is sy '14-A' geneemnahom toe deur dink ekMokhetla het hygesê of iemand, waarop die klaer toe ooksaam met homgegaan het en homgesien het.

In the cells?---dit is korrek.

Were there people there?---*Ekweetnie. Hy het net vir my gesêdit is hoe ditgebeur."*

21. It is not clear whether Mouton's testimony on how the complainant identified the appellants is based on the information he obtained from the appellants or from the police officers who were present when the informal identification was made. After all, it was for the appellants to satisfy the Court that the state had no case against them.
22. Even though the Magistrate did not refer to the appellants' personal circumstances in his judgment it did not follow that he did not consider their circumstances. In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 678, amongst the principles which should guide an Appellate Court in an appeal purely upon fact, the Court stated:

"An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."
23. Much was also made that the Magistrate wrongly relied on the evidence of the investigating officer that the appellants had a pending case of housebreaking and theft of a motor vehicle when they had been charged with malicious

damage to property and have not made any appearance in Court. I fail to see the relevance of the argument. Nevertheless, it suffices to say that nowhere in his reasons did the Magistrate refer to any case that is or was pending against the appellants. In my view, breaking into someone's house is not mere malicious damage to property but it is at least housebreaking with the intent to commit an offence unknown to the prosecutor, including trespassing.

24. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) at 63e-64a para11 the Court held:

"[11]...In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance."

25. The fact that the appellants decamped from the police on their arrest cannot be overlooked. There is no explanation in their affidavits why they were driving at a high speed and fleeing from the police from Barkly West to Warrenton. The appellants were not charged of escaping from lawful custody. Mr Kgalo was at pains explaining that they were not under any detention and therefore it cannot be said that they fled from the police. Counsel's denial from the bar that the appellants fled the scene is not evidence. The appellants do not have any emotional, family, community or occupational ties in Barkly West where they are to be tried. Their affidavits do not state what the appellants were doing in Barkly West whereas they reside and work in Jouberton, Klerksdorp, North West Province. As for the first appellant, he has a previous conviction which involves possession of stolen property.

26. In *S v Barber* 1979(4) SA 218 (D) at 220 E-G the Court 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."

See also the judgment of this Court in *S v Nteoo* 2004 (1) SACR 79 (NC) 82g-83c para 8.

27. It can hardly be said that the Magistrate erred in his inevitable conclusion that a strong likelihood existed that the appellants would, if released on bail, attempt to evade their trial. The denial of bail on this ground is manifestly in the interest of justice. Even though the Magistrate's judgment is not a model one I am not swayed that he exercised his discretion wrongly. The upshot of this is that the appeal must fail.

ORDER

28. In the result the following order is made:

The appeal is dismissed.

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

<i>Appearance for the appellants: Adv T Kgalo Instructed by Mjila & Partners</i>
<i>Appearance for respondent: Adv J Mabaso Instructed by Director of Public Prosecutions</i>