

FREE STATE HIGH COURT , BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A117/2010

In the case between:-

F. P. SIBANDA

and

THE STATE

CORAM: CILLIé, J *et* KAHN, AJ

JUDGMENT: KAHN, AJ

HEARD ON: 13 SEPTEMBER 2010

DELIVERED ON: 23 SEPTEMBER 2010

[1] The appellant, Samuel Paulus Sibanda, was arrested on 10 February 2010 and subsequently charged with armed robbery together with a second accused, Nkosinomuso Ngulwane.

[2] Both accused applied for bail before the magistrate *a quo* on 16 March 2010 at Welkom, who found that no exceptional circumstances had been proven by the said accused and accordingly refused the bail application.

- [3] Both accused applied for leave to appeal against the court *a quo*'s judgement denying them bail; leave having duly been granted.
- [4] However, on the day of the bail appeal hearing, the other appellant was not represented and the appeal hearing commenced on the basis that only the present appellant's appeal would be heard.
- [5] In consequence, the other appellant's appeal was struck from the court roll.
- [6] It is trite law that the appellant bears the onus to prove on a balance of probabilities that exceptional circumstances exist, which, in the interest of justice, permits his release.
- [7] Exceptional circumstances have not and cannot be extensively defined, in that determining such circumstances necessitates the execution of a judicious function in each and every case. The appellant was denied bail in the court *a quo* on the grounds that he failed to adduce any evidence which satisfied the court that exceptional circumstances prevailed together with the fact that the investigation of the

offence was still ongoing.

[8] The appellant in the court *a quo* tendered an affidavit wherein he essentially relied on the allegation that the state's case against him was so weak (citing various reasons) that in consequence it constituted exceptional circumstances.

[9] Two further affidavits relative to his places of residence and employ respectively were also handed in as documentary evidence. The state, on the other hand, submitted *viva voce* evidence, duly presented by the investigating officer.

[10] I stress that a bail application is a unique interlocutory procedure, distinct from that of a trial hearing. The issue is not guilt, but that of the interest of justice.

[11] **Argument advanced on behalf of the appellant**

1. The other accused took the police to the applicant but he subsequently denied that he did so.

2. A further person identified both accused on an identification parade but the length of time such person took to identify the appellant rendered the identification

questionable.

3. He remained silent about the fingerprints.
4. He pointed out that other suspects identified at the I.D. parade were not arraigned.
5. He claims that he was present during a search of his residence and nothing was found, in particular the set of keys.
6. The issue of a photograph of appellant having been removed from his home in and during the search process and that nothing came of it.

[12] The evidence produced by the state at the bail application was that the appellant was identified by his co-accused and that both of them were further identified at an I.D. parade by another person. Furthermore, that he was arrested as a result of information gathered from an informant and his fingerprints were found on an escape vehicle.

[13] There is clearly evidence which links the appellant to the crime. In *casu*, it is not beholden upon the court to

adjudicate the veracity of the allegations. Instead, the court must take cognisance of the strength of the state's case, and if it *prima facie* appears to be exceptionally weak, then it could comprise exceptional circumstances.

[13] However, having regard to the points mentioned *supra*, I am of the view that there is indeed a *prima facie* case against the appellant. The strength of the state's case is thus not an exceptional circumstance *in casu* as the court *a quo* correctly concluded. In addition, the appellant opted to adduce evidence in the form of an affidavit, which could not be tested via cross-examination. I stress furthermore that the investigation is still pending and that the offence allegedly committed is serious.

[14] I am of the view that the appellant's application is somewhat premature in that the investigation may still uncover facts which may weaken or strengthen the state's case. Nothing prevents the appellant from re-newing his bail application at any time in the future. However, judging on the evidence placed before the magistrate it cannot be said that the magistrate came to a wrong conclusion.

[15] In consequence, I make the following order:

The appeal is dismissed.

G. KAHN, AJ

I concur.

C. B. CILLIÉ, J

On behalf of the appellant: Adv Van Eck
Instructed by:

Bloemfontein

On behalf of the state: Adv M. Strauss
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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