

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

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

Appeal no: 12/06
On roll : 07/03/ 2007
Date delivered: 9/03/ 2007

In the appeal of :

SIPHUMLE GADE

APPELLANT

and

THE STATE

RESPONDENT

Coram: **Makhafola A J**

BAIL APPEAL JUDGMENT

MAKHAFOLA A J:

1. This is an appeal against the refusal to grant bail by the Magistrate Court for the district of Gordonia sitting in Upington launched by Accused 3, the Appellant, pending his

trial on a charge of robbery with aggravating circumstances.

2. The appeal is opposed by the prosecution generally and the evidence of Inspector J J P Muller was tendered before court to oppose bail.

3. From the record it is clear that the appellant launched an application for bail twice before the same magistrate and it was refused twice. The offence with which the appellant is charged is a schedule 6 offence of the Criminal Procedure Act 51 of 1977.

Vide: Record: Pages 49-86 (first application)

Record: Pages 93-106(Second application)

S v Acheson 1991 (2) S A 805 (NMHC) at 821 F-H.

S v Vermaas 1996(1) SACR 528(T) at 531 e-f.

4. It is common cause that Accused 1, 2 and 4 who are charged with the appellant have been granted bail though not by the same Magistrate who refused the appellant bail.

Vide: Record: Page 87: lines 23-24

5. It is now trite that the procedure to be followed in bail applications which fall under Schedule 6 is not different from that which applies to Schedule 5 applications. Before the onus

falls on the accused a jurisdictional factor has to be established by a certificate from the Director of Public Prosecutions or full description of the charge in the charge-sheet.

Vide: Section 60(11) (a) of Act 51 of 1977.

Section 60(11A) of Act 51 of 1977.

6. It is so that once the incidence of onus has shifted to an accused person then the accused will begin to lead evidence orally or by way of affidavit. The accused must prove the existence of “exceptional circumstances” on a balance of probabilities that it will be in the interests of justice for him or her to be released on bail.
7. The position as described above was satisfied. The appellant’s affidavit was formally read into the record by his counsel and he was thereafter cross-examined by the prosecution.
8. The appellant placed evidence before court raising the following issues:
 - (1) abscondment
 - (2) interference with statewitnesses
 - (3) endangering public safety and committing further offences

- (4) interference with police investigations
- (5) jeopardising the criminal justice system. Added to these the following circumstances of the appellant were placed before Court:
 - (a) He is a taxi operator residing at 15 Thunga Street, New Brighton, Port Elizabeth.
 - (b) He earns from the taxi business R1000-00 per week.
 - (c) He employs two taxi drivers for his business
 - (d) He co-operated with the police to make himself available for arrest at his home even after having been informed that Inspector Swanepoel wanted to arrest him for an alleged robbery in Upington.
 - (e) He has no passport
 - (f) He has no previous convictions
 - (g) There are no warrant of arrests circulating against him.
 - (h) He did not flee from the police
 - (i) He does not possess or own any firearm
 - (j) He is married with no children
 - (k) His wife is employed as a bus driver by Algoa Bus Company
 - (l) Nothing connected to the crime was retrieved from

him.

- (6) The prosecution led the evidence of Inspector J J P Muller who has 24 years service in SAPS and is based in Upington. He is also involved in the investigation of the main case of robbery.

Vide: Record: Page 16 lines 19-24

- (7) The inspector indicated that he was opposing bail. He had confirmed the appellant's residential address. On this first round of the application bail was refused. He later withdrew his opposition of bail as told to the court by the defence.

Vide: Record: Page 68: lines 22-23

9. On 7 December 2006 the appellant was back in court for second bail application on new facts.

Vide: Record: Page 93: line 20

Page 97: lines 1 and 9

10. The new facts are as follows: The appellant's wife's employment contract with Algoa Bus company has expired; his wife will not be able to pay his legal team which represents

him; there would be no money to pay Mr Meyers who represents his wife in a case where the police had impounded her car; his taxi as a source of the family income to pay debts is no longer operating; his father who is 81 years old is sick with diabetes and has a problem in his leg and appellant is the one staying with him and looking after him. He is the one who receives pension grant at the paypoints for his father, and he has not done so for the past two months. His two taxi drivers left his employment.

11. In this second leg of the application the appellant testified *viva voce* and the state did not lay any evidence before the court to rebut the new facts. Vide: Record: Page 102 lines 22-24.
12. In terms of Section 60(10) of the Act a duty is imposed on a Court hearing bail application to weigh up personal circumstances of the accused against the interests of justice. This applies equally to unopposed bail applications. The prejudice the accused will likely suffer has to be balanced by taking into account factors enumerated in Section 60(9) of the Act.
13. There is a disturbing aspect in the record depicting a delay in

the hearing of the appellant's bail application. The glaring factors are as follows:

- (a) the late starting of the proceedings
- (b) the unavailability of the presiding judicial officer who would leave the proceedings half-way to attend to other matters;
- (c) the unavailability of interpreters;
- (d) the unavailability of public prosecutors; and
- (e) the absence of the investigating officer and a delay occasioned by waiting for him.

14. This bungle-up is unacceptable as it delayed justice and in the process prejudiced the appellant. Perhaps in particular to Upington the administrative arm needs to be brought to the attention of the relevant authorities so that the workings there should be "BATHO PELE" – "PEOPLE FIRST" conscious as other places in the country.

QUESTIONING BY THE COURT

15. The general principle about questioning a witness by the court is noble and sound. The court has the right to question any witness at any stage of the proceedings the main purpose being to clarify and clear up points which are still obscure.

16. The record indicated that the appellant's wife is employed by Algoa bus Company and that she is a bus driver. This was indicated already in the first application for bail when the appellant's affidavit was read into the record.

Vide: Record: Page 51: lines 11-12. There is nothing obscure about where the appellant's wife works and in what capacity she works. The manner of asking the questions depicted on page 100 lines 24-25 and pages 101-102 of the record clearly reflects cross-examination by the Court.

17. In Human v Moolman [1968 (4)] S A 341 [AD] at 344 D-G the learned Judge of Appeal (Wessels, JA) expressed regret that, the Court *a quo* did not at all times conform to the generally accepted norm. The following is stated:

“He sought from time to time to expedite the hearing of the matter by virtually taking over from Counsel both the examination and cross-examination of witnesses. In doing so, it appears that he may at times have overlooked the Judge's usual role in our system of civil trial procedure, and to have associated himself too closely with the conduct of the case, thereby denying himself the full advantage usually enjoyed by the trial judge who, as the person holding the scale between

the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts. The limits which a judge should observe in intervening in the conduct of proceedings over which he presides were dealt with by this court in R v Roopsingh, 1956 (4) S A 509 (AD)."

- 18.** Lord Green (MR) had the following to say on the subject:

"the judge who himself conducts the examination ...descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

Vide: Yuil v Yuil [1945] 1 All ER 183 (CA) 189.

- 19.** The sentiments expressed in the above-cited cases remain salutary and state in no uncertain terms the limits of a presiding officer when questioning a witness to clarify points which are still obscure in his or her evidence.

- 20.** The Magistrate has had regard to withdrawn charges against the appellant to deny him bail.

Vide: Record: Page 85: lines 17-19

Record: Page 105: lines 24-25

Record: Page 106: lines 1-4

21. Although bail application proceedings are *sui generis* and inquisitorial in nature (**Vide: Ellish v Prokureur - General (WAA) 1994 (2). S A C R 579(T) at 596 e**) they remain court proceedings and unless the law stipulates otherwise, the time-tested procedures and practice that maintain fairness and justness of procedures should be adhered to.

22. From the record it is clear that the Magistrate did enter the arena. This manner of conducting the proceedings is irregular because it compromises the impartiality of the presiding officer. Whereas regard to withdrawn charges, in my view, exaggerates and magnifies unnecessarily the pending trial the appellant is facing and it has impacted negatively to the granting of bail.

EVALUATION

23. In the second leg of the application the court had to deal with the evidence of the appellant only because the application was no longer opposed. The court had a duty to act in terms of Section 60(10) of the Act.

24. The court appears not to have taken the new facts as new by balancing them with the facts in the first application and the interests of justice.

Vide: Record: Page 105 line 19-25 where the Magistrate

said: *"I stand by the decision I made last time, when we were together and the basis for that sir, is what I said to you. Armed robbery, robbery with aggravating circumstances, is the rape of the economy, is the rape of your people of our country. It is an offence worse than rape and I said to you, at that stage although you are regarded as innocent until proven guilty by a Court of law, the fact of the matter is that you have two provisionally withdrawn charges of armed robbery against you. One in East London and one in Port Elizabeth, as a charge of possession of an unlicensed firearm and I said to you at the last hearing, that just says to me that I must be very careful before I release a person who has possibly been involved in these sort offences(my own underlining). It is not easy for me, I know how you feel at this stage, but I cannot- if I weigh your right to be released against the right of the community to be at least protected until a Court of Law decides your fate. I cannot take the responsibility on me. Your application is refused, you are kept in custody."*

Vide: Record: Page 106 lines 1-8.

Vide: Rex v Ndhlovu (1945, AD 369 at 386) where it is stated that “*the jury should not speculate on possible existence of matters upon which there is no evidence or the existence of which cannot reasonably be inferred from the evidence.*”

25. The above passage which is part of the judgment of the Magistrate does not address the appellant’s presumption of innocence at this pre-trial stage coupled with the avoidance of unwarranted punishment of the appellant before conviction and sentence.
26. I do not find in this judgment where the Court analyses the appellant’s sole evidence meeting or not meeting the requirements for the test of “exceptional circumstances” justifying the granting of or refusing bail.
27. In **Siwela v S [2000] 1 ALL SA 389(W)** at 410 g-h the court had regard to the history of the case namely: the lengthy incarceration of the accused, his conduct thereafter and the conduct of the state and stated as follows: “*The lengthy incarceration of the accused, his conduct thereafter and the conduct of the State in this case persuade me that in all the circumstances set out above, on a judicial evaluation thereof,*

fall within the ambit of “exceptional circumstances”, bearing in mind the principles set out in the authorities to which I have referred. In my judgment therefore the facts set out in detail in this judgment, do constitute such “exceptional circumstances” as are envisaged in section 60(11)(a). To hold otherwise would, in my judgment, and on the particular facts of this case, render the proof by the accused of “exceptional circumstances” to be such an insurmountable obstacle as to render the right of an accused to satisfy the court that such exceptional circumstances exist, illusory.”

28. From the totality of the evidence there exist no *prima facie* indications that the proper administration of justice and the safe-guarding thereof will be defeated or frustrated if the appellant is admitted to bail. The court would be justified to refuse bail if such indications existed.

Vide: S v Essack 1965(2) 161[D &Coast Local Division]at 162 C-E.

29. **In S v Dlamini 1999 (2) SACR 51(CC)** at pages 63f - 64a paragraph 11 the sentiments expressed there are to the effect that the Court’s focus at bail application is the possible guilt to the extent it may bear or where it borders on the interest of

justice in regard to bail.

30. Consequently, I find as follows:

- (1) that the prosecution in its opposition to bail relied on the charge of robbery with aggravating circumstances which is lacking in persuasion that the court hearing bail application could not even *prima facie* express a view of the strength or weakness of the case against the appellant.
- (2) That there exists exceptional circumstances when the appellant's personal circumstances are weighed against the interests of justice.
- (3) That there is insufficient evidence to justify the court to refuse admitting the appellant to bail.
- (4) That the magistrate did enter the arena to the prejudice of the appellant.
- (5) That the appellant has discharged the onus, on a balance of probabilities, that the administration of justice will not be jeopardised, defeated or frustrated if

he is admitted to bail on the strength of the evidence placed before the court *aquo*.

31. Both Counsel for the state and the defence agree on the amount of bail and that the normal bail conditions should prevail should I decide to grant bail to the appellant.
32. I am alive to the provisions of section 65(4) of the Criminal Procedure Act 51 of 1977 that the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong.

I now pronounce that the decision of the Magistrate is wrong in refusing to admit the appellant to bail and that decision is accordingly set aside.

33. **In the result the appeal succeeds and I make the following order:**
 - i) **The appellant is released on bail pending his trial.**
 - ii) **Bail is fixed in the amount of R3000=00 (three thousand rand) payable at the Magistrate**

Uppington.

- iii) The prosecution should supply the appellant with a list of state witnesses.**
- iv) The prosecution should supply the appellant with the name of the present investigating officer.**
- v) The following conditions apply:**
 - (a) The appellant is to report at New Brighton Police Station on Mondays and Fridays between 09H00-11H00.**
 - (b) The appellant should not interfere and/or intimidate the state witnesses.**
 - (c) The appellant should not leave the Magisterial district of Port Elizabeth without informing the investigating officer.**

MAKHAFOLA K
Acting Judge of the High Court
Northern Cape Division

On behalf of the Appellant : Adv. J J Schreuder

Instructed by : Legal Aid Board, Kimberley
On behalf of the Respondent: Advocate Louw
Instructed by : Office of the D P P, Kimberley.