

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: BA15/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 24/05/2024.

SIGNATURE

In the matter between:

PHUTI DENDANGIKA MATAMBO

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

Heard on 16 MAY 2024. The date and time for hand-down is deemed to be on the 24 May 2024 at 16H00. This judgment handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII.

DEANE AJ

Introduction

1. This is an opposed Appeal in terms of the provisions of section 65(1)(a) of the *Criminal Procedure Act 51 of 1977 (CPA)*.

2. The Appellant appeals against the refusal by the Magistrates decision of 26 April 2024 to refuse bail.

3. The Appellant is facing three charges:

3.1 COUNT 1: Contravening section 80(1)(a) read with section 81A of the *Customs and Excise Act 91 1964* read with sections 115, 47, 54(2)(a), 65 – 67(a)(ii), 87(1), 87(2) and 95(2) of the *Customs and Excise Act 91 1964*.

3.1.1 Where it is alleged that on or about 13 March 2024 and at or near Matlala Road in the district of Polokwane the Appellant unlawfully and intentionally had in his possession/custody/control illicit cigarettes to the value of R180 000.00, whilst knowing it to be illicit goods.

3.2 COUNT 2: Possession of an unlicensed firearm wherein it is alleged that the Appellant contravened section 3 read with sections 1, 103, 117, 120(1)(a), section 121 read with schedule 4 and section 151 of the *Firearms Control Act 60 of 2000*, and further read with section 250 of the *CPA*.

3.2.2 In that on or about 13 March 2024 and at or near Matlala Road in the district of Polokwane the Appellant did unlawfully have in his possession a firearm without having the requisite permit or authorisation be in possession of same.

3.3 COUNT 3: Possession of ammunition in contravention of section 90 read with sections 1, 103, 117, 120(1)(a), section 121 read with schedule 4 and section 151 of the *Firearms Control Act 60 of 2000* further read with provisions of section 250 of the *CPA*.

3.3.1 In that on or about 13 March 2024, at or near Matlala Road in the district of Polokwane the Appellant was in unlawful possession of ammunition to wit nine bullets without having the requisite permit or authorisation be in possession of same.

4. The critical question before this court is whether the magistrate had misdirected himself in refusing to grant bail to the Appellant.

Grounds of Appeal

5. The grounds of appeal as indicated by the Appellant's representative included the following:

5.1 Whether it is in the interests of justice to have the Appellant released on bail;

5.2 Did the Appellant show whether it is in the interests of justice to have him released on bail;

5.3 Whether there is a *prima facie* case against the appellant.

The Applicable Legal Principles

6. The statutory context for determining an appeal relating to bail proceedings is section 65(4) of the CPA, which provides as follows:

'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, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

7. The test for interfering with the Magistrate's judgment is whether the court *a quo* misdirected itself in a material way, in relation to facts or the law.¹ The Court stated as follows in *S v Barber*:²

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. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly.

¹ *Panayiotou v S Panayiotou v S* (CA&R 06 /2015) [2015] ZAECHGHC 73 (28 July 2015), para [26] – [27].

² *S v Barber* 1979 (4) SA 218 (D) at 220 E – H.

Accordingly, although this Court may have a different view, it should not substitute its own review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it should be in 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 but exercised that discretion wrongly.

8. If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances, to have been granted or refused, and in the absence of a finding that the magistrate misdirected him or herself the appeal must fail.

9. The grant or refusal of bail is a discretionary decision under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstance of a particular case, bail should be granted.³

10. Since the offence with which the Appellant is charged falls within the ambit of Schedule 5 of the CPA, section 60(11)(b) of the CPA is applicable, and it provides as follows:

“Notwithstanding any provision of this Act, where an accused is charged with an offence- referred to in Schedule 5, but not 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 the interests of justice permit his or her release”.

11. The effect of this provision is that the Appellant bore an onus to establish, on a balance of probabilities, that the interests of justice permit her release on bail. In this regard, section 60(4) of the CPA provides that the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

“(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in

³ *S v Dlamini; S v Dladla and others; S v Joubert; S v Schieteket* [1999] ZACC 8; 1999 (2) SACR 51 (CC) at 88H – I, 89 E and 90B-D.

question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

(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 jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(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.”

12. In terms of section 60(6) of the *CPA*, in considering whether the ground in section 60 (4) (b) has been established, the court may, where applicable, take into account the following factors:

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his

or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) 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;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) any other factor which in the opinion of the court should be taken into account.”

The Appeal

13. The Appellants representative submits that the strength of the state’s case should be the overriding factor in granting bail.⁴ I disagree.

14. It deserves highlighting that the Appellant has been charged with a Schedule 5 offence, an indication of the seriousness of the crime. The said crime is so serious that the legislature found it necessary to prescribe a minimum sentence for it.

15. The fact that the offence concerned is included in Schedule 5 means that the Appellant possibly faces a very long term of direct imprisonment. The case law⁵ indicates that this is a relevant factor which may be taken into account when considering whether an Appellant might be inclined to evade trial for purposes of bail.

16. It is also common cause that the charge on illicit cigarettes is ordinarily a Schedule 1 offence. However, in this instance since the appellant has a pending case of kidnapping and robbery with aggravating circumstances and he also has paid a fine amount in a previous

⁴ Appellants Heads of Argument: p 3.

⁵ See *S v Hudson* [1980] 1 All SA 130 (D) at 131; *S v Nicholas* 1977 (1) SA 257 (C).

conviction, the matter was approached as a Schedule 5 offence.

17. The question is whether the Appellant has shown, on a balance of probabilities, that the interests of justice, would permit his release on bail?

18. Looking at the circumstances of this case, the Appellant has a pending matter where he was released on bail. One of the conditions of the bail was that the Appellant must not commit further offences. It is clear that the Appellant failed to abide by this condition.⁶

19. In addition, the Appellant was caught having in his possession illicit cigarettes and the unlicensed firearm and ammunition inside the vehicle that he was driving.⁷

20. The strength of a case against Appellants and the nature of gravity of punishment which is likely to be imposed are some of the grounds which, in terms of section 60(6) of the Act, a court should consider in determining whether there is likelihood of an Appellant evading trial.

21. *In casu*, the Appellant failed to disclose in his affidavit⁸ that he has a passport. The investigating officer only found this out during his investigations. It was also found, during investigations, that the Appellant had ties in Zimbabwe. It is important to note that whilst the Appellant did surrender his passport, he only did so after this information came to light.⁹

22. I consider this aspect to be an important consideration in the context of bail proceedings, where there are flight risk concerns. It lends itself towards the probability that there is a likelihood that the Appellant might attempt to evade trial.

23. It was submitted by the State and which evidence remains uncontested that the Appellant also attempted to flee the scene when he was arrested. The police only caught him after pursuing the Appellant in a chase. The State submits that this clearly shows that if given the opportunity he will flee, and it will be difficult to secure his attendance.¹⁰ I am in agreement with these submissions.

⁶ Record: p 65, para 20.

⁷ Record: p 66, paras 10-20.

⁸ Record: p 199.

⁹ Record: p 129, paras 10-20.

¹⁰ Respondents Heads of Argument: p 5.

24. In addition, a principle that requires particular focus in this appeal is that a bail application is not a trial. In *S v Branco*,¹¹ the Court held that a *“bail application is not a trial. The prosecution is not required to close every loophole at this stage of the proceedings.”*

25. In *S v Schietekat*¹² the Court held that bail proceedings are *“... sui generis. The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that ‘exceptional circumstances exist which in the interests of justice permit his release’.”*

26. The Magistrate correctly found that *“...the interests of justice entails that the court must assess the totality of the evidence before it by weighing up the personal circumstances of the applicant against the countervailing potential interest of the society and the seriousness of the offences...”*¹³

27. After weighing up the evidence before it, the court *a quo* correctly found that there was *“a possibility that should the accused perhaps be released out on bail he may go to his father in Zimbabwe and that may call for extradition of the accused person...”*¹⁴

28. The court *a quo* also found that the Appellant’s release on bail, considering that he was already out on bail for a pending matter when he committed the current offences, would show that the *“court [is] relating a wrong message to the public to say that once people are out on bail they can be arrested for offences or commit offences and then they will still be released out on bail”*.¹⁵ The court went further to state that *“there is a likelihood that that will effect the proper functioning of the criminal justice system.....So based on those two reasons as I have indicated the court finds that it will not be in the interest of justice that at this stage*

¹¹ 2002 (1) SACR 531 (W) at 535 D-E.

¹² 1998 (2) SACR 707 (C) at 713 H-J.

¹³ Record: p 194, para 10.

¹⁴ Record: p 213, para 20.

¹⁵ Record: p 214, para 10.

you be granted bail and as such the application for bail is denied”.¹⁶

29. Looking at the factors before the court *a quo*, the conclusion reached by the Magistrate herein cannot be faulted.

30. Indeed, in terms of Section 60(4) of the CPA, it is not in the interest of justice to release an accused if one or more of the consequences listed in paragraphs (a)-(e) therein are established.

31. In *S vs Scott- Crossely*¹⁷ it was held that the court had to consider all relevant factors and determine whether individually or cumulatively they would justify the Appellant's release. Section 65(4) of the Act provides 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, in which event, the court or the judge shall give the decision which in its or his opinion, the lower court should have given.”

32. This Court finds that the Appellant has not successfully discharged the onus as contemplated in section 60 11(a) of the CPA that the interest of justice does permit his release on bail. The Appellant has accordingly failed to discharge the onus resting upon them to establish that it is in the interests of justice for them to be released on bail, and the Magistrate rightly rejected bail. I have found no misdirection in the decision of the Magistrate. Based on the evidence before him, the Magistrate correctly utilised his judicial discretionary power to reject bail.

33. This is especially the case given the personal circumstances of the Appellant and the nature and gravity of the punishment which is likely to be imposed should the Appellant be convicted of the charges against him.

34. The learned Magistrate's refusal was justified considering the facts of this case together with the findings made above and having regard to the relevant authorities.

¹⁶ Record: pp 214-215, para 20.

¹⁷ 2007 (2) SACR 470 SCA.

35. There is accordingly no reason to interfere with the Magistrates refusal of bail which was the decision appealed against.

Order

1. The Appeal is dismissed.

DEANE AJ
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT : Adv MJ Rameetse

INSTRUCTED BY : Ramusi Attorneys

FOR THE RESPONDENT : Adv SP Mphasha

INSTRUCTED BY : State

DATE OF HEARING : 16 May 2024

DATE OF JUDGEMENT :