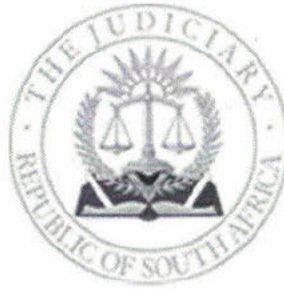


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A20/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
13/06/2024	
DATE	SIGNATURE

In the matter between:

SANDILE DAVID MHLONGO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MKHABELA , AJ

Introduction

[1] This is an appeal in terms of the provisions of Section 65(1)(a) of the Criminal Procedure Act,¹ ("the CPA") against the refusal of the Magistrates' Court to grant the appellants bail pending his trial.

¹ 51 of 1977.

- [2] The appellant was charged with two counts of robbery with aggravating circumstances. The circumstances leading to the charges are that the appellant and his accomplice robbed the complainants of their belongings and used a firearm in doing so.
- [3] Both appellants were legally represented by two legal representatives, respectively, in the Court *a quo* even though the appeal is prosecuted by only one of the two accused.
- [4] The robbery charges pertain to the allegations that the two appellants robbed the complainant of his/her motor vehicle, a white Polo, which is the subject of count 1. The second count of robbery relates to a cellular phone which was valued at R14 000.
- [5] It was not in dispute that the appellants faced a Schedule 6 offence and the legal representative for appellant 1 prepared and read into the record an affidavit in support of the bail application prepared under those bases.
- [6] In demonstrating that the appellant's bail was in terms of Schedule 6. The affidavit in support of appellant 1's bail reads as follows:²

"I have been advised by my legal representative that the onus rests on me to prove to this Honourable Court on a balance of probabilities that the interest of justice do permit my release on bail and exceptional circumstances does exist for my release on bail."

² Equally, the other accused's affidavit in support of his bail application stated as follows: *"I would like to submit the following exceptional circumstances"*.

- [7] The legal principles under which an Appellate Court can intervene and substitute the decision made by a Magistrate in refusing bail are trite.
- [8] The test that is applicable in terms of which an appeal court can set aside a decision of the Magistrate Court based on an appeal against the refusal of bail brought in terms of Section 65(4) of the CPA was aptly enunciated by Hefer J in the case of *State v Barber*³ as follows:

"It is wellknown that the powers of this Court are largely limited where the matter comes before it as an appeal and not as a substantive application. This Court has to be persuaded that the Magistrate exercised the discretion which he has made 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 but exercised the discretion wrongly. Without saying that the Magistrate's view was actually the correct one. I have not been persuaded to decide that it is the wrong one."

- [9] The Magistrate noted that the appellant's bail fell under Section 60(11)(b) of the CPA. This meant that the onus was on him to adduce evidence that satisfies the Court *a quo* that there are exceptional circumstances which would justify his release on bail. Further that the factors that he should bring must show that it will be in the interests of justice to be released on bail.
- [10] The Magistrates' Court also took note of the fact that the appellant had indicated that he had no previous convictions. However, after the investigation officer had produced evidence to the effect that he has previous convictions the appellant adapted his assertions and said that the previous conviction was about 10 years old and that he had thought that it had been expunged.

³ 1979 (4) SA 218 (D) at 220E-H.

[11] The failure to reveal previous convictions by the appellant led the Magistrate to remark that in his view the appellant wanted to mislead the Court.

[12] The Magistrate remarked as follows in respect of the appellant's failure to disclose his previous conviction:

"I take it that applicant wanted to mislead the Court and give the Court the impression that he is appearing before Court for the first time in his life."

[13] Furthermore, the Court *a quo* took into account the evidence of the investigating officer to the effect that the appellants are notorious for hijacking cars.

[14] The judgment of the Magistrate indicated that he took into account the audacity under which the alleged robbery was committed which showed that the appellants were fearless.

[15] The Court *a quo* considered the evidence of the investigating officer to the effect that there was a probability that the appellant and his co-accused might know the witnesses and that the appellant knew where the witnesses were residing.

[16] Moreover and significantly, the Magistrate found that the appellant did not succeed in discharging the onus that there were exceptional circumstances that warranted his release on bail.

[17] The Magistrate's decision in not granting the appellant bail cannot be faulted. In respect of the current appellant, he lied under oath in his affidavit in support of his bail that he did not have any previous convictions. This was a blue lie and the appellant is susceptible for a conviction for not telling the truth about the existence of his previous conviction.

- [18] It is not convincing that when he was confronted with the evidence, the appellant backtracked and stated that it was a 10 year old conviction which he thought had been expunged. What would have been acceptable was to disclose the conviction in his affidavit in support for bail and then assert that it was 10 years old and may have been expunged.
- [19] In respect of the Court *a quo*'s decision or conclusion that the appellant had not succeeded in adducing evidence that there were exceptional circumstances which would justify their release on bail, the Magistrate can also not be faulted on that finding as well. This is because the applicant s' affidavit in support of bail was terse in so far as showing factors that could be regarded as exceptional circumstances.
- [20] It is also difficult to interfere with the reasoning of the Magistrate in his exercise of his discretion in refusing bail given the available evidence before him which was tendered by the investigation officer.
- [21] The prevalence of the crime of armed robbery and the value of the properties being a motor vehicle and expensive cellular phone were factors that were justifiably taken into account by the Magistrate in his exercise of his discretion. In particular, the Magistrate took into account that the properties in question had not been found.
- [22] Accordingly, against the above background, I am not inclined to uphold the appeal.
- [23] To put it differently, I am constrained by the dictates of logic and reason to dismiss the appeal in the absence of any misdirection by the Magistrate in his exercise of his discretion when he refused bail.

Order

[24] I therefore make the following order:

1. The appeal against the refusal to grant bail by the Magistrates' Court on behalf of the appellant is dismissed.

I hand down the judgment.




R B MKHABELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **13 June 2024**.

APPEARANCES

FOR THE APPELLANTS:
FOR THE STATE

ADV J CHABANGA
ADV R BARNARD

DATE OF THE HEARING:
DATE OF JUDGMENT:

6 MAY 2024
13 JUNE 2024