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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.
(Palm Ridge)**

Case Number: A59/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

9 September 2024

DATE

SIGNATURE

In the matter between:

P[...] M[...] M[...]

1st Appellant

K[...] V[...]

2nd Appellant

A[...] M[...]

3rd Appellant

and

THE STATE

Respondent

JUDGMENT

NOKO J

Introduction

[1] The appellant launched appeal against the judgment and order of the Court *a quo*, per Mr H Kuvutlu attached to the Regional Court of Khutsong. The Court *a quo* dismissed an application brought by the appellant to be admitted to bail on new facts. The first bail application having been dismissed on 29 June 2023 and the second bail application was dismissed on 20 September 2023. The appellants are charged with murder, house breaking with intend to rob and robbery, theft and contravention of the Road Traffic Act in driving a motor vehicle without licence.

Background and case before Court a quo.

[2] The parties are in agreement that the charges preferred against the appellants resort in section 60(11) read with schedule 6 of the Criminal Procedure Act (“CPA”).¹ The appellants who are minors were kept at a children’s facility called Walter Sisulu Youth Centre. They were assisted by their respective guardians during the bail proceedings. They brought an application to be released on bail which application was dismissed by the court *a quo* as it was found to be without merits.

[3] Subsequently they brought another bail application on new facts. The said facts were, first, that the appellants were not in good health, the first appellant having been diagnosed with a chronic illness and was not receiving proper treatment. His situation was exacerbated by the fact that his medication was stolen and did not reach the first appellant. The other two appellants where having some allergies. In view hereof consultation was made with the medical doctor who recommended that appellants should be admitted to bail.

¹ Criminal Procedure Act 51 of 1977.

[4] Secondly, that their rights to education was also negatively impacted by the continued incarceration and their teachers had suggested that due to their tender age they should be attending classes for effective learning.

[5] Both the doctor and the teacher were called to attend Court to provide evidence regarding the testimony of the alleged negative impact of the incarceration on both the appellants' rights to health and education. Both professionals confirmed the testimony as stated by the appellants.

[6] The Court *a quo* was not persuaded by the arguments advanced by the appellants and returned a verdict that the applications were unsuccessful. The Court *a quo* held that the contentions advanced were not new but were part of the initial applications for bail though not stated in the affidavits but were mentioned during cross examination and this could be because the new legal representative was not apprised of all that was covered by the appellants' previous legal representative. The Court *a quo* considered several judgments including the oft-quoted *S v Siyanda* and *S v Mohammed*² that the essence of the previous bail application should not be ignored during the subsequent application on new facts. In addition, the contentions in support of the effect of detention on their right to education was also unsustainable.

[7] Lastly, the Court *a quo* referred to the judgment in the case of *S v Mporofana* 1998 (1) SACR 40 where it was stated that complaint with regard to health cannot be used as a basis to apply and be admitted to bail. Importantly the Court *a quo* held that such contentions did not set out good bases to be construed as exceptional circumstances required in instances where applications for bail relates to accused charged under schedule 6 of the CPA. The appellants were aggrieved by the decision of the Court *a quo* and launched appeal.

[8] The appellants have set out the grounds upon which the decision of the Court *a quo* in refusing bail is susceptible to be set aside.

² 1999 (2) SACR 507

On appeal.

[9] The grounds of appeal are detailed in the notice of appeal and are summarised for the purposes of this judgment. First, that the Court *a quo* erred in its finding that there were no exceptional circumstances warranting that the appellants in the interest of justice be admitted to bail. The Court has failed to properly analyse the evidence of the school teacher and medical practitioner who provided testimony to Court *a quo* at the instance of the state. Second, that the Court *a quo* failed to have regard to the consequences of the continued incarceration of the appellants including attendant prejudice to be suffered as envisaged in section 60(9) of the CPA.

[10] Third, that the personal circumstances of the appellants were not accorded due consideration and instead the strength of the case was overemphasised by the Court *a quo* notwithstanding the principle of presumption of innocence. Hence the Court *a quo* failed to have regard to the weakness of the state case. Fourth, that the Court *a quo* readily accepted the version of the investigation officer without proper reflection before disregarding evidence of the appellants.

Submissions by the parties.

[11] Counsel for the appellants submitted that the appellants demonstrated the extent to which their health was compromised by the continued detention. In addition, persuasive evidence was presented which clearly showed that their rights to proper education is also compromised and negatively impacted by the continued detention. Further that this evidence was supported by the state evidence which was submitted for the purpose of rebutting the assertion by the appellants. The medical practitioner who was also called at the instance of the state presented testimony which proved that indeed the appellants' right to proper medical care was negatively impacted by the detention.

[12] First, the teacher demonstrated that in view of the appellants' tender age it would be appropriate that they physically attend classes. Secondly and more specifically with regard to the first appellant who suffered from a chronic illness his medical supplies is not reaching him. Blame for this chaos can only be attributed to the fact that the first appellant is in custody.

[13] The evidence by both the teacher and the doctor should have been accepted by the Court *a quo* as new evidence and also exceptional circumstance warranting that it is in the interest of justice that they be admitted to bail.

[14] The strength of the state's case should have not been considered as the case is not at a trial stage. Further the factors identified in section 60(4)(a-e) were clearly satisfied by the appellants and no evidence or persuasive arguments were advanced to gainsay the said submissions.

[15] The counsel for the respondent submitted that though rights to education and health services are entrenched in the Constitution the Court should not lose sight of the fact that such rights are not absolute and can be limited in terms of section 36 of the Constitution by law of general application. Detentions in accordance with applicable laws constitute constitutionally legislative framework which can justifiably limit the enshrined rights.

[16] In addition, there is no indication that the school performance of the appellants has been negatively affected as the school reports still demonstrate that they are poor performers. The complaint that medication does not reach the first appellant is a red herring. Medication is generally being dispensed as claimed by an inmate using his hospital card. If someone else is using the appellant's card blame should be attributed to him and not the respondent.

Legal principles.

[17] An appeal against the refusal of bail is governed by section 65(4) of the CPA, which 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 judge shall give the decision which in its opinion the lower court should have given.”

[18] It was held in *Chewe v The State* (unreported case A702/2015 GDP-26/10/2015) by Ishmael J who stated that the “... *task of this court is merely to ascertain whether the court of first instance exercised its mind judicially and correctly*”.

[19] The Court in *Barber*³ had regard to appeal legislative framework and held that:

“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.’⁴

[20] As it has been agreed by all the parties the charges preferred against the appellants resorts within the ambit of section 60(11) read with schedule 6 of the CPA which enjoins the appellants to demonstrate that exceptional circumstances exists which in the interest of justice permit of their release on bail. There are plethora of authorities which states that the exceptional circumstances are facts specific and that there is no precise definition of what exceptional circumstances are.

³ *S v Barber* 1979 (4) SA 218D.

⁴ *Id* at 220 E

[21] In this case the Court *a quo* was enjoined to consider whether in compliance with the strictures of section 6(11)(a) of the CPA evidence has been adduced to determine whether exceptional circumstances exist which in the interests of justice permit his release on bail. Would it be exceptional circumstances that the appellants meet all the criteria set out in the relevant sections 60(4) - 8 of the CPA to justify his release on bail?

[22] Section 60(11)(a) of Act 51 of 1977 states that

‘Notwithstanding any provision of the Act, where an accused is charged with an offence referred to-: (a) 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, give evidence which satisfy the Court that exceptional circumstances exist which in the interest of justice, permit his or her release on bail.’

[23] In the context of s60(11)(a) of the CPA, the concept exceptional circumstances has meant different things to different people. In *S v Mahommed*⁵ it was held that the dictionary definition of the word exceptional has two shades of meaning: The primary meaning is simply: ‘unusual or different’. The secondary meaning is marked unusual or specially different’. The accused has to adduce evidence which satisfies the Court that such circumstances exist ‘which in the interest of justice permit his or her release’. The proven circumstances have to be weighed in interest of justice. So, the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellants release on bail.

[24] The strength and weakness of the respondent’s case is important and where the evidentiary material presented before the Court fail to assist the Court in even presenting a *prima facie*⁶ view then the accused must be given the benefit of the doubt.⁷

⁵ 1999 (2) SACR 507 (C).

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[25] The process on bail applications is guided by the provisions of section 60(4)(a-d) read with section 60(9) of the CPA. If one of the factors militates against granting the bail then it will not be in the interest of justice that the accused be admitted to bail. The factors identified in this section are not cast in stone or exhaustive and the presiding officer's constitutional powers to decide on the bail remain intact. Those factors were dealt with in different cases and the court would, *inter alia*, in terms of section 60(4)(b) not grant bail where there is likelihood that the accused may evade trial. Pointers for the court's consideration would include the *seriousness of the offence, the probabilities of a conviction, the nature of probable sentence and the ability to put up bail*.⁸ The court should have regard to the provisions of what is set out in section 60(6) to assist in determining whether the accused is likely to evade trial.

[26] In the matter of *S v Kock* 2003 (1) All SA 551 (SCA) the Supreme Court of Appeal stated that: in the context of s60(11)(a) of the Act the strength of the state case has been held to be relevant to the existence of exceptional circumstances'. *S v Botha en Ander* 2002(1) SACR 222 (SCA) at para [21], *S v Viljoen* 2002 (2) SACR 550 (SCA) at para [11]. There is no doubt that the strength (or weakness) must be given similar consideration in determining where the interest of justice lie for the

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⁸ *S v Pienaar* 2017 (1) NR 149 (SC) at [12].

purpose of s 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a *prima facie* view as to its strength or weakness the accused must receive the benefit of the doubt’.

[27] In the matter of *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12 the Supreme Court of Appeal held that ‘... *in order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...*’.

Analysis

[28] The defence submitted that there is no evidence to gainsay the assertions which the appellants made in respect of the provisions of 60(4)(a-e) of the CPA. The parroting of these sections has been a frequent phenomenon and fails to appreciate the fact that the state need not disprove exceptional circumstances as set out in section 60(11) of the CPA.

[29] The authorities cited above discount the arguments advanced by the defence that the strength of the case should not be accorded due consideration as same should fall exclusively within the jurisdiction of the trial court. The courts in the judgments referred to above do state that the seriousness of the charges and the possible sentence can serve as an incentive for a party to evade attending trial. In this regard I find no fault in the court *a quo* having considered the seriousness of the crime though to the appellants’ credit the court is not called to make a final determination on a finding of guilt or innocence of the appellants. That notwithstanding the apparent weakness of the case may in the long run transform into a stronger case against the accused as it was noted that “[B]ut a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to test. In order successfully to challenge the merits of such a case

in bail proceedings an applicant needs to go further: he must proof on a balance of probabilities that he will be acquitted of the charge.”⁹

[30] The real crux of the appellants being whether the impact of the detention on the right to education or health services satisfy the exceptional circumstances as required in section 60(11). The contentions raised by the state is that the rights are not absolute and in addition the said services are provided by the state. The Court *a quo* has also correctly stated that the recourse is not to admit appellants for bail but challenge the shortcomings which were identified by the appellants in the service they are receiving from the state. If the Court were to readily conclude that where rights of suspects in detention are limited same should be identified as exceptional circumstances this may open flood gates and defeat the purpose which the legislatures had in mind when promulgating section 60(11) of the CPA. This should not be interpreted that limitation of rights entrenched in the Constitution by law of general application will never be construed as exceptional circumstance warranting an accused being admitted to bail. But in casu it cannot be construed as exceptional.

Conclusion

[31] In the premises I am not persuaded that the Court *a quo* erred in refusing the application for bail regard had to the facts presented having been considered against the relevant authorities. I therefore find no basis to interfere with the decision of the Court *a quo*.

Order

[32] In the premises I grant the following order:

The appeal is dismissed.

M V Noko

⁹ *Mathebula v The State* (431/09) [2009] ZASCA 91 (11September 2009).

This judgement was 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 9 September 2024.

Date of hearing:

Date of judgment: 9 September 2024

Appearances

For the Appellant: Adv VM Lifhiga

For the Respondent: Adv L Kgaditsi