

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A138/2024

In the matter between:

AXOLILE MAKOBALO

Appellant

and

THE STATE

Respondent

Heard on: 02 August 2024

Judgment delivered on: 16 August 2024

JUDGMENT

MOLEFE, AJ

Introduction

1. This is an application for a bail appeal which was denied in the Goodwood Magistrate court on 14 March 2024.

Background

2. The appellant, an eighteen-year-old male scholar in matric and his four co-accused are charged with attempted murder under schedule 5. It is alleged that on 09 of February 2024, the complainant at a party accused the appellant of stealing a phone. Words were exchanged between the two. The appellant called the complainant “a boy” and the complainant retaliated by slapping the appellant. The appellant then in response threatened the complainant by saying on “Monday, you will see blood”. On 12 of February 2024, the appellant’s friends (co-accused) were waiting for the complainant outside the school. An attack ensued resulting in the complainant sustaining a swollen brain, a skull fracture from the right side of his ear to his eye and bruising on his brain.

3. The state in its opposition for bail led oral evidence through the investigating office’s testimony. The appellant and his co-accused, made their submissions in favour, in motion and standardised bail application affidavits were read on record. The learned magistrate dismissed the bail application. The appellant and his co-accused have remained in custody since 14 of February 2024.

Submissions by the State:

4. The submissions made in the court *a quo* and before this court, by the state in its opposition for bail were as follows:

4.1 The offence committed by the accused and his co-accused was a very serious offence under schedule 5;

4.2 The appellant and his co-accused in terms of section 60(4)(a) were a threat to the personal safety of the complainant and the public, and in terms of section 60(4)(c) the accused would unduly influence and/or intimidate the complainant and state witnesses;¹

Submissions by the Appellant:

¹ S60(4)(a) and (c) of CPA

5. The appellant's affidavit which was read into the record, submitted that:

- i) He is eighteen years old and still schooling in matric;
- ii) He has a fixed address in Goodwood where he lives with his parents, and could alternatively stay in Woodstock;
- iii) It is the first time that his conduct had come into conflict with the law;
- iv) He has no warrants of arrest against him;
- v) He has no previous convictions nor pending cases against him;
- vi) He does not hold a passport.

6. The court a quo's findings were that:

- (a) The attack was premeditated. The appellant followed through with his threat made on the 09 of February, and the complainant was attacked on the 12 of February 2024;
- (b) That the appellant and his co-accused opted to state their personal circumstances in an affidavit instead of submitting oral evidence in court;
- (c) That the appellant didn't deny the assault and placed himself at the scene;
- (d) The appellant is young but conducted himself as an adult;
- (e) That the appellant and the co-accused acted as a group and had no regard for law and order;

(f) That the accused and his friends threatened and intimidated the public due to the video that was circulated on social media by accused 4 and they would therefore interfere, intimidate state witnesses and jeopardise the state's case.

The Law:

7. It is trite law that this court does not have the authority to intervene with the lower court's decision, unless it is satisfied that the decision was wrong. '*underlining for my own emphasis*'

Section 65(4) of the CPA stipulates:

*"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."*²

In S v Barber the court stated that; _ 1979 (4) 218 (D) at 220E-H

*"... 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."*³

² S65(4) of CPA

³ In S v Barber 1979 (4) 218 (D) at 220E

8. It is also trite law that an accused person bears the onus to prove on a balance of probabilities by adducing evidence which satisfies the court that the interests of justice permit his release.

In terms of Section 60(11) (b):

“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.”⁴

9. In *S v Dlamini* **[1999] ZACC 8; 1999 (2) SACR 51** (CC) **(1999 (4) SA 623**, Kriegler J, stated the following regarding the nature of the onus in schedule 5:

“It clearly places an onus upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in ss 60(4)-(9) or required by s 35 (1)(f). It is clear that an accused on Schedule 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant”. *“underlining for my own emphasis”⁵*

The onus is not heavy; the appellant is required to merely place evidence before the court that the interest of justice permits his release. The appellant is not required to proof this beyond a reasonable doubt.

S v Smith and Another **1969 (4) SA 175** (N) at 177, it was stated that ‘the court will always grant bail where possible, and will lean in favour of and not against

⁴ S60(11)(b) of CPA

⁵ *S v Dlamini* **[1999] ZACC 8; 1999 (2) SACR 51** (CC) **(1999 (4) SA 623**,

*the liberty of the subject provided...that it is clear that the interests of justice will not be prejudiced thereby*⁶ “*underlining for my own emphasis.*”

The factors to be considered upon weighing the interest of justice are:

Section 60(4) 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 or any particular person or will commit a schedule 1 offence; or

(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;

(e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

10. The factors considered by the *court a quo* in denying the appellant as mentioned were under the provisions of section 60(4)(a) and 60(4)(c);

⁶ *S v Smith and Another 1969 (4) SA 175 (N) at 177*

The appellant in the appeal argued that the learned Magistrate erred and misdirected herself by not taking the following factors into consideration in the bail application:

10.1 The magistrate failed to properly evaluate the testimony given by the investigating officer in court, in that he did not testify that the appellant was the one actively involved in attacking the complainant. He submitted that the appellant was a bystander;

10.2 The magistrate failed to consider that when the complainant tried to flee for safety first into a passing vehicle and then into a taxi, it was accused 4 and 5 who pulled the complainant out of the vehicle and attacked him and sprayed the passengers with pepper spray not he appellant;

10.3 The learned magistrate erred by saying the appellant and the other co-accused threatened and intimidated witnesses due to the conduct of accused 4, who posted a video on social media intimidating witnesses. The appellant is not the one who released the video on social media. It was accused 4 and the defence contended that the appellant had nothing to do with it and submitted that accused 4 released this video by own volition.

10.4 That he learned magistrate failed to take into account the circumstances of the appellant in that he is still young and in matric, has no previous convictions and that this was his first time being charged with an offence;

10.5 That the Magistrate should have considered applying stricter bail conditions rather than to deny the appellant bail due to his personal circumstances.

Analysis

11. A holistic analysis of the evidence presented must be adopted in weighing up the available evidence in a matter, those against and in favour. The learned magistrate respectfully placed a lot of reliance on the evidence presented to her by the investigating officer. There are compelling factors submitted by the appellant in his affidavit regarding his personal circumstances that seemed not to have been taken into consideration by the learned magistrate.

12. An accused should not be penalised for opting to submit evidence in bail proceedings in an affidavit. The court is not bound to make its decision purely based on what is contained in the affidavit. The court ought to be proactive and obtain clarity where necessary. The fact that standardised bail application forms were used, the court should have engaged further regarding the personal circumstances of the accused given that the accused were all so young.⁷

13. Section 60(3) of the CPA clearly states that: *If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.* “underlining for own emphasis”

Further; In terms of Section 60 (10) of the CPA “...the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice”⁸ ‘underlining for own emphasis’ The only clarification posted by the court in this instance was a confirmation of the reading of the affidavit into the record, no further questions were posted. Given the youthfulness of the accused herein the court is of the view that the court’s interaction was limited in sourcing the personal circumstances of the applicant adequately in making its decision.

⁷ Willians v S(Bail Appeal)(CA&R92/2024)[2024]ZAECHC55(12 June 2024) at 9

⁸ S60(10) of CPA

14. Further, the learned magistrate respectfully failed to individually consider the individual role that each accused person played in the attack weighing up the factors under Section 604 (a) and (c). The appellant role in the attack was different to the role of the other accused. The investigating officer specifically mentioned certain roles to certain individual accused but it appears that the factors were collectively concluded to the accused as a group.

15. In this instance, the record indicates that;

a. Prior to the attack, initially the complainant singled out the appellant at the party accusing him of theft;

b. Prior to the attack, it is the complainant that was the aggressor, he slapped the appellant;

c. On the day of the attack it is accused 3 who initiated the attack on the complainant and not the appellant;

i. On the day of the attack when the complainant tried to flee for safety into a vehicle, it is accused 4 and 5 who pulled the complainant out of the vehicle and not the appellant;

ii. Again, when the complainant tried to flee for safety into a taxi, it is accused 4 and 5 who sprayed the driver and passengers with pepper spray and pulled the complainant out of the vehicle, not the appellant.

iii. The appellant is mentioned towards the end of the attack, where he after the group left, threw a brick at the complainant;

d. Furthermore, the magistrate respectfully collectively attributed the social media video footage release to all the accused. The appellant had no

involvement in the release of the social media video footage, it is accused 4 that did this by his volition.

Findings:

16. The circumstances of each accused person must be weighed up separately on its own merits. The interest of justice permits the release of the appellant for the reasons set out hereunder:

- a) *From the record, it appears that the appellant's role in the attack was minimal;*
- b) *The appellant unlike the other accused is a first offender,*
- c) *He unlike the other accused has no previous convictions; pending matters and outstanding warrants of arrest against him;*
- d) *The appellant unlike the other accused is still a scholar, in fact he is the youngest in the group at age 18;*
- e) *The appellant is currently in matric and unlike the other accused he is still in school not at tertiary;*
- f) *The appellant is in the custody of his parents;*
- g) *The appellant was willing to move from where he lives to go and live elsewhere away from the complainant and witnesses;*
- h) *He didn't pose any threat to the state's case nor the witnesses, he is not the one who threatened and intimidated witnesses through social media.*

i) The appellant both on 09 of February 2024 and 12 of February 2022 respectively was not the initiator and/or aggressor in the attacks.

17. In weighing up the state's case, the record reflects that the state's case is still under investigation. Material evidence such as the CCTV footage of the scene and the medical records of the complainant still needs to be collected.

18. Given the above, this court finds that the interest of justice permits the appellant's release from detention. The appellant has lost six months of his schooling and this is not in the interest of justice. The appellant indicated that they are in position to post bail at an amount of R5000.00.

Order:

The Appeal is upheld.

1. The Appellant is admitted to bail at an amount of R5 000,00 (Five Thousand Rand);

2. The following bail conditions are imposed:

2.1. The Appellant may not directly or indirectly make contact with any of the state witnesses in this case.

2.3. That the Appellant must report once a week to the officer in charge at his local Police Station from time to time between 6h00am and 6h00pm.

2.4. That directly or indirectly, and on any private or public platform the Appellant may not post anything on social media that may have any bearing to any issue or persons which or who is relevant in any capacity for purposes of this case;

2.5. Without fail, the Appellant shall be in prompt attendance at any instance to which the case against him shall be postponed and the trial.

MOLEFE AJ

Acting Judge of the High Court

COUNSEL FOR THE APPELLANT: ADV CHARLES SIMON LIDDEL

COUNSEL FOR THE RESPONDENT: ADV E CECIL