IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

Not reportable

CASE NO. CA&R 211/2024

Magistrates' Court case no. A 356 / 24

In the matter between:

UYANDA MBANYE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAING J

[1] This is an appeal against the decision of the court *a quo* to refuse bail to the appellant, pending trial. The state charged the appellant with three counts: robbery with aggravating circumstances; money-laundering, as envisaged under the Prevention of Organized Crime Act 121 of 1998 ('POCA'); and forgery. It was alleged that the appellant was involved in the theft of a motor vehicle on 6 June 2024, in Cape Town, accompanied by the assault of the driver and the theft of items that he was transporting. Furthermore, it was alleged that the appellant was involved in a money-laundering operation on 25 September 2024, at Cradock, that included the disposal of the motor

vehicle in question. It was alleged, finally, that the appellant forged a driver's licence, purportedly issued in Lesotho.

[2] In her bail application, the appellant relied on a sworn statement in terms of which she set out, in some detail, her personal circumstances and addressed the factors listed in sections 60(4) to (9) of the Criminal Procedure Act 51 of 1977 ('CPA'). To that effect, she contended that there were exceptional circumstances that warranted her release. It would, she argued, be in the interests of justice for bail to be granted.

[3] The court *a quo*, in its judgment, raised concerns about the information that the appellant provided regarding her residential address in Cape Town. It seemed that a third party had been able to gain access to the address, possibly for the sake of destroying incriminating evidence. The appellant's mother, moreover, informed the police that she was unwilling to accommodate her daughter because of her alleged involvement in criminal activities. The court *a quo* also mentioned that the appellant had produced no evidence to support her allegations that she suffered from a heart condition and depression, and that she was pregnant. The police had found images on the appellant's cellphone that depicted her carrying a handgun and attempting to procure automatic rifles. After her detention at the Cradock police station, she was found, inside her cell, to have been in possession of a large amount of cash, as well as bank cards and a smart watch.

[4] There were, said the court *a quo*, no exceptional circumstances to warrant the appellant's release. Furthermore, her previous convictions and factors mentioned above indicated that there was a likelihood that she would commit a Schedule 1 offence.[1] It was not in the interests of justice for the court *a quo* to grant bail.

[5] The appellant listed several grounds of appeal. She argued that the court *a quo* had erred in allowing the matter to proceed as if the appellant had been charged with a

[1] The schedules are included in the CPA. They list offences that are arranged in degrees of increasing severity.

Schedule 6, not Schedule 5, offence. There was also no basis, she said, to the finding that there was a likelihood that she would commit a Schedule 1 offence. The court *a quo* had, moreover, failed to properly consider her personal circumstances.

[6] The main issues to be decided are conveniently set out in the appellant's appeal. The test, ultimately, is to determine whether the magistrate's decision to refuse bail was wrong. A brief overview of the relevant principles follows.

[7] As a starting point, section 65 of the CPA deals with bail appeals from a lower court. The proper approach is indicated under subsection (4), which provides that:

> '[A] 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.'

[8] Du Toit observes that the functions or powers of a court hearing an appeal in terms of section 65 are like those in an appeal against conviction and sentence.[2] In an oft-quoted passage from *S v Barber*,[3] Hefer J remarked as follows:

> '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. 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

[2] Du Toit (*et al*), *Du Toit: Commentary on the Criminal Procedure Act* (Jutastat e-publications, RS 66, 2021), ch9-p101. See, too, *S v Ho* 1979 (3) SA 734 (W), at 737H.
[3] 1979 (4) SA 218 (D).

> whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.'[4]

[9] The powers of the court were clarified, further, in *S v Porthen and Others*,[5] where Binns-Ward AJ stated that:

> '…it is…necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal Court's competence to decide that the lower court's decision to refuse bail was "wrong".'[6]

[10] The test was confirmed by the Supreme Court of Appeal in S v Sewela,[7] where Bosielo JA held:

> 'It is not as if the court of appeal has *carte blanche*. A court of appeal can only set aside such a decision if it is satisfied that it is wrong.'[8]

[11] The above principles constitute the basic framework that applies in the present matter. The provisions of section 60 are particularly relevant, too, but these will be addressed separately in the discussion that follows.

[12] Regarding the issue of whether the court ought to have permitted the matter to proceed as if the appellant had been charged with a Schedule 6, not Schedule 5, offence, the provisions of section 60(11) stipulate that:

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[4] At 220E-F.
[5] 2004 (2) SACR 242 (C).
[6] At paragraph [17].
[7] 2010 JDR 1471 (SCA).
[8] At paragraph [12].

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence–

(a) referred to 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 exceptional circumstances exist which in the interests of justice permit his or her release;

(b) 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…’

[13] Count 1 of the charges against the appellant was robbery, involving the taking of a motor vehicle.[9] The alleged offence is clearly listed in Schedule 6. From the record, it is apparent that different charges were initially prepared, but by the time that the application commenced, counsel for the appellant had been informed of the amended charge sheet and had prepared his client’s sworn statement accordingly. The parties were *ad idem* in this regard.

[14] The investigating officer, Sgt Zolandiwe Mbizweni testified that there was evidence that someone had delivered a stolen vehicle to the guesthouse at which the appellant and her co-accused, Mr Zolile Sombo, had been staying. The individual in question had enquired about the appellant and subsequently handed over the key. The appellant had left with the vehicle on the following day. Whereas it emerged during the proceedings that there was little at that stage of the police investigation to implicate the

[9] It appears that the Director of Public Prosecutions added ‘with aggravating circumstances’ to the count in question.

appellant in count 1, it cannot be said that the court *a quo* erred in allowing the matter to proceed as if she had been charged with a Schedule 6 offence. The appellant had been so charged. Whether there is sufficient evidence to sustain the charge remains to be seen, but it cannot be disputed that she bore the onus at the time to satisfy the court *a quo* that there were exceptional circumstances which, in the interests of justice, permitted her release.

[15] In *S v Petersen*,[10] Van Zyl J described the meaning of exceptional circumstances as follows:

> 'On the meaning and interpretation of "exceptional circumstances" in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.'[11]

[16] For the appellant, possibly the most obvious factors in this regard would have been the allegation that she was pregnant, as well as the allegations that she suffered from a heart condition, depression, and a broken ankle. These were, nevertheless, entirely unsupported. No medical confirmation accompanied her application, notwithstanding the relative ease with which such proof could have been obtained, with or without the assistance of the appellant's counsel. Of more serious concern, however, was Sgt Mbizweni's testimony to the effect that the appellant never mentioned these to him at the time of her arrest or at any time afterwards. Curiously, this assertion was never challenged by counsel.

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[10] 2008 (2) SACR 355 (C).
[11] At paragraph [55].

[17] Another factor that could have played a role in demonstrating the existence of exceptional circumstances was the allegation that the appellant and her co-accused, Mr Sombo, were the parents of four young children, aged 10, 13, 14, and 19 years. Sgt Mbizweni refuted this, however, saying that the appellant had subsequently admitted that they were not hers; they were Mr Sombo's children. Similarly, this was never challenged by counsel. Even if the children could be said to have fallen under the appellant's care by reason of her alleged marriage (six months) to Mr Sombo,[12] then there was still no evidence that they depended on her; she indicated in her statement that the children 'resides with friends and family'.[13]

[18] A further possible factor was the impact of the appellant's incarceration on her business, but she admitted that she had no employees. Furthermore, she provided no support for the allegation that she realised a profit of between R 20,000 and R 30,000 per month. Details of the nature and extent of her business were, overall, scant.

[19] In *S v Jonas*,[14] Horn AJ held that exceptional circumstances are established when an accused person can present acceptable evidence that the case against him or her is non-existent or subject to serious doubt.[15] The principle was reiterated by the Supreme Court of Appeal in *Woji v Minister of Police*,[16] where Swain JA held that proof by an accused person that he or she will probably be acquitted can serve as 'exceptional circumstances'.[17] No such proof can be said to exist in the present matter. It cannot be said that the available evidence pointed to the fact that the appellant was in no way involved in the robbery of the motor vehicle. If anything, then the delivery of the stolen vehicle to the appellant at her guest lodge in Komani and her possession thereof in the company of her co-accused at the time of her arrest raised more questions than answers. Quite simply, the appellant was unable to mention any factors, whether viewed individually or cumulatively, that could have given rise to exceptional circumstances.

[12] This was a point raised by the appellant's attorney on appeal. He pointed out that, in terms of the appellant's cultural practices, the children should be regarded as her own.
[13] Sic.
[14] 1998 (2) SACR 673 (SEC).
[15] At 678e-i.
[16] 2015 (1) SACR 409 (SCA).
[17] At paragraph [3].

[20] Even if it could be held that the appellant had not been charged with a Schedule 6 offence, then it was common cause that Schedule 5 would have been applicable. This means that the appellant would have been required to satisfy the court *a quo* that the interests of justice permitted her release. In this regard, the appellant faced a formidable set of hurdles.

[21] In terms of section 60(4), the interests of justice do not permit the release from detention of the accused where one or more of the grounds listed thereunder is or are established. These comprise the so-called 'likelihoods', including, under subsection (a), the likelihood that the accused would endanger the safety of the public, any person against whom the offence was allegedly committed, or any other particular person, or would commit a Schedule 1 offence.

[22] The appellant's legal representative referred, in argument, to *S v Diale and Another*,[18] where the court, per Kubushi J, dealt with the subject of the refusal of bail and held as follows:

> 'A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released.'[19]

[23] The court *a quo* in the present matter focused on the appellant's past convictions, the images found on her cellphone, and her having been found in possession of various items while incarcerated. These factors, together with the

[18] 2013 (2) SACR 85 (GNP).
[19] At paragraph [14]. The court referred to *S v Swanepoel* 1999 (1) SACR 311 (O).

information conveyed by the appellant's mother, led the court *a quo* to conclude that she would endanger the safety of others or commit a Schedule 1 offence.

[24] The reasoning cannot easily be faulted. The appellant has three previous convictions for theft, fraud, and a drug offence, covering the period of 2007 to 2019; she is no stranger to crime and past sanctions imposed on her have clearly had little or no effect. Sgt Mbizweni's testimony concerning cellphone images of the appellant carrying an unmarked handgun and attempting to procure automatic rifles suggests, worryingly, that she is an individual who is not averse to using violence or the threat thereof against others. Possibly the factor of greatest concern, however, is the information subsequently conveyed by the state that the appellant was, while detained at the Cradock police station, found in possession of R 9,700 in cash, three different bank cards, and a smartwatch capable of transmitting to and receiving communication from anyone outside. There was an affidavit to that effect from the investigating officer. Counsel for the appellant never challenged this information. The inference that the appellant was engaged in illegal conduct, despite her incarceration, is not difficult to draw.

[25] If the above factors are considered cumulatively, together with what the appellant's mother is alleged to have said to the police about her daughter's criminal activities, then a cluster of red flags was on full display in the court *a quo*. This was not a situation where the magistrate was speculating or groping in the dark. The probability existed that the appellant would, if released on bail, endanger others or commit a Schedule 1 offence.

[26] The court *a quo* went on to mention the appellant's lack of emotional, family, community or occupational ties with the Eastern Cape, as well as the ease with which a third party had gained access to her Cape Town address, possibly concealing or destroying evidence. These were factors that clearly persuaded the magistrate that the grounds stipulated under sections 60(4)(b) and (c) had also been established. Any finding in that regard was, however, superfluous considering the evidence presented in relation to section 60(4)(a).

[27] When considering the section 60(4) likelihoods, a court is also required, under subsection (9), to weigh the interests of justice against the right of the accused to his or her personal freedom. The court must consider the prejudice that the accused will suffer, including possible financial loss and his or her state of health. The negative impact that the appellant's continued detention would have on her business cannot be denied. So, too, is the effect that her custody would have on her health if she indeed suffered from the conditions that she mentioned. Nevertheless, the lack of supporting evidence where the appellant bore the onus envisaged under section 60(11) poses a serious impediment. When measured against the appellant's numerous previous convictions, her possession of dangerous weapons, and the probable commission of a further offence while incarcerated, factors such as potential financial loss and health risks fail to tip the scales in her favour, especially when entirely unsubstantiated. The appellant's personal freedom, in the circumstances of the present matter, does not outweigh the interests of justice.

[28] Consequently, the court is not persuaded that the magistrate ought to have found that the appellant had met the requirements of section 60(11). There is no basis upon which to find that the decision of the court *a quo* was wrong.

[29] In the circumstances, the appeal is dismissed.

JGA LAING

JUDGE OF THE HIGH COURT

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Date of hearing:	17 January 2025.
Date of delivery:	28 January 2025.