



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. CA & R 61/2024

In the matter between:

SIYABONGA ZWELIBANZI

First Appellant

XOLELA NTAKA

Second Appellant

SANELE NGASO

Third Appellant

AYANDA FANI

Fourth Appellant

and

THE STATE

Respondent

JUDGMENT

COLLETT AJ:

Introduction

- [1] This appeal is brought pursuant to the Magistrate at Dimbaza Magistrate's Court refusing the appellants to be admitted to bail on 18 November 2024.
- [2] The appellants are charged with robbery with aggravating circumstances as enunciated in *section 1* of the *Criminal Procedure Act 51 of 1977* (hereinafter referred to as the 'CPA'), and unlawful possession of a firearm.
- [3] The appellant brought a formal bail application, and the proceedings were adjudicated on the strength of an affidavits filed by the appellants and the *viva voce* evidence of the investigating officer, Sergeant Nkangeni on behalf of the state.
- [4] Both the legal representatives for the appellants and the state confirmed that the appellants were charged with offences listed in *Schedule 6* of the CPA. Accordingly, the onus rested upon the appellants at the bail hearing to establish *exceptional circumstances* which would render it in the *interests of justice* for him to be released on bail.
- [5] *Section 65 (4)* of the CPA provides that:
- 'The court or judge hearing an 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.'*
- [6] The powers of the appeal court are limited, and the court must be persuaded that the magistrate wrongly exercised his discretion. Even if the appeal court shares a different view, it cannot substitute its own view for that of the Magistrate as that would be tantamount to an unfair interference with the Magistrate's discretion. The overriding consideration is whether the Magistrate exercised his discretion wrongly.¹

¹ *S v Barber 1979 (4) SA 218 at 220 E–H.*

[7] The Magistrate must have misdirected himself in some material manner in relation to either fact or law and, in event of this being established, the appeal court can consider whether bail ought to have been refused or granted. In the absence hereof, the appeal must fail.²

Appellant's grounds of appeal

[8] The appellant's grounds for appeal can be summarized as follows:

- (i) The Magistrate erred and failed to decide of the respective schedule at the commencement of the proceedings.
- (ii) The Magistrate erred in failing to attach due weight to the personal circumstances of the appellants.
- (iii) The Magistrate misdirected himself in not making findings pertaining to the *likelihoods* set out in *section 60(4)(a) to (e)* of the CPA.
- (iv) The Magistrate failed to make a finding on the strength of the state's case and that it would not be in the interests of justice to refuse bail.
- (v) The Magistrate failed and erred to consider that the evidence of the appellants was undisputed.
- (vi) The Magistrate erred and misdirected himself in refusing a request to lead evidence in rebuttal of the investigating officer when it was in the interests of justice to do so.

[9] In response, the respondent's legal representative submitted that there was no merit in the grounds of appeal and that the Magistrate did not misdirect himself in refusing bail. He submitted that:

² *S v Ali 2011 (1) SACR 34 (E); S v M 2007 (2) SACR 133 (E); S v Porthen and Others 2004 (2) SACR 242 (C).*

- (i) The appellants are charged with *Schedule 6* offences.
- (ii) The onus is upon the appellants to adduce evidence which satisfies the court that there are *exceptional circumstances* in the *interests of justice* that permit their release from custody which they failed to do.

Evidence before the court a quo

- [10] At this juncture, it is necessary to summarize the evidence placed before the court *a quo* in a bid to satisfy the requirement of *exceptional circumstances* by the appellants.
- [11] All the appellants deposed to affidavits in support of their bail applications detailing their places of residence, occupation and other personal circumstances.
- [12] Commonly, they all outlined the circumstances of their arrest confirming that they were in a motor vehicle in each other's company at the time. They were informed by the police that they wanted to search their vehicle and were instructed to lie on their stomach on the ground with their hands behind their heads. The search took place in their absence and without a warrant. They were placed under arrest because of illegal firearms in their possession and as suspects in a business robbery.
- [13] They all denied knowledge or involvement in the offences and indicated that at the time of their arrest, a police officer (who remained unidentified) said that there was no direct evidence implicating them and that the complainant could not identify the perpetrators as they were wearing balaclavas. They all denied that they would act contrary to *section 60(4) (a) – (e)* of the CPA.
- [14] Sergeant Nkangeni gave *viva voce* evidence on behalf of the state. He testified that he was tasked with verifying the addresses of the appellants. During his evidence, the appellants' attorney sought to amend certain of the address details of some of the appellants citing that it was the legal

representative's error and not that of the appellants concerned. Curiously, this was despite the appellants having submitted the information under oath in their respective affidavits.

- [15] The complainant was hit on the head during the commission of the robbery. Nkangeni testified that whilst the complainant could not identify the assailants, a further state witness saw four persons exit the shop, enter a car of which he noted the registration number, colour and description. He provided this information to the police which led to the arrest of the four appellants in the described vehicle some twenty to thirty minutes after the robbery.
- [16] Nkangeni said two firearms were recovered in the vehicle in which the accused were travelling before their arrest and one firearm was found on the person of second appellant which had been reported as a stolen firearm. All the firearms recovered had been sent for fingerprints tests.
- [17] An affidavit from second appellant's mother was presented by the state contradicting his affidavit and the second appellant was permitted to re-open his case with regards hereto. A further affidavit of the mother was presented by the second appellant essentially gainsaying her previous affidavit. Nkangeni also denied that second appellant co-operated with the police stating that he ran away when the police arrived at the car and was chased and apprehended. It was suggested to Nkangeni that as the police were wearing civilian clothes, second appellant thought that he was being robbed.
- [18] Nkangeni testified that there was a prevalence of business robberies in the area which seemed to have quietened since the appellants were in custody. First appellant claimed that the vehicle in which they were driving belonged to him and he was in the process of selling it to fourth appellant. There was no evidence to support this contention and seemingly the vehicle belonged to a third party. Money and airtime vouchers were recovered next to where third appellant had been seated in the car.

Analysis of the refusal of bail by the magistrate

- [19] As the Magistrate's reasoning is pivotal to the determination whether this court should set aside the decision, it is necessary to analyse same, mindful of the alleged misdirections advanced on behalf of the appellants.
- [20] The Magistrate considered the evidence tendered by affidavit, which in some instances was corrected from the bar. He considered the contradictions of the appellants' evidence raised in the testimony of Sergeant Nkangeni. Ultimately, he concluded that there was nothing *exceptional* in the appellants' personal circumstances even though seemingly their bail application was not premised thereon.
- [21] Regarding the state's case, the magistrate, based on the submissions of the appellants' legal representative, stated that '*if it is established that the case against you is not existent or subject to doubt, that is an exceptional factor which can lead to your release*'.
- [22] The Magistrate analysed the evidence of Sergeant Nkangeni and arrived at a conclusion that with the available evidence, the trial court may well find in favour of the state at trial. The Magistrate thus concluded that the case against the appellants is '*not non-existent and even though there is some doubt I do not think it is subject to serious doubt*'.
- [23] The Magistrate concluded that the appellants had not discharged the onus placed upon them in terms of *section 60(11)(a)* of the CPA. He went further to conclude that in the absence of the appellants demonstrating *exceptional circumstances*, there was no need for him to consider the interests of justice.
- [24] Accordingly the Magistrate concluded that the appellants had failed to prove the existence of *exceptional circumstances* or to show that their release on bail would be in the *interests of justice*.

Evaluation of the Appeal

- [25] I do not propose to embark on a re-evaluation of the evidence, submissions and reasoning of the Magistrate except insofar as the issues may impact or be of relevance in considering whether this appeal should succeed.
- [26] Both legal representatives accepted that in the absence of a material misdirection or error on the part of the magistrate, having the effect that the decision to refuse bail was incorrectly taken, this appeal cannot succeed.³
- [27] The purpose of a bail application is to decide whether the interests of justice permit the release of an accused on bail pending the trial. Whilst the possible guilt of an accused may inform the *interests of justice* to a certain extent, the bail enquiry is not a pre-hearing of the trial to follow.⁴
- [28] A formal onus rested on the appellants to satisfy the court and adduce evidence in terms of *section 60(11)(a)* as the evidential burden was upon the appellants.⁵ In assessing *section 60(11)(a)*, the Magistrate was alive to the fact that it was double pronged encompassing the *exceptional circumstances* and the *interests of justice*.
- [29] The Magistrate, in considering whether *exceptional circumstances* existed in accordance with *section 60(11)(a)*, considered the personal circumstances of the appellants and the strength of the state's case as these were the issues presented for consideration.
- [30] It is trite that *exceptional circumstances* found to exist must be balanced with the *interests of justice*. The evidence presented at the bail hearing clearly demonstrates a *prima facie* case against the appellants and the Magistrate was correctly mindful of the nature of the evidence that would be presented at trial.

³ *S v Barber supra, S v Porthen and Others supra*

⁴ *S v M* (CCT 53/06) [2007] ZACC 18

⁵ *Skietekat v S* 1999 (2) SACR 51 (CC) at p 84

[31] The submission made by appellants' legal representative regarding the Magistrate's failure to determine the schedule of the offence and make a ruling thereon was raised for the first time during the bail appeal despite the appellants being represented by the same legal representative in the court *a quo*. The present matter is distinguishable from *Modise v S*.⁶ A perusal of the record reveals that the charge sheet refers specifically to the crime of robbery with aggravating circumstances and that the aggravating circumstances involved the use of a firearm. This offence falls unequivocally within *schedule 6*. The prosecutor in addressing the court, referred to the offence as being a *schedule 6* offence in his description thereof and that the bail application fell within the ambit of *section 60(11)(a)* of the CPA, whereafter, the Magistrate asked the legal representative of the appellants whether he confirmed the *schedule*, and the latter responded in the affirmative.

[32] Moreover, a perusal of the sworn affidavits submitted on behalf of the appellants all record the following statements:

'I have been advised and I understand that I bear the burden to show that it is in the interests of justice to permit my release and that I am obliged to initiate this application.'

and further thereto:

'My legal representatives have explained the provisions of Section 60(11) of the Act to me. I respectfully make the following submission in this regard,

[33] Respectfully, to suggest that any further determination or ruling was required relating to the *schedule* of the offence or that the appellants were unaware that they had an onus to discharge relating to their bail application, is disingenuous. Whilst such a determination and ruling may be applicable in certain circumstances, this does not find application in the present matter. At best for the appellants, even if this is to be regarded as a procedural error, it

⁶ 2021(2) SACR 218 (FB)

did not materially affect the position of the appellants in as far as the question whether or not bail should be granted. Furthermore, there is no indication of any prejudice to the appellants in this regard.

[34] The provisions of *Section 60(11)(a)* of the CPA and specifically the question as to what would constitute *exceptional circumstances* as required in terms of this statutory provision, has been extensively debated and scrutinized by our courts. The fact that the appellants have been charged with a *Schedule 6* offence, evinces that their continued detention is the norm.⁷ The *onus* is upon the appellants to show, on a balance of probabilities that *exceptional circumstances* exist that would, in the *interests of justice*, permit their release on bail.⁸

[35] Nugent JA in *Mabena v S*⁹ stated the following regarding the import of *exceptional circumstances* relating to the continued incarceration of an accused:

‘... that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody...’

[36] It was held in the matter of *Schietekat*¹⁰ that:

‘... that where an accused is charged with a Sch 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by ss 60(4)-(9) ... in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interest of society in denying the accused bail, will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are

⁷ *Schietekat supra* page 84

⁸ *Diseko & Others vs [2016] ZANHC 66* at paragraph (14) ; *Schietekat supra*

⁹ 2007 (1) SACR 482 (SCA) para [6]

¹⁰ *Schietekat supra* page 85; see also *Rudolph v S (484/09) [2009] ZASCA 133* (30 September 2009) at para [9]

shown by the accused to exist ... Its effect is to add weight to the scales against the liberty interests of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interest of justice' were to be applied.'

[37] It is incumbent on the appellants in terms of *section 60(11)(a)* to first discharge the *onus* and convince the court that the required *exceptional circumstances* exist warranting their release on bail, prior to the state attracting any form of *onus* to demonstrate why bail should not be granted. The overriding question remains whether the appellants did in fact discharge the *onus* in showing that *exceptional circumstances* do exist that would warrant their release on bail.

[38] In discharging that *onus*, the appellants elected to submit affidavits, which whilst permissible, are not subject to cross-examination or further clarification. The appellants' criticism of the Magistrate's failure to allow them to re-open their cases to rebut evidence that arose during the state's case is unfounded. The suggestion of '*answering affidavits*' pursuant to the evidence of Nkangeni was correctly rejected by the Magistrate as follows and in accordance with the *onus* upon the appellants:

'There's no space for answering affidavits in a bail application, you bear an onus, it should be contained in the initial affidavit.'

[39] The submission that the appellants' evidence was undisputed and that the magistrate failed to make a finding in this regard is contradicted by the request made to present '*answering affidavits*' to rebut the state's evidence. Effectively, the evidence presented by the state demonstrated various inconsistencies in the evidence submitted on affidavit by the appellants in support of their applications in terms of *section 60(11)(a)*.

[40] The Magistrate made a finding relating to the strength of the state's case referring to the witnesses that had been testified to by Nkangeni. He found that there was a *prima facie* case for the appellants to answer at trial. As held

in *S v Branco*,¹¹ the state does not have to close all loopholes in its case at the bail proceedings which are not a trial.

[41] The Magistrate gave due regard to the personal circumstances of the appellants but at the end of the day there was nothing found to render them as *exceptional circumstances*, warranting consideration in terms of *section 60(11)(a)* of the CPA. The appellants are required not merely to regurgitate their personal circumstances in a hope that these will morph into *exceptional circumstances* and further to deny that they will act as described in *section 60(4) (a) to (d)* of the CPA.¹² Undoubtedly, the provisions of *section 60(11)(a)*, make the release on bail more difficult than in bail applications in the ordinary course for the clear reason that it relates to the more serious offences which ravage our country.

Conclusion

[42] Considering the totality of the evidence that was presented, the Magistrate concluded that the appellants had not discharged the onus to establish, on a balance of probabilities, that *exceptional circumstances* existed which, in the *interest of justice* permitted them to be released on bail.

[43] Moreover, there is nothing to suggest that there was any misdirection or error at instance of the Magistrate in refusing to release the appellants on bail. Accordingly, there are no grounds upon which this court can interfere with the decision of the Magistrate in the court *a quo*.

[44] I therefore make the following order:

1. The appeal is dismissed.

¹¹ 2002(1) SACR 531 (W) at 535 D-E

¹² *Mthombeni v S* (CA&R 55/23) [2023] ZANHC 96 (8 December 2023)

S A COLLETT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellants	:	<i>Mr Lesele</i>
Instructed by	:	<i>Ronny Lesele Attorneys</i> <i>46 leopold Street</i> <i>King William's Town</i>
For the Respondent	:	<i>Mr Soga</i>
Instructed by	:	<i>Director of Public Prosecutions</i> <i>Phalo Avenue</i> <i>Bhisho</i>
Date heard	:	<i>13 December 2024</i>
Date judgment delivered	:	<i>18 December 2024</i>