



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

Case No. A230/2024

In the matter between:

ANELE GWELE

Appellant

and

THE STATE

Respondent

Coram: NUKU J
Heard on : 13 February 2024
Delivered on: 19 February 2024

JUDGMENT

NUKU, J

[1] The appellant appeals to this court, in terms of section 65 of the Criminal Procedure Act, 51 of 1977 (**the Act**) against the decision of the Cape Town Magistrates' Court (**the Magistrates' Court**) to refuse to grant him bail.

[2] The appellant was arrested on 26 March 2024 on a charge of robbery with aggravating circumstances, an offence listed in Schedule 6 of the Act. He appeared at the Magistrates' Court for the first time on 28 March 2024 when the matter was postponed to 8 April 2024 to enable his legal representative to make arrangements for a formal bail application. On 8 April 2024, the matter was postponed to 7 May 2024 for a formal bail application.

[3] The appellant's formal bail application proceeded on 7 May 2024 when he tendered his evidence by way of an affidavit which was read into the record. The appellant's affidavit dealt with, amongst other things, his personal circumstances (residence, dependants, state of health, employment and income), criminal profile, the merits of the state's case against him, the absence of the grounds referred to in section 60 (4) (a) to (e) of the Act, the factors listed in section 60 (9) of the Act, the right to bail, exceptional circumstances as well as bail conditions.

[4] The appellant's stated personal circumstances were that he: (a) is single and resides with his mother in a family home in Khayelitsha where he grew up and where most of his extended family stays, (b) is in a stable relationship with a girlfriend that he supports emotionally and who resides in Claremont, (c) has a one year old child who resides with his mother in Khayelitsha who he sees weekly and provides for him financially whenever he is able to do so, (d) provides both emotional and financial support to her elderly mother, (e) is not formally employed but assists his girlfriend in running her events company where he earns approximately R4 500 per month and is in a good state of health.

[5] Regarding his criminal profile, the appellant disclosed that he has no previous convictions, no pending criminal cases and was not aware of any outstanding warrants for his arrest. Regarding the merits of the state's case against him, he stated that he intended to plead not guilty although he had not had sight of the contents of the docket. He further pointed out that no formal identity parade had been held to link him to the

offences and he reserved the right to supplement his evidence upon getting insight into the merits of the case against him.

[6] The heads of argument filed on behalf of the appellant indicate that the appellant's strategy when applying for bail in the Magistrates' Court was to establish the exceptional circumstances with reference to his personal circumstances as well as the strength of the state's case against him. For this reason, I deem it unnecessary to set out the appellant's evidence regarding the absence of the grounds referred to in section 60 (4) (a) to (e) of the Act, the factors listed in section 60 (9) of the Act, the right to bail, exceptional circumstances as well as bail conditions.

[7] The respondent, in opposing the appellant's bail application, filed an affidavit deposed to by the investigating officer. The affidavit by the investigating officer dealt with, among other, the merits linking the appellant to the offences, the appellant's personal details, the appellant's criminal profile, the presence of the grounds listed in section 60 (4) (a) and (d) of the Act.

[8] On the merits linking the appellant to the offences the investigating officer stated that the allegations against the appellant are that on 13 March 2024, the appellant together with his co-accused were at Top Watch luxury jewellery store (**Top Watch**) in Sea Point, Cape Town where they initially pretended to be potential customers viewing the jewellery that is sold at Top Watch. After a while one of them took out a firearm and threatened the complainant into submission after which they made away with about 30 (thirty) high end luxury watches to the value of approximately R8,5 million. Unbeknown to the appellant, Top Watch has a Closed-Circuit Television Camera (**CCTV**) that captured the events of the day. Video footage was downloaded and circulated to other luxury jewellery stores. On 26 March 2024 an owner of a luxury jewellery store in Paarl recognised the appellant and his accomplice as the persons whose images had been circulated by Top Watch. Police were alerted, responded, followed the appellant and his company and arrested them.

[9] The investigating officer confirmed that the appellant does not have previous convictions, no pending cases and no outstanding warrants. Dealing with the presence of grounds listed in section 60 (4) (a) of the Act, the investigating officer stated that (a) the appellant has disposition to commit schedule 1 offences, (b) the offence that the appellant is charged with is prevalent, and (c) the appellant has been profiled and identified as among the high flyers that go about committing Trio Crimes within the Western Cape and whose cases are investigated by SVC Provincial Detectives.

[10] Regarding the presence of grounds listed in section 60 (4) (d) of the Act, the investigating officer stated, among other things, that (a) the appellant is unemployed and does not have fixed assets, and (b) there is strong evidence against the appellant, and he might evade the trial given the evidence that the State has against him.

[11] The Magistrates' Court, after having had regard to the strength of the state's case against the appellant as well as the appellant's personal circumstances, came to the conclusion that the appellant failed to establish exceptional circumstances which in the interest of justice permit his release.

[11] The Magistrates' Court's comment on the appellant's challenge to the state's case against him was that it was a bare denial, which is not a defence in law in circumstances where a bail applicant who wishes to rely on the weakness of the state's case against him or her is required to present some evidence to challenge the state's case. The Magistrates' Court also went through the evidence that the appellant had presented regarding his personal circumstances and concluded that they are not such as to establish exceptional circumstances warranting the release of the appellant on bail.

[12] The appellant appeals the Magistrates' Court's decision on the grounds that:

1. It erred or misdirected itself, to his material prejudice, in one or more of the following respects:

- (a) In finding that the appellant has the propensity to commit Schedule 1 offences despite not having a criminal record and drawing a negative inference from matters that the appellant had previously been found not guilty, or charges having been withdrawn;
 - (b) In failing to take into account that the appellant has the right to be presumed innocent as guaranteed by the Constitution of the Republic of South Africa, 1996;
 - (c) In failing to take into account that the State had previously placed on record that the residential address of the appellant was confirmed by the investigating officer and accepting that the address of the appellant is unknown;
 - (d) In finding that the appellant has an incentive to evade his trial despite the nature of his evidence not being placed before the court by the State;
 - (e) In finding that a bare denial does not constitute a defence, despite the onus being on the state to prove the charges alleged in the chargesheet beyond reasonable doubt.
 - (f) In placing reliance in *Mathebula v S* 2010 (1) SACR 55 (SCA) read with *Killian v S* [2021] ZAWCHC 100 to the exclusion of *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT499) [1999] ZACC8; in failing to find exceptional circumstances which in the interest of justice permit the release of the appellant on bail, and
2. It failed to take cognizance of the appellant's personal particulars as adduced in evidence, as follows:

- (a) The appellant has been in custody since December 2023;
- (b) The appellant has a fixed address;
- (c) The appellant has two minor children, whom he supported financially; and
- (d) The appellant is in a stable relationship.

[13] An appeal to this court with regards to bail is regulated by section 65 of the Act and subsection (4) thereof 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 sense the court or judge shall give the decision which in its or his opinion the lower court should have given.’

[14] As a statement of general proposition, the provisions of subsection (4) have been interpreted to mean that the functions and powers of the court or judge hearing the appeal under section 65 are like those in an appeal against conviction and sentence (see: **S v Ho**¹). These functions and powers were aptly described by Hefer J in **S v Barber**² as follows:

‘It is well known that the powers of this Court are largely limited to 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.’

¹ S v Ho 1979 (3) SA 734 (W) at 737 H)

² S v Barber 1979 (4) SA 218 (D) at 220E-H

[15] It is also necessary to remind oneself of the burden that sub-section 60 (11) (a) saddles an applicant for bail who is charged with an offence referred to in Schedule 6 of the Act. This sub-section provides:

‘Notwithstanding provision of this Act, where an accused is charged with an offence 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 interest of justice permit his or her release.’

[16] As previously stated, the appellant sought to rely on the combination of the weakness of the state’s case against him, as well as his personal circumstances in order to establish the existence of exceptional circumstances which, in the interest of justice, permits his release on bail, a fact which appears to have been appreciated by the Magistrates’ Court judging from the statement that *“Now case law makes it clear that exceptional circumstances from the applicant’s side can be found mostly by two ways. Either to attack the state’s case, saying it is weak, it is non-existing, it is poor or via your personal circumstances.”* With that appreciation the Magistrates’ Court went to state that *“Now it is incumbent either of the applicant to present exceptional circumstances by way of showing the state’s case is weak or subject to serious doubt or the personal circumstances which is exceptional to be of such a nature that the court can find exceptional circumstances exist therein.”*

[17] The Magistrates’ Court then weighed the evidence presented by the respondent linking the appellant to the offence against the appellant’s lack of knowledge as to how he is linked to the offence and his say so that he will plead not guilty to the charges preferred against him. Having done that it concluded that the appellant had not presented any evidence that casts doubt on the merits of the state’s case.

[18] The attack now on the Magistrates' Court's decision seems to suggest that it misdirected itself in approaching the issue of merits as if the appellant had to prove his innocence when it is the state that has to prove the appellant's guilt. This argument seems to conflate two issues, namely the onus on an applicant for bail charged with a Schedule 6 to establish existence of exceptional circumstances when applying for bail and the overall onus on the state to prove the guilt of an accused person.

[19] It was incumbent on the appellant, who sought to rely on the weakness of the state's case against him in order to establish the existence of exceptional circumstances, to present some evidence that would cast doubt on the merits of the state's case against him. This is so because a court may very well consider it extraordinary to keep a person, who is unlikely to be convicted, in detention pending his acquittal.

[20] The Magistrates' Court, in my view, gave due consideration to this relevant fact and I can find no fault with its reasoning. To add to that, and as was pointed out by respondent's counsel, the appellant's co-accused made some attempt at challenging the state's case by alleging that he had viewed the footage, and he is not the person depicted therein. A further argument that was made by respondent's counsel was that it is peculiar for the appellant to suggest that he and his legal representative had not viewed the video footage when the appellant's co-accused, who is represented by the same legal representative states that he had had an opportunity to view the footage that resulted in their arrest.

[21] Having found that the appellant had failed to challenge the state's case against him, the Magistrates' Court turned its attention to the appellant's personal circumstances. In considering the appellant's personal circumstances, the Magistrates' Court was guided by the decision of the Constitutional Court in *S v Dlamini, S v Dladla and Others; S v Joubert; S Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT499) [1999] ZACC8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999) that it was not

required to look for *'something that was totally out of the ordinary'* ... but *'something different'* which the Magistrates' Court referred to as a watered down criteria.

[22] Having had regard to the watered-down criteria in evaluating the appellant's personal circumstances, it asked itself the question *'where is the difference in your circumstances to the guy that is on the street, that comes and stands next to you.'* It then answered the question in the negative holding that there was nothing different and hence no exceptional circumstances, a conclusion that I cannot fault. Except for the bald submission that the Magistrates' Court erred in this regard, counsel for the appellant could not elaborate on respects that the Magistrates' Court erred in not finding the existence of exceptional circumstances and this should be the end of the matter.

[23] The remainder of the attacks on the decision of the Magistrates' Court cannot take the appeal any further because they are not based on the findings made by the Magistrates' Court and in some instances are based on a misreading of the Magistrates' Court judgment. By way of an example, the Magistrates' Court is said to have erred in finding that the appellant has the propensity to commit schedule 1 offences when the Magistrates' Court made no such finding. What the record shows is that the Magistrates' Court considered this issue which was raised in the affidavit by the investigating officer. It discussed the issues raised by the investigating officer but in the end, it pointed out that the appellant has a *'clear record, no pending cases and no previous convictions.'*

[24] The Magistrates' Court's reasoning for refusing bail does not even refer to the issue of the investigating officer having stated that the appellant's address is unknown. To the contrary, the Magistrates' Court accepted that the appellant has a fixed address, a factor which was taken into consideration when assessing the presence of exceptional circumstances. In the result, I am not satisfied that the decision of the Magistrates' Court was wrong. The result is that this court is not at liberty to interfere and therefore the appeal cannot succeed.

[25] In the result I make the following order:

The appeal is dismissed.

L.G. NUKU
JUDGE OF THE HIGH COURT

APPEARANCES

For Appellant:

Mr. C Levendal

For Respondent:

Adv. J Seethal (State Advocate)