



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A129/2025

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


SIGNATURE

15 AUGUST 2025
DATE

In the matter between

DUMISANI JOHANNES SHONGWE

APPELLANT

v

THE STATE

RESPONDENT

JUDGMENT ON BAIL APPEAL

THOBANE AJ,

Introduction

[1] The appellant, appeals against the refusal of his formal application to be admitted to bail by the magistrate Mr. Wessels at the Regional Court, Pretoria North on 03 December 2024.

[2] He is standing trial which at the hearing of this bail appeal is partly-heard, on two counts. In count 1 the state alleges that on 27 February 2020 the appellant committed a crime of robbery with aggravating circumstances read with the provisions of section 51(1) of the Criminal Law Amendment Act¹. I must hasten to add that I do not believe it is accurate to read robbery with aggravating circumstances with section 51(1). The correct section should be section 51(2)². The state further alleges that aggravating circumstances are that a firearm/s was/were used by those accused of the crimes. In Count 2 it is alleged that the appellant together with two others including those that are unknown to the state, unlawfully and intentionally contravened the provisions of section 18(2)(a) of the Riotous Assemblies Act³ by conspiring to commit robbery with aggravating circumstances.

[3] The appellant did not give oral evidence during his application to be admitted to bail. His counsel read into the record his affidavit after confirming that the appellant was facing a schedule 6 charge and that he accepts that the appellant must show

¹ Criminal Law Amendment Act 105 of 1997.

² (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

³ Riotous Assemblies Act 17 of 1956.

18. (1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who-

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates; commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

that there are exceptional circumstances and that it is in the interest of justice that he be released on bail.

Applicant's case

[4] The appellant placed the following facts before court;

- a. He was arrested 29 April 2020 at his place of residence in Wadeville where he resides with his wife and two kids;
- b. He has been in custody since the day of arrest, which at the time the bail application was heard added up to four years and five months. This he identified as his first ground of an exceptional circumstance;
- c. On his arrest he had been out on parole which parole was thereafter revoked, because of the arrest. As a result, he had to serve the remaining part of his sentence which he did until 10 July 2024;
- d. He was tortured on his arrest, which is against the law;
- e. Part of the reasons for the delay in the case was because his legal representative took ill. In addition, the appellant had no funds to immediately appoint a new legal representative after the then legal representative withdrew;
- f. The case was beset by delays and long postponements due to among others the unavailability of the prosecutor and at times the unavailability of legal representatives of his co-accused and at times the co-accused themselves;
- g. The appellant's torture is identified as the second ground of exceptional circumstance;
- h. He wants to sue the Minister of Police and believes he cannot do so while he is incarcerated,
- i. The third ground is that the state has a weak case against him. He was however told by his co-accused that the state has a strong case and if convicted the sentence will be severe thus making the risk of absconding high;
- j. The appellant refers to the facts of the case and asserts that to the allegation that a cellphone of the complainant was found at his place, his defence is that 12 policemen searched his place without a warrant therefore such evidence is not admissible;

- k. He referred to the confession he is alleged to have made and argued that it was obtained after he was assaulted;
- l. The fourth ground of exceptional circumstance is that it is difficult for him to consult with his witnesses while in custody. He needs to be let out so that he can, in addition, take them to his legal representative's offices for consultation. The consultation room in the awaiting trial section of the prison, where he is kept, is not well lit,
- m. The fifth ground of exceptional circumstance is the constant intimidation by the investigating team and those that escort him to court and stand in court with rifles. He is tortured by their presence in court. During his torture, he wet his pants and soiled himself. Their presence in court is traumatic;
- n. He does not have a passport and has no relatives outside South Africa;
- o. He has no outstanding cases;
- p. He has previous convictions but has served out the sentence. The previous convictions are three counts of robbery with aggravating circumstances and possession of ammunition;
- q. He did not enjoy the benefits of parole;
- r. He is not a danger to the public;
- s. He will not evade his parole;
- t. If released he will not commit a schedule 1 offence;
- u. He cannot influence or intimidate witnesses;
- v. He will not disturb or undermine the proper functioning of the criminal justice system;
- w. He is not enjoying good health. He did not disclose in what sense.

[5] Attached to the appellant's affidavit was the affidavit by his wife who related in detail events of the day of his arrest and how the appellant was treated by the police. She also gave an account of how they did not have an idea of where the appellant was taken after the arrest. She indicated that the appellant was a businessman who earned R6 000-00 per month.

[6] Jabu Masibuko also deposed to an affidavit in which he stated that he was arrested after being pointed out by the appellant. The appellant informed him, among others, that he was severely assaulted. He also mentioned in his affidavit that he also was tortured to a point where he “messed his pants”. He did not institute a civil claim because he fears for his life. He together with the appellant were at the same section in prison.

Respondent's case

[7] The respondent opposed the application and tendered into evidence the affidavit of the erstwhile investigating officer David Mashaba. He confirmed the appellant's physical address. He also confirmed the appellant's previous convictions and indicated that the appellant received 15 years imprisonment for each of the three counts of aggravated robbery he was convicted of. On the facts of the case, he indicated in his statement that the complainant was accosted when he arrived at his residence from work and robbed at gunpoint, of his belongings. His watches, television set, cellphones and a laptop were taken during the robbery. The assailants then tied him with some wire and fled the scene. Subsequently, the complainant positively identified the appellant at a formal identification parade and was able to detail roles played by all the co-perpetrators. A cellphone belonging to the complainant, which was robbed during the robbery was allegedly found in the appellant's possession and the state alleges the appellant failed to give a satisfactory explanation of the possession. In addition, it is alleged that he made a confession which is being considered at a trial within a trial, where after the admissibility of evidence of the identification parade will also come up for consideration later.

[8] The parties then made submissions, with counsel for the appellant relying on numerous cases in support of his argument. He also attacked admissibility of the confession among others on the basis that the appellant was tortured. State counsel submitted that although the appellant says he has been in custody for over four years, sight must not be lost of the fact that there was the COVID-19 pandemic lockdown and that after parole was revoked, the appellant had to serve out his sentence. That

period is to be considered but should not be accounted for as contributing the long period of incarceration for the appellant.

Submissions

[9] Before me counsel for the appellant raised a few other points;

- a) That the magistrate did not take all the evidence into account;
- b) That the statements of the appellant's wife and that of his co-accused Jabu Mazibuko were ignored by the magistrate;
- c) That the state does not allege that the appellant was a flight risk;
- d) That the state did not allege that he will intimidate witnesses;
- e) That the only witness who has testified so far at the trial was a civilian and only police witnesses remained to give evidence;
- f) That there is no evidence that the appellant will abscond;
- g) That there is no allegation about the appellant interfering with investigations primarily because investigations are complete.

[10] In the end however counsel summarized three grounds as being pivotal, namely the long delays, that the accused has a fixed address and was not a flight risk as a result, that his address was confirmed by the police and lastly, that the magistrate simply looked at his previous convictions and was "blind-sided".

[11] State counsel submitted that the appellant;

- a) Has not pointed to any misdirection;
- b) That the three previous convictions of robbery show that the appellant has a propensity to commit crimes;
- c) Was a flight risk because in light of the previous convictions of aggravated robbery (three counts), if convicted he stands to receive a severe sentence;
- d) That he might be inclined to evade his trial as a result.

The judgment and analysis

[12] The magistrate delivered a judgment in which he dealt with the issues raised by both counsel. He in fact dealt with the submissions made by counsel for the appellant

among others to the effect that there are exceptional circumstances present. I shall return to the magistrate's judgment in due course.

[13] The offence of which the appellant is charged is an offence listed in Schedule 6 to the Criminal Procedure Act, 51 of 1977. The appellant therefore had to persuade the Court *a quo* on a balance of probabilities that exceptional circumstances exist which are permissive of his release on bail. Among other tools at the court's disposal is an assessment of the strength of the state's case, which I believe is germane to an enquiry as to the existence of exceptional circumstances. (See *S v Kock*⁴).

[14] In his judgment the magistrate mentions that the incident took place in 2020 and that the appellant was arrested the same year. He also mentions that because of the arrest, parole was revoked and he had to serve out his sentence until mid-2024⁵. When dealing with the delays, he mentioned also the following; for some time investigations took place when the matter was in the District Court before it was eventually transferred to the Regional Court; at some stage the trial was supposed to proceed in the High Court but that never materialized, so it was transferred to the Regional Court instead; the trial started on 19 May 2022 when the accused pleaded, that for more than a year and under COVID-19 protocols, at times the accused were not brought to court due to COVID-19 restrictions; that legal representatives did not at times turn up in court including the appellant's own legal representatives who was for some time indisposed; the prosecutor took up employment at the DPP's office and as a result was and remains not readily available to attend the matter. All the above reasons and/or factors were mentioned by the magistrate in his judgment to show that the delay in the matter was the fault of no one particular person and that many factors contributed to the delay. At some point the appellant did not have funds to engage a legal practitioner and that accounted for further delays. Lastly, that the issue of the delayed trial, as an exceptional circumstance as alleged by the appellant, carried minimal weight and was in actual fact not minimal.

⁴ See in this regard: *S v Kock* [2003] 1 ALL SA 551 (SCA) at par 15 (11 i – 12 b) and cases cited there.

⁵ Page 73 of the appeal record line 7 to line 25.

[15] The magistrate on the submission that the appellant was tortured, acknowledged that he has heard what was said before him and had placed it on record⁶. He advised the appellant to engage services of the Independent Police Investigative Directorate in South Africa (IPID) and complain about the torture. Further, that IPID is easily accessible and that the allegations that are made are serious in nature and should be handled by IPID. I must pause to state that the appellant mentioned many instances of torture, from his arrest to when he was said to be unaccounted for (while in custody) and also when the confession was obtained from him. The confession it would seem is being considered at a trial within a trial that is ongoing. Counsel for the appellant however rushed it before this court and stated that he was prepared to guarantee that it will not be found to be admissible at the end of a trial within a trial because among others the appellant states in it that he was assaulted. Counsel picked apart evidence that is alleged to exist against the appellant, such as the discovery of the cellphone. He argued before this court that it will not pass muster of the doctrine of recent possession; further that the police did not have a search warrant and of course that the admissibility of the confession is suspect. It is impermissible to second guess the trial court, particularly in a partly-heard matter that is on-going. In answer to a question by the court on the status of the trial within a trial counsel indicated that the appellant is yet to testify at the trial within a trial and that admissibility of a pointing out will equally be challenged. It is my view that the court of appeal is simply not well suited to enter the arena of the trial court and make a determination about admissibility which question is being dealt with at the trial within a trial. The magistrate was in my view correct when he opined that he was not going to make a finding on the confession, because that is not his province.

[16] The state flagged three different issues to support its contention that the case against the appellant was strong. Firstly, that the appellant was positively identified at an identification parade. Secondly, that the appellant confessed and thirdly that a cellphone belonging to the complainant was, using a cellular app, traced to the appellant's house and he failed to give a satisfactory explanation of the possession upon being requested on his arrest to provide one. It is accepted that all the pieces

⁶ Page 77 Line 5 to 12.

of evidence will still have to be tested. In fact, admissibility of the confession is currently being dealt with at a trial within a trial and counsel for the appellant has given an indication that it will equally be challenged. It may in the end be found wanting, but it is the trial court that will have to make that determination.

[17] In my view, the magistrate assessed the strength as well as the weakness of the State case, he then concluded that the State case against the appellant was strong. In the context of s 60(11) (a) of the Act, the strength of the State case has been held to be relevant to the existence of ‘*exceptional circumstances*’⁷. In *S v Kock (supra)* the following is said at paragraph 15;

“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. The case presented to the court of first instance fell into the second category. That should have been an important factor in the magistrate’s evaluation of the application. Because of her misdirection no proper attention was paid to it.”

I do not believe that the case presented by the state in the lower court was lacking in detail or persuasion as to be said to be weak.

[18] In the course of a bail application the magistrate need not make a finding, even on a provisional basis, as to the guilt or innocence of an applicant for bail. All the Court has to do is to weigh the *prima facie* strength or weakness of the State’s case and such a subsequent decision ought not be made with reference to credibility findings in order that bail proceedings do not become a dress rehearsal for the trial itself⁸. I conclude that the Court *a quo* did not misdirect itself and that it did in fact weigh, on a *prima facie* basis, the strength and weakness of the State case. It is self-evident that the summary by the magistrate contains what is necessary.

[19] The magistrate was at pains to deal, in point form, with the factors that the appellant advanced as exceptional. What he also accentuated which is of importance

⁷See *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at para [21], *S v Viljoen* 2002 (2) SACR 550 (SCA) at para [11])

⁸ *S v Van Wyk* 2005 (1) SACR 41 (SCA)

is that at the commencement of the bail application, appellant's legal representative confirmed that the bail application was brought on the basis that the appellant was facing a Schedule 6 charge or offence. He submitted that the appellant bore the onus to show that exceptional circumstances were present. Which is why the argument that the state does not or did not allege that the appellant was a flight risk; that the state does not or did not allege that he will intimidate witnesses; that no allegation is made by the state that he will interfere with investigations, is untenable because the onus to allege and prove those factors rests with the appellant. What matters the most is whether the appellant advanced those factors which meet the yardstick set by legislation and case law.

[20] This Court is called upon to determine whether the appellant was able to prove the existence of exceptional circumstances within the meaning of Section 60(11)(a) of the Criminal Procedure Act, 51 of 1977, before the Court *a quo*. In order to establish whether the appellant did discharge this onus, the magistrate was constrained to determine whether on the facts of the case, the circumstances placed before him can be said to be "exceptional". This entailed the making of a value judgment on the part of the magistrate⁹.

[21] The approach to be adopted in bail appeal matters is well settled in our law. It is not the same as an application to be admitted to bail. The appeal to this court therefore must strictly follow the Criminal Procedure Act, which provides among others as follows;

"65 Appeal to superior court with regard to bail

- (1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.
- (b) The appeal may be heard by a single judge.

⁹ *S v Porthen and others* 2004 (2) SACR 242 (C)

(c) A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

(2)

(3)

(4) 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 or his opinion the lower court should have given.”

This court must therefore be satisfied that that the decision of the court *a quo* was wrong.

[22] In *S v Barber*¹⁰, the court remarked as follows in respect of the context of deciding an appeal in terms of section 65(4) of the CPA:

“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 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.”

[23] Thus, even if this Court finds that the Magistrate was wrong, this Court must still consider the facts before it afresh and determine whether the appellant has discharged the applicable onus.

[21] The appellant placed certain facts such as the fact that he will not commit a schedule 1 offence if released on bail. The magistrate indicated that such a statement has a ring of hollowness to it because while on parole, the appellant was arrested and the allegations are that he committed robbery with aggravating circumstances. The magistrate was not pronouncing on his guilt but was simply stating the facts. That much is said in his judgment. Other factors that the appellant relied on such as

¹⁰ *S v Barber* 1979 (4) SA 218 (D) at 220E–H

the fact that he is “tortured” by the presence of rifles in court, he wants to be admitted to bail so that he can take his witnesses to the offices of his legal representative for consultation and lastly that the consultation area for awaiting trial inmates at the correctional facility was not well lit, are simply not exceptional.

[22] In summary, before the Court *a quo* was the appellant against whom there was assessment of the strength or weakness of the state case; there was a well-grounded reason to believe that he may commit a schedule 1 offence, that the case against him was strong. I am of the view that the facts placed by the appellant before the magistrate, when considered cumulatively, bearing in mind the state case, are not exceptional. I conclude that the magistrate correctly refused the release of the appellant on bail. The appeal must therefore fail.

[23] I therefore make the following order;

23.1. The appeal is dismissed



SA THOBANE

ACTING JUDGE OF THE HIGH COURT, PRETORIA

ON BEHALF OF THE APPELLANT : MR. MOLDENHAUER

ON BEHALF OF THE RESPONDENT : MR. SHIBURI

Date of the hearing : 16 July 2025

Date of judgment : 15 August 2025 - *This judgment was handed down electronically by circulating to the parties’ legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 15 August 2025.*