

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO. CA & R 22/2024

In the matter between:

**AYABONGA MANI
LIVOKUHLE VENA
ZIPHOZIHLE NASE
QHAVELILE NASE
NTUNZI GXOWA
Appellant**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant
Fifth**

and

THE STATE

Respondent

BAIL APPEAL JUDGMENT

COLLETT AJ:

Introduction

- [1] This appeal is brought pursuant to the Magistrate at the Alice Magistrate’s Court refusing the appellants to be admitted to bail.
- [2] The appellants are charged with the crime of robbery with aggravating circumstances as enunciated in *section 1* of the *Criminal Procedure Act 51 of 1977* (hereinafter referred to as the ‘CPA’), attempted murder of Constables Mitchell and Blaauw, unlawful possession of a firearm and possession of stolen property.
- [3] The appellants brought a formal bail application, and the proceedings were adjudicated on the strength of affidavits filed by all appellants supplemented by the *viva voce* evidence of second and fifth appellants and the opposing evidence of the investigating officer, Sergeant Mpitimpiti on behalf of the state.
- [4] It is common cause that the appellants are 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 them to be released on bail.
- [5] The appellants are required to not merely regurgitate their personal circumstances in a hope that these will morph into exceptional circumstances or to simply deny that they will act as described in *section 60(4) (a) to (d)* of the CPA.¹
- [6] *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.”*
- [7] The powers of the appeal court are limited, and the court must be persuaded that the Magistrate wrongly exercised her discretion. Even if the appeal court shares a different view, it cannot substitute its own view for that of the Magistrate as that

¹ *Mthombeni v S* (CA&R 55/23) [2023] ZANHC 96 (8 December 2023)

would be tantamount to an unfair interference with the Magistrate's discretion. The overriding consideration is whether the Magistrate exercised her discretion wrongly.²

[8] The Magistrate must have misdirected herself 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.³

Appellant's grounds of appeal

[9] The appellants' grounds for appeal can be summarized as follows:

- (i) The Magistrate misdirected herself in failing to hold that the *ordinary circumstances* of the appellants cumulatively constituted *exceptional circumstances* as envisaged by *section 60(11)* of the CPA.
- (ii) The Magistrate misdirected herself in failing to arrive at a decision as to whether the appellants were likely to evade their trial.
- (iii) The Magistrate made no finding on the *likelihoods* set out in *section 60(4) (a) to (e)* of the CPA.
- (iv) The Magistrate erred in holding the view that in *schedule 6* bail applications, the appellants were expected to show that there are chances of acquittal when the case goes to trial.

[10] The respondent's response can be summarised as follows:

- (i) The appellants are charged with *Schedule 6* offences.

² *S v Barber* 1979 (4) SA 218 at 220 E–H.

³ *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).

- (ii) The onus is upon the appellants to adduce evidence which satisfies the court that there are *exceptional circumstances*, and it is in the *interests of justice* to permit their release from custody which they failed to do.

Evidence before the bail court

- [11] At this juncture, it is necessary to summarize the evidence placed before the court *a quo* by the appellants in a bid to satisfy the requirement of *exceptional circumstances*.
- [12] The first appellant submitted an affidavit in support of his application. He is 22 years old, unmarried, has no children and is unemployed. He has no previous convictions or pending cases. He resides and has resided at N[...] Street, NU9, Motherwell, Gqeberha since birth.
- [13] The second appellant submitted an affidavit in support of his application. He is 24 years old, unmarried and has one child. He has no previous convictions or pending cases. He resides and has resided at M[...] Street, Zinyoka, Missionvlei, Gqeberha since birth.
- [14] The third appellant submitted an affidavit and *viva voce* evidence in support of his application. He is 23 years old, unmarried, has no children and is not permanently employed. He assists his father in the family business and earns R 500.00 to R 1000.00 per month. He has a pending case where he is charged with hijacking, possession of stolen property and possession of a firearm and ammunition. He resides at [...] Street, NU9, Motherwell, Gqeberha.
- [15] The fourth applicant submitted an affidavit in support of his application. He is 23 years old, unmarried, has no children and not permanently employed. He assists in the family business and earns R 500.00 to R 1000.00 per month. He has no pending cases or previous convictions. He resides at M[...] Street, NU9, Motherwell, Gqeberha.
- [16] The fifth appellant submitted an affidavit and gave *viva voce* evidence in support of his application. He is 22 years old, unemployed, unmarried and has no children. He

has no previous convictions or pending cases. He resides at N[...] Street, NU9, Motherwell, Gqeberha.

[17] The respondent led the evidence of Sergeant Andile Mpitimpiti, an investigating officer, stationed at East London Serious and Violent Crime who had 19 years' experience as a police officer. His evidence is described briefly as follows:

- (i) All five appellants were known to Mpitimpiti, and he confirmed that third appellant had a pending case of hijacking, possession of stolen property and possession of a firearm and ammunition. The remaining appellants had no pending cases or previous convictions.
- (ii) He opposed the release of all the appellants on bail regarding them as dangerous and a flight risk. He testified that they failed to stop at a highway patrol in Cookhouse and were pursued by the police. During the pursuit, one of the appellants seated on the back seat was shooting at the police.
- (iii) A robbery of cash and cell phones occurred at Ackermans. A person recorded the license plate of the vehicle involved in the robbery, which was circulated to the police. The vehicle in question (and in which the appellants were found) had been hijacked at Ikamvehlhle on 24 November 2023.
- (iv) Except for fifth appellant who managed to flee the scene of arrest, all the appellants were arrested in the car which had been pursued by the police. The police found two firearms and a bag of cell phones which were identified as the property of Ackermans by its manager.
- (v) Fifth appellant was apprehended by the police the following day after having been pursued, located and recognised by the police.
- (vi) He further testified that third appellant committed the present case whilst on bail in a pending case. In addition, second appellant initially provided an incorrect address to the police.

(vii) He testified that crimes of this nature are prevalent in the area and, particularly the victims in the Ackermans robbery were severely traumatised by the event.

(viii) The appellants were linked to the alleged offences by the vehicle, firearms and property found in their possession on arrest. The fifth appellant was recognised by the police as having fled the previous day and thus arrested.

Analysis of the refusal of bail by the magistrate

[18] What remains is an analysis of the reasoning advanced by the Magistrate in arriving at the decision to refuse bail, mindful of the misdirections submitted by the appellants.

[19] The Magistrate, in referring and dealing individually with the evidence presented by the appellants, concluded that the personal circumstances of the appellants did not constitute *exceptional circumstances* for the purposes of *section 60(11)(a)* as they were commonplace.⁴ This is in accordance with the approach adopted by our courts.

[20] The Magistrate further considered the fact that second and fourth appellants had children in terms of the *Constitution*⁵ and the best interests of the child referring to *S v Pietersen*.⁶ She concluded that in this instance the court had to weigh up the best interests of the child with the interests of justice and public interest.

[21] The Magistrate further referred to the constant assertion by the appellants' legal representative's that the '*State had no strong case and at the end of the trial, the five applicants would be acquitted*' stating that the only evidence before her was that of appellants' affidavits other than what she referred to as - '*testimony from the bar by the legal representative*'. Whilst it was recognised by the Magistrate that proof by an applicant that he would likely be acquitted could amount to an *exceptional circumstance*, there was no such evidence in this matter from the appellants despite

⁴ *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) para [12].

⁵ Act 108 of 1996 sections 28 & 36

⁶ 2008(2) SACR 355

that they carried the burden of proof in terms of the provisions of *section 60 (11)(a)* of the CPA.⁷

[22] The State opposed the bail of the appellants asserting that they were a danger to the community and a flight risk. The evidence of the use of violence both during the alleged robbery and during the pursuit by the police was correctly viewed by the Magistrate as violence translating into danger to the community. The fact that the police gave chase and that fifth appellant saw fit to flee, are certainly indications of flight risk. Just to add to the mix, fifth appellant's false identification of himself to the police and second appellant's false address speaks for itself. All these facts were considered by the Magistrate.

[23] Lastly, the Magistrate specifically recognised the appellants' right to freedom in terms of the *Constitution* but concluded that the appellants had not discharged the onus of showing on a balance of probabilities that *exceptional circumstances* existed which in the *interests of justice* permitted their release on bail. The factors submitted by the state vitiated any prejudice the appellants may suffer due to their continued incarceration.

Evaluation of the appeal

[24] I do not propose to embark on a re-evaluation of the evidence, submissions and reasons of the court *a quo* but rather to highlight the issues that are of relevance in considering whether this appeal should succeed.

[25] The appellants' counsel strenuously argued that the Magistrate misdirected herself in not considering that the personal circumstances taken cumulatively, did not amount to *exceptional circumstances* because she did not '*tie them up*'. He further submitted that she did not deal with them at all. He persisted with submissions relating to the strength of the State's case despite the lack of evidence advanced by the appellants during the bail proceedings.

⁷ *S v Mazibuko and Another* 2010 SACR 433 (KZN) para [23].

- [26] He further submitted that the Magistrate misdirected herself in concluding that the appellants' conduct prior to arrest in fleeing from the police was indicative of them being a flight risk and that this factor could in any event be alleviated by bail conditions such as placing the appellants under house arrest which the Magistrate failed to consider.
- [27] His further submission that there was no indication of violence because only one occupant in the vehicle was the shooter and the firearms found have not been proven to be firearms, is somewhat novel, to say the least, given the evidence of the investigating officer. Furthermore, it was submitted that despite the appellants being found in the vehicle that had been identified at the scene of the Ackermans robbery, this did not mean that they were involved as there was a lapse of two hours and, by implication, that this violence could not be considered.
- [28] As a somewhat surprising final submission, whilst quoting from the *Constitution*, regarding the appellants' rights to freedom and equality, counsel for the appellants submitted that the appellants seem to have been denied bail because they are from poor backgrounds.
- [29] Counsel for the state persisted with his submission of the two-pronged approach to be adopted in accordance with *section 60(11)(a)* of the CPA stating that the enquiry was firstly into *exceptional circumstances* and that should these be found to exist, the consideration would be *the interests of justice*. He submitted that the appellants bore the onus in this regard, and they had failed to establish the *exceptional circumstances*.
- [30] He expanded his submission on *the interests of justice* with reference to the pre-arrest conduct of the appellants which he contended was indicative of them being both a flight risk and dangerous. Regarding the imposition of bail conditions to address these fears, he referred to the circumstances of third appellant who was on bail for similar offences when these offences occurred, indicating that bail conditions are not necessarily useful in this regard. Accordingly, he submitted that the Magistrate did not misdirect herself and produced a well-reasoned judgment in refusing bail.

- [31] 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.⁸ In assessing *section 60(11)(a)*, the magistrate concluded that it was double pronged encompassing the exceptional circumstances and the interests of justice. The Magistrate was mindful of the appellants' right to liberty as enshrined in the *Constitution*.⁹
- [32] In the final analysis, the court *a quo* concluded that the appellants had failed to discharge the onus of demonstrating the existence of exceptional circumstances which were in the interests of justice, thus permitting their release on bail.
- [33] The evidence presented at the bail hearing clearly demonstrates a *prima facie* case against the appellants and the Magistrate was correctly mindful of the salient features of violence, the appellants' attempts to evade arrest and the prevalence of the crime in the area.
- [34] The Magistrate's judgment contains a full and appropriate discussion of the nature and onus that rested upon the appellants who are charged with *Schedule 6* offences with reference to several relevant authorities in substantiation thereof.
- [35] I consider it necessary to address the contention of appellants' counsel that for some sinister reason the appellants were denied bail because of their impoverished circumstances. Not only is there no indication whatsoever that this factor was under consideration by the Magistrate, but it certainly falls foul of the constitutional precepts of our democratic society. The constitutional right to liberty is all encompassing and is not dependent upon the wealth or poverty of a person. The limitation thereto as contained in *section 60(11)(a)* casts the same onus on all persons to which it is applicable. To hold otherwise would be a constitutional travesty as all persons are equal before the law.

⁸ *Skietekat v S* 1999 (2) SACR 51 (CC) at p 84.

⁹ 108 of 1996.

[36] 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.¹⁰

[37] I am satisfied that the Magistrate adequately considered all the factors which are ordinarily considered, in conjunction with those advanced by the appellants in accordance with the statutory prescripts.

Conclusion

[38] On the totality of the evidence that was presented, the court *a quo* concluded that the appellants had not discharged the onus to establish, on a balance of probabilities, that *exceptional circumstances* existed which, in the *interests of justice* permitted the appellants to be release on bail.

[39] 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 court *a quo*.

[40] I therefore make the following order:

1. The appeal is dismissed.

S A COLLETT
ACTING JUDGE OF THE HIGH COURT

¹⁰ *S v Barber supra, S v Porthen and Others supra.*

APPEARANCES:

For the Appellants	:	Mr C. Jacobs 3 rd Floor, Africa House 6 Graham Street, North End Port Elizabeth
For the Respondent	:	Mr Gula
Instructed by	:	Office of the Director of Public Prosecutions, Bhisho
Date heard	:	5 June 2024
Date judgment delivered	:	6 June 2024