IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: CA&R 129/22

In the matter between:

MNYAMEZELI GILBERT TSHISANI **APPELLANT**

and

THE STATE **RESPONDENT**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

……

……

Signature Date

APPEAL JUDGMENT

NORMAN J:

1. This is an appeal against the refusal by the Magistrate sitting in Makhanda to admit the appellant to bail. The appeal is opposed by the respondent.
2. The respondent preferred four charges against the appellant, namely, trespassing, two counts of theft, and one count of being found in possession

of suspected stolen property. The respondent alleged that the appellant, without permission, entered St. Andrews College premises and stole a Mac Book valued at R18 000.00, a citizen watch worth R7211.00 and was also found in possession of a suspected stolen laptop bag embossed “Graeme College”. It is further alleged that the unlawful actions of the appellant were captured on a CCTV camera footage. The appellant was apprehended and the watch was allegedly recovered from him. The MacBook has not been recovered and two cell phones were found in the laptop bag. Both the appellant and the respondent tendered their evidence by way of affidavits.

Appellant’s case

3. In his affidavit, the appellant stated that: He is 63 years old and resides at No. 69 Nkonjane Street, Extension 9, Makhanda and has been residing at that address since 2009. He was working in Cape Town but retired in December 2021. He is married with children who are now adults. His children reside in Port Elizabeth with their mother. He is currently separated from his wife. He receives old age grant but also generates income by repairing cell phones and restoring CCTV cameras. He disclosed his previous convictions which were all related to the charges pending against him. The convictions are: trespassing in 2009 in Stellenbosch; theft in Makhanda in 2010, theft in Stellenbosch in 2012 and shoplifting in 2016 in Somerset West. He has no other pending criminal cases. He intends to plead not guilty to the charge against him. He would be able to afford bail in the amount of R 1000 and undertook not to interfere with the state witnesses or with the police

investigations. He undertook to stand his trial as he had no outstanding warrants. He does not possess a passport and does not have relatives outside the borders of South Africa and he undertook to abide the bail conditions should they be imposed by the court. He requested that he be released on bail due to ill health. He suffers from ulcers which cause him to vomit and he had been vomiting since the day of his arrest.

Respondent's case

4. The respondent tendered the evidence of the Investigating Officer Mr Torsen Cangweni. He stated that: There is a strong case against the appellant because the commission of the offence was recorded on a video footage from the school. A watch that was also stolen was found in the appellant's possession and was returned to the owner. The appellant was carrying a bag with two mobile phones inside. He confirmed the previous convictions referred to, above. The appellant was targeting schools. The previous convictions indicated the appellant's tendency to enter and steal from people's properties. There were ongoing investigations regarding the laptop bag. On 12 July 2022 the headmaster of St. Andrews College received a report of theft that occurred the previous day. The appellant was identified by the clothes he was wearing, by one student, on the video footage. The headmaster looked for him and found him in the building and that was when the missing watch was found on him. The appellant has been in custody since 12 July 2022.The investigating officer, submitted that, based on the factors dealt with, above, it would not be in the interests of justice to admit the appellant to bail.

The charges

5. Both the State and the defense counsel, at the bail hearing , were *ad idem* that the offences fell under Schedule 5, because the appellant had previous convictions. Whilst preparing this judgment I observed that there was no reference at all to Schedule 5 on the charge sheet. I accordingly requested the parties to address me on the issue by either making submissions or placing before me relevant authorities.

6. I am grateful to them for responding to the request promptly. What is apparent from the further submissions from the parties is that there was agreement between the parties that Schedule 5 was applicable and that a greater onus was placed on the appellant to satisfy the court that it was in the interests of justice to release him on bail.

7. I find it apt to deal with this issue because, although it is not a ground of appeal, it is apparent from the record. The charge sheet mentions only the charges as mentioned in paragraph 2, above. It makes no reference to Schedule 5 at all. A form entitled "*First Appearance: Court A"* recorded matters such as, language of choice, legal representation, rights relating to access to police docket, whether bail is opposed or not and whether the accused person elects to bring a formal bail application etc. It also dealt with various matters.

8. I shall record only those aspects from the form that are relevant herein:

> *"E. Prosecutor informs Court that the State:*
> *Does not oppose the release of the accused: [on warning []on bail, and informs the court that the accused is facing a charge under Schedule 1 of the Act. The provisions of section 60 (11) (B) of Act 51 of 1977 applied as per Annexure, and it is ordered that it be filed separately from the case record in accordance with the provisions of Section 60 (11) (B) (c) of Act 51 of 1977 as amended….*
> ✔***Opposes*** *the release of the accused from custody on the following grounds:*
> *Has previous conviction of Theft…"*

9. The respondent is obliged to formulate a charge sheet in a manner that sufficiently informs an accused person about the relevant provisions of the Act that the respondent will invoke in supporting the charges against him. I am mindful of the fact that the appellant was legally represented. However, that does not relieve the respondent of its responsibility in this regard. The legal knowledge of the legal representatives does not supplant the contents of the charge. I do not suggest that the respondent must place in the charge sheet each and every section of the Act that is relevant to the charge. That would place a very onerous burden on the respondent. However, the invocation of Schedule 5 to apply to a charge that falls under Schedule 1 or 2 has great significance in that it has a bearing on:

(a) one of the fundamental rights of the accused (although not absolute), such as his liberty and the greater onus it places on him in bail proceedings;

(b) the offence itself because it leads to a re- categorization of what was a schedule 1 offence to a Schedule 5 offence, being a serious offence;

(c) the sentence to be imposed;

(d) the criminal proceedings relating to both bail and trial; and

(e) the accused person's previous convictions which receive consideration before the commencement and conclusion of a trial. It is as a result of all the above mentioned factors that an applicable Schedule should be

mentioned in the charge sheet to ensure fairness of a trial. This ought to apply whether or not an accused person is legally represented. Afterall the charge is against the accused and not his or her legal representative.

10. In *S v Legoa*[1] the Supreme Court of Appeal in dealing with an accused's right to a fair trial stated:

> *"[20] …. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub- sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer 'a charge encompasses this case does not require us to determine…But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet."* (my emphasis).

11. In my view, once the provisions of Schedule 5 are invoked, having regard to all the consequences they bring to the charge, their inclusion in the charge sheet to ensure a fair trial, is imperative. The oral mention of the applicability of Schedule 5 to a particular offence at a stage when an accused applies for bail is, in my view, not sufficient to meet the fair trial right. *In casu* , the issue of unfairness does not arise[2] because of the agreement between the parties. However, the remarks made by the Supreme Court of Appeal in **S v Khoza and Another 2019 (1) SACR 251 (SCA)** *at paragraph [10],* *that : " … As a general rule, fair – trial rights require that an accused person should be informed at the outset of the trial of the*

[1] 2003 (1) SACR 13 (SCA) at [20].

[2] S v Ndlovu 2003 (1) SACR 331 (SCA) para 14

provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) that the state intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial…", find application.

Grounds of appeal

12. The appellant advanced the following grounds of appeal: The Magistrate failed to properly consider his personal circumstances; the fact that he is 63 years old, and suffers from ulcers; he has a fixed address in Makhanda where his family resides and has resided at that address for many years. The court erred in its finding that the refusal of bail is in the interests of justice. The court overemphasized the fact that the appellant has similar previous convictions. The Magistrate ought to have found that the appellant discharged the onus resting on him.
13. Mr Geldenhuys submitted that: The previous convictions occurred between the years 2009 and 2016 and no violence was involved. The court erred in criticizing the appellant for his failure to testify. The fact that the appellant had a fixed address, where he lived for many years with his family, should have moved the court to release him on bail. His ill health and advanced age should have been considered in his favour. It is not in the interests of justice to refuse to release him on bail.

14. Ms van Rooyen, on the other hand, submitted that: The fact that the appellant is elderly is not a deciding factor because that must be balanced with the crimes he is charged with. The previous convictions have not deterred the

appellant from breaking the law again. The appellant has a propensity to invade and steal from schools. It will not be in the interests of justice to release him.

Discussion

15. Section 60 of the Criminal Procedure Act provides:

> *"**60 Bail application of accused in court***
> *1(a)An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."*

16. Section 60 (11) of the Act provides:

> *"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-*
>
> *(a) 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) 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." (* my underlining*)*

17. Schedule 1 lists *"Theft, whether under the common law or a statutory provision*". Similarly, Part I and Part II of Schedule 2 lists: *" Theft, whether under the common law or a statutory provision ,* and *" Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500",respectively.*

18. *Schedule 5 lists, amongst others: "An offence referred to in Schedule 1-*

> *(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or*
>
> *(b) …."*

19. Section 60 (11) (B) compels an accused person or his legal representative to disclose whether he has previous convictions or pending charges against him or her and whether he has been released on bail in respect thereof.

20. Section 60(4) provides for factors that a court has to consider in determining whether or not it is in the interests of justice to have an accused person released on bail.

21. Section 60(4) provides:

> *'The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established-*
> *(a) Where there is a likelihood that the accused if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a schedule 1 offence; or*
> *(b) Where there is a likelihood that the accused if she or he were released on bail, will attend to evade his or her trial; or*
> *(c) Where there is a likelihood that the accused if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
> *(d) Where there is a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or*
> *(e) Where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'*

22. In considering the ground in section 60 (4)(a), the Act makes provision for other factors, that the court, in order to satisfy itself that for the grounds in (4) (a) have been established, must consider. Those are provided for in section 5 (a) – (h) and are not relevant for the purposes of this judgment.

23. The legislature also deemed it appropriate to make provision for factors that a court must consider in deciding the interests of justice and in particular, whether or not there is a likelihood that the accused person will evade his or her trial as provided for in section 60 (4)(b). Those factors are provided for in section 60 (6).

24. These are factors that must be taken into account by the court because that is what the legislature enjoins the court to do. It follows therefore that it is incumbent upon the court to make the enquiry in so far as, for example, the

provisions of section 60(4) (b) are concerned and enquire from the accused persons directly about those factors that it might have to consider in its decision on whether or not to grant bail or even call for additional information, if it so wishes. That obligation is not imposed on an accused person but on the court itself.

25. The Magistrate in his judgment stated that he considered, amongst others, the appellant's age, his state of health and other factors as stated in section 60 of the Act. He made the following remarks which, for the purposes of this judgment, are relevant:

> *'it is mentioned in his statement, all sorts of things and is unfortunate that the accused chose not to testify verbally and not being tested by cross-examination. It is unfortunate also, that he states in his statement that he intends to plead not guilty but just leaves it at that. There is a case against him. I mention once in a bail application, that there is a strong case and it does not mean – I do not mean that the case is very strong, I just mean that there is a sufficiently strong case for the accused to answer and there is some claims against him. He must respond to those. So keeping in mind that he does not have to incriminate himself. He is not compelled to incriminate himself, well if he pleads not guilty then I am assuming there is a defence yet, he chose not to disclose the defence. So unfortunately then there is nothing to be considered in his favour in this regard.'*

26. The Magistrate also found that there was nothing compelling in the personal circumstances of the appellant to warrant his release on bail. He considered the fact that the appellant had previous convictions and found that he had a propensity to engage in criminal activity. He also found that the appellant had no problem entering people's property, without their consent and invading their privacy. He found that the state has a strong case against the appellant. He also found that the interests of justice dictate that bail should not be granted and he accordingly refused bail.

27. First, the findings by the Magistrate that '*it is unfortunate that the accused chose not to testify verbally and not being tested by cross-examination. It is unfortunate also, that he states in his statement that he intends to plead not guilty*" and his finding that because

the appellant failed to disclose his defense , that meant that there was nothing to consider in his favour is, with respect, contrary to the Bill of Rights , in particular , section 35 (3) that provides :

> *"Every accused person has a right to a fair trial, which includes the right-*
>
> *(h) to be presumed innocent, to remain silent, and not to testify during the proceedings"*

28. A bail application is not meant to assess the soundness or lack thereof of an accused person's defense to the criminal charges. In this particular case, the investigations were still ongoing and it would be unfair to expect the appellant to tender a defense for the purposes of bail. He indicated that he was going to tender a plea of not guilty at trial. In any event, the accused's defense is not a factor enumerated in section 60 (4) The main purpose of bail proceedings, is for the court, to examine whether the accused person will stand trial and whether it is in the interests of justice to release him on bail. The bail proceedings cannot be used to undermine the accused person's constitutional rights. I accordingly find that the Magistrate in reaching the above findings, wrongly exercised his judicial discretion.[3]

29. Section 65 (4) of the Act 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 event, the court or judge shall give the decision which in its or his opinion, the lower court should have given*."

30. It is trite that once a misdirection is apparent from the record either on the findings of fact or law , this Court , is at large to interfere with the decision of the Magistrate.[4] It is apparent that the Magistrate failed to weigh and balance all the factors before dismissing the appellant's bail application. The

[3] S v Barber 1979 (4)SA 218 (D) at 220 E-H
[4] S v M 2007 (2) SACR 133 (E)

balancing act enjoins a court to look at both the favourable and unfavourable factors. That exercise does not envisage a total disregard of the favourable factors simply because an accused person has failed to disclose his defense, as found by the Magistrate. The finding in this regard constitutes a misdirection.

31. The record demonstrates clearly that the Magistrate did not apply himself to the issue of whether or not the appellant would stand trial. This is an important consideration and is inextricably linked to bail. The respondent did not adduce evidence that the appellant was a flight risk. Failure to consider this factor, with respect, constitutes a misdirection on the part of the Magistrate. In **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC) at para 11**, the Constitutional Court restated the purpose of a bail enquiry as follows:

> *"Furthermore, a bail hearing, is a unique judicial function…Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial . In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial, and that entails in the main protecting the investigation and prosecution of the case against hindrance."*

32. If a misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances, to have been granted or refused. In the absence of a finding that the Magistrate misdirected him or herself the appeal must fail *(cf.S v Porthen and Others 2004 (2) SACR 242 (C) at para [11]; referred to in Sv Panayiotou 2015 JDR 1532 (ECG) para [27])*

33. In the light of my findings, the decision of the Magistrate refusing bail cannot stand and is liable to be set aside.

34. I accordingly make the following Order:

1. **The appeal is upheld.**
2. **The order of the *court a quo* is set aside and replaced with the following:**

   "The applicant's application for bail is granted. The applicant's release on bail is subject to the following conditions:

   (a) The payment of the amount of R1000.

   (b) The applicant is prohibited from entering any of the schools in Makhanda.

   (c) The applicant shall report to the Makhanda Police Station between 09h00 and 16h00 on Wednesday each week."

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T.V. NORMAN

JUDGE OF THE HIGH COURT

Appearances

DATE OF THE HEARING: 25 AUGUST 2022

DATE OF JUDGMENT : 30 AUGUST 2022

For the Appellant:	**Adv. Geldenhuys** **Legal Aid South Africa** **Makhanda Local Office** **69 High Street** **Makhanda**
For the Respondent:	**Adv. Van Rooyen** **The Office of the Director of Public Prosecutions** **Makhanda**