IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

CASE NO.: CA&R137/2022

Matter heard on: 23 September2022

Judgement delivered on: 27 September 2022

In the matter between: -

MYOLISI MTSHEMLE **1st Appellant**

ZIVELISA HOWARD **2nd Appellant**

and

THE STATE **Respondent**

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

JUDGMENT

SMITH J

[1] The appellants appeal against the refusal of their bail applications by the East

London Regional Court on 22 December 2021. They and their co-accused are awaiting trial on a charge of robbery with aggravating circumstances in terms of s. 1 of the Criminal Procedure Act, 51 of 1977 (the Act), read with the relevant sections of the Criminal Law Amendment Act, 105 of 1997. Armed robbery with aggravating circumstances is a Schedule 6 offence, and the appellants were accordingly required to prove exceptional circumstances which justify their release on bail. Both appellants gave oral testimony in support of their applications and the state adduced the evidence of the investigating officer. They were both legally represented.

[2] The appellants are charged with cash-in-transit robbery. The state alleges that on or about 23 August 2021 and at the Pick n Pay Store, Settlers Way, East London, the appellants unlawfully and intentionally assaulted two guards and took by force from them certain items, namely a 9 mm pistol, 13 life rounds of ammunition as well as cash, being the property or in the lawful possession of the G4S Security company. The state relies on the doctrine of common purpose.

[3] It is common cause that on the day a group of armed men robbed the motor vehicle of the security company in front of the Pick n Pay Store. The robbers used a white pickup truck and a silver VW Polo. An amount of R80 195 was stolen, as well as a pistol belonging to the security guards. The investigating officer, Sgt Isaac Peters, testified that the police viewed the video footage of the robbery while they were still at the scene. It revealed that one of the vehicles used in the commission of the robbery was a silver Polo with registration number JDF 459 EC and a white pickup truck. They were, however, unable to ascertain the registration number of the pickup truck. As a result of their investigations, they were able to trace the owner of the Polo in Port Elizabeth. The owner confirmed that the appellants' co-accused (accused number one), had hired the vehicle from him. He also told the police officers that the Polo had a vehicle tracking system. After obtaining the details of the tracker system from the owner, they managed to track the vehicle and eventually found it in Kwazulu Natal, close to the Mozambican border. With the assistance of their colleagues in KwaZulu Natal, they arrested the appellants and their co-accused. They were all brought back to the Eastern Cape and all of them subsequently confessed to involvement in the robbery.

[4] The first appellant testified that he lives in the Cilingca Administrative Area. He is a carpenter and welder. He also earned money from farming. He has no previous convictions and there are no cases pending against him. He said that he would plead not guilty to the charges and would rely on an alibi as a defence. While admitting that he was with his other two co-accused in the vehicle when they were apprehended by the police in KwaZulu Natal, he testified that they had been to a traditional healer and he was surprised when they were arrested.

[5] The second appellant lives in Bongelwethu, Lady Frere. He owns a house and a motor vehicle. He lives with his children and nephews, and is self-employed, selling clothes and practising subsistence farming. He utilizes the proceeds from these activities to support his family. He also owns livestock, including sheep and goats. He said that he has no previous convictions and there are no cases pending against him. He alleged that was he not in East London on 23 August 2021, but at home in Lady Frere. He admitted, however, that he was arrested together with his other two co-accused on 24 August 2021. He said that he will plead not guilty to the charges and denied that he had made any statements to the police. He also claimed that he had been severely tortured and assaulted by the police and coerced into signing a statement.

[6] It appears that the magistrate was of the view that there was nothing exceptional in the appellants' personal circumstances. He also found that the state has a strong *prima facie* case against the appellants. He consequently concluded that 'the seriousness of the offence and the possible type of punishment that might be imposed in a case of conviction is to be taken into consideration as well'.

[7] A court sitting in an appeal in terms of the provisions of s. 65 of the Act must undertake its own analysis of the evidence and on the basis thereof decide whether or not the court *a quo* has made the correct decision regarding the discharge of the onus in terms of s. 60(11) of the Act. (See: *S v Pothern and others* 2004 (2) SACR 242 (C).

[8] Since armed robbery with aggravating circumstances is a Schedule 6 offence, in terms of s. 60(11) (a) of the Act the court must order that an accused be detained

in custody unless he or she produces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.

[9] In deciding whether or not the interests of justice permits the release of an accused on bail, the court must have regard to the considerations mentioned in paragraphs (a) to (e) of s. 60 (4) of the Act. In terms of that section the interests of justice would not permit the release of an accused person on bail if any one of the grounds mentioned therein are established. They are:

> "(a) where there is the 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 the likelihood that the accused, if he or she were released on bail, will attempt 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 the 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;
>
> (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"

[10] After taking into account these broad considerations the court must do a final weighing up of factors for and against the granting of bail as contemplated in ss. 60 (9) and (10) of the Act. In *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (4) SACR 623 (CC)* Kriegler J held that these sections should be read as:

> "Requiring of a court hearing the bail application to do what courts had always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty of the individual and the interest of justice are given full value according to the Constitution."

[11] With regard to the meaning of the phrase “exceptional circumstances” mentioned in s. 60(11) of the Act, it has been held in a long line of cases that in order for circumstances to be exceptional, the subsection does not require them to be generically different, or to go above and beyond those numerated in ss. (4)-(9). (See in this regard *S v Botha and another* 2002 (1) 222 (SCA) also *S v Dlamini* 1999 (4) SA 623 (CC) and *S v Yanta* 2000 (1) SACR 237 (Tk).

[12] However, Viviers AJA in *S v Botha* (*supra*), cautioned that the requirement of exceptional circumstances means that the usual considerations for the granting of bail are no longer enough. And a mere denial of the likelihood of the occurrence of the circumstances mentioned in s. 60 (4) to (9) is not sufficient to constitute exceptional circumstances.

[13] Mr *Jokweni*, who appeared for the appellants, submitted that the magistrate has erred in finding that the state has a strong case against the appellants. He argued that the investigating officer’s testimony evinces that upon viewing the video footage of the robbery, the police were unable to identify the perpetrators since they were wearing masks. The assertion that the two appellants could be identified by virtue of their physiques is not a convincing one. He argued, furthermore, that the two appellants have provided a reasonable explanation for their presence in the motor vehicle and it is likely that that explanation will be regarded as being reasonably and possibly true at the trial in due course. The appellants have also indicated their intention to challenge the admissibility of the confessions. The magistrate accordingly erred by attaching too much weight to the fact that they had made the confessions. He submitted that these factors, taken together with the appellants’ personal circumstances - which establish that they have fixed places of abode, live with their families and undertake activities to support them, and have no traveling documents - prove that they are not a flight risk. He submitted that when considered cumulatively, those factors constitute exceptional circumstances justifying their release on bail. He argued that any doubt regarding their intention to stand trial can be mitigated by requiring them to report to the nearest police station on specified days.

[14] An applicant for bail who relies on the weakness of the state case to show exceptional circumstances, faces a daunting task. He or she must establish on a balance of probabilities that there will be an acquittal on the charge. (*S v Mathebula* 2010 (1) SACR 55 (SCA), para. 12)

[15] In my view the appellants have failed to establish this prospect. In the event, I disagree with the submission that the state case against the appellants is weak. As Mr *Mtsila*, who appeared for the state, correctly submitted, the appellants were arrested in the car that was conclusively identified in the video footage as having been involved in the commission of the robbery and they both made confessions admitting their complicity in the crime. Even though the appellants have indicated their intention to challenge the admissibility of the confessions, the compelling circumstantial and direct evidence against them will no doubt put them on their defence at the trial and they will be required to provide a reasonable explanation to rebut the strong *prima facie* case. It is common cause that upon conviction they will both face lengthy terms of imprisonment. I am accordingly of the view that the magistrate has correctly found that this formidable prospect will serve as an incentive for the appellants to evade trial.

[16] And to my mind there is nothing in the appellants' personal circumstances that can be regarded as exceptional. This fact, when considered in the light of the strong case against them, means that they were unable to establish exceptional circumstances justifying their release on bail. In any event, according to Mr *Mtsila*, the matter has been enrolled for hearing on 25 October 2022. It is therefore not in the interest of justice for the appellants to be released on bail.

[17] In terms of s. 60 (5) of the Act I can only set aside the magistrate's decision if I am satisfied that it was wrong. On the facts before me I am unable to make such a finding. The appeal must accordingly fail.

[18] In the result the appeal is dismissed.

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J.E. SMITH

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant	:	Mr Ngqeza
	:	Zolile Ngqeza Attorneys
		C/o Yokwana Attorneys
		10 New Street
		MAKHANDA
Counsel for the Respondent	:	Mr Mtsila
	:	The Director of Public Prosecution
		High Street
		MAKHANDA