

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

CASE NO.: CA&R 171/2022

Heard: 14 October 2022

Delivered: 19 October 2022

In the matter between:

NKULULEKO TAILOR

Appellant

and

THE STATE

Respondent

JUDGMENT

MOLONY AJ:

Introduction

[1] The appellant appeals (in terms of section 65 of the Criminal Procedure Act 51 of 1977 – ‘the CPA’) against the decision on 14 July 2022 of the magistrate at Maclear to deny him bail.

[2] The appellant faces charges of:

(a) Unlawful possession of a firearm (contravening section 3¹ of the Firearms Control Act 60 of 2000 – ‘the Firearms Control Act’). The firearm in question is described in the charge sheet as ‘an 83 caliber 9mm browning’.

(b) Unlawful possession of ammunition (contravening section 90² of the Firearms Control Act). This relates to four live rounds of ammunition.

[3] It is alleged that on 4 June 2022, and at or near Umga Road, Ugie, the appellant was found in possession of the above-mentioned firearm and ammunition, without the requisite licence, permit or authorization, in contravention of the Firearms Control Act.

[4] The parties were in agreement that the bail application fell under Schedule 5 of the CPA. Mr Ntshengulana (who appeared for the appellant) confirmed during argument that the reason it fell under Schedule 5 was that the appellant had

¹ Read with sections 1, 103, 117, 120(1)(a) and section 121 read with Schedule 4 of the Firearms Control Act, and further read with section 250 of the CPA.

² Read with sections 1, 103, 117, 120(1)(a), section 121 read with Schedule 4 and section 151 of the Firearms Control Act, and further read with section 250 of the CPA.

previous convictions for Schedule 1 offences, and the offences with which he was now charged also fell under Schedule 1.

[5] The appellant has two previous convictions, for fraud (2013) and robbery (2016).

The offences of robbery and fraud both fall under Schedule 1 of the CPA.³

[6] The bail application was heard over two days (13 and 14 July 2022). The notice of appeal is dated 6 September 2022. There is a letter (dated 5 October 2022) inside the court file from Advocate van Heerden at the office of the Director of Public Prosecutions, stating that it had been agreed with the appellant's attorney of record that the bail appeal could possibly be heard on 14 or 21 October 2022.

[7] I received the file on 10 October 2022, and indicated that I would hear the matter on 14 October 2022.

[8] It must be recorded that when reading through the bail appeal record, it became apparent that the relevant J15 charge sheet and exhibits referred to during the bail application were not in the court file. A request was made on 13 October 2022 for these to be provided, which duly occurred the same day, thus allowing the matter to proceed on 14 October 2022.

Relevant facts

³ The charges faced by the appellant only appear to fall under Schedule 1 in that they amount to: 'Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.' Schedule 4 to the Firearms Control Act permits for a maximum period of imprisonment of fifteen (15) years to be imposed in regard to each of the charges being faced by the appellant.

[9] The appellant testified during the bail hearing, and provided the following information in regard to his personal circumstances:

(a) He was born on 26 May 1985, and is a South African citizen. This means he was at the time of the bail hearing, and still is, thirty-seven years of age.

(b) He arrived in Ugie in December 2020.

(c) He was, at the time of the bail hearing, residing at a rented property at 36 Plain Street Ugie, where he had resided for a year.

(d) He owned vehicles (both of which were registered in his wife's name), a television, beds, cupboards, a fridge and wardrobes.

(e) He was self-employed, running a 'Shisa Nyama' in Ugie with his wife, known as 'First Class Shisa Nyama'. The business itself was registered under a different name, it only having been named 'First Class Shisa Nyama', it appears, when they moved to Ugie. The business was registered in Cape Town in his wife's name. The business was registered with the local municipality in January 2021 under the name 'First Class Shisa Nyama', in his wife's name. The business opened in April 2021.

(f) The appellant was responsible for the day to day running of the business.

(g) His wife, Nomandla Mqamelo, is permanently wheelchair bound and was, at the time of the bail application, heavily pregnant. The baby was due to

be born by way of caesarian section, which was scheduled to occur on 17 June 2022.

- (h) The appellant and his wife were married on 26 May 2022.
- (i) The appellant has three children (he included the unborn child in this calculation).
- (j) The appellant confirmed that he would be pleading not guilty to the charges against him.
- (k) He has a previous conviction for fraud from 2013, for which he received a sentence of three years' imprisonment, which was suspended (the conditions of suspension were not disclosed).
- (l) He has a previous conviction from 2016 for robbery (apparently with aggravating circumstances)⁴. He received a sentence of five years' imprisonment. At the time of the bail hearing he was out on parole in regard to that conviction. It was his second year of being on parole at the time of the bail hearing. He was released on parole in July 2020.
- (m) According to the appellant he had not broken or breached any of the conditions of his parole, and had not done so previously or defaulted on any parole conditions. He confirmed that his parole officer was aware that he was in custody at the time of the bail hearing.

⁴ The appellant himself referred to it as 'robbery', whilst his legal representative later referred to it as 'robbery with aggravating'.

- [10] The appellant's identity document, his wife's identity document, proof of address of the appellant, the appellant and his wife's marriage certificate, and an affidavit deposed to by the appellant's wife, dated 11 June 2022, essentially confirming her circumstances (as testified to by the appellant), were all handed in as exhibits.
- [11] The prosecutor confirmed not having any objection to any of the above-mentioned exhibits being handed in.
- [12] The appellant's attorney of record indicated an intention to hand in documentation relating to the business (a certificate and an evaluation report), however these were then withdrawn and did not become exhibits.
- [13] It was, later during the hearing, established that the appellant's two minor children (aside from the third unborn child) were two daughters, both eight years of age, one of whom lived with the appellant and his wife, whilst the second lived in Cape Town with her mother. The appellant's wife had been caring for the eight-year-old daughter who resided with them whilst the appellant was in custody.
- [14] The prosecution, when cross-examining the appellant, focused primarily on the fact that one of the appellant's parole conditions was that he not commit any other offences whilst out on parole, emphasizing that during the third year of his three-year suspended sentence of imprisonment in regard to his fraud conviction, he was convicted of robbery (in 2016).

[15] During questioning from the presiding magistrate, the appellant referred to another previous conviction of robbery from 2014, but it appears that he was acquitted on that charge. The appellant confirmed earning between 'seven' and 'nine' (presumably R 7 000 and R 9 000) from his business per month, although he said it fluctuated. He stated that he employed two people in his business.

[16] The prosecutor, having been invited to address the presiding magistrate on the facts of the case, disclosed the following:

(a) The police (in Ugie) received information about an unlicensed firearm in the possession of a male named Nkululeko Tailor (i.e. the appellant) on 6 June 2022.

(b) They were given a description of the model and registration number of the car in which the person was travelling.

(c) They were given a description of what the male person was wearing.

(d) Having searched for the vehicle in question, the police found it at Umga Road, with the appellant inside. The appellant confirmed owning the vehicle, and gave them permission to search the vehicle. During the search they found the relevant firearm and ammunition.

- (e) They asked the appellant to whom the firearm and ammunition belonged, and he said that both belonged to him. He was unable to give the police officials licences, permits or authorization to possess the firearm and ammunition. He was then arrested.
- (f) The State was in possession of documentation relating to the lawful owner of the firearm. An *'enquiry was made into the system'* and the firearm was reflected as having been reported stolen in Parow (in the Western Cape) in May 2018.⁵

[17] The documentation was never made an exhibit and was not available in the court file.

[18] The prosecutor, having received a document from Correctional Services which contained the appellant's parole conditions, read the parole conditions into the record, and handed in the relevant document as an exhibit. The appellant's attorney had no objection to this occurring.⁶

⁵ The appellant's attorney objected to the submission of the documentation relating to the allegedly stolen firearm, as he had not seen it prior to that moment. The appellant's attorney and the presiding Magistrate then engaged on the issue of the rules of evidence in relation to bail applications. The matter then stood down for the appellant's attorney to examine the documentation. It appears that what happened thereafter was that, based upon the magistrate's comments about the rules relating to documentary evidence in bail matters, the appellant's attorney did not object to the documentation being handed in as an exhibit.

⁶ The prosecutor then attempted to hand in the appellant's SAP69 forms (setting out his previous convictions). It appears that, in addressing the court, the prosecutor disclosed that in regard to the 2016 robbery sentence, the appellant had been declared unfit to possess a firearm. The magistrate did not feel that the SAP69 forms should form part of the record in case they were seen by the magistrate who would be attending to the trial and they were, in any event, not in dispute. The SAP69 forms were then withdrawn by the prosecutor.

[19] At no point did the appellant disclose how much he could afford in regard to bail, if bail was to be granted. During argument I enquired about this from Mr Ntshengalana. His response was that he would need to take instructions in this regard.

The Magistrate's finding

[20] The magistrate, having considered all of the available information, was of the view that the appellant, *inter alia* having two previous convictions and having broken one of his parole conditions, had not discharged the relevant onus.

[21] In the magistrate's view section 60(4)(a) of the CPA was of application, in that there was a likelihood that the appellant, if released on bail, would commit a Schedule 1 offence.

Grounds of appeal

[21] The appellant alleges, in his notice of appeal, that the Magistrate erred in that she:

(a) Found that the appellant had failed to discharge the onus resting upon him to show that it was in the interests of justice that he be released on bail.

(b) Found that the appellant had broken one of his parole conditions.

(c) Found that the aspects contemplated in section 60(4)(a) of the CPA were present in this matter.

(d) Considered factors stated in section 60(5) of the CPA. I understood this ground to convey that the magistrate did not adequately consider the factors set out in section 60(5) of the CPA.

The law

[23] Section 60(11)(b) of the CPA provides that:

'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

...

(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.'

[24] Section 60(4)(a) of the CPA states that:

'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 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...'*

[25] Section 60(5) of the CPA provides aspects which the court may take into account when determining whether section 60(4)(a) is of application. That subsection reads as follows:

'(5) In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the degree of violence towards others implicit in the charge against the accused;*
- (b) any threat of violence which the accused may have made to any person;*
- (c) any resentment the accused is alleged to harbour against any person;*
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;*
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;*

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or

(h) any other factor which in the opinion of the court should be taken into account.'

[26] Sections 60(9) and 60(10) of the CPA provide further that:

'(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) *any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;*

(f) *the state of health of the accused; or*

(g) *any other factor which in the opinion of the court should be taken into account.*

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'

[27] This court is required to approach the appeal on the assumption that the decision of the court *a quo* was correct. This court may only interfere if satisfied that the decision was wrong. As stated in *S v Mbele*⁷:

'...the Court of appeal is required to uphold the order made by the court below until enough has been done to persuade and satisfy the Court of appeal that the order was wrong, and, in the ordinary course, it is for the appellant to do whatever has to be done in that regard.'

⁷ 1996 (1) SACR 212 (W) at 221h-j.

- [28] Bail applications are *sui generis* and are neither civil nor criminal proceedings. Consequently the rules of evidence applied in trial actions are not strictly adhered to.⁸
- [29] The court, in bail applications, is required to take into account whatever information is placed before it in order to form an opinion in regard to what may occur in the future.⁹
- [30] Whilst the strength of the State's case against the appellant was not specifically placed in issue in the bail hearing, the following instructive dictum appears in the matter of *S v Mathebula*:¹⁰

'But a State case supposed in advance to be frail may nevertheless sustain proof beyond reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha en 'n Ander 2002 (1) SACR 222 (SCA) (2002) (2) SA 680; [2002] 2 All SA 577) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala and Others v Attorney-General, Transvaal, and Another 1995 (2) SACR 761 (CC)(1996 (1) SA725; 1995 (12) BCLR 1593). Nor is an attack on the

⁸ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at para 11.

⁹ *S v Yanta* 2000 (1) SACR 237 (Tk) at 246 – 247.

¹⁰ 2010 (1) SACR 55 (SCA) at para 12.

prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect [my emphasis]t: S v Viljoen at 561f-g.¹¹

Assessment

[31] In a bail application which falls under Schedule 5 of the CPA the onus is on the applicant to show that, on a balance of probabilities, the interests of justice permit his release.

[32] It does not appear to be in dispute that the firearm allegedly found in the possession of the appellant was reported as stolen.

[33] The allegation against the appellant is that he was found in possession of the above-mentioned firearm, and ammunition, without the requisite licences, permits or authorisation, and was promptly arrested.

[34] The appellant, who was legally represented, did nothing more during his evidence than state that he was going to plead not guilty. Neither the

¹¹ See further *S v Kanana* 2018 JDR 0459 (ECG).

appellant nor his legal representative disputed that he was found in possession of the above-mentioned firearm and ammunition.¹²

[35] The appellant has two previous convictions for Schedule 1 offences, with the second conviction occurring during the final year of suspension of the sentence of imprisonment imposed in regard to the first conviction. The existence of these previous convictions is what elevated the current matter to the level of Schedule 5 for purposes of the bail application.

[36] The appellant was out on parole in regard to one of the above-mentioned previous convictions (robbery with aggravating circumstances – a serious offence involving violence) at the time of his arrest.

[37] The charges currently faced by the appellant are self-evidently very serious.

[38] The issue of whether or not the appellant had in fact infringed one of his parole conditions due to his arrest was in dispute. The condition in question stated that the appellant was: *'Not to commit any crime or offence of any kind'*.

¹² There was, accordingly, no evidence requiring rebuttal (in contrast to the circumstances in *S v Jonas* 1998 (2) SACR 677 (SE) at 678 to 679).

[39] The appellant's legal representative, in the court *a quo*, referred to *Twala v S*,¹³ which involved a bail appeal in a matter with similar charges to those being faced by the appellant, and which fell under Schedule 5 of the CPA.

[40] The appellant in the *Twala* matter advanced the argument that simply because he was on parole at the time of his arrest, did not mean that he had violated his parole conditions. He was entitled to the benefit of the presumption of innocence.

[41] It was clear in the *Twala* matter that the view adopted was that the question of whether or not the appellant had infringed one of his parole conditions was tied to the strength of the State's case against the appellant in regard to the charges the appellant was facing. In the *Twala* matter the State's case against the appellant was considered to be weak.¹⁴

[42] The above does not appear to be the case in the present matter, where the appellant did nothing more than state that he will plead not guilty to the charges, and did not question or dispute that he was in unlawful possession of the firearm and ammunition. I agree with Mr Nohiya (who appeared for the State) that simply stating that he would plead not guilty would not amount to a *prima facie* case which would require the State to advance evidence in rebuttal.¹⁵

¹³ (A156/2019) [2019] ZAGPPHC 1105 (27 June 2019).

¹⁴ *Supra* at paras 24 – 28.

¹⁵ See *S v Viljoen* 2002 (2) SACR 550 (SCA) at para 25.

[43] It is self-evident that the factors referred to in section 60(5)(d) and (e) of the CPA find application in this matter and that it has been established, in terms of section 60(4)(a), that there is a likelihood of the appellant committing further Schedule 1 offences if released on bail. In addition, the appellant has, *prima facie*, committed a very serious offence whilst out on parole.

[44] Having considered the aspects set out in section 60(9) and (10), and with particular regard to the personal circumstances of the appellant, as well as the interests of justice, I am not persuaded that the appellant discharged the *onus* of satisfying the court of first instance that the interests of justice permit his release from custody. I am therefore not persuaded that the decision of the court *a quo* was wrong.

In the result, the following order is made:

(a) The bail appeal is dismissed.

N MOLONY

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant : Mr Ntshengulana

Instructed by : G. Mapena Attorneys

Mthatha

c/o Mfundo Ntshwaxa Attorneys

Makhanda

Counsel for the respondent : Mr Nohiya of the Office of the Director of

Public Prosecutions Makhanda