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

Case No: CA & R 80/2024

In the matter between:

NDODOMZI MDA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

METU AJ

INTRODUCTION

1. This is an appeal instituted in terms of Section 65 (1) of the Criminal Procedure Act, 51 of 1977, "CPA", against the judgment and/or order of Ms. Sityana which was delivered on 28 June 2023.

2. The Appellant was arrested and detained on 26 May 2021[1]. The first time the Appellant made an application for bail was on 09 May 2023 in the East London Regional Magistrates' Court. The bail application was unsuccessful[2]. For the

[1] Vol 9 @ p 34 para 8.
[2] Vol 8 @ p 311; line

purposes of the bail application, two (2) cases were consolidated, being cases with reference numbers **A273/2023** and **RC2/13/2022B**.

3. The bail proceedings were adjudicated on the strength of an affidavit filed in support of the application by the Appellant and oral evidence resisting the granting of bail, which the Investigating Officer gave.

4. The Appellant contends that the learned Magistrate, Ms. Sityana, misdirected herself on several grounds in refusing to admit him to bail. These grounds are outlined in the Appellant's heads of argument, which include *inter alia*:

    4.1. The Appellant was charged with 11 counts of theft of motor vehicle, contained in two (2) matters which are at various stages;

    4.2. The nature of the charges dictates that the application falls within the ambit of Schedule 5 of the CPA, therefore the onus is on the Appellant to show that interests of justice permit his release from custody in terms of Section 60 (11) (b) of the CPA[3].

5. The state opposes this appeal. The basis for opposition and resisting that the Appellant be admitted to bail is also set out in the Respondent's heads of argument.

6. The Appellant, has been in custody since his arrest on 26 May 2021 to date.

THE ISSUE

7. Whether the Court *a quo* was justified in denying bail to the Appellant.

[3] See also Respondent's Heads by Adv. Phikiso @ p 2; para 2.

8. What is before me for determination is whether the Court *a quo* arrived at a wrong decision, in which event, I have authority and/or power to make a decision that the lower Court ought to have made[4].

BACKGROUND AND FACTUAL MATRIX

9. It is apposite that if I find that the Court *a quo* in her discretion decided wrongly, then in such event I am at large to consider whether bail, in the particular circumstances, ought to have been granted or refused. If the Appellant in the Court *a quo* ought to have been granted bail, what would be the appropriate conditions to attach to the bail? However, in the absence of a finding that the Magistrate misdirected herself the appeal must fail.

10. In the bail proceedings, an affidavit deposed to by the Appellant was read to the record, in which he states:

    10.1. He is facing two (2) cases of motor vehicle theft, and his attorney explained to him that this makes the offence he is facing a Schedule 5.

    10.2. His personal circumstances are that at the time of the bail hearing, he was 36 years of age, and his address is Erf […], D[…] Street, Tsolo, Eastern Cape Province and he has an alternative address at […] H[…] Street, R[…], East London; Eastern Cape Province where his sister resides. Before his arrest, he was renting at house number […], NU […], M[…], East London, Eastern Cape Province, but had to terminate the lease as he could not keep up with the rent, which accumulated to astronomical pinnacles.

[4] ***Ho v State*** 1979 (3) SA 734 (W).

10.3. He is not married and has four (4) children of which two (2) of those are entirely dependent on him. Before his incarceration he had strong ties with his children.

10.4. He was employed as a Taxi Driver with earnings fluctuating between R1 500.00 and R2 000.00 per month, with which he supported his children. This is confirmed by the mother of one of his children[5].

10.5. He has been in custody since 26 May 2021 and the trial has not commenced in both cases.

10.6. He was advised by his attorney shortly after his arrest not to make a bail application as the Investigating Officer had indicated that he wanted to charge him for other offences. The advice was that he should wait until all the charges have been proffered.

10.7. He contended that he had no previous convictions, also no pending cases except for the ones subject to the bail proceedings and had no knowledge of any warrants of arrest issued against him.

10.8. He pledged not to endanger the safety of the public or any person in particular and would not commit an offence whilst out on bail. He also made an undertaking not to interfere with any witnesses, although he was not aware of potential witnesses for the state and would not conceal or destroy evidence.

10.9. He confirmed that his release on bail would not compromise the proper functioning of the Criminal Justice System. He would not evade trial.

[5] See: Vol 9; Exhibit "F" @ p 48 – 49.

10.10. The Appellant in his affidavit stated that his release on bail was in the interests of justice.

11. The State opposed the bail application and called the Investigating Officer, Sergeant Thula Maja ("Sgt. Maja") as a witness. He gave *viva voce* evidence which comprises approximately eight (8) volumes and his evidence spans the bulk of the nine (9) volumes of the transcript.

12. Briefly, the evidence of Sgt. Maja is as follows:

12.1. There are four (4) cases in which the Appellant is charged. It is not true that the Appellant was not in possession of a stolen motor vehicle. When he was arrested together with his cohorts, he was a passenger in a stolen motor vehicle; therefore, indirectly, he was in possession thereof[6].

12.2. In a matter of a stolen motor vehicle that was reported in Cambridge Police Station under **CAS 349/5/2021**, the Appellant was charged together with Vuyo Mthombeni; Bongani Simelane and Don Mbutho ("Mbutho")[7].

12.3. When Mbutho was arrested, he betrayed his cohorts and informed the police that an escort car they had hired was behind him. The police were then on the lookout and signalled for the hired car that was driving behind Mbutho to stop when it appeared. The identified escort car sped off, and a chase ensued. When the hired car was cornered, the Appellant and other cohorts alighted and ran on foot[8].

[6] Vol 1, p14 – 16 @ lines 13 – 23.s
[7] *Loc cit* @ p14, line 21 & p15, lines 3 – 4.
[8] *Loc cit* @ p16, lines 14 – 17.

12.4. A call was made to Mbutho at the time he was being arrested. This turned out to have been from the Appellant. In this call, a bribe of R10,000.00 was offered to the police who were arresting Mbutho[9]. The person using the Appellant's cellular phone offered the bribe directly to the police[10].

12.5. It was contended that a Section 205 application was made to establish who was implicated in the actual theft of the motor vehicle[11]. In a nutshell, it was established that the cellular phone that made a call to Mbutho on the day of his arrest belonged to the Appellant.

12.6. The Appellant was involved in a theft of motor vehicles as far back as 2013, when he was arrested for theft of a black Toyota Yaris in Oxford Street, East London. This motor vehicle was reported stolen under **CAS167/3**. In this matter, the police advised that the case against the Appellant be withdrawn as they wanted him to be a Section 204 witness against some Mthatha duo known as Terra and Bawu. However, Sgt. Maja could not say whether the Appellant fulfilled the requirements of a witness in terms of Section 204[12]. What Sgt. Maja could confirm was that the Mthatha case under **CAS 363/04/2014** was reinstated, although he was not the Investigating Officer in that matter. In respect of this matter, there was a bench warrant and later a J50 warrant of arrest was issued[13].

[9] *Loc cit* @ p17, lines 17 – 25. r/w p19, lines 18 – 21.
[10] *Loc cit* @ p20, lines 2 – 4.
[11] *Loc cit* @ p18, lines 13 – 16.
[12] *Loc cit* @ p24, lines 17 – 25 & p 25, lines.
[13] *Loc cit* @ p24, lines 17 – 25 & p 25, lines 1 – 25.

12.7. In 2016, a motor vehicle theft was reported and registered in East London under **CAS 685/03/2016**. This case is still alive. According to Sgt. Maja, there is a witness, one Mawande, who will testify that the Appellant asked to store the motor vehicle reported stolen in the witness's premises under the pretext that the car needed some mechanical attention. When the motor vehicle was found at the said witness's premises, it was combed for fingerprints. The Appellant's fingerprints were found in the motor vehicle[14]. Mawande is friends with the Appellant.

12.8. Using the cellular phone records obtained through the Section 205 application, the investigation established that the Appellant was near where the motor vehicle was stolen and could later be located in Scenery Park, where it was recovered. From the motor vehicle that was reported stolen at Cambridge Police Station and was found at Mawande's premises, fingerprints of the Appellant were recovered.

12.9. Sgt. Maja further testified that on 18 July 2019, he received a call from the Appellant who advised him to go to West Bank. This was without any prompting or provocation. At West Bank, Sgt. Maja found a stolen Toyota Fortuner. According to Sgt. Maja, the Appellant knew what he was doing because whilst they were in West Bank waiting to see who would come for the Toyota Fortuner in the bushes where it was hidden, during that time a Toyota Hilux was being stolen at Frere Hospital. This Toyota Hilux was found and recovered being driven by one Kumbula Fanapi ("Fanapi").

[14] *Loc cit* @ p29, lines 4 – 18.

12.10. Fanapi told the police who arrested him that the Appellant had hired him to take the motor vehicle to Mthatha. The cellular phone report once more placed the Applicant near the crime scene as at the time the Toyota Fortuner was stolen at Frere Hospital[15].

THE LAW

13. The statutory context for determining an appeal relating to bail proceedings is Section 65 (4) of the Criminal Procedure Act 51 of 1977 ("the CPA"), which provides as follows:

> *"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."*

14. I can only interfere with the Court *a quo's* judgment on the bail application if I find that Ms. Sityana misdirected herself in a material way in relation to facts or the law. Goosen J in ***Panayiotou*** cited the provisions of Section 65 (4) of the CPA in making a point on how the appeal judge has to handle bail appeal[16]. The said Section 64 provides:

> *"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 is wrong, in which event, the court or judge shall give the decision which in its or his opinion, the lower court should have given".*

[15] *Loc cit* @ p41, lines 2 – 23.
[16] ***S v Panayiotou*** CA & R 06/2015 @ para 25.

15. At paragraph 27 of ***Panayiotou*** Goosen J had this to say:

> *"This approach has been approved in a number of decisions. In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected himself or herself in some material way in relation to either fact or law (see* ***S v Ali*** *2011 (1) SACR 34 (E) at para 14; cf. also* ***S v M*** *2007 (2) SACR 133 (E)). If such 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 par [11])".*

16. The Court in ***S v Barber*** succinctly depicted the role of the Court in a bail appeal. Accordingly, the Court encapsulated the approach to a bail appeal. It propounded that while an appeal Court may have a different view, it should not substitute its own view for that of the Magistrate because that would be an unfair interference with the Magistrate's exercise of its discretion. The Court held that[17],

> *"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. 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 review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it*

[17] ***S v Barber*** 1979 (4) SA 218 (D)at 22 E – H.

should be in 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 but exercised that discretion wrongly."

17. The real question is whether it can be said that the Magistrate had the discretion to grant bail but exercised that discretion wrongly.

18. It is apposite that where I find that there was misdirection by the Court *a quo* then in such event this Court is at large to consider whether bail ought, in the particular circumstances, to have been granted or refused. If it ought to have been granted, what would be the appropriate conditions to attach to the bail? However, in the absence of a finding that the Magistrate misdirected herself the appeal must fail.

ANALYSIS

19. I am in agreement with the Court *a quo* that the offence of theft of motor vehicle contained in the two charge sheets that the Appellant is charged in the two (2) matters fall within the ambit of Schedule 5 of the CPA.

20. In the premise, provisions of Section 60 (11) (b) become applicable. Therein it is provided:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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."

21. Therefore, the Appellant bears the onus to establish, on a balance of probabilities, that it is in the interests of justice that he be admitted to bail.

22. No evidence was brought before the Court showing that the Appellant had previous convictions, nor was there a history of evading trial. Further, at the time of making the bail application, there was no record of pending charges against the Appellant.

23. It was submitted by Ms. Phikiso for the Respondent, that the appellant faces 11 counts. Mr. Malala for the Appellant, retorted that there was no documentary evidence before this Court proving such 11 counts. A closer examination of the charge sheet which is appended to the bundle in these proceedings does not reflect the alleged 11 counts.

24. It is settled law that the correct approach to bail against the constitutional rights of an accused is founded in Section 35 of the Constitution of the Republic of South Africa Act, 108 of 1996. This section provides:

> *"Section 35(1)(f) presupposes a deprivation of freedom – by arrest - that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But s35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial-related factors are to be taken into account. The broad policy considerations contemplated by the 'interests of justice' test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will*

commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds."

25. Mr. Malala submitted that the trial has not started after three (3) years of the Appellant's incarceration. He further contended that even when the trial start, it would be a trial of long duration. Mr. Malala put in issue the fact that the Appellant was never apprised of the Schedule of the offence he was facing. According to Mr. Malala, this must be done at the outset of the proceedings. The Schedule was not dealt with in the Charge Sheet.

26. It was further submitted on behalf of the Appellant that when the accused was arrested:

    26.1. He was never found in possession of any of the motor vehicle allegedly stolen;

    26.2. There is no witness to adduce evidence that he saw the Appellant stealing any of the motor vehicles;

26.3. No one came up to claim to be the owner of the allegedly stolen motor vehicles;

26.4. No evidence was presented showing that the Applicant was a flight risk;

26.5. Also, there was no evidence led at the bail hearing that the Appellant had committed either a crime of murder or armed robbery;

26.6. The Appellant was not out on bail and was only incarcerated for the offences he was applying to be admitted to bail for;

26.7. Other than the two (2) cases that were consolidated for the purpose of bail application, the Appellant did not have any pending cases against him; and

26.8. There was no evidence or any reason to believe that the Appellant would commit a Schedule 1 offence whilst out on bail.

27. Mr. Malala submitted that the provisions of Section 60 (4) (b) must be read with Section 60 (6) of the CPA in making a determination whether or not the Court *a quo* exercised her discretion wrongly by not taking into account the factors enumerated in Section 60 (6).

28. The Appellant had attested to an affidavit in support if his bail application. At the time of making the bail application, the Appellant was 36 years of age, and had been renting a place in Mdantsane, which he had to give up as he could not afford to pay rent whilst in prison.

29. At Volume 1, page 6 at lines 1 - 6, the Applicant avers:

"Witnesses and investigations. There is not threat to any of the State witnesses as I do not know them or their residential addresses. If there is a concern that the witnesses may be intimidated, I undertake to relocate to an alternative address. I confirm that I will not interfere with the investigation.

30. Then in the same page at lines 7 - 9 the Appellant states:

"Flight risk. I do not have any travel documentation, I am not a flight risk, I will attend court at all times when required.

31. In the affidavit, at the very same page 6, in lines 11 - 15, the Appellant testified that he was arrested on 26 May 2021 when he was on his way to Ngcobo driving a hired car. He went on to say that he was charged with theft of a motor vehicle which was not even in his possession. He had been appearing at Court without fail and was intending to plead not guilty at the appropriate time because he disputes the charges levelled against him.

32. In the affidavit, the Appellant further pledged that he would not commit any offence whilst released on bail. He also committed not to conceal or destroy evidence. The Appellant further made an assurance that he would not endanger the safety of the public or the witnesses. He would not disturb or undermine public order or undermine public peace or security.

33. The Appellant made a plea that his release on bail was in the interests of justice[18].

34. In this division in the case of ***S v Ndjadayi*** Jenett J aptly stated[19]:

[18] Vol 1, p7 @ lines 19 – 22.
[19] ***S v Ndjadayi*** 1995 (2) SACR 583 € @ 584 G – H.

"Under the new Constitution a bail application is an application to enforce the right of an arrested person to his release from detention even if that right is not unlimited. The effect of the new Constitution is to make the application for release from detention with or without bail a species of the ***interdictum de libero exhibendo*** *and, as such, in my view, civil proceedings within the meaning, not only of s 3 of Act 45 of 1988 to which I have referred, but also of s 20 of the Supreme Court Act 59 of 1959, with the result that I consider that the refusal of bail is appealable, but only with leave of the Court that refused such bail."*

35. Turning to the question of whether I find the Court *a quo* to have exercised its discretion wrongly. I find that the Court *a quo* did not take into cognisance the fact that the Appellant had been incarcerated for a long period of time and on the other hand the contention that he was facing 11 counts was not supported by any indictment[20].

36. In as much as the evidence of the Appellant was by way of an affidavit and could not be tested through cross-examination, the evidence led by the State through the Investigating Officer did not discredit the Appellant's version as improbable or far-fetched. In the premise, I find the Appellant's version to be reasonably probably true. There was no corroboration of the evidence of Sgt. Maja and no proof of his evidence that it was reasonably probably true that the

[20] See charge sheet @ p1 – 3 r/w with appearance notices @ p4 – 30 of Vol 9.

Appellant was likely to undermine or jeopardise the objectives and proper functioning of the criminal justice system.

37. The State contended that the Appellant had intimidated one Mawande, however a closer reading of the transcript the threat complained of came from Mbutho who is allegedly said to have told Mawande that if the Appellant was arrested, he would be killed[21]. In no way could this be imputed to the Appellant.

38. On the other hand, there is no cogent explanation why the Appellant has not been brought to trial in three (3) years.

39. In examining whether the grounds set out in Section 60 (4) (b) of the CPA, I have taken into account the factors enumerated in Section 60 (6) of the CPA. Of importance is the fact that the Appellant does not possess a passport which may enable him to leave the country.

40. The State did not adduce evidence showing the strength of its case, which would enable this Court to weigh whether as a consequence thereof the Appellant might be tempted to attempt to evade trial.

41. Ms. Phikiso submitted that the Appellant did not adhere to conditions that were placed when in one matter under **CAS 362/04/2013** he had been turned to be a Section 204 witness. When I explored this issue with Ms. Phikiso, she indicated that the matter was withdrawn. In the circumstances, the notion that the Appellant could evade trial was watered down.

42. Ms. Phikiso also submitted that the Appellant had supplied false information to the police when he was arrested relating to his name. Mr. Malala retorted that

[21] Vol 2, p61 @ lines 18 – 24.

the warning statement was not signed by the Appellant. Upon my enquiry about whether the Appellant was furnished with a copy of the said warning statement, none of the legal representatives could assist in this regard.

43. When juxtaposing provisions of Sections 60 (4) (b) and 60 (6) of the CPA, I am of the view that the interests of justice permit the release of the Appellant from detention and be admitted to bail.

ORDER

44. I therefore issue the following order:

44.1. The Appellant is admitted to bail upon posting of a bail bond in the amount of Three Thousand Rand (R3 000.00).

44.2. The Appellant must report in person at Tsolo Police Station once fortnightly (every two weeks), not unless he is attending trial in East London.

44.3. The Appellant must not leave his homestead in Tsolo for three (3) consecutive days without informing the Investigating Officer.

45. The Appellant is restricted and restrained from visiting or communicating with State witnesses, which include but are not limited to the following:

45.1. Odwa Mda;

45.2. Bongiwe Ncula;

45.3. Kumbula Fanapi; and

45.4. Mawande (whose surname was never revealed or mentioned in the bail proceedings in the Court *a quo*).

46. The Appellant is restricted from applying for a passport whilst out on bail.

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B. METU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Attorney for the Appellant	:	Mr Malala
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		MAKHANDA
		(REF.: MR JIKIJELA/MR MALALA
Counsel for Respondent	:	Adv. Phikiso
	:	C/o National Director of Public Prosecution

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MAKHANDA

Date Heard	:	31 May 2024
Date Delivered	:	11 June 2024