



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. CA&R76/23

In the matter between:

LUBABALO NCUME

1ST APPELLANT

MASIBULELE NCUME

2ND APPELLANT

MZIWOXOLO PHATHEKILE

3RD APPELLANT

And

THE STATE

RESPONDENT

BAIL APPEAL JUDGMENT

INTRODUCTION

[1] This case comes before me as an appeal in terms of Section 65(1) of the Criminal Procedure Act 51 of 1977 , (“the Act).

The Appellants Lubabalo Ncume, Masibulele Ncume and Mziwoxolo Buhle Phathekile were arrested on different dates during October 2022 charged with two (2) counts . The charges against them relate to kidnapping and murder. Those

charges arose from the incident that occurred at Highland View in Bizana on the 9th September 2022.

GROUND OF APPEAL

[2] The grounds of appeal are set out in detail in the notice of appeal, which *inter alia* reads as follows:-

2.1 The Honourable Magistrate erred and misdirected herself in all aspects, *inter alia*, by finding that the appellants failed to discharge the onus resting upon them to show that there were exceptional circumstances which in the interest of justice permit their release.

2.2 The Honourable Magistrate further misdirected and erred in finding that she has reasonable and justified in dismissing the appellant's bail application.

2.3 The learned Magistrate misdirected herself by quoting and considering the community outrage without even gathering and evaluating such evidence from the investigating officer, that is, there was no petition presented by the state during bail application as a sign of community outrage.

2.4 The Honourable Magistrate dismissed the likelihood or grounds so listed in section 60(4) (a-e) that are non-existent on the appellants bail application.

2.5 The Honourable Magistrate failed to take into account the time period in which the appellants are in custody.

[3] The argument eventually advanced boils down to the contention that the learned magistrate misdirected herself on the facts and in the law and consequently her decision to refuse the Appellants bail was wrong.

FACTUAL BACKGROUND

[4] The I/O testified as follows in relation the strength of the State's case :-

Appellant No 1 and 2 are brothers, appellant No3 is known by appellant No 2.

The deceased was a student at Bizana Village SSS doing Grade 12. A quarrel ensued between deceased and one Noxolo the sister to the 1st and 2nd appellants. Deceased assaulted Noxolo and a case was opened in Bizana police station. It transpired that Noxolo reported this incident to her brothers. Deceased received threatening telephone messages from Noxolo that her brothers are to deal with him accordingly. Deceased kept on apologising to her but in vain.

[5] On a certain day in September 2022 1st appellant drove from Gqeberha to meet 2nd and 3rd appellants in Mtata. They drove to Bizana using two vehicles. There were other people in the vehicle driven by 2nd Appellant. They proceeded to Bizana looking for the deceased. On arrival at Bizana where the deceased was staying they pretended to police officers, that they are looking for the deceased who is accused of theft. Deceased on realising that he was in danger , ran away but appellants chased and caught up with him firing gun shots at him. They assaulted him and took him in one of the vehicles and drove away. Deceased was apologising. It was the last day for his life. They drove him to a secluded area on the way to Mount Ayliff where they forced him to drink a poison. On seeing that he was not dying Appellant No 1 instructed Appellant No 3 to shoot the deceased, which he did. Deceased's remains were found after days. All three appellants are linked as the perpetrators of this crime. 1st and 2nd Appellants made confessions and pointing out which led to the discovering of the deceased decomposed body.

PERSONAL CORCUMSTANCES OF THE APPELLANTS

[6] Appellant No 1: LUBABALO NCUME:

He is 24 years old born from Kwandela Locality in Bizana.

He is single and has one minor child.

He is residing in Newton Park in Gqeberha, working a part time job at Seaden Harbour.

He earns R5000 per fortnight. He also operates as an Uber driver, using a polo vivo and earns R12000 per month.

He pays instalments for the said vehicle which belongs to his brother the 2nd appellant.

He supports his parents, minor child and siblings.

He has no previous convictions.

APPELLANT NO 2 : MASIBULELE NCUME :

He is 29 years old born from Kwandela Location in Bizana.

He resides at House No 86 3rd Avenue Norwood, Mtata.

He is single with one minor child Ongeziwe July who is three months old.

He is self-employed running business RAVA TRADING ENTERPRISE installing electricity and cameras.

He has three employees.

He pays instalments of two vehicles, for Toyota bakkie, registration no. JMJ 59 EC instalment of R5500, for Isuzu bakkie , registration no. JXL 595 EC of R8000.

He is also responsible in maintaining his parents and siblings.

He has an unfinished job of his customers.

He has no previous convictions.

APPELLANT NO 3: MZIWOXOLO PHATHEKILE:

He was born in Mqanduli on the 14/10/1991.

He is residing with his girlfriend at no 29 Delvin Road in Mtata December 2021.

He is not married . He has 5 children who are staying with their different mothers.

He is working as a grass cutter in Nkululwekweni earning R9000.00 per month.

He is the breadwinner at home.

He has no previous convictions.

ANALYSIS AND APPLICATION OF LAW

[7] It is trite law that in the case of an accused person charged with an offence referred to in schedule 6 of the CPA, the provisions of Section 60 (11) (a) of the CPA¹ provide that such an accused person shall be detained in custody until he or she is dealt with in accordance with the law unless such an 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 permits his or her release”.

¹ Criminal Procedure Act 51 of 1977

[8] In the matter of S vs Mazibuko and Ano ² , the court held that for the circumstance to qualify as sufficiently exceptional to justify the appellants release on bail, it must be one which weighs exceptionally heavily in favour of the appellant, thereby rendering the case for release on bail exceptionally strong or compelling.

[9] The onus is thus on the accused to establish on a balance of probabilities the existence of exceptional circumstances, which, in the interests of justice call for his or her release.

[10] In terms of Section 60(4) of the Act , it is not in the interest of justice to release an accused if one or more of the consequences listed in paragraphs (a)-(e) therein are established. However, in considering the question in subsection (4), the court must weigh the interests of justice against the accused's right to his personal freedom ³ and in that process the factors as listed in paragraphs (a)-(g) of subsection (9) must be taken into account. A bail court must always be alert so as not to trample on accused's right to personal liberty entrenched in our Constitution.

In S vs Mwaka ⁴, Le Grange J, expressed a view that:

“In terms of section 60(4), the basic principle in our law is that the bail ought to be granted unless it is not in the interests of justice.”

[11] In terms of that section the interest of justice would not permit the release of the accused person on bail if any one of the grounds mentioned therein is established.

They are :

² 2010(1) SACR 433 KZP

³ Section 60(9) and (10) of the Act

⁴ 2015 (2) SACR 306 WCC

- (a) Where there is 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.
- (b) Where there is likelihood that the accused, if he or she were released on bail , will attempt to evade his or her trial
- (c) Where there is 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.
- (d) Where there is likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including bail system.
- (e) Where in exceptional circumstances there is likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[12] 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 subsections 60 (9) and (10) of the Act .

In *S vs Dlamini* , *S v Dladla and others* , *S vs Joubert*, *S vs Schietekat* ⁵ Kriegler J held that these sections should be read as follows :

“Requiring 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 ,

⁵ 1999(4) SACR 623 CC

where the liberty of the individual and the interest of justice are given full value according to the Constitution “.

ARGUMENTS

[13] It was submitted on behalf of the appellants that in the court a quo it was conceded that the offence with which the appellants were charged, falls within the ambit of Schedule 6 of CPA and submitted that throughout the bail proceedings there was no evidence whatsoever that the murder was planned by the appellants. Their application should have been dealt with under Schedule 5. The defence pleaded with this court to consider the applicable cases that when deciding the bail appeal. The defence referred the court to a case Svs Dewani cc 15/05/2015, S vs Panayioton cc 26/206 (EC) and S vs Pistorius.

[14] It was further submitted by the defence that appellants co-operated with the police. Appellant no.2 surrendered himself to the police station in Bizana in company of his attorney which proves that the appellants will not evade trial.

The appellants will not interfere with state witnesses. They do not know who the witnesses are. The 1st and 2nd appellants made an inadmissible confession which will not stand in trial. That the court must consider the period spent by the appellants in custody.

The state does not have a strong case against the appellants. The appellants have managed to convince the court that there are exceptional circumstances which justify their release.

[15] The state argued that the appellants failed to justify their application to be released on the bail. The admissibility of confession made by the appellants will be dealt with during trial. The appellants will interfere with the state witnesses. They

know who the witnesses are. There is also a section 204 witness who is known to appellants. The fact that the appellants handed themselves to the police is not an exceptional circumstance which justify release on bail. They were not yet charged by then. Murder committed by the appellants was pre- planned .The interests of justice do not permit the release of the appellants on bail

CONCLUSION

[16] The strength of a case against appellants and the nature of gravity of punishment which is likely to be imposed are some of the grounds which, in terms of section 60(6) of the Act, a court should consider in determining whether there is likelihood of an appellant evading trial. Murder cases are rife in our country. Such actions of appellants need to be carefully considered before releasing them on bail.

A weak state's case will not necessarily result in granting of bail.

[17] In S vs Scott- Crossely ⁶ the court held that the prospects of success did not itself amount to exceptional circumstances as envisaged by the Act –the court had to consider all relevant factors and determine whether individually or cumulatively they constituted exceptional circumstances which would justify the appellant's release.

[18] In S vs Mpulampula ⁷it was held that the fact that accused made confession and pointing out but are going to dispute admissibility during the proceedings does not constitute exceptional circumstances.

⁶ 2007(2)SACR 470 SCA

⁷ 2007(2)SACR 113 [E]

[19] In *Scott-Crossley* (supra), it was held that, personal circumstances like fixed address, fixed employment, a business etc. are all ordinary circumstances. The mere fact that accused was granted leave to appeal does not constitute exceptional circumstances. Having and /or running a business and /or serious financial prejudice do not constitute exceptional circumstances.

[20] 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 the judge shall give the decision which in its or his opinion, the lower court should have given.”

[21] This Court finds that the appellants has not successfully discharged the onus as contemplated in section 60 11(a) of Act 51 of 1977 that there are exceptional circumstances which permit their release on bail.

[22] The applicants have accordingly failed to discharge the onus resting upon them to establish that it is in the interests of justice for them to be released on bail.

[23] The magistrate’s conclusion in refusing bail was accordingly correct based on inter alia:

(i) the strength of the state’s case,

(ii) their failure to demonstrate that it is in the interests of justice to release them on bail, having regard to all the relevant factors and authorities listed above.

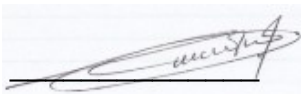
(iii) the likelihood of the appellants to interfere with the state witnesses who are known to the appellants.

[24] I am accordingly not satisfied that the magistrate wrongly exercised her discretion and that the decision to refuse bail was wrong.

[25] The learned magistrate's refusal was justified having regard to the facts of this case and the findings made above and having regard to the relevant authorities.

There is accordingly no reason to interfere with the learned magistrate refusal of bail which was the decision appealed against.

[26] Consequently, the appeal by all three appellants is dismissed.



P.C.N.MJAME

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: Advocate N. Mazamisa

Instructed by: National Director of Public Prosecutions

UMTATA

Counsel for appellants: B. Qakumbana

28 Sprigg Street

Mbambisa's Medical Center

Mthatha

Date heard: 27 October 2023

Date delivered: 01 November 23