



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

Case No: CA & R 91/2023

In the matter between:

ZWELAKHE MTENGWANA

Appellant

and

THE STATE

Respondent

BAIL APPEAL JUDGMENT

ZONO AJ

[1] This is a bail appeal emanating from Magistrates' Court in the district court of Mthatha under Case No: F1054/23. The appellant appeared before the lower court facing charges of Robbery with aggravating circumstances where a firearm was used.

[2] On 03 November 2023 the appellant made his first appearance in the lower court and was represented by his legal representative Mr Malala where it was indicated that the State is opposed to the release of the appellant on bail. The bail hearing proceeded and postponed to 07 November 2023. Nothing happened on 07 November 2023. It further proceeded on the 08 November 2023 and 09 November 2023 respectively. On the 09 November 2023 the bail proceedings were postponed on 10 November 2023 for judgment.

[3] The Court and the parties proceeded with the bail proceedings on the basis that they are premised on the provisions of Section 60 (11)(a) of the Criminal Procedure Act 51 of 1977 as amended. They understood the offence facing the appellant to be the one listed in Schedule 6. It suffices to mention that in terms of the aforesaid provisions appellant bore the onus to prove that there are exceptional circumstances which in the interests of justice permit his release. The bail so proceeded.

CRUCIAL EVIDENCE LED BY THE APPELLANT

[4] The gravamen of appellant's evidence in the lower court was recorded as follows:

[5] He testified that he is 30 years old residing at[...] He is not married but a father of two children born from different mothers, whose names are [...]

[6] The appellant testified that both these children are staying with their maternal grandmothers. The mother of the eight year old one is working whilst the mother of the six year old is still at school. He further testified that these

children are schooling, one doing Grade 1 and the other doing Grade R. He told the court that he is responsible for their care. He is the one paying their school fees and buying them clothes.

[7] The appellant testified that he is working on part-time basis at [...]which offices are at[...] He has only one parent his father who is staying at[...] He further stated that he has brothers, one staying at [...]and the other at[...] All of those addresses are within the area of jurisdiction of Mthatha.

[8] He stated that he has no relatives residing abroad. He has no travel document. He stated that he does not know witness in this case and cannot interfere or intimidate them. He stated that if he were to be released on bail he would not evade trial. He would not undermine and jeopardise the objectives and the proper functioning of the criminal justice system. He would not disturb the public order and undermine the public safety and security.

[9] He testified that the conditions in the cells are not good as they are overcrowded; and that three or four people sleep in one bed. Cells are infested with lice and the food is not good and those conditions have affected him as he has lost weight.

[10] He stated that he would plead not guilty to the charges as he did not commit the offence. He also stated that the State's case is weak against him.

[11] When asked about what he would benefit if he is released on bail he stated that, he would regain his strength and look after his children in a good way. He stated that he would go back to his work and support his children properly. When asked to establish exceptional circumstances for his release, he

stated that he wants to go back to work and to pay the school fees of his children, buy them clothes and perform his responsibilities as a parent. As exceptional circumstance he stated that he would go and check-up on his family members in the rural areas because no one is working there, he is the one who at times will bring food. That you find in Volume 1 page 14. This is the crux of his evidence.

[12] The Court below, after its analysis of facts and law, dismissed the application and refused to grant bail. It is that judgment that led to this appeal. The lower court found that the appellant has failed to establish that there are exceptional circumstances that in the interests of justice permit him to be released on bail.

IN THIS COURT

[13] The appellant filed his Notice to Appeal in which he sets out his grounds for this appeal. Stripped of wordiness appellant's grounds of appeal are that the lower court has misdirected itself in refusing bail on the ground that there are no exceptional circumstances which in the interests of justice permit the grant of bail.

[14] The appellant criticizes the lower court for not having put weight on appellant's personal circumstances regard being had to the provisions of Section 60 (4)(a) to (e).

[15] The appellant criticizes the lower court for not having taken into account the fact that in a pending case listed under Schedule One the appellant had just

been released on bail on the basis that he has satisfied the requirements of Section 60 (4)(a) to (e).

[16] He complains about the lower courts' failure to take into account the *mala fides* of the State of arresting the appellant when he had just been granted bail in another case listed in Schedule One.

[17] The appellant finds the lower court to have misdirected itself by not requiring the State to adduce evidence regarding the existence of fingerprints linking appellant to the commission of the offence.

[18] The court misdirected itself in considering other factors in refusing bail when the bail was opposed only on the basis that the appellant has committed a serious and violent crime and that the State fears that the appellant would interfere with the police investigation.

[19] The lower court failed to demonstrate that the appellant was likely to evade trial.

ANALYSIS

[20] It is common cause that the appellant was charged with robbery with aggravating circumstances, which is listed in Schedule 6. It is further common cause that the bail application of that nature was governed by Section 60 (11)(a) of the Criminal Procedure Act 51 of 1977 as amended.

[21] Section 60 (11)(a) of Act 51 of 1977 as amended provides as follows:

“11 Notwithstanding any provision of this Act, where the 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/her release.”

[22] It is now trite that this Section burdens the bail applicant with onus to prove that exceptional circumstances exist which in the interests of justice permit his release. It is further trite that if there are no exceptional circumstances which in the interests of justice permit the release of the accused, the court is enjoined to order the detention of such an accused until evidence that satisfies the court that they do exist is adduced. See: S v Nwabunwanne 2017 (2) SACR 124 (NCK) para 10.

[23] The exceptionality of the circumstances must be considered with reference to the peculiar facts of the case. However, the law is settled that there is no definition that can be ascribed to the concept of exceptional circumstances. But Labe J in S v H 1999 (2) SACR 72 (W) at 77e-f made the following *dictum*:

“Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly... to an accused person’s specific application. What a court is called upon to do is to examine all the relevant considerations... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under Section 60 (11).”

[24] Before examining other authorities, I am constrained to state that appellant’s grounds of appeal are by and large complaining about the lower court’s failure to consider the provisions of Section 60 (4)(a) to (e) relating to appellant’s personal circumstances. Section 60 (4)(a) to (e) deals with ordinary

circumstances. That stance prevailed in court during argument where appellant's legal representative insisted that those requirements for ordinary bail application are indispensable in Section 60 (11)(a) bail applications. I am supported by the aforesaid authority that something more need to be said.

[25] The second thing that must appear from the evidence is a circumstance or circumstances pertaining peculiarly to the accused person's specific application. General facts or circumstances applicable in the ordinary bail application are not without more satisfactory or sufficient to make accused person a candidate for bail under Section 60 (11)(a) bail applications. The exceptionality of the circumstances lies with the fact that they are unusual and out of the ordinary.

[26] Labe J is not alone on this view. Van Zyl J in S v Peterson 2008 (2) SACR 355 (C) para 55, had this to say:

“55 ... Generally speaking “exceptional” is indicative of something unusual, extraordinary, remarkable, peculiar or simple different. There are, of course, varying degrees of exceptionality, unusualness, extra-ordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration...”

[27] In S v Rudolph 2010 (1) SACR 762 SCA, Snyders JA, having referred to S v Dlamini and S v Botha, concluded that ordinary circumstances present to an exceptional degree may lead to a finding that release on bail is justified.

[28] Reverting to the evidence adduced by the appellant in the lower court after

having repeatedly testifying that the main reason he wants to be release on bail is because he wants to take care of his two children, paying school fees, buying

clothes and toys for them, he was specifically asked by his legal representative and answered as follows: See: Vol 1 page 14:

Mr Malala: The offence that you are facing falls under Schedule 6 and this court requires you to establish exceptional circumstances for you to be granted bail. Precisely, can you tell the Court why do you want to be released on bail?

Applicant: I want to go back to my work and also to pay the school fees of my children, buy them clothes and perform my responsibilities as a parent.

Mr Malala: Yes, what else”?

Applicant: To go and check-up on my family members in the rural areas, because no one is working there, I am the one who at times will bring them food.

Mr Malala: By family what do you - are there?

Applicant: My aunts

[29] There are no other reasons or circumstances that were stated as an exceptional circumstances than the ones mentioned. His legal representative persisted with that argument even before this court, although it was at this time trimmed and reduced.

[30] It is incorrect to suggest in the notice of appeal that the lower court did not deal with the personal circumstances of the appellant in its judgment. In Volume 4, page 183 the lower court said the following:

“Mr Mtengwana, the applicant herein has advised the court that amongst the reasons as to why he is applying to be released on bail is that he wants to go out and take care of his minor children. Further advised the court that his maternal aunts are depending on him. Further, that he wants to go and continue with his employment.”

[31] At page 18 of the same Volume the lower court states as follows:

“It is a known factor ... [indistinct] thing becomes apparent, that person has to take care of his or her offspring. In order for one to take care of their offspring, they have to generate an income somewhere and it is, there is nothing special about that and there is nothing extra-ordinary about it. And there is nothing peculiar about that. Further, the children who are said to be taken care of by the applicant are said to be residing with their grandmothers. Therefore, the best interest of the children in question are again recognised by this Court and they are being taken care of.”

[32] I cannot find fault on the reasoning of the lower court. Instead, I find the evidence of the appellant not to have established exceptional circumstances which in the interests of justice permit his release. The legislature did not intent that every person who has children and working is a candidate for bail without more under Section 60 (11).

[33] Appellant’s Counsel, in argument did not pursue the ground relating to his minor child whose mother is working. Whilst that minor child is in the custody of the grandparent, and taken care of there, his/her mother is also working. Accordingly, I find that the ground was wisely not pursued as that child is clearly taken care of in the absence of the appellant.

[34] About the second child, the evidence is that the minor child is also staying with the maternal grandparent. The mother of the child is said to be schooling. That evidence is not without difficulties.

[35] The appellant in his evidence, nowhere did he say he is the sole provider for the minor child concerned. Whilst the mother of his child is taken care of by her family, it was not stated by and on behalf of the appellant that, that family with which the minor child is staying is incapable of taking care of her. This must be looked at against the backdrop that it is the appellant who had a duty to present evidence which establishes that without him that child will suffer. The lower court was correct to remand the appellant in custody as there was no evidence showing that exceptional circumstances do exist, which in the interests of justice permit his release on bail.

[36] To conclude on this point, the appellant, whilst he said that he is responsible for the payment of children's school fees, clothing and goodies, he did not prove that by any empirical evidence. His duty is not only to allege, but it is to prove the substance of his allegations. The only proof, one can think of is the school receipt. How he pays for all of these is not clear. It is not clear if he pays directly to the school or he gives money to the mother to pay for the child. I am therefore not persuaded that the appellant discharged a duty put on his shoulders to demonstrate that there are exceptional circumstances which in the interests of justice permit his release on bail.

[37] Section 28 rights (Section 28 of the Constitution) relied upon by the appellant were his bull or strong points. I find reliance thereon to be unpersuasive. The appellant is on record to say his father is a businessman, but

does not go further and say he cannot assist him with the child's needs when he is absent.

[38] The appellant was unable to prove that the State's case was weaker than his. Although bail hearing is not about the guilt or otherwise of the accused person, but his allegation that the State's case is weak attracted overwhelming evidence that during trial he might be found guilty of the offence of robbery with aggravating circumstances.

[39] Firstly, the appellant said that he has no witness in the case. He confirmed to have been in possession of the motor vehicle (Benz) used in the commission of the offence few days before the incident of robbery. It is that motor vehicle that was used in the commission of the offence and that is a common cause.

[40] Secondly, the fingerprints that were collected on the scene match those of the appellant. Those fingerprints correspond with his identity numbers.

[41] I do no more than only saying, it is incorrect that the State's case is weak. I say this because he presented no evidence stronger than the one the State presented or adduced.

[42] During argument of this appeal appellant's representative did not argue on evidence that the appellant suffered from the conditions of the cells like lice, lost of weight and sleep in bed with three or four inmates. On invitation by the Court he simple said that he is not abandoning those.

[43] It is worth mentioning that during clarity seeking questions the lower court pointed out to the appellant a discrepancy and sought clarity on the issue of addresses. The addresses he gave during the oral evidence is different from that appearing on the charge sheet. When he was charged he gave the police and the prosecutor an address which is [...] This does not look good for him to be considered as a trustworthy person. An address in bail proceedings is a very important information.

[44] In the circumstances I am not persuaded that the appellant has made out a case for the success of the appeal and that he must be released on bail.

[45] In the result, I make the following order:

45.1 The appeal is dismissed.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

Appearing for the appellant:

Mr L. Malala
c/o Mvuzo Notyesi Inc
MTHATHA.

Appearing for the respondent:

Adv. A. Bikitsha
c/o Office of the DPP

MTHATHA.

Heard on: 07 December 2023

Delivered on: 12 December 2023