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

CASE NO.: CA&R 06/2024

In the matter between: -

MOSES LOVELADGE GOMBE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Monakali AJ:

Introduction

[1] This is an appeal against the refusal of bail by a Magistrate in the District of Mthatha. The appellant was arrested on 20 September 2023 for allegedly

having committed robbery with aggravating circumstances. Aggrieved by the refusal of bail, he approached this court in terms of section 65 (1) of the Criminal Procedure Act 51 0f 1977.

[2] The appellant was legally represented in the court *a quo*. He tendered oral evidence, which set out his personal circumstances. In opposition to his bail application, the state led the evidence of the Investigating Officer.

Factual Background

[3] It is alleged that on 25 March 2023, between 22h00 and 02h00, the appellant and four others, acting in common purpose with one another, robbed an electricity equipment warehouse in Boziza Location, at Mthatha. They accosted the security guards at gunpoint and disarmed one guard of his firearm. They forced the security guards to load the material from the warehouse onto their bakkies. At some stage during the robbery, the guards were bound with cable ties. One of the guards managed to untie himself and his colleagues. They then called the police. The police recovered all the material stolen from the warehouse and a cell phone which the robbers stole from one of the guards. The faces of the robbers were not covered when they robbed the security guards.

The security guards placed the appellant on the scene and identified him as one of the robbers. The appellant pleads *alibi* to the charge.

The findings of the court *a quo*

[4] The Magistrate in the court *a quo* found that:

(a) There is a *prima facie* case against the accused.

(b) The community is outraged because the appellant stole material that was meant for electricity in their homes.

(c) The appellant is a flight risk, he has no fixed property, and he can easily move from his rented house to another place.

(d) The witnesses for the prosecution will not be safe, and

(e) There are no exceptional circumstances which permit the release of the appellant in the interests of justice.

Grounds of Appeal

[5] The appellant submits that the Magistrate erred in reaching the following findings, namely, that:

a) The appellant has failed to establish exceptional circumstances, which in the interest of justice permit his release.

b) The appellant's personal circumstances do not constitute exceptional circumstances.

c) There is a strong case against the appellant.

d) The appellant is a flight risk and will evade trial and,

e) The witnesses would be in danger, should he be released on bail.

Submissions by the parties

[6] The Appellant contends that the court *a quo* erred by not considering the following factors, which, in his view constitute exceptional circumstances:

a) The appellant is a 31-year-old Zimbabwean citizen and was awaiting the determination of his asylum seeker permit,

b) The best interest of his minor children are paramount and he is their primary caregiver,

c) His parents in Zimbabwe, and his wife, all depend on him financially for their medication.

d) He suffers from an ulcer; the food at Correctional Centre is spicy and is not good for his health condition.

e) He is a breadwinner at home.

f) The state case against him is weak.

g) The above factors cumulatively viewed, are exceptional and in the interest of justice permit his release, pending the finalization of his trial.

[7] The respondent submits that the appellant has failed to discharge the onus of establishing that exceptional circumstances exist which in the interest of justice permit his release on bail. The court *a quo* properly exercised its discretion in refusing to grant bail. The illness of the appellant with other factors, cumulatively taken, does not establish exceptional circumstances. The fact that the best interests of the children are paramount does not mean they are absolute. Like all other rights in the Bill of Rights, their operation has to take account of their relationship with other rights, which require their ambit to be limited.

Applicable Legal Principles

[8] An appeal against an order refusing bail is lodged within the purview of section 65(4) of the Criminal Procedure Act 51 of 1977 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."

[9] The test for interfering with the Magistrate's judgment is whether the court *a quo* materially misdirected itself in relation to facts or the law[1]. It was appositely stated, with respect, in *S v Barber*, [2]

> "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 for bail. 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 view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it 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 exercised that discretion wrongly."

[10] In the absence of the finding that the Magistrate misdirected him or herself, the appeal must fail. This approach was endorsed in cases such as *S v Nqumashe* [3] , *S v Branco* [4] and *S v Porthen and Others* [5].

[1]Panayotou v S [CA&R 06/2015] ZAECGHC 73(28 July 2015) at para [26] –[27].
[2]S v Barber 1979 (4) SA 218 (D) at 220 E- H
[3] 2001 (2) SACR 310 (NC) at para 20.
[4] 2002 (1) SACR 531 (W) at 533j.
[5] 2004 (2) SACR 242 (C) at para [3] – [7].

[11] In *Porthen*[6], however, Binns–Ward AJ expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60 (11) (a) of the Act.

Analysis

[12] The offence allegedly committed by the appellant falls within the ambit of Schedule 6. Section 60 (11) (a) of the Criminal Procedure Act is applicable and provides that:

> "(11) Notwithstanding any provision of this Act, where an 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 or her release;"

[13] The onus rests on the appellant to adduce evidence on balance of probabilities that exceptional circumstances exist, which in the interest of justice, permit his release.

[6] Supra n 5 at para 16.

[14] What is required is that the court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant, consistent with the interest of justice, warrant his release, the appellant must be granted bail.[7]

[15] In *S v Petersen*[8] the court said:

> "On the meaning and interpretation of "exceptional circumstances" in this context, there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration"

[16] Exceptional circumstances must be circumstances which are not found in an 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

[7] S v Bruitjies 2003 (2) SACR 575 (SCA) at 577.
[8] 2008 (2) SACR 355 (C) at para 55.

relevant considerations as wholistically, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60.[9]

[17] Section 35 (1)(f) of the Constitution acknowledges that persons who may be arrested and detained for allegedly having committed offences are entitled to be released on reasonable conditions if the interests of justice permit.

[18] Section 60 (4) of the Criminal Procedure Act provides that the interest of justice does not permit the release from detention of an accused where one or more of the following grounds are established:

(a) where there is a likelihood that the accused if she or he were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a schedule 1 offence.

(b) where there is a 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 the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the

[9] S v H 1999 (1) SACR 72 (W) at 77E- F.

proper functioning of the criminal justice system including the bail system.

(d) 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

(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.

[19] It is correct that bail appeals should be dealt with through the legal prism of the Constitution. In *Mafe v S*[10], Lekhuleni J said the following regarding the presumption of innocence:

> "In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(*a*), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the other hand, must show that, notwithstanding the accused's presumption of innocence, it has a *prima facie* case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed

[10] Mafe v S (A49/22) [2022] ZAWCHC 108 (31 May 2022) At para [143] (in a dissenting judgment).

innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society."

[20] In *S v Dlamini*[11], the Constitutional Court unanimously decided that the right to be presumed innocent is not pre-trial right but a trial right. According to the evidence of the Investigation Officer, the security guards placed the appellant on the scene. Therefore, it cannot be said that the Magistrate misdirected himself.

[21] When the accused is able to adduce evidence that the case against him is non-existent or subject to serious doubt, that constitutes exceptional circumstances. The appellant has proffered an alibi as his defence. The Investigating Officer testified that the witnesses managed to identify the appellant as one of the robbers as his face was not covered. It is further alleged that the robbery continued for approximately six hours. In S *v Mathebula*[12], the Supreme Court of Appeal set out the test in relation to an attack on the strength of the state's case as follows:

"But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the

[11] 1999 (2) SACR 51 (CC), (1999 (4) SA 623; see also S v Mbaleki and another 2013 (1) SACR 165 (KZD) at para 14.
[12] 2010 (1) SACR 55 (SCA) at para 12.

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".

[22] It cannot be found that the state case in relation to the alibi defence is non-existent or weak. The appellant has not been able to show that he will be acquitted. I cannot find fault with the court *a quo*'s evaluation.

[23] However, I find that it is highly improbable that the appellant would interfere or intimidate witnesses. There is no evidence that the appellant threatened the witness or did attempt to influence them. In my view, the Magistrate erred in in finding that the appellant will interfere with witnesses.

[24] The appellant arrived in South Africa in 2021 for economic reasons, or to secure employment. He was not persecuted in his homeland or fled to South Africa to save his life. He had stayed in South Africa for more than 10 years without seeking asylum. He failed to apply for the asylum seeker permit upon his arrival. There is no satisfactory explanation as to why he remained with no valid documents. In 2017 he was convicted in terms of section 49 (1) of the Immigration Act and in 2021 his passport also expired. He is not detained for purpose of deportation nor has he expressed his intention to seek asylum permit

while waiting to be deportation. It cannot be said that the status of the appellant constitute exceptional as argued. The appellant has no valid documentation.

[25] In my view the case of *Ashebo v Minister of Home Affairs*[13] which the court *a quo* referred to, is distinguishable from this case. In *Ashebo* the issue was about the lawfulness of detention in terms of section 34 of the Immigration Act, once an intention to apply for asylum has been expressed.

[26] The appellant has conceded that he has access to adequate treatment where he is detained. There is no evidence that a request was made for a special diet and was refused by Correctional Officers. His health condition cannot be considered in isolation.

[27] The appellant testified that his family solely depends on him financially. His business was still in the process of having all the valid documents. It is not yet lawfully registered. It is evidence that his income is not stable; sometimes he can stay for a period of three to four months without any work to do. Therefore, there is no proof that his business interests will be financially prejudiced by his continued detention.

[13]Ashebo v Minister of Home Affairs (CCT 25/22} [2023] ZACC 16, 2023 (5) SA 382 (CC) 2024 (2) BCLR 217 (CC) (12 JUNE 2023) at para 59.

[28] The interests of minor children were dealt with in S v Petersen[14] where it was held that:

> "When, as in the present case, the special circumstances relied on by the accused include the constitutionally protected interests of a minor child, this court must, in terms of s 28(1)*(b)* of the Constitution, take cognisance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'. Inasmuch as a decision in regard to the appellant's bail application and subsequent appeal to this court will, of necessity, impact upon a child, it may not be lost from sight that the child's best interests are, in terms of s 28(2) of the Constitution, paramount. This does not, of course, mean that such interests will simply override all other legitimate interests, such as the interests of justice or the public interest. It must, however, always be taken into consideration as a relevant factor and a general guideline in assessing such competing rights."

[29] I am not convinced that the minor children are or will be destitute. They are in the care of their mother. They still enjoy their right to family, family care or parental care. The mother was not defined as unemployable.

[30] In the circumstances set above, I am convinced that the appellant's personal circumstances are not in any way exceptional. I cannot find that the decision of the court a quo was wrong.

[14] 2008 (2) SACR 355 (C) at para 63.

Order

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

1. **The appeal is dismissed.**

MONAKALI

ACTING JUDGE OF THE HIGH COURT EASTERN CAPE DIVISION

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