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

Case No: CA & R 96/2023

Court *a quo* Case No. D64/2023

In the matter between:

AYANDA SULELO WITBOOI FIRST APPELLANT

SOMELEZE XHOBISO SECOND 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. Mkumbuzi which was delivered on 28 June 2023.

2. The First Appellant was arrested and detained on 16 August 2021 and the Second Appellant was arrested on 21 August 2021. The offence the Appellants face is a Schedule 6 and comprises charges listed below:

2.1. Two (2) counts of robbery with aggravating circumstances, read with provisions of Section 51 (2), 52 (2), 52A, and 52B for the Criminal Procedure Act, 105 of 1997 ("CPA");

2.2. Two (2) counts of attempted murder;

2.3. Possession of a firearm;

2.4. Possession of ammunition; and

2.5. Arson.

3. In the premise, the onus is on the Appellant to show that the interests of justice permit his release from custody in terms of Section 60 (11) (b) of the CPA

4. Appellants first made a bail application on 10 September 2021, which was on 06 December 2021 and was denied. Again, on 22 September 2023, the Appellants made another bail application ostensibly on new facts. This was also refused on 10 October 2023.

5. This bail appeal is in respect of the last refusal to be admitted on bail on new facts. It is common cause that provisions of Section 60 (11) (a) of the CPA are applicable. Section 60 11 (a) provides:

> *"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 interest of justice permit his or her release."

6. In essence, the default position is that the Appellant should be detained in custody. However, he must be afforded a reasonable opportunity to adduce evidence that there are exceptional circumstances that permit his release. In this matter, the Appellants have had an opportunity two (2) times to make bail applications. Hitherto, I can safely say a reasonable opportunity was afforded. The only remaining issue is whether the Magistrate who was hearing the last bail application was wrong in exercising her discretion by refusing to admit the Appellants to bail.

THE ISSUE

7. 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[1].

8. Put differently, I have to determine whether the Court *a quo* was justified in denying bail to the Appellants.

NATURE OF THESE PROCEEDINGS

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 Court *a quo* ought to have been granted bail, what would be the appropriate

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

conditions to attach to the bail? However, in the absence of a finding that the magistrate misdirected herself the appeal must fail.

10. A bail appeal is an appeal in the ordinary sense and not a rehearing or a review. There appears to be a departure from the posture that was adopted in ***Mahomed*** that a bail appeal is an appeal in the wide sense[2], that is, it is a complete re-hearing and re-adjudication by a higher court on the merits of the application, with or without additional information, in which the appeal court will exercise its own discretion. Trollip JA had this to say[3]:

> *"It would seem at the first blush that the proceedings are civil. In that event a decision by the W.L.D. thereon would be appealable to the full Court of the Transvaal Provincial Division ("T.P.D.") and not direct to this Court unless the parties consent thereto in writing (see sec. 20 (1) (a) and (3) of the Supreme Court Act). However, the proceedings under sec. 97 of the Code originate in and are closely associated with the accused's arrest, detention and prosecution for a criminal offence. Hence, although they are civil in form, they are criminal in substance, and must be so regarded for the purposes of the relevant sections of the Supreme Court Act. See* ***Sita****'s case, supra,1967 (2) SA at pp. 448 in fin. to 449E, which is directly in point."*

11. Later, Kirk-Cohen J in ***Maliwa*** aptly stated[4]:

> *"In my view the remarks by MCEWAN J in* ***Ho****'s case, and those in* ***SA Strafproses****, demonstrate that this is an appeal* ***strictu sensu*** *in terms of subpara (ii) of the judgment of TROLLIP JA supra.*

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[2] ***State v Mahomed*** 1977 (2) SA 531 (A).
[3] *Ibid* @ 539H – 540A.
[4] ***Maliwa v State*** 1986 (3) SA 721 (W).

*[2] Thus, being an appeal **strictu sensu**, the following are essential requirements:*

*2.1 A notice of appeal. This is apparent from the provisions of s 65 (3) and the normal H procedure applying to appeals **strictu sensu**.*

2.2 A true copy of the record of proceedings in the court a quo. It goes without saying that, on appeal, this Court is limited to the four corners of the record.

2.3 That the appeal record, in proper form, be placed before the appeal Court, it being the I duty of appellant's attorney to do so. See Ho's case at 737C D.

12. As contemplated in Section 65 (2) of the CPA, the new facts were brought to the notice of the Magistrate who again ruled against the Appellants. This appeal therefore lies against the refusal of bail on new facts.

13. After the Magistrate presiding in the bail application on new facts was served with a Notice of Appeal he furnished reasons for her judgment and at page 397 at paragraph 5 it is recorded:

> *"The court noted this aspect as it is aware of what a new fact is, but it was outweighed by the gravity of the offences the first appellant is facing which [if] he is convicted of will invite life or long terms of imprisonment.* [sic].

14. In the transcript of record, at page 381 at lines 7 – 25 and continued at page 382 at lines 1 – 17 it is stated:

> *"In this application the Court finds that indeed the ailment of accused 1 is a new fact. But the Court finds that his ailment has been treated while he is in prison, and it continues to be treated at All Saints Hospital according to the medical records that have been submitted before this Court. But now as regards to accused 2, I find that it is just say so of him and there is no medical evidence regarding his alleged sickness as there is no medical record or medical history from either prison or elsewhere which suggest that he is not well. I find that the ailment of accused 1 can properly be treated in prison as it is doing currently. There is no medical evidence from a medical practitioner to the effect that his ailment cannot be treated while in prison. One should understand that prison always keeps a lot of people, those who are awaiting trial and those who are convicted. The prison has got a medical facility wherein if they are unable to treat a person, they would refer him to a medical practitioner from outside the prison premises. That is why even if sickness befalls those people who have been convicted, they are not taken out so they that they would not serve their sentence because they are ill, but they are treated in prison sick bays or prison hospital and if the ailment is too big for them, they would refer them to hospital outside the prison. Recently this court has been hearing the bail application of* ***S v Duma*** *and another which is B171/2022. One of the accused had a medical condition which the prison have been treating and when they felt they were not able to treat*

him they referred him to Nelson Mandela Academy Hospital. And I know for a fact that one has got the right to be visited by a medical practitioner of their own choice if that is what they want. And even if I choose one has got a particular medical doctor whom he wants to be treated by, he can be taken on the order of the court to be taken by the prisoner authorities or the investigating of the case to that medical practitioner or that hospital outside the prison premises."

15. With the foregoing, it is clear that the learned Magistrate considered the new fact but was not persuaded that this was an exceptional circumstance warranting the release of Appellant 1. Ms. Mkumbuzi was even less impressed by Appellant 2's evidence. She indicated that there were no medical records backing up his contention that he was ill.

16. In essence, the Appellants have to remain in custody until they show that exceptional circumstances permit that they be released on bail. The Appellants in their application for bail on new facts had to adduce evidence and show that exceptional circumstances exist, which are in the interest of justice, that they be released on bail. According to the Respondent, they failed to do that.

DISCUSSION

17. Mr. Tutu representing the State, submitted that the health of Appellant 1 improved and his medical record showed that he was diagnosed with a urinary tract infection which was successfully treated. At page 228 of the bundle is a report by a professional nurse, Ms. B Mketo, to the effect that he was seen on 13 June 2023 complaining of burning urine. He was given treatment.

Appellant 1 came back again on 27 August 2023 complaining of urinary retention and lower abdominal pain. He was wearing a catheter, which he said was inserted at All Saints Hospital on 12 August 2023. The catheter was removed and a new one was inserted. He was given medication. Ms. Mketo reported further that Appellant 1 never reported any health problems afterwards.

18. Mr. Songelwa, representing the Appellants did not dispute the depiction of Appellants' medical condition that they have improved. However, he submitted that even though he was not a doctor, during his consultations with the Appellants, Appellant 1 looked sickly.

19. Mr. Songelwa stated that if Appellant 1 were to be admitted to bail he would not interfere with evidence or intimidate state witnesses. To that end, he was willing to go to Lusikisiki and stay with his relatives away from his home where the witnesses were in the same village.

THE LAW

20. 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."*

21. I can only interfere with the Court *a quo* judgment on the bail application if I find that Ms. Mkumbuzi misdirected herself in a material way in relation to facts or the law[5].

22. The Court in ***S v Barber*** succinctly depicted the role of Court in 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[6],

> *"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 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."*

23. The real question is whether it can be said that Ms. Mkumbuzi had the discretion to grant bail but she exercised that discretion wrongly.

FINDING

[5] ***S v Panayiotou*** CA&R06/2015.
[6] ***S v Barber*** 1979 (4) SA 218 (D)at 22 E – H.

24. The evidence before me pertaining to the medical condition of the Appellants is not persuasive that it amounts to exceptional circumstances justifying that they be released on bail.

25. I cannot fault the decision of Ms. Mkumbuzi in denying bail to the Appellants. She did not exercise her discretion wrongly.

26. In the circumstances, the appeal must fail.

27. Therefore, the bail appeal is dismissed.

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B. METU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Date Heard	:	07 June 2024
Date Delivered	:	11 June 2024