REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: CA&R: 05/2015

In the matter between:

SIMNANZILE HLATYWAYO **Appellant**

vs

THE STATE **Respondent**

Date heard : 7th May 2015
Date delivered: 19th May 2015

Summary : This is a bail appeal which was refused by the magistrate in circumstances where the appellant was charged with a Schedule 6 offence. Section 60(11)(a) of the Criminal Procedure Act (the Act) required the appellant to show that exceptional circumstances permitted his release in the interests of justice. Appellant only submitted an affidavit and did not testify in his bail application. The trial Court dismissed his application for bail. On appeal the Court also dismissed his appeal, mainly on the grounds that appellant failed to show exceptional circumstances permitting his release in the interests of justice.

BAIL APPEAL JUDGMENT

TSHIKI J:

[1] The appellant herein and two others were arrested and charged in Uitenhage Magistrate's Court with three counts which are:

[1.1] Count 1: Robbery with aggravating circumstances as intended in section one of the Criminal Procedure Act 51 of 1977 read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended;

[1.2] Count 2: Possession of unlicensed Firearm in contravention of section 3 read with sections 1, 117, and 121 of the Firearms Control Act 60 of 2000;

[1.3] Count 3: Possession of ammunition in contravention of the provisions of section 90 read with sections 1, 103, 117, 120(1)(a), 121 read with Schedule 4 and section 151 of the Firearms Control Act, 60 of 2000 further read with section 250 of the Criminal Procedure Act 51 of 1977.

[2] The offences are alleged to have been committed at Fairbridge and Joe Slovo township in the district of Uitenhage.

[3] A formal bail application was therefore conducted at the instance of the appellant and his co-accused. In the bail application proceedings appellant submitted to the Court an affidavit as his evidence. He did so with a view to comply with the provisions of section 60(11) of the Criminal Procedure Act 51 of 1977 (the Act) in discharging the *onus* resting on him to satisfy the Court that exceptional

circumstances justify his release on bail in the interests of justice. Section 60(11) of the Act provides:

> "(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;
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> (b) 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 satisfied the court that the interests of justice permit his or her release."

[4] The above provisions of the Act were also explained and the difference between subsections (a) and (b) were clarified in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999(2) SACR 51 (CC) hereinafter referred to as *S v Dlamini* etc, the Constitutional Court at page 85 para [65] Kriegler J remarked as follows:

> "... an accused must satisfy a magistrate that the 'interests of justice' permit his or her release. It clearly places an *onus* upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in ss 60(4)-(9) or required by s 35(1)*(f)*. It is clear that an accused on a Sch 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant. The additional requirement of 'exceptional circumstances' imposed by s 60(11)*(a)* is absent. A bail application under s 60(11)*(a)* is more gravely invasive of the accused person's liberty right than that under s 60(11)*(b)*. To the extent, therefore, that the test for bail established by s 60(11)*(a)* is more rigorous than that

> contemplated by s 35(1)*(f)* of the Constitution, it limits the constitutional right."

[5] What it means is that whenever section 60(11)(a) and (b) apply, notwithstanding any provisions of the Act, there can be no question of an inquisitorial procedure and the issue of bail has to be decided on the question whether the accused has discharged the burden of proof placed on him or her by section 60(11). In other words, where section 60(11)(a) applies, there is no *onus* on the State to disprove the existence of exceptional circumstances. With respect to section 60(11)(b), the accused has to satisfy the Court that the interests of justice do not require his detention in custody. In other words, the interest of justice should justify the accused's release out on bail.

[6] Coming to the facts of this case, the appellant in his attempt to discharge the *onus* explained above, submitted the evidence of an affidavit deposed to by him which was handed in by him as exhibit "A". His affidavit evidence was consequently not tested by way of cross-examination. However, the rebutting evidence of the State was in the form of oral evidence of a policeman Mr Zaine Bosch who testified under oath. The important aspects of the state witness's evidence relative to the bail application is that when he saw the appellant the latter was in the back of the police vehicle. The witness asked the appellant for his address and in response the appellant gave him an address at 1752 Sokwana Street, Kwazakhele. He also gave him a cellphone number 078 394 7942. The witness discovered later that the address he was given by the appellant was not correct. The appellant gave the witness another address which is no 8 Katu Street. On interviewing the appellant, the witness discovered that the appellant had not told him the truth. He was in Joe

Slovo area in Uitenhage in his motor vehicle. He was in fact seen (identified) with the other robbers in the vehicle. In that vehicle there were three cartons of cigarettes laying in the front and back of the vehicle. There were also R180 000.00 worth of cigarettes covered under a white sheet. The witness disputed what the appellant said in his affidavit "that he did at first run away from the police but then stopped and he rendered himself over to the police". According to the witness the explanation given to him by the appellant reads "die persone het uit die bakkie gespring en het in die rigting van die bos gehardloop". This information about the appellant was read from the written statement explaining how the appellant was arrested which states that the appellant first ran away and then stopped and surrendered to the police. He had first been chased as he was running and thereafter fell down and that is how the police managed to catch and arrested him. He was also seen at the place where the two vehicles with cigarettes were robbed. His heart was beating very fast when he was arrested by the police. A beanie hat which he had been seen wearing was later found covering a firearm with it. According to the witness, evidence will be led at the trial to show that the appellant was also in possession of a firearm.

[7] The witness testified that according to the video footage at the petrol station the appellant took his time there and got out on his own and without any pressure, he pumped the wheels of his vehicle on his own and took his time to leave the petrol station. The witness refuted the evidence that the appellant was pointed with a firearm at any stage before or during his arrest. The witness also stoutly denied that the appellant was hijacked, instead he appeared in the video footage of the garage where the cigarette vehicle was hijacked by the alleged suspects including the appellant.

[8] The witness's evidence is that the appellant is also linked to the vehicle with the cigarettes that have been stolen during the robbery and the cigarettes were found inside the appellant's motor vehicle. He had also testified that the offence of which the appellant was found is a schedule 6 offence. Cigarettes worth about R200 000.00 were found in the vehicle of the appellant. The appellant according to the witness, if convicted, faces a sentence of up to fifteen years imprisonment. According to the evidence of the witness the appellant is linked to the syndicate of well-known robbers. He only admitted having been in Uitenhage when the investigating officer confronted him about the possibility of checking his phone to establish whether he had been in Uitenhage that day or at the relevant time. According to the evidence the appellant made attempts to remove the exhibit in the form of cigarettes from his vehicle. It is also strange that the police presence had to do with the property in his bakkie unless he knew that the cigarettes were unlawfully kept in his motor vehicle. Appellant never disputed the fact that he attempted to remove the cigarettes from his motor vehicle. In my view, his conduct is consistent with that of a person who knew that the police were there to arrest him.

[9] In his judgment the magistrate in the Court *a quo* dealt with the offence as a schedule 6 offence in terms of section 60(11)(a) of the Act. The magistrate in his judgment is of the view that the facts as elicited by the appellant in his affidavit lack detail which could be verified or confirmed. Contrary to the evidence of the police, the appellant denies in his statement that he only ran away from the scene before the police came. The appellant's failure to testify in Court deprived him of the

opportunity to explain the inconsistency between his evidence and that of the state witnesses.

[10] Another important aspect of this appeal which militates against the appellant is that the latter failed to satisfy the Court, on a balance of probabilities, that the interest of justice permit his release on bail. He failed to give oral evidence and instead he filed an affidavit and therefore his evidence was never tested by way of cross-examination. The contents thereof appear in annexure A. When tested against the oral evidence of the State witnesses his mere *ipse dixit* of what he deposed to in his affidavit could not be verified and tested by way of cross-examination. In this case, the appellant had a duty in terms of section 60(11) in the form of an *onus* to show on a balance of probabilities why he should be released out on bail. In respect of section 60(11)(a) he had to show exceptional circumstances which justified that the interest of justice permit his release.

[11] In my view, what is expected of a Court in proceedings of this nature is to exercise a value judgment in accordance with all the evidence and to apply the relevant legal criteria. [*S v Mbaleki* 2013(1) SACR 165 (KZD]. The State prosecutor in the Court *a quo* could not test the veracity of the appellant's evidence to establish the correctness of his affidavit testimony. It is evident that what the Act in terms of section 65(4) requires of this Court, before setting any decision on bail aside, is that this Court should be satisfied that the lower Court was wrong in its decision. Section 65(4) of the Act, reads:

> "(4) 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." [*S v Barber* 1979 (40 SA 218 (D)]

[12] In *S v Najoe* 2012(2) SACR 395 at 397 para [6] Dambuza J on a rather similar issue remarked as follows:

> "It is trite that there is no closed list of factors that constitute exceptional circumstances under s 60(11). What becomes evident from the numerous cases in which the courts have considered applications for bail, where the applicants face charges listed under sch 6 of the Act, is that what constitutes exceptional circumstances is, in each case, determinable from the circumstances of the particular case."

[13] The exceptional circumstances of each case are determined in accordance with the peculiar circumstances of each case and such circumstances are to be extracted from the witnesses who testify during the bail application proceedings. In the absence of oral evidence tested on oath by way of cross-examination it would be difficult for the Court hearing a bail application to make a determination of those exceptional circumstances and/or the interests of justice as the case may be. In *S v Mathebula* 2010 (1) SACR 55 (SCA) at page 59 para [12] and [13] in a case with similar facts Heher JA remarked as follows:

> "[12] 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 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: *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) at 230*h*, 232*c*; *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556*c*. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (2) SACR 761 (CC)

> (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: *S v Viljoen* at 561*f - g*. As will be apparent from the paucity of facts in support of his case, the appellant fell substantially short of the target. Despite the weak riposte of the State, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the State case than he had been when the application commenced. It follows that the case for the appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances."

[14] In this case only the State witnesses have testified and whose evidence was tested by way of cross-examination. The appellant's evidence was not tested by cross-examination and therefore, in my view, the appellant has not shown that his evidence could have more value as opposed to that of the State witnesses who testified against him.

[15] As I have said above, the learned magistrate has given his judgment in which he has rejected the version of the appellant and in the circumstances I cannot see how the magistrate could have accepted the version of the appellant.

[16] It, therefore, follows from what I have said above and on an analysis of the evidence as a whole, the probative value of the statement produced by the appellant and the burden of exceptional circumstances that rested on the appellant in the Court *a quo* that the appellant has not succeeded in demonstrating that the Court *a quo* was wrong. Its decision should prevail even in this Court. The appellant has failed to discharge the evidential burden resting on him.

[17] I have been referred to decided cases by both *Mr Wessels* for the appellant and *Mr Thysse* for the respondent which I have considered. However, each case will always have its peculiar circumstances in the sense that the facts of this case are distinguishable from other cases I am referred to in this appeal.

[18] In the result, the appeal is hereby dismissed.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the appellant	:	Adv J Wessels
Instructed by	:	Brian Maqungu Attorneys PORT ELIZABETH

Counsel for the respondent	:	Adv J Thysse
Instructed by	:	The Director of Public Prosecution PORT ELIZABETH