IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, PRETORIA

APPEAL CASE NO: A18/2022
COURT *A QUO* CASE NO:RC72/2020

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

14 April 2022 **.....**
DATE

In the matter between:

SITHOLE, IMRAAM First Appellant

RAGOMO, MOOLOLA Second Appellant

SELLO, JOSEPH KHAMUZELA Third Appellant

And

THE STATE Respondent

JUDGMENT

Coram NOKO AJ

Introduction

[1] The Appellants brought an application in terms of section 65 of the Criminal Procedure Act 51 of 1977, as amended (*CPA*) for this court to set aside the decision of the Regional Court Magistrate (per H Makhasibe[1]) in terms which the appellants' second application for bail was dismissed.

Background

[2] The factual background apropos the application is common cause between the parties. The appellants are charged with three counts of House breaking with intent to rob and robbery with aggravating circumstances[2], malicious injury to property, trespassing, possession of stolen property, 3 counts of kidnapping, possession of car breaking implements, 4 counts of possession of unlicensed fire arm and possession of ammunition. The said offences were allegedly committed in various areas and dockets were registered with the respective police stations, namely, Sandton, Ga-Rankuwa, Bedfordview, Douglasdale and Sandton. The offences were committed between the period January 2020 and March 2020. The appellants were arrested on 7 March 2021 and brought their first bail application which was refused by the Regional Magistrate Court on 29 April 2020. At the time of the first bail application the contents of the docket were not disclosed to the appellants.

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[1] Referred to as Mr H Makhasibe on 003-1 of the record but as Ms Makhasibe on page 003-4 in the caseline.

[2] This charge was added to the initial charges, see first judgment on the bail application on page 003-134 and 003-135 on caseline, where it was indicated that the investigating officer intended to add a charge of attempted robbery

[3] The docket was subsequently disclosed and the appellants contend that subsequent to the perusal of documents disclosed and witnesses' statements they established that the State's case is weak. The appellants then brought an application for bail on the basis of the new facts which are predicated on the contention that with new charge and the contents of the docket being disclosed they believe that the State's case against the appellants is weak.

Before court a quo

[4] The second application for bail was adjudicated before the court a quo where the appellants contended that on the conspectus of the evidence as gleaned from the docket, there are no sufficient bases for the State to contend that there is a strong case against the appellants. The appellants submitted affidavits in support of the application for bail and did not present *viva voce* evidence.

[5] The appellants referred to the provisions of section 60(11)(a) of CPA in terms of which the accused who is charged with an offence listed under schedule 6 shall be detained in custody unless such an accused adduces evidence which satisfies the court that the exceptional circumstances exist which in the interest of justice permit his or her release[3] on bail.

[6] The evidence presented by the appellants is that witnesses in respect of all crimes allegedly committed by the appellants could not identify the suspects as they were wearing balaclavas. There is also a video footage of a vehicle leaving one of the scenes of crime which was examined by an expert (at the instance of the state) who returned the opinion that the video does not provide

[3] Section 60(11)(a) of CPA.

conclusive evidence that the individuals in the vehicle are the appellants. The finger prints taken on the scene of the crime cannot assist as the alleged assailants had hand gloves on. The firearm and the ammunition have since been forwarded for ballistic investigation and despite the period of one year six months the State has not been able to present a ballistic report which would have demonstrated that the firearms and ammunition which were found in the appellants' possession are linked in the commission of the crimes for which they are being charged for.

[7] The state testified through the investigating officer that the appellants were arrested in possession of a Mercedes Benz, ML 63 (*vehicle*) which was the subject of the investigation of robbery in Ga-Rankuwa. Inside the vehicle the police found the balaclavas, hand gloves, four firearms, a toy gun, ammunition and several number plates. The complainant who was robbed of the vehicle in Ga-Rankuwa did identify the vehicle as his though in his statement he mentioned that the colour of his vehicle is silver whereas the investigation officer stated that the vehicle was gold. The State contended that the question of the dispute about colour of the vehicle is not a critical issue as the colours of vehicles now-a-days are not readily ascertainable. Unfortunately, the number plates which were on the vehicle and others which were inside the vehicle were not the original number plates for that car. None of the victims or witnesses of the robberies managed to identify the number of plates of the vehicle which was used in robbery at their places.

[8] The appellants stated in their affidavits that the evidence presented was that the vehicle was given to the appellants by one Verga. Further that the items, including the

firearms found in the vehicle were in the vehicle when it was given to them by Verga. The said Verga will be called before trial court to testify and only then the court would interrogate the veracity of his evidence. The state did not gain say the evidence in this regard. Details of the said Verga are in the cellular phones which were confiscated by the police and investigating office should be able access them.

[9] The investigating officer testified further that he did manage to identify the appellants on the footage as he knows them. He persisted with this view despite the fact that the State's expert had reservation and in fact concluded that the photos of individuals do not fit the photos of the appellants.

[10] Notwithstanding several enquiries the investigating officer could not procure the ballistic report and the last attempt was made few days before the bail hearing where, one Brigadier Van Niekerk, highest ranking officer at the State Laboratory, promised that efforts will be made to expedite their investigation and production of the report.

[11] The State's counsel contented that the first appellant was on bail on a charge whose details he was not privy to. Further that the second and third appellants were on parole and the details of the parole were not within the knowledge of the state's counsel.[4]

[4] The court a quo's judgment on caseline page 003-131 held that the first applicant has a pending matter against him wherein he is facing a charge of being in possession of a suspected stolen vehicle. The second applicant has a previous conviction of armed robbery wherein he was sentenced to 18 years imprisonment. At the time of the commission of this alleged crime he had just completed his parole 3 months before the alleged commission of this crime, he has no pending matters against him. In respect of the third applicant how has a previous conviction of armed robbery when he was convicted where he was sentenced to 16 years imprisonment. At the time of the commission of the alleged crime he was serving his parole, he also does not have any pending case against him.

[12] In summing up the application by the appellants was based on the arguments that the evidence presented by the state is weak and in view of the length of the investigation exceptional circumstances now exist which in the interest of justice warrant that the appellants should be admitted to bail.

[13] The court a quo dismissed the second bail application on the basis that the contentions which are advanced by the appellants' representative speaks to the 'holes'[5] on the State's case. In addition, so proceeded the court a quo, the defence counsel highlighted contradictions in the state evidence. The court a quo held that the issues raised by the appellants should be left for the determination of the trial court. The court a quo further stated that the decision of the first bail application should be incorporated in its judgment and the court was not persuaded that the appellants would not interfere with witnesses and further that they are still a danger to the society.

On appeal

[14] The appellants' counsel persisted with contentions advanced before the court a quo that the evidence disclosed by the state will not sustain the charges proffered against the appellants. In addition, that the magistrate erred in disavowing her responsibilities to assess the appellants' contentions that the state's case is weak when the court a quo held that same should be left for the consideration by the trial court. In addition, the magistrate concluded without any evidence that the appellants pose a threat to the public and are likely to interfere with the witnesses. The case's inherent weakness is aggravated by the

[5] Used in the judgment by the court a quo.

fact that there is no direct evidence and is greatly based on circumstantial evidence.

[15] The State, on the hand, persisted that the evidence against the appellants is overwhelming and indeed it was correct of the court a quo to have concluded that the appellants are indeed a threat to the public and further the appellants are likely to commit further crimes and/or threaten the State's witnesses. The State had difficulties in advancing the basis for these submissions except to state that the reason why the witnesses were not threatened and having no evidence demonstrating that the appellants will commit further crimes is because the appellants are in jail.

Legal principles and analysis

[16] This application was brought in terms section 65 of the CPA in terms of which an accused who is denied bail or aggrieved by the bail conditions may bring an appeal to the higher court for the higher court to set aside the decision to refuse bail or amend the conditions attached to the bail granted.[6] CPA provides further that the higher court shall not set aside the decision of the court a quo unless it is clear that the court a court was wrong.[7]

[17] The court has to determine whether the application is predicated on the new facts failing which the application must be dismissed. It was held in *S v Peterson* 2008 (2) SACR 355 (C) at par 57 that "…*[W]hen… the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new*

[6] Section 65(1) of CPA.
[7] Section 65(4) of CPA.

and, secondly, that they are relevant for purposes of the new bail application. The state appears not to take issue with the fact that the contents of the docket was disclosed after the first bail application and the contention that the defence was only able to assess the merits of the State's case is based on the witnesses' statements disclosed to the defence.

[18] In considering whether the accused will stand trial section 60(6) of the CPA listed factors which will aid in guiding this process. The court in *Mooi v The State (2012) ZASCA 79 (30 May 2012)* held at para 5 that factors which can be considered for the purposes of ss(4)(b) of the CPA include "…*the emotional and occupational ties of the accused; his assets and where they are situated; his means of travel and available travel documents; whether he can afford to forfeit the amount of money paid in relation to bail; prospects of extradition; the nature and gravity of the offences charged with; the strength of the case against him; the nature and the gravity of the likely punishment in the event the accused being convicted; the binding effect of possible bail conditions and the ease with which they could be breached, and any other factor which in the opinion of the court should be taken into account."*[8] These factors do not present a prescribed tick box to be ticked for all bail applications.

[19] The evidence by the appellants were only presented through an affidavit, though the State did raise this point in its papers this was not pursued with the requisite vigour before me, one would therefore infer that the State was not prejudiced in this regard. In any event the essence of the affidavits was only to demonstrate the weakness of the state case as the basis for contending that there

[8] See Booi at para 5

are exceptional circumstances which warrant admission of the appellants to bail. The evidence presented which is not oral is generally less persuasive than evidence presented orally.[9] As already alluded to above the essence of the evidence contained in the affidavits relate to the State's evidence (and its strength) and not necessarily the appellants' case and to this end no prejudice visited the state.

[20] The weakness of the state's case and attendant proof that the accused is likely to be acquitted at the end of the trial can also be considered exceptional circumstance.[10] It is noted that the during the bail proceeding the court is not enjoined to decide or pronounce on the guilt of the accused but only to assess the prima facie strength of the State's case.[11] Coupled therewith is the length of the detention or the duration of the trial which may be considered exceptional circumstances.

Circumstantial evidence argument.

[21] There is a cardinal principle in the law of evidence that direct evidence in general is more trustworthy in contrast to circumstantial evidence, though in other instances this may be to the contrary.[12] The State's case is, in general, purely circumstantial at this juncture. There appears to be merit in the contention advanced by the appellants that the only charge which may be considered crisp is that the appellants were in possession of a stolen car, the facts that there are hand gloves, balaclavas, toy guns and different number plates though feeding into a

[9] See *S v Pienaar* 1992 (1) SACR 178(W) at 180H; *S v Mathebula*, an unreported Supreme Court of Appeal judgment under case number 431/2009).
[10] See *S v Botha and Another* 2002 (1) SACR 222 SCA at para 21. See also *S v Mazibuko and Another* 2010 (1) SACR 433 KZP at 23.
[11] *S v Van Wyk* 2005 (1) SACR (NC) at para 6.
[12] See "*The Law of Evidence*", DT Zevert, AP Paizes and A St Q Skeen, Lexis Nexus, 2003, at 94.

possible inference that these tools are carried for criminal activities the state evidence is not that clear. To act on this inference could, without more, in this specific case fly in the face of the principle of presumption of innocence. The appellants have contended that they were willing to assist the investigation with the tracing of Verga, the alleged lawful possessor of the vehicle, but to no avail as the cellular phones have allegedly been confiscated by the State.

[22] The explanation by the appellants regarding access to Vega is flimsy. Despite the fact that the investigating officer was not able to trace the said Verga the appellants could have traced him through other means, including sending their family members to instruct him to communicate with the investigator. Verga is an important to the defence case lest the case regarding possession of a stolen motor vehicle would be sustainable.

The delay in prosecution.

[23] The court would ordinarily have regard to the attendant systemic difficulties which beset the investigative and prosecutorial process to bring cases to court. In this regard the court should therefor not act in haste to conclude that there is recklessness or negligence on the part of the State to bring the accused to justice. This should however be balanced against the guaranteed constitutional freedoms of individuals and the right to a speedy trial.

[24] The State’s contention that the response from the laboratory has over time just being that there is backlog, and without more, fails to demonstrate the necessary commitment to deliver a speedy trial. There are no details provided as

the extent of the backlog and an estimation of when the report may be availed. The State having opined that their intention was to proceed on the charges for which investigation was concluded. The ballistic report is critical for the charge relating to the firearms and ammunition without which the charges will not be sustained.

Previous convictions and or being on parole.

[25] The fact that there are previous convictions and parole tilts the balance of scale against the second and third appellants' application for bail. The first appellant is currently on bail and this fact should weigh heavily against bail in his favour. To this end one would accord a semble of credence to the court a quo's decision that there is well-founded apprehension by the magistrate there is likelihood on the part of the first appellant to commit further crimes.

[26] Admitting the first appellant on bail whilst he was on bail for another charge will send an unfortunate message to the general populace that the justice system is prone to abuse and can readily be manipulated. To this end the first appellant's ambitions to be admitted to the second bail cannot be entertained or indirectly countenanced.

Conclusion

[27] The SCA held in *Booi* that the delay and the weakness of the state case can be construed as exceptional circumstances. To this end the court held that "*… the delay in concluding its case, the lack of explanation for the delay and the*

absence of evidence of the alleged strong case, undermine the assertion by the state and the finding of the magistrate that there is such a substantial case against the appellant that it would serve as motivation not to stand trial were he be to be released on bail."

[28] The appellants' contentions before me were very thin on the factors required in terms of section 60(4)(b) of the CPA by presenting factors which would justify the inference that they will not be reluctant to attend court. This would ordinarily be compensated by an appropriate amount fixed for the bail.

[29] The concession by the state that the only concrete evidence available speaks to possession of stolen vehicle lend credence to contention that evidence on the other charges relating to, *inter alia*, armed robbery is weak. That notwithstanding the defence would still have to prove that the vehicle was placed in their possession allegedly by a third party whose details appears to be obscure.

[30] The appellants did not present evidence to support the inference that they would not afford to skip bail, for example owning immovable properties, businesses or any other assets. There was proposal that the appellants would afford bail in the sum of R10 000,00. This amount may not be sufficient to dissuade the appellants from skipping trial.

[31] It is trite that interference with the decision of the court a quo would be justifiable if it becomes clear that same was wrong. The court a quo acknowledged the fact that there are 'holes' in the State's case and further that there are possible contradictions but these issues, as the court a quo held, should be left to the trial court. The failure by the court to assess such contentions for

the purposes of determining weakness of the State case which will have influence the court regarding exceptional circumstances warranting release on bail was a misdirection by the court a quo.

[32] In the circumstances, having considered the conspectus of arguments advanced by both parties I am persuaded that the appellants have discharged the onus of proving on a balance of probabilities that state case is weak and further that the delay is unjustifiable. It is therefore concluded that there are exceptional circumstances warranting admitting the second and third appellants to bail.

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

(a) The appeal in respect of the first appellant is dismissed,

(b) The appeal in respect of the both second and third appellants is upheld.

"The order by the Magistrate is set aside and substituted in respect of the second and third appellants as follows:

Second and third appellants are released on bail in the amount of R20 000.00 (twenty thousand rand) each subject to the following conditions.:

(i) The second and third appellants must report to the Douglasdale police station every Monday, Wednesday and Friday, between 06h00 and 18h00;

(ii) The second and third appellants should surrender their passports to the investigating officer, Mr Kabelo Shakung or any other invenstigating officer appointed,

(iii) Should the appellants change their address they should inform the investigating officer and supply in writing their new address.

(iv) The second and third appellants shall remain within the province of Gauteng for the duration of the trial, and may where necessary, leave the Gauteng province with written permission from the investigating officer.

(v) The second and third appellants should attend trial on each date the matter is postponed and remain in attendance until excused by the court.

Noko AJ,
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES

Appellants	Adv Makhubela Paul T Leisher and Associates.
Respondent	Adv Mongwane DPP, Johannesburg.
Date of judgment	4 May 2022