IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE **DATE:** 23.12.2023

Case number: A143/2023

DPP Ref No.: 10/2/5/2 (2023/053)

In the matter between:

DUMANE, SIFISO Appellant

and

THE STATE Respondent

JUDGMENT

PULLINGER, AJ

INTRODUCTION

[1] This is an appeal against the judgment and order of the District Magistrate of Kagiso refusing the appellant's bail application on 10 October 2023.

[2] The appellant is charged with robbery with aggravating circumstances.

[3] In his affidavit in support of his bail application, the appellant said that he resides with his father and has resided at the same fixed residential address for the past 21 years. He stated, further, that:

> "I therefore would like to state that I have a fixed address in the jurisdiction of this Court and I confirm that I will attend to this matter until finalised."

[4] The appellant said further that:

> "I am a student at the University of Johannesburg, currently registered for a Bachelor of Arts Degree in Humanities and I am currently in my third year of studies. I wish to state that if I am denied bail I will be unable to attend my studies and will subsequently be deregistered, I therefore humbly ask this Honourable Court to regard this as exceptional circumstance [sic]."

[5] The appellant confirmed that he has no family outside of the jurisdiction of the Court, the Gauteng Province or the borders of the Republic and does not possess a passport or any travel documentation. Similarly, he does not have any assets outside the country and submits that he is not a flight risk.

[6] The appellant, stated, further, that he is not under correctional supervision, not on parole and there are no harassment orders or protection orders granted against him. He records that he intends to plead not guilty and that, if granted bail, he will not endanger the safety of the public or any person or commit any offences, will not evade trial and will not attempt to influence or intimidate witnesses or to conceal or destroy evidence, will not jeopardise the objectives or proper functioning of the criminal justice system, including the bail system and his release on bail will not undermine public peace or security.

[7] In the circumstances, the appellant stated:

> "… the interests [sic] of justice permits my release on bail. I will have no further objection if a condition is fixed that I report to my nearest police station."

[8] The appellant proposed that bail in the amount of R500.00 be ordered.

[9] Before the Magistrate's Court, the State did not oppose bail. It opposes this appeal.

[10] The investigating officer, in his affidavit, stated that:

"3.

Merits of the case

On Saturday 23-09-23 at about 19:30 the victim was robbed of her cell phone at the passage Kagiso Ext 06 by two unknown males and they ran away by foot. The victim did not sustain any injuries.

4.

Arrest of applicant

On the same day the the [sic] alerted two known males that she was robbed and they chased the applicant and arrested him, his friend ran away. The applicant was assaulted and undressed by the community members and was later handed to the police at Kagiso saps naked and he was detained. The applicant was taken to Leratong Hospital by the police for medical attention where he was admitted for three days."

[11] The investigating officer, further, confirmed the personal circumstances of the appellant.

[12] In the proceedings on 10 October 2023, the Court postponed the matter to 7 November 2023 for further investigation and refused bail.

DISCUSSION

[13] Robbery with aggravating circumstances is a charge that falls within the ambit of Schedule 6 of the Criminal Procedure Act, 1977 in that the appellant is accused of robbery involving the use of a firearm.

[14] The relevant portion of Section 60(11) of the Criminal Procedure Act provides:

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence-

(a) referred to 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**;"

[15] Accordingly, the onus is on the Schedule 6 applicant to demonstrate, on a balance of probabilities, that there are "exceptional circumstances" and that it is in the “interests of justice” that he be released on bail.[1]

[16] The Court *a quo* found there to be nothing exceptional about the appellant's circumstances and held that:

"… The fact that you have attended school you should have known that you are attending school.

You are envisaged to take then before you robbed that complainant. The State's case against you is so strong that the [sic] and the firearm that was used is still out there with your friend.

It is on this basis that the Court is also of the view that you are also a student is not at all an exceptional circumstance. As such bail is denied."

[17] It is long established that "exceptional circumstances" defies precise meaning. In **Mohammed**[2] the Court found that:

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1 **S v Rudolph** 2010 (1) SA 262 (SCA) at [9]
2 **S v Mohammed** 1999 (2) SACR 507 (C)

"The phrase 'exceptional circumstances' does not stand alone: the Schedule 6 applicant has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'."[3]

[18] The Court went on to hold that:

"the true enquiry…is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release… and "sufficiently" will vary from case to case."[4]

[19] A similar sentiment was expressed in **Najoe**,[5] where the Court said:

"[6] 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. The following are some of the guidelines laid down by the courts for determination of exceptional circumstances:

> 'An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. … In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.
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> In requiring that the circumstances proved must be exceptional the subsection does not say they must be circumstances in addition to, above and beyond and generally different, from those enumerated.'" (footnotes omitted)

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3 At 515 C - D
4 At 515 D
5 **S v Najoe** 2012 (2) SACR 395 [ECP] at 7

[20] These expositions of the meaning of a "exceptional circumstances" appear to accord with the decisions of the Supreme Court of Appeal in, amongst others, **Rudolph**[6] and are an accurate representation of the law as it stands.

[21] Returning to the facts of this case.

[22] In his notice of appeal, the appellant states that there was nothing found on the appellant linking him to the crime with which he is accused and no physical evidence linking him to it, thus, it is contended, that the court *a quo* failed to properly consider the strength or weakness of the State's case as part of its consideration of "exceptional circumstances".

[23] But, in his affidavit in support of his application for bail the appellant did not give a version of his whereabouts at the time the offence with which he is charged took place. The appellant also omitted to address the reasons the community identified him as the perpetrator of the alleged offence and handed him over to the South African Police Services.

[24] Succinctly stated, the appellant did not engage with the facts of the State's case at all.

[25] It is difficult, in these circumstances, to uphold the appellant's argument that, inferentially, the State's case is weak. Rather, the State's has a *prima facie*

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[6] **S v Rudoph** (supra) at [9] and the authorities therein cited

case against the appellant – *ex facie* the investigating officer's statement, which was not challenged, the appellant was apprehended by two members of the community who gave chase after the commission of the alleged offence and handed the appellant over to the South African Police Services.

[26] In the absence of a version or a challenge to the investigating officer's evidence, the learned magistrate was, in my view, correct to infer that the State's case against the appellant is strong.

[27] Mr Guarnari who appeared for the appellant, very properly conceded that the appellant's affidavit in support of his bail application does not, on its own, result in the onus of demonstrating "exceptional circumstances" being passed.

[28] He argued that the evidence presented to the Court *a quo* must be considered holistically (and for this proposition he relied on the decision in **Alephi**[7] and in supplementary heads of argument on the decision in **Nkuna**[8]) and, when a holistic approach is taken, that which creates the exceptional circumstances contemplated in the Criminal Procedure Act, is the fact that the appellant's bail application was not opposed by the State.

[29] So the argument went, the court *a quo* failed to take proper cognisance of all the material facts and thus erred in its decision by considering only the fact that the appellant is a student.

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7 **S v Alephi** 2022 (1) SACR 271 (GP)
8 **S v Nkuna** 2013 JDR 0426 (GNP)

[30] Taking this argument to its logical conclusion, the appellant's real point is that the court *a quo* failed to take the absence of opposition from the State into account and weigh up the effect thereof.

[31] In this regard, a few observations are apposite. First, this proposition is not one of the grounds upon which the appeal was brought. Second, it ignores the incidence of onus.

[32] Even where bail is not opposed by the State in a schedule 6 matter, the applicant for bail must still establish exceptional circumstances and that the interests of justice favour release on bail. To the extent that the decision in **Nkuna** held to the contrary, such a conclusion is not supported by the authorities.

[33] In this case, the appellant failed to present any evidence that could lead to a conclusion that exceptional circumstances, as contemplated, are present in this case.

CONCLUSION

[34] I am unable to find that the appellant discharged the onus imposed upon him.[9] An appeal on the grounds aforesaid is unsustainable.

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[9] **S v van Wyk** 2005 SACR 41 (SCA) at 44J

[35] My power to overturn the decision of the court *a quo* is limited by section 65(4) of the Criminal Procedure Act. It requires me to be satisfied that the court *a quo* was wrong in making its decision.

[36] I am unable to reach such a conclusion on the facts before the court *a quo*.

[37] In supplementary heads of argument, Mr Guarnari sought to address a question that I put to him in argument, being, whether this matter ought to be remitted to the Magistrates Court. The authorities to which I was referred concerned (second) bail applications made on new evidence where appropriate weight was not accorded to the evidence as a whole or proper opportunity afforded to the applicant for bail to adduce evidence.[10]

[38] I do not think that these principles apply in this case as there is no suggestion that the appellant is able to, or will, if the matter is remitted, adduce further evidence that will lead to, or could lead to, the onus being discharged.

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

The appeal is dismissed

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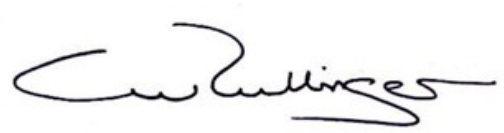
[10] **S v Nwabunwanne** 2017 (2) SA 124 (NCK) at [16] – [19] and [23] – [25] although the distinguishing feature is that there was confusion as to whether the offence was one contemplated in schedule 5 or schedule 6 of the Criminal Procedure Act which impacts upon the incidence of onus and the facts that an applicant for bail must prove. The State conceded that the offences fell within the ambit of schedule 5 (at [14]) thus the applicant was not required to prove “exceptional circumstances” but only that the interests of justice were in his favour.



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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 23 December 2023.

DATE OF HEARING: **6 DECEMBER 2023**

DATE OF JUDGMENT: **23 DECEMBER 2023**

APPEARANCES:

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