REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A33/2023

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

21 April 2023

URANGA TSHISIKHAWE Appellant

and

THE STATE Respondent

Neutral Citation: Uranga Tshisikhawe v The State (Case No. A33/2023) [2023] ZAGPJHC 360 (21 April 2023)

JUDGMENT: BAIL APPEAL

Johnson AJ

[1] The applicant, who is accused 2 in the regional court, is charged with accused 1 in count 1 with conspiracy to commit robbery with aggravating circumstances in that he conspired to rob the complainant of a motor vehicle with the use a firearm and in count 2 of robbery with aggravating circumstances in that he committed the offence as set out in count 1, an offence mentioned in Schedule 6 of the Criminal Procedure Act 51/1977 (CPA). Both accused applied for bail pending the hearing in the regional court, which was refused after the court heard evidence in support of the applications. Only the applicant has appealed against the refusal of bail.

[2] The application for bail was conducted in a strange way and findings were made which is uncommon in our law.

[3] After it was determined that the applicant was charged with an offence mentioned in schedule 6 of the Criminal Procedure Act 51/1977 (CPA), the prosecutor informed the court that he was in possession of the investigation officer's statement, and requested permission to read it into the record. Without considering that the applicant in a bail application, where he is charged with an offence mentioned in schedule 6, bears the onus to prove exceptional circumstances on a balance of probabilities and has a duty to start first, the prosecutor started reading out the statement. The applicant's legal representatives were not asked for their input, and no reasons were given for deviating from the well-established principle in our law that he who bears the onus, has a duty to begin first with the proceedings. The learned magistrate allowed an incorrect approach to be followed.

[4] The applicant deposed of an affidavit on page 218 of the record.

[5] The important part of his statement, is his explanation of how he is linked to the commission of the offence. Before his arrest he met up with a person "Ashley" in Braam

Fischerville. Ashley was aware that he was a driver at RTT, and he wanted information about scheduled deliveries. Ashley said that he was aware of where he resides, and that he only needed to provide him with information he required. He wanted information about the time and place where the delivery would take place. He was told to provide this information if he knew what was good for him and his family. He perceived that as a threat. Ashley took his contact details and would contact him from various unknown cell phone numbers. On the date of his arrest, Ashley contacted him. He gave Ashley information about one of the deliveries of goods at Diepkloof. That was the last time he spoke to Ashley he does not know accused number 1

[6] He was not found in possession of any of the goods that were robbed, or a firearm, and he did not take part in the robbery. He has a cast iron alibi.

[7] The investigating officer's affidavit appears on page 64 of the record.

[8] From a reading of the affidavit, it is obvious that his only objection to bail concerned the commission of the offences, as he only mentions the facts of the case, and nothing about the personal circumstances of the applicant.

[9] While busy parking the truck at a pharmacy in Orlando, they were pointed with a firearm by three African males, who instructed them to get out of the truck. They jumped out of the truck and left it in the parking area. The suspects got into the truck and drove to a park.

[10] The whereabouts of truck was tracked by means of a tracker device. Members of the police and the JMPD went to the indicated location where they found the truck being driven by an African male. The vehicle was stopped and the driver searched. The victim's drivers' licence and the medication were found in his possession. He was

arrested and later identified as Oupa Khososa, accused number 1 according to the charge sheet.

[11] Upon investigation he found that accused 1 was planning the robbery with another RTT driver known as Uranga Tsisikhawe, the applicant. Upon checking with the RTT risk managers, they confirmed that they have a driver by the name of Uranga, who also did the Soweto routes delivering medication. Accused 2 was also arrested. The cell phones of both the accused were confiscated. It was established that there were communications between the two, planning the robbery of the medication van.

[12] In his judgement, the learned magistrate moved beyond the *viva voce* evidence that was produced, and found that the prosecutor was entitled to supplement the bail application by informing the court what the contents of other statements were that are contained in the docket. This is of course an irregularity. By allowing that, the learned magistrate in fact allowed the prosecutor to be a witness in his own case. The contents of a statement must be placed before court by the investigating officer, and not the prosecutor.

[13] He further found that it was not clear how the applicant was implicated in the crime, and that it was a matter for the trial court (Record page 25). This lackadaisical approach is irregular and must be criticized in the strongest possible terms. It is for the court to whom the bail application has been allocated, to ascertain whether the strength or not of the state's case, can be regarded as an exceptional circumstance. The approach of the learned magistrate is incorrect and boils down to a dereliction of his duties. What is confusing however, is that the court *a quo* then finds as follows: "Given the weight of the evidence available against him his version cannot in any constitute an exceptional

circumstances."(sic) It is unclear to what "weight of the evidence" is referred, as it had just been found that it was unclear how the applicant was implicated in the crime.

[14] Ultimately, the learned magistrate found, without evidence to corroborate his finding, that the applicant is a danger to the witnesses. The required finding whether the applicant proved that exceptional circumstances exist, was left undecided.

[15] The question that arises, is what the consequence should be where the learned magistrate misdirected himself on points of law? I am of the view that the approach that was adopted in the criminal matter of *S v Bernardus* 1965 (3) SA 287 (A) at 299F, should find similar application in a bail application. If the trial court committed a misdirection on a point of law, the court of appeal has to determine whether the evidence nevertheless establishes beyond reasonable doubt whether the accused is guilty. Conversely put, this court must determine whether the evidence establishes on a balance of probabilities that the applicant has proved exceptional circumstances.

[16] One of the "exceptional circumstances" which an accused can prove is that there is no case against him or that there is serious doubt whether that case will succeed (*S v Maja and Others* 1998 (2) SACR 677 (SEC); *S v Jonas* 1998 (2) SACR 677 (SEC)). Where there are, however, other compelling factors present, a weak state case will not carry the day (*S v Dhlamini* 1997 (1) SACR 54 (W)).

[17] I am of the view that, if one considers the strength of the state case, the applicant has not proved on a balance of probabilities that it is weak. The applicant has by his own admission, placed himself amid the offences.

[18] He said that he was approached by Ashley, and that he divulged information about the time and place of a delivery that was going to take place. He was clearly aware before the complainant was robbed, that the robbery was going to take place. The delivery and the truck carrying it was ultimately robbed, and accused 1 was found driving the truck. He further stated that he has a cast-iron alibi. To make a mere unsubstantiated allegation is not proof on a balance of probabilities. He has not divulged any information about the "cast-iron" alibi. In any case, his presence on the scene of the crime does not prevent him from being found guilty as an accomplice.

[19] It is significant that he is only willing after his arrest, to supply the address of Ashley to the police. Why did he not give that information to them after his so-called threat when he knew a robbery was imminent?

[20] He further states that he believes that Ashley was involved in the commission of the robbery. There is no doubt that he knew that Ashley would be involved when he was initially approached by him. If he was innocent as he professed, he would immediately have alerted his employer of his interaction with Asley, to enable him to take precautionary steps. His silence is telling, and leads to the inescapable conclusion that he was an accomplice to the robbery.

[21] He alleged that he does not know accused 1. This allegation is as far removed from the truth as the moon is from the earth. Their phones were confiscated and indicate that they were in contact with each other.

[22] I have also taken cognisance of the other facts that the applicant mentioned in his affidavit. He alleges that his incarceration will lead to financial and family hardships, and that it would impede his preparations for the trial. He and his girlfriend have two children

of whom he takes care. He has a fixed address and is the sole breadwinner. His girlfriend is unemployed and his mother has relocated. It seems however, that his family got by well enough without his assistance since his arrested on 2 September 2022, which means that he had been in custody for more than 7 months. He failed to give clarity about this issue in his affidavit. As he bears the onus and he did not address this, he did not prove that these factors are exceptional. These circumstances are not of such a nature that they can individually or cumulatively cross the threshold as exceptional circumstances. It can be described as nothing else than the usual run of the mill circumstances which all arrested person are subjected to.

[23] Section 60 (11) of the CPA determines that, notwithstanding any provision of this Act, where an accused is charged with an offence 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.

[24] This section places a burden on the appellant to prove on a balance of probabilities, that exceptional circumstances exist which in the interest of justice permit his release.

[25] Bail appeals are governed by section 65(4) of the Criminal Procedure Act 51 of 1977 which states that: "*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.*"

[26] The powers of courts of appeal are limited where a matter comes before it on appeal and not as a substantive application for bail. The court must be persuaded that the magistrate exercised his discretion wrongly. In *S v Barber 1979 (4) 218 (D)* at 220E *et seq.* The court *a* said the following: *"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 the bail exercised that discretion wrongly*"

[27] The court a quo should have found that the applicant failed to prove that exceptional circumstances exist which in the interests of justice permits his release. Although the court a quo followed the incorrect approach, the ultimate decision was correct.

[28] In the result the following order is made:

The appeal is dismissed.

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P Johnson
Acting Judge of the High Court

FOR APPELLANT:	R. MUFAMADI INSTRUCTED BY THIKHATHALI MASHIKA ATTORNEYS
FOR RESPONDENT:	J.F MASINA- OFFICE OF DIRECTOR OF PUBLIC PROSECUTION
DATE OF HEARING:	23 APRIL 2023
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