REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:

A22/2023

DATE OF HEARING: 21/04/2023

DATE DELIVERED: 28/04/2023

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED

..... DATE .....
SIGNATURE

In the matter between:

CHABALALA, LYBORN JOHN

APPELLANT

And

THE STATE **RESPONDENT**

Neutral Citation: *Chabalala Lyborn John v The State* (A22/2023) [2023] ZAGPJHC 446 (28 April 2023)

JUDGMENT

KARAM AJ:

The appeal in this matter was argued on 21 April 2023. Mr Shilowa appeared for the appellant and Ms Morule represented the State. The Court proceeds to hand down its judgment in this matter.

The appellant applied for bail which was opposed by the State and refused on 15 December 2022. The appellant subsequently brought a further application for bail on new facts. This, too, was refused on 7 February 2023. This is an appeal against such refusal of bail.

It is common cause that this is a Schedule 6 matter, the appellant being required to satisfy the Court that exceptional circumstances exist which, in the interests of justice, permit his release on bail.

Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977 (‘’CPA”) prescribes that:

‘’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.’’

An onus is placed on the appellant to adduce proof, on a balance of probabilities, that “exceptional circumstances exist which in the interests of justice permit his release on bail”.

In S v Rudolph 2010 (1) SACR 262 (SCA) at para 9, Snyders JA stated the following in this regard:

“It contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstances” are shown by the accused to exist.

Exceptional circumstances do not mean that “they must be circumstances above and beyond, and generally different from those enumerated in Sections 60(4) to (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.”

An appeal against the refusal of bail is governed by section 65(4) of the CPA, which provides and I quote:

"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 shall have given."

The wording of Section 65(4) is couched in peremptory terms and the intention of the Legislature expressed in such section is clear. See also in this regard what is expressed in S v Barber 1979 (4) SA 218 (D) at page 220 E - H where it was stated and I quote:

"It is well known that the powers of this Court are widely limited where the matter comes before it on appeal and not as a

substantive application for bail. 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 view for that of the Magistrate because it 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 bail exercised that discretion wrongly..."

In *S v Porthen & Others* 2004 (2) SACR 242 (C), in regard to the appeal Court's right to interfere with the discretion of the Court *a quo* in refusing bail, it was stated and I quote:

"When a discretion...is exercised by the Court *a quo*, an Appellate Court will give due deference and appropriate weight to the fact that the Court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision, unless it is persuaded that the determination of the Court or tribunal of first instance was wrong."

This Court is aware that there is no onus on a bail applicant to disclose his defence or to prove his innocence. Further, that the Court hearing the application or this Court of Appeal, is not

required to determine in such application or appeal, the guilt or innocence of the applicant- that is the task of the trial Court.

No oral evidence was led in the applications and the evidence for and against bail was by means of affidavit.

The notice of appeal and heads of argument outline the submissions of the appellant and this Court is not going to unduly burden this judgment by reiterating same.

The appellant is charged with robbery with aggravating circumstances and unlawful possession of a firearm, viz a pistol.

This is a serious robbery in that it is alleged that the appellant was part of a syndicate that hijacked a vehicle transporting cellular telephones to the value of approximately R950 000,00.

It would appear that there was a shootout in the course of the robbery and that the appellant may further be charged with attempted murder.

It would further appear from the evidence of the appellant's neighbour that the firearm is in fact a prohibited firearm.

Accordingly, the appellant, should he be convicted, faces a minimum sentence of 15 years imprisonment in respect of the robbery and a minimum sentence of 15 years imprisonment in respect of the firearm.

One of the factors to be considered in a bail application is the strength of the State's case. It is apparent to this Court that the State, indeed, has a strong case against the appellant. Apart from the appellant having been pointed out as one of the perpetrators of the robbery by one of the suspects, the appellant informed the police as to the fact that his neighbour was in possession of his i.e the appellant's firearm; this neighbour confirmed that the appellant requested him to keep same for the night that the offence was committed; the appellant had confirmed that he had no licence to possess this firearm; and the appellant further confirmed that he had been driving a white Mercedes motor vehicle the day that the offence was committed. Tracking reports of this vehicle confirm this vehicle having been at the hijacking scene in Tembisa as well as at Mamelodi West where the goods were recovered. It appears that the appellant was further pointed out at an identification parade.

In the initial bail application, the appellant refers to the fact that he has no previous convictions or pending matters and further states on page 33 of the paginated bundle and I quote:

"I will not commit any offence if released on bail and submit that my impeccable record is indicative thereof".

In opposing bail, the affidavit of Sergeant Matlala of the Provincial Organised Crime Unit refers to the fact that the appellant has a pending matter for possession of an unlicensed firearm.

In the bail application on new facts, the appellant provided proof that there are no pending cases against him and stated that he was found not guilty of the latter matter.

In the affidavit opposing same, Sergeant Matlala stated that the relevant pending matter was struck from the roll due to the delays occasioned in obtaining the ballistics report and that application will be made to have same reinstated upon receipt of such report. The extract from the Court records indeed reveal that the matter was struck from the roll. Counsel for the appellant agreed with the Court that there is a marked difference between a matter having been struck from the roll and a matter where an accused has been found not guilty.

In any event, this factor alone, is certainly not one that weighs heavily with this Court in its determination as to whether to uphold or refuse the appeal.

Sergeant Matlala proceeded to state that, inter alia, the appellant's cellular telephone records and SANRAL footage, further link the appellant to the offence.

He further referred to previous charges against the appellant which have been withdrawn. These include 2 cases of malicious damage to property, robbery of a motor vehicle, armed robbery, assault with intent to do grievous bodily harm, and unlawful possession of a firearm. He has no immovable property and owns

a motor vehicle. As stated by counsel for the respondent, this is the calibre of person that the appellant is.

The other new fact, relates to the passing of the appellant's younger sister and requirement that, as the elder brother, he be present when the customary rituals are performed.

Whilst the Court sympathises with him, there is no evidence that this is no other brother who can perform same. He can further request correctional services to escort or accompany him to perform same.

In any event, this cannot be considered an exceptional circumstance.

In this matter, it is this Court's finding that the order of the Court a quo, in refusing bail in both the original and subsequent application on new facts, was fully justified and correct.

In the result, the following order is made:

The appeal in respect of both applications against the refusal of bail, is dismissed.

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KARAM AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 ARIL2023

DATE OF JUDGMENT: 28 APRIL 2023

COUNSEL FOR APPELLANT: ADVOCATE SHILOWA

INSTRUCTED BY MOLOTO STOFILE ATTORNEYS

COUNSEL FOR THE RESPONDENT: ADVOCATE MORULE

DPP GAUTENG LOCAL DIVISION