

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A151/2023

DATE: 26-02-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between

PRETORIUS, JACQUES

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

KARAM AJ:

1. The appeal in this matter was argued on 20 February 2024. Mr Gissing appeared for the appellant and Ms Kau represented the state.

2. The appellant applied for bail which was opposed by the State and refused on 10 November 2022.

3. This is an appeal against such refusal of bail.

4. The appellant, accused 1 in the trial, is charged in the Randfontein Regional Court with robbery with aggravating circumstances and with discharging his firearm in a public place.

4.1 In essence it is alleged that the appellant and his co-accused robbed or hijacked the complainant of the latter's motor vehicle, and that the appellant fired a shot into the air to frighten off the complainant and make good his escape in the latter's vehicle.

4.2 The appellant is a JPMD officer and the complainant, an SAPS Officer.

4.3 It was common cause at the hearing, that the hijacking of the vehicle was a Schedule 6 offence and the bail application proceeded that basis.

5. I will proceed to set out the legal principles and thereafter deal with the submissions made and the merits.

5.1 It is trite that in bail applications falling under Schedule 6, an accused is burdened with an onus 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”) provides that 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 is dealt with in accordance with law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that the interests of justice permit his release.

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

"A 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.”

5.3 The approach of a court hearing a bail appeal is

trite. In ***State v Barber* 1979(4) SA 218(D) at 220 E-H** it was stated:

“It is well known that the powers of this court are largely 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”.

5.4 In ***State vs Porthern and 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:

"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".

6. At the bail hearing, the evidence of the appellant was by affidavit. Oral evidence of the investigating officer in the matter was tendered by the State.

7. The judgment of the court *a quo*, in its refusal of bail, unfortunately fails to specifically deal with relevant factors, pertaining to the appellant, *inter alia*, the strengths or otherwise of the State's case against him, whether or not he is a flight risk, the possible sentence he is facing and other such factors.

The failure to do so does not, however, disqualify or prevent this Court from considering such factors. Counsel for the appellant conceded this. The Court will deal therewith herein below.

8. It was submitted on behalf of the appellant, that the learned Magistrate had erred in dealing with the application under Schedule 6 and that same ought to have proceeded under Schedule 1.

The reasons therefor, so it was submitted, were that according to the evidence of the Investigating Officer, the video footage revealed that the appellant was already in possession of the vehicle when the complainant approached. The appellant then exited the stolen vehicle, fired a shot into the air to scare off the complainant, and having successfully done so, re- entered the vehicle and drove off. Accordingly, and already having stolen the vehicle and been in possession thereof, there was no robbery with aggravating circumstances, the production of the firearm and firing of the shot serving to enable the appellant to retain the already stolen motor vehicle.

Reference was made to lines 15-25 of the case lines transcript

004-37.

8.1 This Court is of the view that there is no merit in this submission, for the following reasons:

The appellant's legal representative's concession at the bail hearing (see case lines transcript 004-3 lines 15-17), that this was a Schedule 6 hearing, is not a reason for the rejection of this submission.

8.2 Firstly, it is not clear that counsel's interpretation of the evidence as to what exactly transpired, is correct, regard being had also to the evidence of the investigating officer as contained in case lines transcript 004 -39 at lines 14 – 24, which suggests the contrary.

8.3 Secondly, and more importantly, it is trite that the court ought not to compartmentalize or look at different segments of the evidence in isolation or, but rather to consider same in its totality or as a whole.

The learned author **CR Snyman in his text Criminal Law (6th Edition)** defines the crime of robbery as theft of property by unlawfully and intentionally using

- (a) violence to take the property from somebody else; or
- (b) threats of violence to induce the possessor of the

property to submit to the taking of the property.

The elements of the crime are:

- (a) the theft of property;
- (b) through the use of either violence or threats of violence;
- (c) a causal link between the violence and the taking of the property;
- (d) unlawfulness; and
- (e) intention

The learned author goes on to state at pg 509 paragraph 6 that

the premise is that the violence must precede the taking, and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape. If this happens, the perpetrator commits theft and assault.

However, this general rule that the violence must precede the taking is qualified and robbery may be committed in circumstances where the violence follows the completion of the theft. This occurs where having regard to the time and place of the perpetrator's act, there is such a close link between the theft and the violence

that they may be regarded as connecting components of one and the same action.

See S v Yolelo 1981 (1) SA 1002 (A) at page 1015.

S v Nteco 2004 (1) SACR 79 (NC) at page 84.

8.4 Accordingly, and even were this Court to accept counsel's interpretation as to what occurred, the appellant's conduct clearly constitutes robbery.

8.5 Regarding the other submissions:

Whilst there appears to have been no identification parade conducted or facial comparison evidence tendered at the bail hearing, the evidence of the investigating officer is such that very shortly after the hijacking, the appellant is apprehended driving the robbed vehicle.

Given what is stated above by the learned author, it is irrelevant whether the complainant's vehicle was taken forcefully from him at gunpoint or whether the complainant ran away after the vehicle was fired. It is further irrelevant that the complainant was not assaulted and/or pointed with the firearm. There is further no merit in the submission that the complainant was not threatened with the firearm.

The mere production of the firearm by the appellant, let alone the discharge of a shot, sufficiently constitutes a threat of violence.

9 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 accused. That is the task of the trial court.

10 Regarding the strength of the State's case:

10.1 It is common cause that the appellant was in possession of the complainant's hijacked vehicle very shortly after the hijacking in the early hours of the morning and at the time the appellant was apprehended.

10.2 What is significant is that the appellant gives no explanation as to why he was in possession of or his presence in the robbed vehicle.

10.3 Counsel for the appellant conceded that the appellant faced difficulties in this regard.

10.4 And this, apart from the investigating officer's evidence that there is video footage of the robbery, depicting the appellant as the perpetrator; that one of the two cellular telephones found in the appellant's pants pocket belonged to the complainant; that the appellant's service pistol together with an empty cartridge (presumably that fired by the appellant into the air causing the complainant to run away), was recovered on the front passenger seat of the robbed vehicle.

10.5 From the aforesaid, it would appear that indeed, the State has an overwhelming case against the appellant.

11 Regarding the possible sentence the appellant faces should he be convicted:

11.1 The appellant has been charged with robbery with aggravating circumstance, read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the minimum sentence legislation").

11.2 Should he be convicted he faces a minimum sentence of 15

years imprisonment. The minimum sentence legislation further empowers a magistrate to impose up to an additional 5 years imprisonment. Given the aggravating

factors and in particular the fact that the appellant is a person whose duty it is to combat crime and not participate therein, there is a possibility that he may receive a sentence of more than 15 years on this count alone.

12 Regarding the issue as to whether the appellant will stand his trial:

12.1 It is apparent from the evidence of the investigating officer that subsequent to the robbery, a high speed car chase ensued with JPMD officers pursuing the appellant in the hijacked vehicle for some 4 kilometres prior to the appellant stopping. Further, that after the appellant stopped the hijacked vehicle he quickly alighted therefrom and tried to flee. He was apprehended by a JPMD officer and then taken back to the vehicle.

12.2 The aforesaid evidence purports to demonstrate 2 occasions where the appellant attempted to evade justice, thereby rendering him a flight risk.

13 The Court has considered the other submissions made on behalf of the appellant and finds no merit in same.

14 Having regard to all of the foregoing, this Court cannot find fault with the finding of the Court a quo to refuse bail.

In this result, the appeal against the refusal of bail is dismissed.

WA KARAM

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv. R Gissing

Instructed by: Frans Mphatshwe Attorneys

For the respondent: Adv R Kau

Instructed by: The Director of Public Prosecutions

Date of hearing: 20 February 2024

Date of judgment: 26 February 2024