



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A43/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
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	DATE
SIGNATURE	

In the matter between:

MKHWANANZI CYRIEL KHULEKANI

First Appellant

PITALE THIBE

Second Appellant

MAZIBUKO XOLANI

Third Appellant

RADEBE VUKANI

Fourth Appellant

and

THE STATE

Respondent

JUDGMENT

MKHABELA AJ:

[1] This is an appeal in terms of the provisions of Section 65 of the Criminal Procedure Act 51 of 1977 (“the CPA”) against the decision of the Boksburg Magistrates’ Court refusing to release the four accused on bail pending their trial.

[2] Section 65(4) of the CPA deals with bail appeals from the lower Courts to the High Court and provide as follows:

“4.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 opinion the lower Court should have given.”

[3] In *S v Barber*¹, Hefer J considered the test to be applied and remarked as follows:

“It is well-known that the powers of this Court are largely limited where the matter comes before it as an appeal and not as a substantive application. 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 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 bail exercised the discretion wrongly.

... .

Without saying that the magistrate’s view was actually the correct one, I have not been persuaded to decide that it is the wrong one.”

¹ 1979 (4) 218 (A) at 220E-H.

- [4] It is also trite that in respect of the offences that do not fall under Schedules 5 and 6, the onus is on the State to adduce evidence that proves that the interest of justice do not warrant the granting of bail.
- [5] In respect of the appellants who are charged with offences that fall under Schedule 5, the onus is on the appellants to adduce evidence that satisfies the Court that the interest of justice permit his or her release.
- [6] The appellants in this matter were arrested together and found in possession of jamming devices. The first and third appellants' bail applications were adjudicated in terms of Schedule 1. This means that the State bears the onus to prove on a balance of probability that the interest of justice permit their release on bail.
- [7] The evidence that was adduced in the Court *a quo* is that the four appellants were arrested after there was an "*attempted theft of a motor vehicle*". The first appellant was the driver of a motor vehicle in which all the other three appellants were passengers.
- [8] The investigating officer testified that the appellants refused to stop when they were stopped by both the police and the security officers. Eventually they were stopped by the security who used their vehicle to block the appellants' motor vehicle.
- [9] The security vehicle that was used to stop the appellants' motor vehicle was damaged in the process.
- [10] The appellants drove away when they were stopped notwithstanding that their motor vehicle had a burst rear tyre.
- [11] The Magistrate remarked that the Court should not allow lawlessness in South Africa. In its view the Court *a quo* reasoned that "*if people avoid to*

be arrested, that is a clear case of those people being a flight risk". It therefore concluded that it was not in the interest of justice for first and third appellants, who were facing a Schedule 1 case, to be granted bail.

[12] With regard to second and fourth appellants, the Court *a quo* noted that their bail application falls under Schedule 5 and therefore the onus was on them to adduce evidence that satisfies the Court that the interest of justice warrants their release on bail.

[13] The Court *a quo* found that second and fourth appellants did not adduce evidence that convinced the Court that it is in the interest of justice that they be released on bail. The Magistrate observed that he would have expected them to explain the reasons as to why they refused or failed to stop when the police and the security officers stopped or tried to stop them. Accordingly, the Court *a quo* refused to grant bail in respect of second and fourth appellants on the ground that they did not discharge the onus that rested on them since the onus was on them by virtue of the fact that they are facing a schedule 5 offence.

Analysis

[14] The refusal of bail in respect of first and third appellants was predicated on the finding that they were a flight risk since they failed to stop when the police and the security tried to stop them.

[15] In oral argument in this Court, it was not disputed that the appellants and in particular first appellant, who was the driver, did not stop.

[16] Ms N A Mohomane, who appeared on behalf of all four appellants, submitted that the appellants were entitled not to stop when directed to do so by the security officers driving in an unmarked car. She submitted that first appellant was a first offender and should have been granted bail.

[17] Ms Mohomane's submission that the appellants were chased by the security officers and not the police is not borne by the evidence on the record. For the sake of completeness, I reproduce the relevant extracts from the record:

"PROSECUTOR: Before you proceed, Warrant Officer, when you said they were together, where?

MR O'NEIL: Your Honour, they were all together in one vehicle that the police were trying to stop and the security and they drove away from the police.

COURT: Can you repeat this? You say they were stopped by the?

MR O'NEIL: The police picked up the vehicle, and the security. The vehicle was circulated. Your Honour on the Whatsup group when they tried to steal a motor vehicle in Benoni and then the police and security tried to stop them and they refused to stop.

COURT: So, it is the police who stopped them?

MR O'NEIL: The police and the security, your Honour.

COURT: You say they did not stop.

MR O'NEIL: They did not stop, your Honour.

COURT: Yes.

MR O'NEIL: And after about plus minus seven kilometres the vehicle hit a pavement on the left back wheel and burst and they still drove on with the vehicle and refused to stop.

COURT: Which wheel has burst?

MR O'NEIL: I think the left back wheel.

COURT: Yes.

MR O'NEIL: And then for about another kilometres the security blocked the road to make the vehicle to stopped and then they drove into the security vehicle without stopping, your Honour.

COURT: So driving into, you mean?

MR O'NEIL: He bumped into the security vehicle that blocked the road to make them stop.

COURT: Yes.

MR O'NEIL: And then the vehicle was forced off the road and stopped by the security and the police and the four accused in the Court today was found inside the vehicle.

COURT: Yes.

MR O'NEIL: And then accused 1 was the driver of the vehicle."

[18] Ms Mohomane, who appeared in the Court *a quo* on behalf of third and fourth appellants, did not seek to dispute the investigating officer's testimony to the effect that the appellants refused to stop when both the police and the security tried to stop them. Ms Mohomane did not even attempt to challenge the investigation officer's testimony as reproduced above. There was also no proposition that was put to the investigation officer to the effect that the appellants were entitled not to stop because they were stopped by security officers who were driving in an unmarked car. This assertion was made before me from the bar something that is not permissible.

[19] Significantly, the submission in oral argument by Ms Mohomane that the appellants were chased by the security and not by the police was not put to the investigation officer in his cross-examination.

[20] It is trite that it is impermissible to attempt to place new facts by way of statements from the bar. A bail appeal has to be determined on material on record.²

[21] It is common cause from the record that appellants 2 and 4 were on bail involving similar offences and had therefore pending cases. It is for these reasons that appellants 2 and 4 faced a bail application under Schedule 5 of the CPA.

[22] In light of the evidence that was before the Court *a quo*, it is difficult to come to a decision that the Court *a quo*'s decision in refusing bail was wrong.

² S v Ho 1979 (3) SA 734 (W) at 737G.

- [23] To my mind a Court of law is entitled to refuse bail on the ground that an accused is a flight risk when there is cogent and uncontroversial evidence that an accused attempted to evade arrest or disobeyed an order to stop when directed to do so.
- [24] Although the reasons for the refusal of bail for first and third appellants were that they were a flight risk since they disobeyed the order to stop, these reasons are equally applicable to second and fourth appellants as well.
- [25] It must be borne in mind that the Magistrate's reasons for refusing bail to second and fourth appellants was that they had failed to discharge the onus of adducing evidence that satisfied the Court that it would be in the interest of justice for them to be released on bail. It is difficult to disagree with the Court's findings in this regard.
- [26] On the contrary, the Court *a quo's* decision in refusing bail for all four appellants was well-founded. Even if second and fourth appellants' bail application was under Schedule 1, it would still not be in the interest of justice to release them on bail given the undisputed evidence of disobeying the police when directed to stop.
- [27] Moreover, the Magistrate took into account the prevalence of the offence of car theft using jamming devices which were found in possession of the appellants when they were arrested. This indicates unequivocally that the appellants were on a mission to commit crime and were determined to evade arrest come rain or sunshine. Hence the attempt to drive away even with a burst rear tyre.
- [28] For all these reasons, I am not constrained as a matter of logic to refuse the appeal in the absence of a conclusion that the Magistrate exercised his discretion wrongly.

Order

[29] I therefore make the following order:

1. The appeal against the Court *a quo*'s refusal to grant bail to all four appellants is dismissed.

R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **6 June 2024**.

FOR THE APPELLANTS:

Ms N A Mohomane

FOR THE STATE:

Mr H H P Mkhari

DATE OF THE HEARING:

15 May 2024

DATE OF JUDGMENT:

6 June 2024