



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

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

Date:

Signature:

Case No. A148/2023

In the matter between

MOKOQO, MICHAEL PAKISO

1st Appellant

TAYOB, ABDULLAH JOEL

2nd Appellant

and

THE STATE

Respondent

JUDGMENT

MAHOMED AJ

This is an appeal in terms of s 65 of the Criminal Procedure Act (“the CPA”), against a refusal by the Honourable Magistrate of the Regional Court in Orlando, to admit the appellants’ to bail. The appellants are charged with premeditated

murder, the unlawful possession of a firearm and possession of ammunition. The offences are serious and are listed in terms of Schedule 6 of the CPA¹, which provides for substantial sentences.

1. Section 65(4) of the Act provides:

“(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 of Judge shall give the decision which in its or his opinion the lower court shall have given.”

2. In *S v Porthen and Others*,² Binns-Ward J the court held that the court a quo has a discretion and that the appeal court would be slow to substitute its own decision unless it is postulated that the court a quo was wrong.

3. The court is to weigh up the personal interests of the accused against the interests of justice having regard to all the evidence presented.

4. Bail proceedings are *sui generis*³, the state is not obliged to produce all the evidence at this stage, the court may consider what is presented before it and “must formulate an opinion or make a value judgment of what an uncertain future hold. The court is to consider what is put before it by the state to decide if the accused has discharged the onus.”

¹ Act 51 of 1977

² 2004 (2) SA CR 242 (C)

³ 1998 (2) SACR 707 C at 713H-J

The Onus

5. In *S v Rudolph*,⁴ the court held that, an applicant for bail in a schedule 6 offence must demonstrate on a balance of probabilities exceptional circumstances exist in his case and that they in the interest of justice permit his release. In *S v Petersen*⁵ the court set out what would constitute, exceptional circumstances an appellant must demonstrate “something unusual, extraordinary, remarkable, peculiar or simply different.”

6. Subsections 60(4) (a) to (e) of the Act, sets out the grounds, which if established, would not permit the release of appellants on bail, they are:
 - (a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a schedule one offence.*

 - (b) where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*

 - (c) where there is the likelihood that the accused if he or she were released on bail, will attempt to influence, or intimidate witnesses or to conceal or destroy evidence; or*

 - (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine, or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system.*

⁴ 2010 (1) ACR 2152 (SCA) at 266, G-H

⁵ 2008 (2) S ACR 355 (C) par 55

(e) *where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”*

7. Section 60 (5) to 60 (9) sets out the factors to be considered when applying s 60(4) (a) to (e).
8. In the judgment in the bail application, the court a quo considered the appellants affidavits as read into the record, the report by the investigating officer and a statement by an eye witness for the state.

The appellants submissions on bail

9. The appellants relied on their affidavits at the bail hearing. The court a quo noted that the appellants provided “general information” and were both citizens of Lesotho and in possession of a valid passports. Both appellants have family and extended family who reside within and outside the borders of the Republic of South Africa. Neither owns assets nor other financial interests outside of the Republic of South Africa . Both were married in Lesotho and have children. The first appellant has three minor children the eldest is studying in Lesotho, his second child is at a primary school ibn Lenasia, and his daughter attends a creche.
10. He informed the court that he was employed at Thato Romanaro transport services as a taxi driver doing long distances and he earned approximately R6 000 per month. He supports his family who are all

dependent upon him for their maintenance and if he were released on bail, he would be able to resume employment to support them. It was noted that he was deeply rooted emotionally, financially, and socially in the community and he testified that the address has been verified. His movable property is in the value of R10,000,⁶ he stated he could afford R3 000 for bail and that he had no previous convictions.

11. The first appellant chose to explain the basis of his defence, briefly, he informed the court he and the second appellant teamed up to collect items to be delivered to persons in Lesotho and whilst on their way, they were stopped by the SAPS on the Soweto highway who informed them that their vehicle was involved in a shooting at Pennyville. He was then arrested together with second appellant, and they were informed that a firearm was found in their vehicle. He alleged that he was assaulted and was forced to admit that he was involved in the incident. He was charged with the three charges which fall within the ambit of schedule 6 of the Act. The first appellant intends to plead not guilty at his trial, he stated that he did not know the identity of any state witness and undertook not, to intimidate any state witness, to commit any offences, to hamper any police investigation and stated that there is no likelihood of him endangering the safety of the public or any person if he were released on bail. He testified that if he were denied bail he would lose his permanent job, his children would suffer because their mother is unemployed, and

⁶ Transcript p8-9

the trial will take a long time before it is concluded. He demonstrated his commitment to attend trial as he handed in his passport. He stated that the above factors set out the exceptional circumstances which demonstrate that it is in the interests of justice for him to be released on bail.⁷ The court a quo confirmed that the appellant was legally in the country and was in possession of a work permit which was to expire on 30 December 2023.⁸

12. The second appellant, in addition to the general information considered, informed he has travelled regularly across the borders of the Republic. He has no assets or financial interests outside of the Republic, he was married for 10 years and has two minor children both children are at school in the Republic. He was employed at Thato Ramonaro transport services as a taxi driver and travelling long distances together with the first appellant and he earned approximately R4000 per month. He supports his family and if he is released on bail, he would be able to resume his employment to support his family. He stated that he was deeply rooted in the Republic and the community since 2010⁹ and his address was confirmed.

13. He stated that he could afford R3 000 for bail and that he has no previous convictions. He set out the basis of his defence as set out by the 1st

⁷ Transcript p 8 – 10 and p 14 lines 7-10

⁸ Transcript p 9-12

⁹ Transcript p14-15

appellant and informed the court that he intended to plead not guilty. He stated that the police took them to the scene of the crime and informed them that a firearm was found in their vehicle. He stated that he was arrested 3 km away from the scene of the incident where he was assaulted and forced to admit that he was involved in the offence. He stated that on the facts he set out he demonstrated exceptional circumstances to be released on bail. He denied any knowledge of any witnesses and undertook not to interfere with witnesses or hamper the police investigation nor to interfere with the proper running of the justice system. He would lose his job and no longer be able to support his family should he be refused bail.

The respondent's Submissions

14. The prosecutor read into the record a statement by Sgt Mathonsi of the detective services and is the investigating officer in the matter. She arrested all the accused on 24 September 2023 at 18h50. She reported the shooting incident, as relayed to her by the witness, when accused 3 alighted from a Honda Civic vehicle and walked up to the deceased and shot and killed him, he turned to the witness however at that moment the SAPS had arrived to investigate the murder of two others in the same area the night before, when accused 3 ran off and was shot in the legs by the police, whilst the appellants sped off upon the arrival of the police. The witness informed her that he knew the other two persons in the

vehicle as Abdulla and Michael, he pointed them out to her. She confirmed the first appellants address and that he lived with his family, but she was unable to verify the second appellants address in Olieven in Ficksburg, as she had no time between the arrest and the bail hearing.¹⁰ She stated that she has not verified the second appellants address in Johannesburg as he failed to inform her of that address which he had moved to 3 months before his arrest. She testified that the second appellant stated that he was a plumber, however, she could not verify that as no documents were available to her.¹¹ She stated that the appellants knew where the deceased and witness lived and it is likely that they can interfere with her investigations.¹² Furthermore, she expressed the view that the community interest in this matter was noteworthy therefore bail should be refused. The prosecutor informed the court that the second appellant was illegally in the country and was subject to deportation in terms of the Immigration Act, he does not hold a temporary residence permit.¹³

15. The state informed the court of an eye witness who was with the deceased at the time he was murdered. The witness identified accused 3 and the two appellants, they all live in the same area at New Canada informal settlement.¹⁴

¹⁰ Transcript p23 lines 30-35

¹¹ Transcript p 23 line 7-10

¹² Transcript p 23 lines 7 to 10 , 15 -22

¹³ Transcript p26 lines 8-10

¹⁴ Transcript p 26 lines 10-20

16. The appellants argued that they are not linked to the incident, they were not arrested at the scene, the vehicle registration nor the firearm found are linked to the appellants.¹⁵ The state argued that it has a strong case against the appellants, the eye witness linked them to the vehicle and being at the scene. The appellants have the means to flee to Lesotho and there are no documents which can verify the second appellant and his presence in the country, and it will be difficult to trace him should he fail to attend the trial.¹⁶ The appellants know the witness and there is a possibility that they would interfere with the witness who may need to be placed in a witness protection program. The state submitted that the court must refuse bail.

17. In the judgment the court a quo considered the following:
 - 17.1. The court noted that it had the general information on each of the appellants.

 - 17.2. Whether it will be in the interest of justice for the appellants to be released on bail,

 - 17.3. That the appellants bear an onus to prove that exceptional circumstances exist justifying they be released on bail.¹⁷

¹⁵ Transcript p43 to 44

¹⁶ Transcript p 58 lines 3-15

¹⁷ Transcript p 63 lines 2 to 10

- 17.4. That the appellants are both Lesotho nationals with passports, that the first appellant's passport was to expire in December 2023 and the second appellant's passport had expired when the offense was committed.¹⁸
- 17.5. The court noted that the state's key witness had filed an affidavit that he was with the deceased when he was killed in the vicinity of New Canada Rail houses. The court understood that all three accused were in the vehicle, and it noted that the three accused and the witness all lived in the same area and were known to one another.¹⁹
- 17.6. The court a quo noted that the defense argued that the state had a weak case against the two appellants and that they were not linked to the scene, the vehicle or the firearm and that exceptional circumstances had been proven, justifying the release of the accused ²⁰ however the state argued it had a strong case against all three accused and that a firearm was recovered from the Honda Civic which was found abandoned after the chase, which was sent in for a ballistics report.

¹⁸ Transcript p63 lines 15 to 20

¹⁹ Transcript p 64-66 line 5

²⁰ Transcript p66 lines 1-9

17.7. The court noted that the state is relying on the “doctrine of common purpose,” the state was intimating that all accused had single intent when they went out to kill the deceased. The court was of the view that the state had a prima facie case, at this stage of the bail hearing.²¹

17.8. The court a quo noted the serious charge of murder and if convicted the appellants could face a life sentence, whilst the charges in relation to possession of firearm and ammunition attracted a minimum sentence of 15 years. The court considered that given the harsh punishment the crime attracts and given that both appellants are foreign nationals who move freely between the countries that they are not likely to return if they left the country, there is no incentive to return to attend their trial.²² The court held a strong view that if granted bail they would be tempted to abscond if they appreciate the nature of the punishment if they are convicted.²³

17.9. Court noted that 2nd appellant has remained in the country illegally for a while and he has contravened s49 (1) of the Immigration Act. The Court concluded that the state had set up a prima facie case and given the punishment the appellants

²¹ Transcript p 66 to 67 lines 20

²² Transcript p 68 lines 3 -23

²³ Transcript p 68 line 18 -21.

would be tempted to abscond, they will not stand trial. In my view the court a quo considered the critical factors on an attendance at the trial and therefore was not wrong in the exercise of its discretion when it refused bail. The facts in relation to provisions of section 60(4)(a) (b) (c) were established, the appellants are a flight risk, they were familiar with border crossings and their only link to the country appears to be their family who live in the country.

17.10. The court concluded that the appellants failed to set out exceptional circumstances which demonstrates that it is in the interest of justice that they be released on bail. It considered the fact that it will be necessary to place the single witness in the protection programme because the state is concerned, they are likely to interfere with the witness and the investigations. The court a quo considered that the evidence of the state's single witness, could result in a conviction and imposition of severe sentences and in the light of those facts, witness would likely require protection and therefor bail was denied.²⁴

²⁴ Transcript p 69 line 18 - 29

THE GROUNDS OF APPEAL

18. The appellants argue that the court a quo focused only on the state's case. The grounds appear more fully in the notice²⁵ and this court will make only brief reference to each ground.

14.1 The grounds at:

1.2 the appellants complain that the court was confused about the time that the incident took place.

1.3 the appellants argued they were not arrested at the scene but 3 km away from the scene of the crime after being pointed out by a state witness.

1.4 the Magistrate misdirected himself when he accepted the version of the state witness which contradicts the version of the arresting officer, who confirmed the appellant's version.

1.5 the Magistrate misdirected himself when he concluded that the appellants were known to the complainant despite their denial in their affidavits.

1.6 the Magistrate misdirected himself when he concluded that the appellant's were with accused number three in the Honda Civic when accused number three shot and killed the deceased, no identification parade was held.

1.7 the Magistrate misdirected himself when he drew an inference that the appellants returned to the scene and were apprehended at the crime scene.

1.8 the Magistrate misdirected himself when he stated in in his judgement that if both the appellants were innocent

²⁵ case lines 007-1 to 4

why would they keep this murder to themselves and why didn't they go to the police and reported, when both appellants deny being in the company of accused number three.

1.9 the Magistrate misdirected himself when he had regard to the fact that the first appellant travels frequently between South Africa and Lesotho and that this automatically renders him a flight risk.

2. The Magistrate overemphasised the seriousness of the offence when he mentioned that the accused may likely face a life sentence and therefore overlooked the appellant's right to be presumed innocent until proven guilty.

3. The Magistrate failed to take into consideration that the state had a weak case against the appellants and overlooked the fact that the appellants discharge the onus placed on them, when they demonstrated exceptional circumstances."

19. I considered the grounds of appeal, the transcript and judgment, the heads of argument in this matter.

20. The appellants grounds are focused in the main, on issues that are for determination at the trial. Neither the grounds of appeal, nor the heads raise exceptional circumstances that it is in the interest of justice that the appellants be released on bail.

21. In *S v Schietekat*,²⁶ the court held:

"In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court

²⁶ 1999(2) SACR 51 CC

hearing the bail application is concerned with possible guilt only to the extent that it may bear on where the interests of justice lie in regard to the bail, the focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending, trial, and that entails, in the main, protecting the investigation and prosecution of the case against hinderance.”

22. The court a quo weighed the evidence before the court and correctly found that the appellants, are unlikely to return for trial, given the severity of the charges and the sentence it attracts. In *S v Hudson*,²⁷ the court held that:

“... the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country ...

23. The court a quo considered the state’s concern for the safety of the witness and given that both appellants and the witness lived in the same area and the appellants knew he has pointed them out, it is not unreasonable to conclude that it is likely that they would interfere with the witness and the investigation, should they be granted bail.

24. At the hearing of this appeal, counsel for the appellants conceded that more information could have been sourced and presented to the court in regard to their personal circumstances, more particularly in that the 2nd appellant’s address was not verifiable and he appeared to have given different versions in regard to his employment, he told the investigating

²⁷ 1980 1 ALL SA 130 (d) at 131

officer he was a plumber, whilst at the bail hearing he was a taxi assistant. The court has only the say so of the appellants.

25. In my view, the court a quo applied its mind and considered all the evidence before it, the strength of the state's case is a relevant factor to be taken into account²⁸ and noted that a firearm was found in the vehicle they travelled in, the appellants were brazen when they returned to the scene of the crime and slowly drove past, in another vehicle, when the witness confirmed their identities. They were arrested later that day in another vehicle and the eye witness had another opportunity to confirm the appellants were the persons in the vehicle from which accused 3 alighted and approached and shot the deceased. The court a quo also considered that even if convicted on a a lesser charge, the minimum sentence of 15 years, would tempt them to abscond.²⁹ The court a quo is justified in concluding that the state has a strong case against all three accused. In *S v Yanta*,³⁰ the court on a proper construction to s60 (11) of the Act, stated that the interests of society and a proper and effective administration of criminal justice system are supreme, and the personal interests of the accused are secondary. On the evidence before the court a quo it is apparent that the community in the New Canada settlement are gravely concerned for their safety, as many have been murdered in the area.

²⁸ *S v Botha en 'n ander* 2002(1) SACR 222 SCA

²⁹ Transcript p68 lines 8-17

³⁰ 2000 (1) SACR 237 Tk at 249 C-D

26. This court appreciates the Constitutional rights of person not to be deprived of their freedoms arbitrarily, and if it is in the interests of justice the persons must be released on bail. In *Conradie v State*³¹, the court stated, “ that right is a qualified liberty right , not a fair trial right. The presumption of innocence is indeed a peculiarly trial- related right as evidenced by its entrenchment as one of the fair trial rights listed in s35(3) of the Constitution. ... the presumption of innocence does not play an operative role in bail applications.”
27. I am not persuaded on the merits of this appeal, I agree with Advocate Morule that the appellants arrest was not random, but on information obtained. It was argued that they provided no independent evidence of innocence and of their prospects of success at trial. I find that the court a quo exercised its discretion correctly when it found that the appellants failed to discharge the onus permitting their release on bail.
28. In *Mafe v State*³²the court in a dissenting judgment stated,
- ‘In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the state’s case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in schedule 6 offences the accused must be given an opportunity in terms of s 60(11)(a) to present evidence

³¹ 2020 ZAWCHC 177 (11 December 2020) at par 19-20

³² [2022] ZAWCHC 108 (31 May 2022) para 143 (dissenting)

to prove that there are exceptional circumstances which in the interest of justice permit his release.”

29. I agree with the court a quo the appellants have failed to demonstrate exceptional circumstances, as set out in Petersen, supra, and therefore they failed to discharge the onus. Accordingly, the following order will issue:

“The appellants’ appeal against the refusal to admit to bail is dismissed.”

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 18 January 2024.

Date of hearing: 8 December 2023

Date of Judgement: 18 January 2024.

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