REPUBLIC OF SOUTH AFRICA

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

CASE NO: A1/2023

Judgment handed down electronically by circulation to the parties' legal representatives by email and by uploading on case lines. The date and time for the handing down of the judgment is deemed to be 10h00 on 20 February 2023.

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

21/2/2023
DATE SIGNATURE

In the appeal between:

TSHIRELETSO LESUFI **Appellant**

and

THE STATE **Respondent**

JUDGMENT

GREYVENSTEIN, AJ

1. This is an appeal by the Appellant against the refusal of bail by the Tshwane Magistrate's Court on 26 May 2022 by the learned Magistrate Hitchcock.

2. The Appellant is charged as accused 2 together with a co accused on a charge of robbery with aggravating circumstances as set out in section 1 of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as the CPA). The charge sheet further alleges that the provisions of section 51 and Part II f Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 is applicable, which prescribes compulsory minimum sentences in the case of a conviction, subject to the provisions of subsection 51(3) of the said Act.

3. It is alleged by the investigation officer that the Appellant and his co accused are also facing charges of "possession of unlicensed firearm and possession of stolen goods", however no such charges form part of the charge sheet.

4. The Appellant and his co accused both brought bail applications on 10 December 2021 after their arrest on the same day and soon after the crime was committed. Both the Appellant and his co accused based their applications on affidavits and did not lead any viva voce evidence. The State also relied only on the affidavit of the investigation officer in their case. The learned Magistrate called upon the investigation officer to present viva voce evidence to clarify aspects surrounding the strength of the State's case. Bail was refused on 15 December 2021.

5. Although the date of arrest is not mentioned in the evidence adduced in the original bail applications, it seems clear that all parties were ad idem that the Appellant and accused 1 were arrested together on the very same day that the crime was committed, which is alleged to be 1 December 2021 according to Annexure A to the charge sheet. The case record however indicates on the J15 that accused 1 was arrested on 17 March 2019 (more than two years' prior the incident) and that the Appellant was arrested on 3 December 2021 (two days after the alleged incident).

6. The undisputed evidence of the Appellant during the first bail application, in so far as it is relevant to this judgment, inter alia consisted of the following facts: He

is a South African citizen, born and bred in Gauteng and living in Pretoria for all his life. He studied mechanical engineering and has his own business as a motor mechanic earning approximately R 5 500 per week. He owns movable assets to the value of about R 250 000, a Toyota Hilux bakkie and no immovable property. He does not have a passport and has never travelled outside the borders of the Republic of South Africa. He has no previous convictions and no outstanding cases against him. His release will not endanger the public safety. He does not know any of the state witnesses and will not interfere with them. His release will not jeopardize the proper functioning of the judicial system, nor will it undermine public order or peace. It will take a long time before the matter is enrolled for trial. Should he be detained pending the trial, he will suffer serious financial losses. He can afford to pay bail and is willing to subject himself to any bail conditions that may be set. He has every reason to remain in the country and fleeing is not an option for him and he will not evade his trial.

7. The Appellant did not dispute that the crime of armed robbery of a truck is such circumstances is a serious crime. The only fact in dispute was the strength of the State's case against the Appellant. The Appellant indicated that he was not privy to the docket and as such cannot comment on the available evidence per the docket. The Appellant denied any involvement in the crime he is arraigned for and denied that the State could have a strong case against him.

8. Sgt Jacobs, who is the investigation officer submitted an affidavit in which he stated that the appellant is facing a charge of hijacking, possession of unlicensed firearm and possession of stolen goods. He stated that the Appellant and his co-accused pointed a truck driver with a firearm, broke the window of the driver of the truck, and took the truck with the trailer stocked with furniture. They were chased by members of SAPS, and both were arrested with a firearm. The robbed goods were recovered. The address of the Appellant was confirmed, the Appellant has no previous convictions, no outstanding warrants and no outstanding pending cases. The Appellant is a SA citizen and does not hold a

passport. The Appellant will not be able to interfere with the witnesses or the investigation if he was released. The Appellant is not a flight risk. He opposes bail because truck hijacking is a serious offence that is prevalent in SA. A firearm with no serial number was used in the commission of the crime.

9. When Sgt Jacobs gave viva voce evidence on request of the learned presiding Magistrate about the strength of the State's case, he testified that the Appellant is linked to the case, because according to police members, they saw the two accused persons (of which the Appellant was one) jumping out of the hijacked car while en route to the police station with the victim. The members of SAPS chase them by foot and arrested the accused persons. Both were identified by the victim. The firearm, of which the identification mark was removed, was found in possession of the Appellant's co-accused. Some property belonging to the victim was found in possession of the Appellant's co-accused.

10. During cross examination on behalf of the Appellant he testified that three policemen gave statements. It was put to him that the Appellant will deny participation in the robbery. His version is that there was a commotion during which he was arrested. He denied it and stated that one on the policemen stated that they saw them jumping from the car.

11. He admitted that the fears that he might have about the seriousness of the offence can be allied by legislative conditions such as having conditions. He testified that on the day of the incident the Appellant and the co-accused acted with disregard to the safety of other people by travelling at a high speed when the streets were full.

12. He reiterated that three policemen each made statements implicating the Appellant and his co accused person.

13. The learned Magistrate correctly found that the version of the Appellant that he was arrested during a commotion is not evidence (it was a mere statement that was put to the investigating officer during his cross examination). The learned

Magistrate criticized the fact that the Applicant elected to limit his application by ways of an affidavit with reference to case law. The learned Magistrate concluded that as a result thereof, there is a strong case against the Applicant and as a result thereof no exceptional circumstances were proven by the Applicant.

14. The Court found, in view of the current case law, that the expectation of a substantial sentence of imprisonment in the case of a conviction (as is common cause to be applicable in the case of the Applicant), is undoubtedly an incentive for the Applicant to abscond.

15. The Court found that the Applicant is man of straw. The only evidence in this respect was that of the Appellant who claimed to be self-employed as a motor mechanic and earn on average R 5 500 per week. He further claimed to be the owner of movable property to the value of approximately R 250 000, and that he is the owner of a Toyota Hilux bakkie. It is the only evidence adduced in respect of the financial status of the Appellant. This finding of the learned Magistrate that the Appellant is a man of straw was wrong.

16. The Court referred to his health status, that there will be no financial loss and that the Applicant has no dependents. The reference by the learned Magistrate that there will be no financial loss if the Appellant is detained is wrong, given the evidence that the Appellant was self-employed generating an income of approximately R 25 000 per month.

17. The Application for bail was dismissed.

18. An uncertified copy of case number A16/850/2022 was attached to the application before this court, which is clearly not relevant to the case against the Appellant. An uncertified copy of case number 14/395/2022 was correctly attached to the current application, which indicates that an application for bail on new fact was brought by the Appellant on 31 March 2022 before the same learned Magistrate that heard the first application, and the judgment wherein the

application was dismissed was delivered on 12 April 2022 by the same learned Magistrate who heard the first application. The transcripts of the proceedings for 31 March- and 12 April 2022 were not placed before Court. What was presented, is an application for bail, brought by the Appellant on 26 May 2022 before another Magistrate on case number A16/1236/2021. The uncertified copy of the charge sheet of case number 14/395/2022 makes no mention of any appearance on 26 May 2022 and no copy of the charge sheet of case number A 16/1236/2021 was presented.

19. Section 65(2) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as the Criminal Procedure Act) makes provision for an application of bail application to be brought on new facts and that it be brought "before the magistrate" against whose decision the appeal is brought. No evidence was produced or address was produced to clarify the clear ambiguity. In the exordium to the affidavit by the Appellant in the bail application on new fact, he stated as follows: "The reason why the case is now in Court 16 is because of the arrangement made with the authorities that the bail on new facts may be brought before Mr [indistinct] Kock, who heard the original bail hearing and refused me bail". This even confuses the aspect of who presided in the original bail application, and in the bail application brought on new facts even more. It is unclear if the bail application on new facts was brought before the learned Magistrate who adjudicated the first bail application or not. If not, the bail application on new facts before another Magistrate was heard in contrast to the provisions of section 65(2) of the Criminal Procedure Act.

20. During this bail application on new facts, the defence brought the Court's attention to the record of the first bail application in which the investigating officer testified that three different police officers each gave statements that links inter alia the Appellant.

21. The defence continued to bring their bail application on new facts based on an affidavit by the Appellant. He stated that the contents of the docket were

disclosed to his legal representative on 18 May 2022, long after the original bail application. He stated that the docket contained no statement made by the arresting officer and the reason for his arrest. The only reference to the Appellant in the docket is in the arresting statement marked A2 made by the investigating officer and that there is no statement for the charge of robbery. He stated that this is a new fact as he was not privy to the docket when he brought the original bail application.

22. The State adduced the evidence of the investigating officer. He stated that when he arrested the Appellant on the charge of robbery with aggravating circumstances, the Appellant was already in the police cells after being arrested on a charge of possession of stolen items, possession of a firearm and possession of a hijacked vehicle. The name of the Appellant was not mentioned in the original case. He further stated that the possession comes from a main docket, and he simply added the count of robbery with aggravating circumstances because the goods had an owner that was hijacked.

23. During cross examination he confirmed that there was only one docket for the case. He conceded that the docket does not mention the Appellant in any statement. He conceded that the police who caught the Appellant described him. When he effected the arrest, he was alone, and no one pointed out the Appellant to him. He admitted that the docket that was discovered to the defence in this matter does not contain statements by three policemen who identified the Appellant. He testified that they only mentioned the co-accused of the Appellant. When the legal representative wanted to put it to the witness that he arrested the Appellant that there was no link between the hijacking and the Appellant upon which the investigating officer could have arrested the Appellant, he was denied putting it by the learned Magistrate who ruled that the "question is bad, because he says he informed him of a hijacking". This Court finds that it was a highly relevant and admissible statement to make, in view of the fact that the dismissal of the bail application originally was based purely on the strength of the State's case, which would make the probability of the Appellant not to stand trial higher

due to the long-term imprisonment that would probably be imposed once convicted. The strength of the State's case becomes debatable if there are not three policemen who made statements that the Appellant was identified by them.

24. The investigating officer further confirmed that the name of the Appellant appears nowhere in the docket upon which the arrest was effected. He further admitted not one of the statements in the docket, consisting of A1, A2 and A3 gives a description that fits the Appellant. It is common cause that the arrest was more than six months prior to the bail application on new facts. He admitted that no identification parade was held. It was put to the witness that after all the months there is no evidence that links the Appellant to the commission of the crime.

25. The learned Magistrate continued to question the witness. Unfortunately, many of the questions by the learned Magistrate and many answers by the witness were indistinct.

26. During further questions by the legal representative of the Appellant it was put to the witness that it will be argued that the evidence against the Appellant is so [indistinct] that it could not even be classified as circumstantial.

27. The learned Magistrate relied upon the affidavit of the Appellant in the original bail application in which he stated that on the date in question he was arrested together with his co-accused and thus found that the Appellant placed himself on the scene.

28. The Court ultimately found that irrespective the new fact, the Appellant was identified on the scene by the complainant, arrested and charged. The Court found that there is still a strong prima facie case against the Appellant and dismissed the application for his release on bail.

29. The provisions of section 60(11)(a) of the Criminal Procedure Act are applicable. Where an accused person is charged with a schedule 6 offence (of which the crime in this instance is one), the Court shall order that the accused be detained

until he 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 interest of justice permit his release. The interest of justice do (sic) not permit the release of an accused person in circumstances listed in section 60(4)(a)- to (e) of the Criminal Procedure Act. It is common cause that the State opposed bail simply because of the alleged strength of its case, as a consequence of which the Appellant would then probably be convicted and probably would be sentenced to a lengthy term of imprisonment. The prescribed sentence for the offence in these circumstances is 15 years imprisonment. That would give the Appellant an incentive to abscond. Thus the objection against the release on bail is limited to the interest of justice that would not be served if there is a likelihood that the accused, if released on bail will evade his trial. It should be mentioned that such was not alleged by the investigation officer at the original bail application, or the application based on new facts. Simple reliance was made on the alleged strength of the State's case.

30. Section 60(6) lists the factors that the court may take into account when consideration is given to whether the grounds in section 60(4)(b) of the Criminal Procedure Act has been established, As such the strength of the State's case and the incentive that the Appellant may in consequence have to attempt to evade justice, the nature and gravity of punishment which is likely to be imposed and the ease with which such conditions could be breached are relevant factors as listed in section 60(6)(f)- to (g) of the Criminal Procedure Act.

31. The ultimate question is whether the Appellant adduced evidence which satisfied the Court that exceptional circumstances which in the interest of justice permit his release.

32. In respect of the strength of the State's case:

32.1 The evidence that the Appellant adduced, albeit by affidavit, is that he did not commit the crime. The State attempted to gainsay his denial by alleging through evidence under oath, consisting of an affidavit by the investigating officer, and his viva voce evidence during both applications by the Appellant, that there is a strong case against the Appellant. During the first bail application he alleged that the docket contains three statements of policemen identifying the Appellant and his co-accused. It however became evident to the Appellant, only after the disclosure of the contents of the docket that not only does it not contain the three mentioned statements, but also that no mention is made of the Appellant in respect of the merits of the case. He was arrested by the investigating officer for the crimes of robbery with aggravating circumstances and possession of an unlicensed firearm, without the investigating officer being told who to arrest or the reason for the arrest. The fact that he admitted to being arrested together with his co-accused does not strengthen the State's alleged strong case.

32.2 It is admissible for the applicant in a bail application to present his case by ways of an sworn affidavit. The Appellant adduced evidence by ways of affidavit which meets all the criteria set out in section 60(4)- to (8) of the Criminal Procedure Act to be released on bail and/or not to be detained pending the outcome of the trial.

32.3 The new facts adduced during the second bail application is clear that the docket for the case against the Appellant contains no statement that implicates the Appellant in the commission of the crimes that he is facing. The Court finds that the State did not disprove the evidence by the Appellant that he did not commit the crime/s (being equal to evidence that the State does not have any evidence against the Appellant). The learned Magistrate erred in concluding, more so after the second bail application, that the State has a strong prima facie case against the Appellant.

33. Section 60(9) of the Criminal Procedure Act is clear that the Court shall decide the matter by weighing the interest of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained considering the factors mentioned in section 60(9)(a)- to (g) of the Criminal Procedure Act.

34. The remaining question is what would constitute exceptional circumstances that would permit the release of the accused person in the interest of justice as mentioned in section 60(11)(a) of the Criminal Procedure Act. Would it be exceptional circumstances that the Appellant meets all the criteria set out in the relevant sections 60(4)- to 8 of the Criminal Procedure Act to justify his release on bail?

35. In the case of S v Jonas 1988(2) SACR 677 SE the Court said at p 678: "....To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance..."

36. In Fourie v S [A107/2020] ZAGPPHC 260 (8 June 2020) Rabie J, par 38 the court found that the Appellant has shown that he has a proper defence to the charges against him and that the State's case against him, is at least, subject to serious doubt. The State failed to make out a prima facie case against him

37. In terms of the provisions of section 65(4) of the Criminal Procedure Act the Court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such Court is satisfied that the decision was wrong in which the Court shall give the decision which it=n its opinion, the lower Court should have given.

38. In Chewe v The State (unreported case number A 702/2015 GDP – 26/10/2015 Ishmail J stated with regard to the approach on bail appeals: " The task of this court is merely to ascertain whether the court of first instance exercised its mind judicially and correctly."

39. The Court finds that the learned Magistrate in the court a quo erred, was wrong and did not exercise its mind judicially and correctly by finding that the Appellant is a man of straw, that he will suffer no financial losses if he is to be detained and last but least, that the State has a strong prima facie case against the Appellant.

40. If regard is had to the cumulative circumstances, inclusive of his unblemished record, his strong and fixed emotional and occupational ties in the jurisdiction of the trial court, the fact that he has no passport, that he has never travelled outside the borders of our country and his evidence that he is going to stand trial and not abscond, this court is satisfied that he Appellant proved on a balance of probabilities that exceptional circumstances exists that permits his release on bail.

41. In the result, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following order:\
    1. Appellant shall be released on bail on payment of the amount of R 5 000 and subject to the following conditions:
        (i) That he shall report at the Eersterust Police Station every Monday and Friday between 08h00 and 18h00 and have this recorded in a register kept at the police station for this purpose; and
        (ii) That he shall not leave the jurisdiction of Gauteng without the prior written permission from the investigating officer; and
        (iii) That he shall appear at the trial court on every date the matter is remanded to at the time and place ordered

    until the completion of the trial.

M GREYVENSTEIN AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA