



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case Number: A157/2022

In the matter between:

NANDO NYOKWANA

Appellant

and

THE STATE

Respondent

Date of hearing: 18 November 2022

Date of judgment: This judgment was handed down electronically by circulating same to the parties' legal representatives via email. The date and time for hand down is deemed to be 10h00 on 29 November 2022.

JUDGMENT

DE WET, AJ:

1. This is an appeal against the decision of Magistrate Bengaqula, of Cape Town Magistrate's court, delivered on 30 May 2022 under case number 15/382/2022, refusing the appellant's release on bail.

2. The appellant was charged, together with two others, with housebreaking with the intent to steal and theft. At the time the appellant had a pending charge which fell within the purview of schedule 1 of the Criminal Procedure Act 51 of 1977 ("the CPA") and accordingly the matter proceeded in the court *a quo* as a bail application in terms of s 60(11)(b) of the CPA. The appellant had to satisfy the court *a quo* that his release on bail was in the interests of justice.

3. The appellant was represented in the court *a quo* and decided to bring his bail application by way of affidavit. He admitted that he had two pending cases against him. The State opposed the application and called the investigating officer, Sergeant Sizani, who explained that he was called to a block of flats in Sea Point where security gates were forced open and items removed. He was advised that the suspects were caught in the act of removing items from the flat by a security guard. According to the security guard, they tried to attack him and he shot two of the suspects. One of these suspects was the appellant. On his arrest the appellant was found with a bag which contained stolen goods such as the TV remote, a Volvo motor vehicle key belonging to the owner of the flat which was broken into and a crowbar or spanner. The value of the stolen goods amounted to approximately R 400 000.00. He confirmed that the appellant lived at the address he provided in Delft but had concerns in this regard as the appellant had told him that he was from Durban, whilst he is, in fact, from Mozambique.

4. On behalf of the appellant, it was contended that it would be in the interests of justice that bail be granted *inter alia* due to the injuries he sustained during his arrest

which allegedly rendered him incapacitated, that he was not receiving adequate medical attention in custody and the nature of his personal circumstances. Further to this, he has no previous convictions or outstanding warrants of arrest which evidences that there is no likelihood that he would evade trial.

5. The court *a quo* refused bail and the appellant proceeded to lodge this appeal.

The bail appeal:

6. After being allocated the appeal, I was advised that the parties have reached agreement and that I accordingly need not read the file. I was further sent a draft order in which the parties had agreed that the appellant be released on bail of R 5 000 together with certain bail conditions. This was quite perplexing, given the trite position regarding the function and powers of a court or judge hearing an appeal under s 65 of the CPA, which states: “65(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 or his opinion the lower court should have given.”

7. The approach in bail appeals is similar to that used in appeals against conviction and sentence¹ and was explained by Hefer J in *S v Barber* 1979 (4) SA 218 (D) at 220 E–H as follows:

¹ See *S v HO* 1979 (3) SA 734 (W) 737 H.

“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. This Court has to be persuaded that the magistrate exercised the discretion which it 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 but exercised that 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*”.²

8. As I had some concerns and with reference to s 60(2)(d) read with s 60(11)(b) of the CPA, I requested the parties’ legal representatives to address me as to why the state was not opposing the bail application and why, in the exercise of judicial oversight, I should grant the order as requested by the parties in the circumstances of this particular case. Counsel for the State indicated that she was initially reluctant to agree to an order in terms whereof the appellant is released on bail, but then had a consultation with the investigating officer who indicated to her that he had verified the address of the appellant and that given the appellant’s medical condition and the fact that the appellant would hand in his passport, was now satisfied that the appellant could be released on bail subject to strict bail conditions.

² Also see *S v Nel* 2018 (1) SACR 576(GP) at [3] and *S v Porthen* 2004(2) SACR 272 (C) where Binns-Ward AJ (as he then was) pointed out in para 17, in the context of bail appeals, that it remains necessary to be mindful in the context of the provisions of s 60(11)(a), that it concerns the question of deprivation of personal liberty. He held that this consideration “is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court’s competence to decide that the lower court’s decision to refuse bail was ‘wrong’.”

9. On behalf of the appellant, it was submitted that the decision of the court *a quo* was wrong, as it does not appear from the judgment *a quo* that the personal circumstances of the appellant was sufficiently considered. Further reliance was placed on the following facts, in order to persuade this court that it would be in the interest of justice for bail to be granted:

9.1. The State has agreed to an order that the appellant be released on bail subject to strict bail conditions.

9.2. Although the appellant was charged during 2015 with housebreaking and theft, no warrant for his arrest has been issued which is indicative that there is no likelihood that he would evade the trial.

9.3. He was shot by a security guard on the day of his arrest and does not receive the medical attention he requires whilst in custody.

9.4. He has been in custody since 29 April 2022 (almost 7 months).

10. Furthermore, the appellant's counsel produced the passport of the appellant which he intended handing over to the investigating officer for safe-keeping and provided me with a one-page copy thereof.

11. In considering the submissions, it appeared, at least *prima facie*, that the court *a quo* overemphasized the strength of the State's case whilst not considering the personal circumstances of the appellant, particularly the fact that he required medical attention, had no previous convictions, and had no outstanding warrants of arrest to indicate that he would evade the trial.

New information:

12. However, on perusal of the copy of the passport, it came to my attention that the appellant was not truthful when he deposed to his bail affidavit in support of his bail application.

13. In his bail affidavit he had stated, under oath, that he did not have a valid passport. This statement was repeated in the notice of appeal.

14. Contrary to the aforesaid, it now appears that the appellant was in fact in possession of a valid passport for the period 23 March 2020 to 23 March 2025, and that since 2020 he has left the country on various occasions to go to Mozambique. Apparently, neither the State, nor the representatives of the appellant noticed or investigated this aspect.

15. This is indeed quite concerning as s 60(4)(d) read with s 60(8)(a), expressly provides that false information provided by an applicant in a bail application constitutes grounds for a refusal to grant bail in the interests of justice.

16. Given the new information, the legal representatives were requested to deal with the application in open court. The appellant's legal representative replied by way of email that the matter had proceeded as an unopposed bail appeal and that if the situation had changed, he would have to take instructions. In response the parties were advised as follows:

"Good day

Please be advised that it is for the Court to decide whether the Court a quo misdirected itself and if so, whether the interest of justice demands the release of the accused. As previously indicated the Honourable Ms Acting Justice De Wet had concerns regarding the release of the accused but was advised by the State that the investigating officer had verified his address. She was later handed a copy of the passport of the accused.

On perusal of the document, it shows that the accused indeed has a valid passport. In his bail affidavit, he stated he does not have a valid passport.

In the circumstances, the matter will be dealt with in open court on Friday, 18 November 2022 at 10h00. Both the State and the defence can make such submissions, as they deem appropriate in court."

17. In response hereto, the appellant's legal representative advised that he has "no further instructions to proceed with the appeal. Accordingly, a notice of withdrawal of the Appeal will be filed today." Shortly thereafter, a notice of withdrawal of the appeal was

sent by email and in this notice the court was further advised that counsel for the defence will not be available to attend Court on 18 November 2022 due to other court commitments.

18. On 18 November 2022 at 11h30 only counsel for the State appeared. She advised the court that the issue pertaining to the appellant's passport was an oversight by the state and was not considered at all.

Discussion:

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19. There appears to be a perception or maybe a misguided belief that court orders in in terms of which bail was refused, can simply be set aside by agreement between appellants and the state. Whilst it is so that the attitude of the Director of Public Prosecution, given the experience and the responsibilities of its office, can be a relevant consideration, especially as it has the powers to certify in terms of s 60(11A) under which schedule a charge resorts, it does not change the nature of the inquiry which has to be conducted by the appeal court as set out in s 65 of the CPA. The legislature saw it fit to place an onus on an accused charged with a schedule 5 or 6 offence, to show that his or her release would be in the interest of justice. The question of whether or not bail should be granted pending trial turns on several competing Constitutional rights such as an accused's rights to liberty, his right to be presumed innocent until proven guilty, the interests of justice and the protection of society. There is consequently a duty on all parties involved in bail applications and bail appeals to ensure that the outcome of such proceedings is ultimately in the interest of justice.

20. More concerning though is the brazen attitude displayed in this matter: if the court is not willing to grant the agreed order, the appeal is simply withdrawn, no doubt with the intention to set it down before another court who might have a more favourable attitude towards the appellant.

21. In the circumstances, the following order is made:

1. The bail appeal is removed from the roll.
2. The appellant is to provide reasons why the appeal was previously withdrawn and deal with the issues raised herein, should he wish to re-enrol the bail appeal or launch a new bail appeal.
3. This judgment shall be brought to the attention of the Office of the National Director of Public Prosecutions.

A De Wet
Acting Judge of the High Court

Coram:

De Wet AJ

Date of Hearing: 18 November 2022

Date of Judgment: 28 November 2022

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