REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 008/06

Reportable

In the matter between:

ROBERT GREEN
FIRST APPELLANT
BHEKI MASHABA **SECOND APPELLANT**

and

THE STATE
RESPONDENT

CORAM: FARLAM, HEHER JJA et CACHALIA AJA

HEARD: 11 JANUARY 2006

DELIVERED: 3 MARCH 2006

SUMMARY: Criminal Procedure – bail – refusal – Court's discretion to invoke s 60(3) Act 51 of 1977.

Neutral citation: This judgment may be referred to as R Green and Another *v* The State [2006] SCA 3 (RSA).

JUDGMENT

FARLAM JA

INTRODUCTION

[1] The two appellants in this matter, who are charged in the magistrate's court for the regional division of Mpumalanga with robbery with aggravating circumstances involving the use of firearms, appealed to the Pretoria High Court against the decision by a regional court magistrate to dismiss their application for bail and to order, in terms of section 60(11)(a) of the Criminal Procedure Act 51 of 1977, as amended (to which I shall refer in what follows as 'the Act'), that they be detained in custody until dealt with in accordance with the law.

[2] The magistrate had found that the appellants had failed to establish exceptional circumstances justifying their release on bail in the interests of justice.

[3] Bosielo J dismissed the appellants' appeal, holding that the magistrate was correct in finding that there were no exceptional circumstances justifying the release of the appellants on bail in the interests of justice.

2. RELEVANT STATUTORY PROVISIONS

[4] It is convenient at this stage to set out the statutory provisions which are relevant in this matter. They are contained in section 60(1), (2), (3), (10 and (11).
These sub-sections, as far as is material, read as follows:

'(1)(a) An accused who is in custody in respect of an offence shall … be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.
(2) In bail proceedings the court –
. . .
(c) may . . . require of the prosecutor or the accused . . . that evidence be adduced . . . .
(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application the presiding officer shall order that such information or evidence be placed before the court.
…
(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty … to weigh up the personal interests of the accused against the interests of justice.
(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she 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 interests of justice permit his of her release. ..'

[5] Among the offences listed in Schedule 6 of the Act is robbery involving the use by the accused or any co-perpetrators or participants of a firearm.

[6] In terms of section 65(4), which deals with bail appeals to the High Court from decisions in lower courts, 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 event the court … shall give the decision which in its … opinion the lower court should have given.'

[7] Section 60 of the Act was extensively added to by amendments effected by the Criminal Procedure Second Amendment Acts of 1995 (Act

75 of 1995) and 1997 (Act 85 of 1997). These amendments gave rise to a number of constitutional challenges to the new bail dispensation, including the provision in subsection 11(a). These challenges were considered by the Constitutional Court in a judgment reported as *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999(4) SA 623 (CC). In what follows I shall refer to that judgment as 'the *Dlamini* decision'.

[8] The Constitutional Court upheld the constitutionality of the provisions challenged. As far as sub-section 11(a) is concerned it held that the inclusion of the requirement of 'exceptional circumstances' in the sub-section limited the right 'to be released from detention if the interests of justice permit, subject to reasonable conditions', which is enshrined in section 35(1)(f) of the Constitution, but was a limitation which was reasonable and justifiable in terms of section 36 of the Constitution.

3. PROCEEDINGS IN THE COURT OF FIRST INSTANCE

[9] In the charge sheet in the present case the State alleged that the appellants were guilty of robbery with aggravating circumstances (as defined in section 1 of the Act) in that on the 9th September 2005 at or near Nelspruit they assaulted four persons and with force took from them R7 276 150, the aggravating circumstances being the use of firearms.

[10] When the appellants first appeared in court there were two persons charged with them, namely PT Makhakula and SG Nkosi. The appellants' attorney, who was also appearing for Makhakula and Nkosi, opposed an application brought by the State for a postponement to enable it to prepare for a bail application to be brought by the appellants and their co-accused. Shortly after an adjournment to enable discussions between the prosecutor and the defence attorney to take place, the prosecutor announced that he was withdrawing the case against Makhakula and Nkosi and stated that they would probably be used as State witnesses. The investigating officer, Superintendent MF Molapo, then testified in support of the State's application for a postponement.

[11] In cross-examination it emerged that the second appellant was the security manager at the place where the robbery occurred. It was put to him that Makhakula and Nkosi, who had apparently made statements implicating the appellants, averred that they had been assaulted and

forced to make statements that were false. This he denied. The defence then called Makhakula and Nkosi, who repeated under oath what the defence attorney had put to Superintendent Molapo.

[12] The State's application for a postponement of the case until 24 October 2005 was granted.

[13] On 24 October 2005 the defence attorney applied for access to the police docket, but this application was refused by the magistrate, basing his decision on section 60 (14) of the Act, which in terms provides that an accused does not have the right of access to the police docket at the bail stage.

[14] The magistrate did, however, grant a defence application calling on the State to indicate on what grounds it averred that the appellants were linked to the robbery.

[15] In response to this the prosecutor gave the following information as to the grounds on which the State relied for its contention that the appellants were linked with the robbery:

(a) an amount of approximately R80 000 had been seized by the police, who were in the process of investigating whether this money could be identified as part of the R7 million taken during the robbery;
(b) the appellants were also connected to the crime by fingerprints;
(c) they had been identified as persons visible on closed circuit television film taken during the robbery;
(d) clothing resembling that worn by participants in the robbery was subsequently seized while in their possession;
(e) certain vehicles had been bought immediately after the robbery, some of which had, as the prosecutor put it, been 'confiscated' by the Asset Forfeiture Unit;
(f) some of the properties so purchased had disappeared but the police and the Asset Forfeiture Unit had the necessary particulars regarding these properties;
(g) two persons [clearly in the circumstances he was referring to Makhakula and Nkosi] had made statements implicating the appellants.

[16] The defence attorney then applied for access to the closed circuit television tapes. The State opposed the application and it was dismissed.

[17] On the following day the two appellants testified in support of their

application. They both denied that they were linked in any way with the robbery. The second appellant said that he was not at the scene when the robbery took place but had been there earlier and that while he was on his way to go to one of the paypoints he had been telephoned and told about it. Both appellants testified that they would stand their trial, not interfere with state witnesses or the police investigation and not commit any offences in the interim.

[18] Superintendent Molapo, the investigating officer, then testified for the State in support of the State's opposition to the application. Most of what he said in chief was destroyed in cross-examination and it is accordingly unnecessary for me to summarise it. The magistrate was well aware of the aspects in respect of which Superintendent Molapo's evidence was discredited in cross-examination. The aspects on which he relied in his judgment were the following:

(a) the first appellant's fingerprints were found on the utility vehicle which was used by the robbers as a getaway vehicle to escape with the proceeds of the robbery and which was later found abandoned;

(b) it is clear from the video film taken by the closed circuit television camera that the first appellant was the driver of the getaway vehicle;

(c) a t-shirt which the first appellant wore when he appeared in court resembled the t-shirt worn by the appellant during the robbery according to what could be seen on the closed circuit television film;

(d) the second appellant could be seen on the closed circuit television film arriving for work substantially before the normal time, talking to two security officers, embracing them and kissing one of them, a female, leaving the scene and returning to report for work in the normal manner, the security officers in question being the persons who were later seen helping the robbers to load the proceeds of the robbery onto the getaway vehicle;

(e) the second appellant's employer stated in an affidavit that the second appellant had reported to him before the robbery that the first appellant had approached him for information to enable him to commit a robbery, that the second appellant had been told to investigate the matter so that a case could be brought against the first appellant, which did not happen before the robbery took place;

(f) the State was in possession of other affidavits which indicated that the second appellant, although it had nothing to do with his job description, had on various occasions shortly before the robbery made enquiries relating to the amount of cash that was in the safe on the premises at certain times.
(Counsel for the State conceded in the course of argument in this court that there were no other aspects of Superintendent Molapo's evidence which survived the cross-examination and which require to be considered.)

[19] The appellants' attorney submitted that the appellants had established the presence of exceptional circumstances which justified their release as being in the interests of justice. He contended that the appellants' evidence, which had not been contradicted, should be accepted and that the evidence of the investigating officer should be rejected. He then subjected this evidence to detailed criticism which it is not necessary for me to repeat. Dealing with the evidence that the appellants were linked with the robbery by what appears on the closed circuit television video he pointed out that the State whose case could in no way be prejudiced by showing the video to the court, possibly even in the absence of the appellants and their attorney, had refused to do so. Relying, *inter alia,* on the judgment of this Court in *S v Botha* 2002 (1) SACR 222 (SCA) at para [21], in which it was said that proof by an accused that he will probably be acquitted can constitute exceptional circumstances, he submitted that was in fact no evidence against the appellants and that they should accordingly be released on bail.

[20] In his judgment refusing the application the magistrate held that, although there were certain aspects in respect of which Superintendent Molapo's evidence rested, as he put it, on 'wankelrige bene', there were other aspects 'wat wel deeglik water hou' and on the strength of which he could find that there was what he called ''n *prima facie* sterk saak' against the appellants. The aspects to which he referred are those summarized in par [18] above. He was not prepared to find that Superintendent Molapo's evidence on these points could be rejected. His reasoning on the point

appears from the following passage in his judgment:

'… ons [weet] almal dat meineed 'n ernstige misdaad is en indien Malapo vir die Hof gelieg het aangaande die sterk saak teen die beskuldigdes wat op hierdie stadium tot beskikking van die Staat is dan kan hy van meineed aangekla word en sal hy waarskynlik in sy posisie en hoedanigheid direkte gevangenisstraf in die gesig staar. As dit dus sou blyk dat Malapo onder eed in hierdie hof gelieg het oor die feit dat beskuldigde nommer 1 se vingerafdrukke op die gewraakte voertuig gevind is en dat die Staat inderdaad oor daardie getuienis beskik, sal dit baie maklik wees vir die Staat om hom te vervolg op 'n aanklag van meineed. Dieselfde gaan natuurlik oor of indien hy sou gelieg het oor dit wat waarneembaar is op die beelde van die geslote kring televisie kameras of die ander getuieverklarings waarna hy verwys het met verwysing na beskuldigde 2 se betrokkenheid. Daarmee saam kan daar natuurlik, indien hy gelieg het, uiteindelik 'n geweldige siviele eis teen hom ingestel word, teen hom en die toepaslike ministers vir kwaadwillige arrestasie en vervolging en kwaadwillige opponering van die borgverrigtinge. Alhoewel Malapo my verstom het in sekere aspekte van die reg soos dat hy nie weet wat 'n Bylae 1 misdaad is nie, glo ek dat hy wel deeglik bewus is van die risiko's verbonde daaraan om te lieg oor die feite soos ek hier uitgespel het. Op grond daarvan of weens hierdie observasies voel ek dat ek nie in 'n posisie is om te bevind dat Malapo inderdaad 'n ongeloofwaardige getuie is wie se getuienis verwerp moet word aangaande die getuienis wat tans teen die beskuldigdes beskikbaar is nie en moet ek vir doeleindes van hierdie saak bevind dat daar op sterkte van Malapo se getuienis inderdaad 'n *prima facie* sterk saak teen die twee beskuldigdes uitgemaak kan word ongeag hulle ontkenning dat hulle by die pleging van die misdade betrokke was of nie.'

JUDGMENT OF COURT A *QUO*

[21] In his judgment dismissing the appellants' appeal Bosielo J held that as the appellants had not appealed against the magistrate's refusal to allow the appellants access to the police docket or to the material therein which implicates the appellants, his function was limited to deciding whether 'the facts put on record by the appellants [met] the low threshold as postulated in [the *Dlamini* decision] with regard to "exceptional circumstances".' His conclusion, based on that approach was that the magistrate's approach could not be faulted and the appeal had to be dismissed.

APPELLANTS' CONTENTIONS BEFORE THIS COURT

[22] Arguing the matter in this Court counsel for the appellant submitted that the magistrate had erred in relying on certain portions of Superintendent Malapo's evidence for his finding that there was a strong *prima facie* case against the appellants. In this regard he pointed out that on other important parts of the case Malapo had been shown to be

untruthful and submitted on the strength thereof that he had been shown to be an arrogant witness, who was not deterred by the law of perjury from giving evidence which was demonstrably false. In the circumstances, he submitted, it was inappropriate to rely on his *ipse dixit* on matters as to which the State could easily have produced the closed circuit television video and statements from its fingerprint expert and the second appellant's employer and the person or persons to whom he addressed the enquiries referred to earlier. Producing the video and the statements would not have led to a dress rehearsal of the State's case and would not have prejudiced it any way. On the other hand, if the appellants' evidence, which had not been significantly challenged in cross-examination, was correct, Superintendent Malapo's evidence relating to the video and the fingerprints must be false. It followed, he contended, that the appeal should succeed and the appellants released on bail.

DISCUSSION

[23] I agree with this criticism of the magistrate's approach and am satisfied that the order he made cannot stand. It is accordingly incumbent on this Court, acting in terms of section 65(4) of the Act, to give the decision the magistrate should have given. I do not think that the appellants' counsel's submission that this Court should order that the appellants should be released on bail can be accepted without more. It seems to me, on the particular and in some respects peculiar circumstances of this case, that one cannot assume that the prosecutor's refusal to give the defence access to the closed circuit television video can necessarily be explained on the basis that Superintendent Malapo's evidence in regard thereto was false: it is possible, to put it no higher, that the prosecutor had not seen the video. (The defence application did not relate to the other items of evidence.) It is clear from section 60 (10) that the court's function in a bail application is intended to be more pro-active than in normal criminal proceedings. As it was put in the *Dlamini* decision (at para [11]), 'a bail hearing is a unique judicial function' and 'the inquisitorial powers of the presiding officer are greater'. On a proper consideration of the case on which the State relied any reasonable court

must have concluded that it lacked reliable and important information necessary to reach a decision, notwithstanding that such information was apparently readily available. In such circumstances the court has no discretion but to invoke s 60(3). In my view, the magistrate should, instead of refusing bail without more, have ordered the State to grant the defence access to the video tapes and any statements made by the police fingerprint experts linking the fingerprints of either of the appellants with the crime, with the decision on whether or not to grant bail to be made thereafter.

[24] I am aware that such an order would have been contrary to that made earlier by the magistrate when the defence had applied for access to the video tape but that decision was interlocutory and subject to revision in the light of subsequent events, in this case the substantial demolition of evidence of the investigating officer. (The fact that that decision was not attacked on appeal, something which appears to have influenced the learned judge in the court below, takes the case no further. An appeal against the magistrate's decision would have been confined to the matter before him when he refused to order the production of the video tapes and may well have been unsuccessful.)

ORDER

[25] The following order is made:

1. The appeal succeeds.
2. The order made in the court *a quo* is set aside and replaced by the following:

   'A. The appeal succeeds.

   B. The order made by the magistrate is set aside and replaced by the following:

      "1. No order on the bail application is made at this stage.

      2. The State is ordered to grant the defence access to the video tapes and any statements made by the police fingerprint experts relating to the fingerprints of either the appellants linking them with the crime."'

.....

IG FARLAM

JUDGE OF APPEAL

CONCURRING
HEHER JA
CACHALIA AJA