



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: D8054/2023

In the matter between:

PHILANI INNOCENT SIKHOSANA

APPELLANT

and

**THE
RESPONDENT**

STATE

ORDER

The following order is made:

The appeal is dismissed.

JUDGMENT

Chithi AJ

Introduction

[1] This is an appeal against the refusal of bail by the Umlazi Magistrates' Court on 30 November 2022. According to the charge sheet the appellant and his co-accused, his fiancé who was successful in her application for bail, are facing charges comprising five main counts as set out below.

The charges

Count 1: Dealing in drugs

[2] It is alleged that the appellant and his co-accused ('they') are guilty of contravening the provisions of s 5(a) or 5(b) read with ss 1, 13, 17-25 and 64 of the Drugs and Drug Trafficking Act¹ ('the Drug Trafficking Act') further read with the provisions of s 51(2) of the Criminal Law Amendment Act² ('the CLAA'). The offence is alleged to have been committed on or about 16 November 2022 at or near K-Section, Umlazi in the district of eThekweni South wherein the appellant did unlawfully deal in a dependence producing substance as listed in Part 1 of Schedule 2 of the Drug Trafficking Act or an undesirable producing substance as listed in Part 1 of Schedule 2 of the said Act, to wit diacetylmorphine.

Count 2: Dealing in mandrax

[3] It is alleged that they are guilty of the offence of contravening s 5(b) read with ss 1, 13(f), 17(e), 18, 19, 25 and 64 of the Drug Trafficking Act. The offence is alleged to have been committed on or about 16 November 2022 at or near K-Section, Umlazi in the district of eThekweni South wherein the appellant did unlawfully deal in an undesirable dependence producing substance, to wit methaqualone, contained in unknown amount mandrax tablets.

Count 3: Possession of a prohibited firearm: a fully automatic firearm

¹ Drugs and Drug Trafficking Act 140 of 1992.

² Criminal Law Amendment Act 105 of 1997.

[4] It is alleged that they are guilty of the offence of contravening the provisions of s 4(1)(a) read with ss 1, 103, 117, 120(1)(a) and 121 read with Schedule 4 and s 151 of the Firearms Control Act³ ('the FCA') and further read with s 50 of the Criminal Procedure Act⁴ ('the CPA') and s 51 (2) of the CLAA. The offence is alleged to have been committed on or about 16 November 2022 at or near K-Section, Umlazi in the district of eThekweni South wherein the appellant did unlawfully have in his possession fully automatic firearms being prohibited firearms to wit two rifles an R4 and AK47 without being the holder of a license issued in terms of ss 17, 19 or 20(1)(b) of the FCA in respect of those fully automatic firearms.

Count 4: Possession of more than 200 cartridges

[5] It is alleged that they are guilty of the offence of contravening the provisions of s 91(1) read with ss 1, 103, 117, 120(1)(a) and 121 read with Schedule 4 and s 151 of the FCA and further read with s 250 of the CPA. The offence is alleged to have been committed on or about 16 November 2022 at or near K Section, Umlazi in the district of eThekweni South, the appellant being the holder of a licence to possess a firearm referred to in Chapter 6 of the FCA, did unlawfully have in his possession more than 200 cartridges for any/each firearm in respect of which he holds a licence, to wit 220 live rounds of rifle ammunition and 50 live rounds of a 9mm ammunition.

Count 5: Possession of stolen property

[6] It is alleged that the appellant is guilty of the crime of contravening the provisions of s 36 of the General Law Amendment Act.⁵ The offence is alleged to have been committed on or about 16 November 2022 at or near K Section, Umlazi in the district of eThekweni South wherein the appellant was found in possession of goods other than stock or produce as defined in s 1 of the Stock Theft Act⁶ to wit, an A200 Mercedes Benz with registration number JM 828H GP in regard to which there was a reasonable

³ Firearms Control Act 60 of 2000.

⁴ Criminal Procedure Act 51 of 1977.

⁵ General Law Amendment Act 62 of 1955.

⁶ Stock Theft Act 57 of 1959.

suspicion that the said goods had been stolen and the appellant was unable to give a satisfactory account of such possession.

Factual background

[7] Bail was refused in this case pursuant to a formal bail application wherein the evidence was initially tendered by both parties by way of affidavits with the appellant later, and in reply adducing evidence viva voce. In addition, he tendered into evidence three testimonials from the General Secretary of the Umlazi Local Football Association, a counsellor from Ward 78 and from a founder of a football club known as ISkoshi Football Club and such testimonials were accepted as exhibits “E”, “F” and “G” respectively.

[8] At the outset I should mention that although bail proceedings are sui generis the hybrid procedure which the parties employed in tendering their evidence in this case is undesirable and should be discouraged. This hybrid procedure has the potential to plunge proceedings into chaos where the parties had already made their own respective election to adduce evidence by way of affidavits. This procedure would still have opened the appellant to cross-examination in relation to those issues which were in dispute between the appellant and the respondent, such as his alleged unemployment.

[9] At the commencement of the bail proceedings before the court a quo both parties were agreed that the offences for which the appellant and his co-accused were charged fell under Schedule 5 of the CPA read with s 60(11)(b). This was because among the charges which the appellant and his co-accused were facing was possession of two automatic firearms, the possession which places the case within the ambit of Schedule 5 of the CPA.

[10] Section 60(11) of the CPA provides:

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence –

(a) ...

- (b) referred to in Schedule 5, but not 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 satisfied the court that the interests of justice permit his or her release;'

[11] So, what this effectively meant was that the appellant was saddled with an onus in the bail hearing which he had to discharge on a balance of probabilities that the interests of justice permitted his release on bail.

Grounds of appeal

[12] The appellant seeks to assail his refusal of bail as per his notice of appeal on the following grounds:

- (a) The learned magistrate misdirected herself in failing to find that the appellant had discharged the onus of proof entitling him to be admitted to bail.
- (b) The appellant had discharged the onus of proving that the interests of justice permitted his release on bail in that the appellant would stand his trial, he would not interfere with State witnesses, he would not interfere with the police investigations, he would not commit further crimes if released on bail and that the prosecution's case against him was not strong.
- (c) The magistrate misdirected herself and was judicially wrong in not finding that the appellant had satisfied the court that the interests of justice permitted his release on bail on appropriate conditions.
- (d) The magistrate exercised her judicial discretion wrongly in failing to admit the appellant to bail on appropriate conditions in as much as there was no likelihood that the appellant, if he were released on bail would endanger the safety of the public or any person and would commit a Schedule 1 offence or that he would attempt to evade his trial or that he would attempt to influence or intimidate witnesses or to conceal or destroy evidence.

The test on appeal

[13] An appeal against the refusal of bail is regulated in terms of the provisions of s 65(4) of the CPA which provides:

'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.'

[14] The correct approach as to the test espoused in s 65(4) of the CPA is elucidated in the oft quoted case of *S v Barber*⁷ as follows:

'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 for bail. 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 that discretion wrongly.'

[15] In order for me sitting as a court of appeal to interfere with the judgment of the court a quo it would accordingly be necessary that I find that the court a quo misdirected itself materially on the facts or legal principles. If I find that the court a quo misdirected itself, as a court of appeal, I may consider the issue of bail afresh.⁸ In those circumstances I would be at large to consider whether bail ought to have been granted or refused.

[16] In order to determine whether there was any misdirection by the court a quo as posited in the appellant's grounds of appeal and in argument by his counsel Mr *Alberts*, it is necessary to consider the judgment of the learned magistrate.

⁷ *S v Barber* 1979 (4) SA 218 (D) at 220E-F.

⁸ *S v Mpulampula* 2007 (2) SACR 133 (E) at 136e; *S v Jacobs* 2011 (1) SACR 490 (ECP) para 18; *S v Ali* 2011 (1) SACR 34 (E) para 14; *S v Porthen and others* 2004 (2) SACR 242 (C) para 11.

[17] In the beginning of the judgment the magistrate points out that the offences for which the appellant and his co-accused were charged fell under the ambit of Schedule 5 of the CPA and consequently they had to adduce evidence which satisfied her that the interests of justice permitted their release. In addition, she adverted that in considering the application she would consider the exhibits which were tendered in evidence as well as the appellant's viva voce evidence which he tendered in amplification of his affidavit.

[18] The magistrate correctly identified all the relevant provisions of both the CPA and the Constitution which were applicable in this case. She also cautioned herself about the danger of the bail proceedings turning into a trial before the actual trial and degenerating into a dress rehearsal for trial. Moreover, she points out that it was not her task to make a provisional finding on the guilt or innocence of the appellant and his co-accused. All that she had to do was to assess the prima facie strength or weakness of the State case with the central question being whether the interests of justice permitted that the appellant and his co-accused be granted bail. She concluded by alluding that the primary purpose was to ensure that the accused appeared in court to face the charges against them.

[19] In analysing the evidence, the magistrate stated that when she considered the evidence which was adduced by the investigating officer, the appellant and his co-accused she found that their versions were different particularly in relation to whether the appellant's co-accused resided in the house or merely came to the house to visit the appellant. She further asserted that after considering all factors that were presented together with legislation and case law, she found that the appellant's co-accused would be granted bail in the sum of R2 000 subject to her reporting twice a week to her nearest police station between 06h00 and 18h00. Regarding the appellant, she tersely stated that unfortunately the appellant had not discharged the onus to prove that it would be in the interests of justice that he be released on bail and she accordingly refused to release him on bail.

[20] What is evident from the record is that the magistrate failed to evaluate the evidence at all. She failed to assess the evidence as was adduced by the appellant and the respondent against the considerations in s 60(4)(a)-(e) of the CPA. Although the strength or otherwise of the respondent's case formed a central issue in the appellant's application, she also did not make any evaluation of the evidence to decide on this issue. Essentially the magistrate failed to set out the factual foundation upon which her ultimate determination that the appellant did not discharge the onus which was embedded upon him that the interests of justice permitted his release on bail, was founded.

[21] Both Mr *Alberts* and Ms *Naidu* for the respondent did not address the issue of the magistrate's failure to evaluate the evidence in their respective heads of argument. However, during the hearing, they both agreed that the magistrate did not evaluate the evidence at all and she did not indicate the basis upon which she was of the view that the appellant had failed to discharge the onus that it was in the interests that he be released on bail. In view of this, Mr *Alberts* argued that I should interfere with the magistrate's judgment and consider all the appellant's circumstances individually and cumulatively and find that the appellant had discharged the onus that rested on him and therefore release him on bail. Ms *Naidu* argued that in view of the magistrate's failure to evaluate the evidence I was entitled to consider the issue of bail afresh and consider whether bail ought to have been granted or refused. She insisted that the ultimate decision by the magistrate to refuse to admit the appellant to bail was correct.

[22] It is necessary that I stress that the right to a fair trial applies to bail proceedings with the same vigour as in a trial and it dictates that a judicial officer must give reasons for any decision they make. It is settled law that the courts speak through their judgments.⁹ A reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect.¹⁰ Although I have sympathy for

⁹ *S v Mathebula and Another* 2012 (1) SACR 374 (SCA) paras 10-11.

¹⁰ *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28A; *S v Maake* 2011 (1) SACR 263 (SCA) paras 19-20; *S v Mokela* 2012 (1) SACR 431 (SCA) paras 11-13; *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 15.

judicial officers who sit in the bail courts due to the volume of cases that they deal with on a daily basis, they are however not excused from their function which is to account for their decisions by giving reasons. A failure by a judicial officer to evaluate the evidence so as to enable a litigant to understand the basis upon which the decision is founded must be discouraged.

[23] On 18 July 2023 the appellant requested reasons for judgment in terms of Rule 67 of the Magistrates' Courts Rules and despite having been afforded an opportunity to amplify her judgment by furnishing reasons for her judgment the magistrate did not furnish her reasons until the appeal was set down for a hearing. The magistrate did not furnish her reasons for judgment despite her judgment grossly lacking in relation to the reasons behind her judgment.

[24] In view of the foregoing, I find that the magistrate misdirected herself in not evaluating the evidence at all and setting out the factual foundation upon which she made her determination that the appellant did not discharge the onus that the interests of justice permitted that he be released on bail.

[25] It is trite that where the court a quo misdirected itself materially on the facts or legal principles, the court of appeal may consider the issue of bail afresh. If misdirection is established, the appeal court is at large to consider whether bail ought, in the circumstances, to have been granted or refused.

[26] As a court of appeal, I am therefore duty bound to undertake my own analysis of the evidence and decide whether the court a quo made a correct determination that the appellant did not discharge the onus which was embedded upon him to establish on a balance of probabilities that the interest of justice permitted that he be released on bail.

In order to do so it would be necessary to sketch out the evidence which served before the magistrate.

The appellant's evidence

[27] The following is a paraphrased version of the appellant's evidence as set out in his affidavit:

- (a) He was 30 years of age. He lived at the fixed address known as [...], KwaMgaga Road, Umlazi Township, Umlazi. This is the property he was leasing and had been residing there for two years. He provided an alternative fixed address where he would reside if it was deemed necessary that he should relocate from the address in which he was a tenant and the alternative fixed address which he provided was [...], Mangosuthu Highway, KwaMgaga Area, Umlazi Township, Umlazi this address being his parental home.
- (b) He was single although he was engaged to his co-accused. He has three children who were five, three and two years respectively.
- (c) From time to time and whenever there was a vacancy he worked as a taxi driver. He was also a moneylender operating in Umlazi and surrounding areas.
- (d) He had no previous convictions or pending cases and to the best of his knowledge there were no warrants of arrest which were outstanding against him, no protection orders were pending against him and he was not out on parole in respect of any other case. He does not have any travel documents, has never been outside the borders of the Republic of South Africa, nor does he have any friends or family outside of the country. He undertook to fully comply with any bail conditions which the court a quo could possibly have deemed necessary including:
 - (i) not to apply for any travel documents while out on bail,
 - (ii) not to leave the province of KwaZulu-Natal or the prescribed magisterial districts without the permission of the investigating officer;

- (iii) not to enter any port of entry or departure into or out of South Africa;
 - (iv) to report to the nearest police station namely Umlazi as and when deemed necessary;
 - (v) to inform the court and/or the investigating officer in writing of any change of his address;
 - (vi) not to interfere with or hamper directly or indirectly with the investigation of the case; and
 - (vii) not to have any contact, directly or indirectly with any State witnesses in this case.
- (e) He asserted that he was arrested at the house which he was leasing with other people. Upon the arrival of the police, they searched the room in which he and his fiancé occupied but did not find anything. They then proceeded to search other rooms which were not within their eyeshot. After a few minutes, the police emerged and alleged that they found some illegal things. He would plead not guilty to the charges as he did not commit any offences, nor did he possess any of the illegal firearms or drugs. He has assets including motor vehicles, furniture, household appliances and other valuable equipment and assets of good value. In 2020 he was diagnosed as diabetic, and he is on treatment for diabetes.
- (f) The appellant contended that the aforementioned factors considered individually and cumulatively justify that in the interests of justice he be admitted to bail and he proposed to post bail in the sum of R2 000.

[28] Before the appellant adduced his viva voce evidence in amplification of his affidavit his counsel tendered the three testimonials which I have referred to in paragraph 7 above. The essence of these testimonials was that the appellant was a well-known community builder who assisted countless people and the development of football players at grassroots level in Umlazi and the surrounding areas, funded their school fees and he, together with other local business people, once donated money

towards the burial of a local resident whose family was apparently impecunious and could not afford to bury him.

[29] The appellant's viva voce evidence related to his arrest. He testified that upon hearing a knock on the door he went to open the door and noticed that people at the door were police. He allowed them to enter the house as he knew that there was nothing wrong in his house. He had an opportunity to flee from the house but elected not to do so as he knew that there was nothing wrong in his room. He did not see where the firearms were recovered from as he was in the dining room, being the section of the house, he was renting, when the firearms were recovered. He was assaulted by being suffocated with a plastic being placed over his head. While he was in the dining room being suffocated, the police recovered the firearms from another room which was being leased by another gentleman. He testified that he supported a total of about nine nieces and nephews whose parents are unemployed. He asserted that the major role he played in the community was that he managed a soccer club which he owned, and was also responsible for gathering children around. He generally also assisted people who were in need in his community. He particularly assisted people in his community who for example were affected by floods. There were several people who visited him in prison posing as police and who would interrogate him about the firearms that were allegedly found in his possession. In each instance when so questioned, he would deny any knowledge of the firearms. He lived in fear and no longer knew who to trust.

The respondent's evidence

[30] The respondent also adduced evidence by way of an affidavit which was deposed to by the investigating officer, Sergeant M C Mchunu, which I paraphrase as follows:

- (a) He was employed by the South African Police Service ('SAPS') attached to the KZN Provincial Organised Crime Investigation Unit in Durban. He held the rank of a Sergeant and had 14 years' experience in the SAPS. He was assigned as an

investigating officer to Bhekithemba CAS 88/11/2022 and CAS J2325/2022 in which the appellant is accused number one.

- (b) The appellant was 30 years of age residing at [...] Road, Umlazi a property which he is leasing out. He resides alone on the property except for occasional visits by his co-accused who is his fiancé.
- (c) The appellant was unemployed. He had two children one of whom resided with her mother and the other resided with the appellant's mother. Both children are the recipients of a child support grant.
- (d) The appellant had a television, bed, cupboard, and a refrigerator. He did not have a passport and has no occupational ties to place of trial.
- (e) The appellant has no pending cases and no previous convictions.
- (f) On 16 November 2022 at approximately 15h00 a police complainant and his crew who were on duty in full uniform received a tipoff that the appellant, at his rented premises, was in possession of drugs. On following up on this information they found the appellant on the property concerned. They introduced themselves as the police and requested permission to search the person of the appellant and the premises. Upon searching the appellant, they found 24 red and white capsules in the right pocket of the appellant's pants. They suspected these capsules to be heroine and seized them forthwith.
- (g) They then proceeded to search the appellant's bedroom which was pointed to them by the appellant. As they proceeded to the appellant's bedroom the appellant's co-accused was in the passageway. Before they could conduct a search of the appellant's bedroom the appellant stopped them and voluntarily went and pulled out a bag from underneath the bed which he handed over to the police. Upon searching this bag, the police discovered that there were two rifles, an AK47 with serial number SC9201P and R4 rifle with no serial number. In addition, there were 220 live rounds of rifle ammunition and 50 live rounds of a 9mm ammunition. The appellant failed to produce a licence in relation to these

firearms upon being requested to do so and he was thereafter placed under arrest.

- (h) The police enquired from the appellant's co-accused if there were any other illegal items on the premises and the appellant's co-accused then voluntarily handed over a clear plastic bag containing 144 mandrax capsules and seven capsules of crystal meth. When the appellant and his co-accused were questioned in relation to their possession of these items, they could not provide any satisfactory answer. Consequently, the appellant's co-accused was also placed under arrest.
- (i) While the police were still in the appellant's bedroom, they also noticed that there were keys for a Mercedes Benz. When they enquired as to the whereabouts of the motor vehicle from the appellant and his co-accused, the appellant indicated that it was parked outside behind the house. Upon inspecting such motor vehicle, the police discovered that the chassis number was positive in relation to a car hijacking in Malvern CAS 03/11/2022. When the police asked the appellant and his co-accused as to how they came to be in possession of this vehicle they failed to give a satisfactory answer. This vehicle was also seized by the police. All the exhibits which were recovered from the appellant and his co-accused were entered in the SAPS Bhekithemba SAP13/536/2022. The firearms and ammunition were dispatched for forensic analysis to the ballistic forensic science laboratory. The ballistic forensic science laboratory confirmed that both firearms were fully automatic and functioned normally without any defects. The serial number for the R4 rifle was found to be 645253 and it came out positive in relation to an aggravated robbery per Flagstaff CAS 57/06/2010.
- (j) The investigating officer opposed bail for the following reasons:
 - (i) It would not be in the interests of justice for the appellant to be released on bail because his release will endanger the safety of the public and cause public disorder. The appellant was found in possession of two fully automatic assault rifles, 220 live rounds of rifle ammunition, 50 live rounds of a 9mm ammunition and drugs. This was a clear indication that the

appellant was a very dangerous person who did not deserve to be in society.

- (ii) There was a likelihood that if the appellant was released on bail, he would evade his trial due to the seriousness of the offences and the sentences it carries should he be convicted.
 - (iii) There was a likelihood that if the appellant was released on bail, he would commit further crimes as he had a propensity of committing crime if one looks at the number of the charges he was facing.
 - (iv) The appellant's release would jeopardise public confidence in the criminal justice system because the public has an interest in the matter as the appellant was arrested during daylight. The public is very concerned about drugs and illegal firearms as they are a major cause of crime within society.
 - (v) Keeping the appellant in custody would assist in eliminating illegal firearms and illegal drugs sales within Umlazi and surrounding areas.
 - (vi) The respondent had a prima facie case against the appellant. The appellant had acted in furtherance of a common purpose with his co-accused. There was to his knowledge no exceptional circumstances warranting the release of the appellant on bail. In addition, the appellant and his co-accused were linked to the offences in question by the fact that they were found in possession of the relevant exhibits. There were no bail conditions which the court a quo could possibly consider as appropriate which would alter his attitude in relation to his opposition of bail.
- (k) Further, the investigating officer stated that the investigations were almost complete and what was outstanding were the SAP 69's as well as the ballistics report in relation to the drugs concerned.
- (l) Moreover, the investigating officer attached to his affidavit a letter which was directed to the commander of the forensic science laboratory in Amanzimtoti

where, inter alia, the following was stated: 'the recovered firearms are suspected to have been used or involved in the shooting on the following recently reported cases:

- (aa) Amanzimtoti CAS 283/07/2022 murder;
- (bb) Amanzimtoti CAS 126/11/2022 murder;
- (cc) Bhekithemba CAS 67/11/2022 murder;
- (dd) Amanzimtoti CAS 227/01/2022 murder;
- (ee) Umlazi CAS 447/09/2022 murder; and
- (ff) Umlazi CAS 99/10/2022 murder.'

Evaluation of the evidence

[31] In deciding whether the interests of justice permit the release of an accused on bail, the court must among others have regard to the considerations mentioned in paragraphs (a) to (e) of s 60(4) of the CPA.

[32] In terms of this section the interests of justice would not permit the release of an accused person on bail if any one or more of the grounds mentioned in paragraphs (a) to (e) of s 60(4) are established. The grounds are as follows:

- '(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b) where there is the 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 or the proper functioning of the criminal justice system, including the bail system; or
- (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.’

[33] In *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat*¹¹ the Constitutional Court in elucidating the enquiry that a bail court is concerned with and paragraphs (a) to (e) of s 60(4) held as follows:

‘[11] ...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 hearing the bail application is concerned with the question of *possible guilt only to the extent that it may bear on where the interests of justice lie in regard to 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 hindrance.’

‘[42] ...courts are told that, if *they find one or more of the factors listed in (a)-(d) to have been established, a finding that continued detention is in the interests of justice will be justified*. Put differently, judicial officers are pointed towards categories of factual findings that could ground a conclusion that bail should be refused. By like token a court is not enjoined to accord decisive weight to the one or other or all the personal factors mentioned in ss (9). In short, the Legislature was providing guidelines as to what are factors for, and what are factors against, the grant of bail. Whether and to what extent any one or more of such pros or cons are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer.’

‘[49] ...In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paras (a)-(e) of ss (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by ss (9) and (10).’

‘[50] Subsections (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to *bring a reasoned*

¹¹ *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

and balanced judgment to bear in an evaluation where the liberty interests of the arrestee are given the full value accorded by the Constitution.' (Footnote omitted.) (My emphasis.)

[34] In deciding the question of whether the court a quo has made the correct decision regarding whether the appellant had discharged the onus which was embedded upon him to establish on a balance of probabilities that his release on bail was in the interests of justice I would therefore consider the evidence against the factors listed in s 60(4)(a)-(e).

Likelihood that the appellant would endanger the safety of the public or any particular person or would commit a Schedule 1 offence

[35] According to the investigating officer the appellant and his co-accused were not only allegedly found in possession of drugs in respect of which the police got a tip off but they were also found in possession of two rifles, an AK 47 and R4, 220 live rounds of rifle ammunition and 50 live rounds of a 9mm ammunition. In addition, they were found in possession of a Mercedes Benz which was allegedly hijacked in Malvern.

[36] As if the unlawful possession of those two assault rifles and ammunition was not on its own serious enough, those rifles were suspected to have been used or involved in shootings in different cases which were reported with the police. Those are cases of murder which were committed at different times during 2022 and were reported under the following Cas Numbers:

- (a) Amanzimtoti CAS 283/07/2022;
- (b) Amanzimtoti CAS 126/11/2022;
- (c) Bhekithemba CAS 67/11/2022;
- (d) Amanzimtoti CAS 227/01/2022;
- (e) Umlazi CAS 447/09/2022; and

(f) Umlazi CAS 99/10/2022.

[37] It is a fact that Umlazi borders Amanzimtoti and Malvern. Amanzimtoti lies south of Umlazi and a couple of kilometres therefrom and Malvern lies west of Umlazi and a couple of kilometres therefrom. The relevance of this is that three of the series of the murder cases in which the rifles were allegedly suspected to have been used or involved were committed in Amanzimtoti. While on the other hand the Mercedes Benz which was found in the appellant's possession was allegedly hijacked in Malvern. The appellant was himself arrested in a house situated at Mgaga Road, Umlazi. Umlazi is where the other three of the series of the murder cases in relation to which the rifles were allegedly suspected to have been used or involved were committed. The pistol which could fire the 50 rounds of ammunition was not recovered from the appellant's rented premises.

[38] It is apparent from a mere glance of the Cas Numbers that the series of the murder cases in which the rifles were allegedly suspected to have been used or involved including the car hijacking were committed between January and November 2022.

[39] The R4 rifle was also linked to an aggravated robbery which was allegedly committed in Flagstaff in the Eastern Cape and reported under Cas Number 57/06/2010.

[40] The degree of violence towards others which is implicit in the charges against the appellant is beyond doubt. The area in which the appellant was allegedly found in possession of these high calibre firearms is relevant in this enquiry. Umlazi is known as a hot spot for violent contact crime which includes murder, aggravated robbery and car hijacking. The prevalence of violent contact crime in Umlazi involving the use of firearms coupled with the fact that the pistol which could fire the 50 live rounds of ammunition

which were found in the appellant's possession was not recovered means that the possibility of the appellant committing further similar crimes is not negligible but a real possibility. Ms *Naidu* contended that considering the number of charges that the appellant was facing he had a propensity of committing crime and this therefore meant that if he was released on bail there was a likelihood that he would commit further crimes.

[41] The disposition of an accused to commit Schedule 1 offences is usually determined in relation to his previous convictions and not in relation to the number of the charges he is facing. However, within the context of this case it seems to me that to determine the appellant's disposition to commit Schedule 1 offences only in relation to his previous convictions would be to ignore reality. The firearms which were recovered from the appellant were suspected to have been used or involved in the commission of a series of Schedule 1 offences over a period of time. Those Schedule 1 offences are the aggravated robbery which was committed in Flagstaff in June 2010 involving the R4, the spate of murder cases involving the use of both firearms which were committed in Amanzimtoti and Umlazi between January and November 2022 and the car hijacking in Malvern in November 2022. It is a fact that the pistol which could fire the 50 live pistol ammunition was not recovered from the appellant when he was arrested. In addition to Umlazi being a hot spot for violent contact crime the industry in which the appellant is allegedly employed from time-to-time, which employment the investigating officer disputed without any countervailing evidence from the appellant in reply, is a volatile industry where the use of firearms is commonplace. Accordingly, considering those facts it would be fair to conclude that the appellant had a disposition to commit Schedule 1 offences. The series of the offences which were allegedly committed involving the use of the rifles which were found in the appellant's possession demonstrates that there is indeed a real likelihood that the appellant would commit further offences and no bail conditions would deter the appellant from committing further offences if he were released on bail.

Strength of the respondent's case

[42] The court among the factors it may take into account in considering whether the grounds in subsec (4) have been established is the strength of the State case against the accused and the incentive that he may in consequence have to attempt to evade his trial.

[43] There is a strong prima facie case against the appellant, not only in relation to his alleged possession of drugs but also in relation to his possession of the two assault rifles and the motor vehicle.

[44] According to the investigating officer the appellant is the one who voluntarily took the bag which had the firearms and ammunition from underneath the bed and handed it to the police. The appellant disputes the alleged possession of the firearms and ammunition in his affidavit. He disputes having committed any offence. When he testified in amplification of his affidavit, he alleged that the firearms were recovered from the other room which was leased by another gentleman, while he was being suffocated in the dining room. What is bewildering about the appellants' testimony in this regard is that he did not mention this anywhere in his affidavit. All he said in his affidavit was that after the police searched the room in which he and his fiancé occupied and they then proceeded to search the other room which was not in their eyeshot. A court confronted with these contentions for the first time in reply would have every reason to classify these contentions as after thoughts which were calculated to augment the appellant's supposed defence. In any event if the appellant was in the dining room being suffocated when these firearms were recovered, he would not possibly have been able to see where they were recovered from in the house. More importantly the appellant did not dispute the investigating officer's telling contention that he lived on his own on the property except for the occasional visits by his co-accused. Moreover, the appellant did not make any mention of the Mercedes Benz which was found in his possession anywhere in his affidavit or during his viva voce evidence.

[45] In bail proceedings absent a challenge from the accused to the admissibility and reliability of the evidence as tendered by the State, the court will accept that evidence.

[46] Save and except for the appellant to say that he did not commit the offences in question and that the firearms were recovered from the other room which was leased by another gentleman the appellant did not seriously challenge the strength of the State case against him; while the investigating officer contended that the State had a prima facie case against the appellant as the appellant was linked to the case through the exhibits which were found in his possession.

[47] There is of course no obligation on the part of the applicant for bail to challenge the strength of the State case. However, in order to enable the court to conclude that the State case was weak or that he was likely to be acquitted the appellant was required to adduce evidence which proved on a balance of probabilities that he will be acquitted of the charges.¹² The appellant has failed to do so

Likelihood that the appellant would evade trial

[48] Allied to the issue of the strength of the State case is the question of whether there is any likelihood that the appellant will evade his trial. The evidence of the appellant and the respondent in relation to the appellant's family, occupational ties, fixed address, and the appellant assets is divergent.

[49] According to the appellant he has three minor children while according to the investigating officer the appellant has two children. One of the two children reside with her mother while the other resides with the appellant's mother. The appellant asserts that from time to time and whenever there is a vacancy he works as a taxi driver and he

¹² *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12; *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 230H and 232C; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556C.

also operates a money lending business in Umlazi and surrounding areas. Contrary to these assertions the investigation officer said that the appellant was unemployed, did not have occupational ties to place of trial, and the address which the appellant has given as his fixed address being the premises he was leasing when he was arrested is different from the fixed address referred to in the affidavit of the investigating officer. Other than for a television, bed, cupboard and a refrigerator the investigating officer made no reference to any assets of substantial value. The appellant did not do himself any justice by referring to the assets he owned in general terms. The appellant did not indicate how many vehicles he owned, whether these vehicles were freehold or financed, what type of vehicles were these and their approximate market value. The appellant also did not specify what type of household effects and furniture he owned, what the other valuable equipment was and its approximate value. The appellant is facing serious charges including possession of fully automatic firearms and if found guilty the prescribed minimum sentence is 15 years' imprisonment. The appellant rented the house in which he lived in. The house he proposed as the alternative fixed address belongs to his parents. The appellant seemingly does not own any assets of substantial value except for the unspecified household effects. He does not live together with his children nor does he maintain them, his children are the recipients of a child support grant. This on its own cancels out the assertion as contained in the three testimonials which portrayed the appellant as a generous person who looked out for destitute members of the community and children. The appellant proposes to post a sum of R2 000 as bail. All these factors when considered together with the seriousness of the offences and the probable sentence should the appellant be convicted leave me with a distinct impression that there is a real likelihood that the appellant would evade trial.

[50] In bail proceedings where the applicant decides to bring his application by way of an affidavit and there is a dispute between his papers and those of the prosecution, the allegations of the prosecution, unless farfetched, would prevail, because the applicant bears the onus to prove his case on a balance of probabilities. In this case there is no reason why the respondent's version should not prevail.

Likelihood that the appellant would interfere with witnesses and police

[51] In his affidavit the appellant undertook not to interfere with State witnesses as he did not know their identities and that even if he comes to know of their identities, he would not interfere with them. Mr *Alberts* during argument suggested that the appellant could not possibly interfere with witnesses in this case as they are all police. Mr *Alberts* submission is with respect incorrect, and the appellant's undertaking rings hollow, considering the facts of this case.

[52] The appellant was found in possession of a Mercedes Benz which was allegedly hijacked in Malvern and in his affidavit and viva voce evidence he offers no explanation for this alleged possession. The identity of the owner of this motor vehicle has not been mentioned by any of the parties and it is apparent that it is yet to be established. The pistol from which the 50 live rounds could be fired was not recovered. There therefore remains a real likelihood that the appellant may interfere with these witnesses and tamper with the police investigations.

[53] The establishment of any one of the grounds listed in subsec (4) is sufficient to found a determination that it is not in the interests of justice to release the appellant on bail. It is therefore unnecessary for me to proceed and consider all the factors individually.

[54] The appellant is charged with a Schedule 5 offence and he is therefore required to prove that it is in the interests of justice that he be released on bail. In considering this appeal, 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 her discretion.

[55] After having considered all the evidence I find that the appellant's personal circumstances when weighed up against the strength of the respondent's case, the probability of the appellant committing further offences and the likelihood of the appellant evading his trial they are far outweighed.

[56] In my view the appellant has failed to discharge the onus resting upon him to establish that it is in the interests of justice that he be released on bail. The magistrate's decision in refusing bail was accordingly correct for the following reasons:

- (a) There is a real likelihood that if the appellant was released on bail, he would commit further offences which are listed in Schedule 1 of the CPA.
- (b) The respondent has a prima facie strong case against the appellant.
- (c) There is a real likelihood that the appellant would evade his trial if he were released on bail in view of the seriousness of the offences and the probable sentence, he is likely to get should he be convicted.
- (d) There is a real likelihood that if the appellant were released on bail, he would interfere with the State witnesses particularly the witnesses who may testify in relation to the motor vehicle which was allegedly found in the appellant's possession.

[57] Accordingly, there is no reason to interfere with the magistrate's refusal of bail. The magistrate's refusal of bail was justified having regard to the peculiar facts of this case and having regard to the relevant authorities.

[58] In the result the appellant's appeal is dismissed.

APPEARANCES

Counsel for the Appellant : Adv. S. Edwards
Instructed by : R M D Legal Services

Counsel for the Respondent : Ms. S. Naidu
Instructed by : DPP: Durban

Date Hearing : 24 August 2023

Date of Judgment : 15 September 2023