REPUBLIC OF SOUTH AFRICA

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

CASE NO: A173/18

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

MODIBA J

08 MARCH 2019

In the matter between:

Appellant

DIRE TSHEPISO

and

Respondent

THE STATE

JUDGMENT

MODIBA, J:

[1] The appellant appeals against the judgment and order of the Magistrate's Court, Orlando Soweto, *refusing him bail.*

[2] The appellant is accused number two in Orlando CAS number: 324/03/2016, where he is charged with two others, with one count of aggravated robbery of boxes of cigarettes to the value of R100, 000.

[3] All three accused were arrested on 18 March 2016 being the same day the alleged offence was committed. They first appeared in court on 22 March 2016. When his co-accused applied for bail, the appellant did not apply because at the time, he had two pending charges, hence he only brought the application approximately five months after his arrest. He could apply then because his pending charges had been resolved.

[4] The state initially opposed the application. However, when it came to light that the appellant's pending charges had been resolved, it no longer opposed bail. By then the bail application was part-heard. The court *a quo* proceeded to hear it. It cannot be faulted for doing so because in bail proceedings, a presiding officer is not just an umpire. In terms of section 60 (10) of the Criminal Procedure Act[1] he is not bound by the state's decision not to oppose bail but has a duty in terms of section 60 (1), read with section 60 (11), to consider whether releasing an accused person on bail serves the interests of justice.[2]

[5] The appellant relies on several grounds of appeal. I do not find it necessary to deal with each ground respectively. The gravamen of these is that the court *a quo* misdirected itself:

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[1] 51 of 1977.
[2] See also *S v Dlamini* 1999 (4) SA 623 (CC) para [10] at 641B/C-D/E.

[5.1] when it dealt with the application in terms of Schedule 6, given that the state conceded that the facts only support a Schedule 5 application;

[5.2] when it found that exceptional circumstances that warrant the appellant's release on bail are absent, because it refused to allow the appellant to place any evidence on record on whether there is a *prima facie* strong case against the appellant, thereby denying the appellant an opportunity to show that exceptional circumstances are present;

[5.3] when it failed to accord sufficient weight to the appellant's personal circumstances and to consider that the appellant is not solely responsible for the delay in the finalization of the trial, which has been pending for more than two years;

[5.4] when it considered that the appellant has six previous convictions whereas, he only had one previous conviction in respect of six counts of suspected stolen property.

[6] The test in respect of a bail appeal is set out in section 65(4) which provides that:

> "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 respondent contends that the court *a quo* did not misdirect itself and correctly refused bail. Further, the respondent contends that as the refusal of bail was not wrong, sitting as the court of appeal, this court should not interfere with the court *a quo's* decision and should dismiss the appeal. He relied in this regard on *S v Barber*[3] and *S v Porten and Others*[4].

[8] I find no merit in the appellants' grounds of appeal.

WHETHER THE APPLICATION OUGHT TO HAVE PROCEEDED IN TERMS OF SCHEDULE 5 OR 6

[9] Contrary to what is stated in the notice of appeal, there is no concession by the state that the appellant will only be convicted of being found in possession of the robbed items. In his affidavit, the investigation officer states that the appellant was found in possession of the stolen goods on the same day the offence was committed. In this court, the appellant's counsel contended on that basis that the state will only be able prove the offence of possession of suspected stolen property, a Schedule 5 offence, hence the application should have been dealt with in terms of Schedule 5.

[10] The appellant has been charged with a Schedule 6 offence. It is for that reason that the bail application proceeded in terms of section 60(11) (a).

Section 60(11) (a) provides:

> (11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

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[3] 1979 (4) SA 218 (D) at 220E-H
[4] 2004 (2) SACR 242 (C).

> *(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 or her release.

[11] There is no ambiguity in respect of the offence with which the appellant is charged. If there was, section 60 (11A) (c) sets out how it ought to be dealt with. It provides:

> "Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph *(a)* shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge to be brought against that person."

[12] The bail record does not show that such a question arose during the bail application.

[13] I find no misdirection in how the court *a quo* dealt with the appellant's bail application. The fact that the appellant was only found in possession of the items that were robbed does not imply that he will only be convicted of the offence of possessing these items, particularly considering that he was found in possession of the items on the same day the robbery was committed. This is precisely how the court *a quo* reasoned this issue.

THE STRENGTH OF THE STATE'S CASE

[14] In his notice of appeal, the appellant complains that the court *a quo* did not allow him to place evidence before the court pertaining to how the state intends linking him to the offence. There is no merit to this complaint.

[15] The bail application proceeded by way of affidavit. In his affidavit, the appellant states that even though he believes that he has a strong defence on which he will succeed, he made an informed decision "not to dwell on the strength of the state's case in this application". So the decision not to place evidence before the court to rebut the state's contention that its case is strong is clearly his. The court *a quo* never prevented him from including that evidence in his affidavit.

[16] When she argued in these proceedings, his counsel contended that the court *a quo* did not allow her to address it in respect of the strength of the state's case. This is also not correct. After reading the paragraph partially quoted above, his counsel proceed to say:

> *"May I add here Your Worship, the State said the accused is linked by identification of the complainant. I am in possession of the transcripts, it is not so,*
>
> *There is no identification..."*

[17] Firstly, there is no averment in the investigating officer's affidavit relating to the evidence of identification. During argument, appellant's counsel sought to rely on the transcript of the trial to argue this point. At that stage, the presiding magistrate indicated that he will not make any decision regarding the evidence in the trial court as he is not the trial magistrate, however, counsel is welcome to proceed. At that point appellant's counsel stated that she is answering the averment of the state, then proceeded to read the next paragraph of the appellant's affidavit dealing with previous convictions. Again here, the bail record does not demonstrate that the presiding magistrate did

not allow her to address him on this point. He indicated how he intends approaching the relevant evidence.

[18] In these proceedings, given that counsel for the state addressed the court on the state's evidence against the appellant, I allowed the appellant's counsel to address me in that regard. She did so in relation to the issue I dealt with above, that is, the schedule under which the bail application was dealt with. As already stated there is no misdirection in how the court *a quo* dealt with the bail application in terms of Schedule 6.

[19] Further, as already stated, contrary to the relevant ground of appeal, the court *a quo* never prevented the appellant from adducing evidence regarding how he is linked to the offence. It was his election not to do so. In the reasons for refusal of bail, the court *a quo* states that it did not heed the appellant's counsel's invitation to have regard to the record of a part-heard trial to determine what the strength of the state's case may be in the view of the trial court because, attempting to discern the strength of the state's case from the perspective of the trial court under the circumstances where the state has not closed its case would constitute a misdirection on its part.

[20] I find no misdirection on the part of the court *a quo* in how it dealt with the trial record, especially when regard is had to how the appellant dealt with this issue in his affidavit, as well as the warning in S v *Viljoen*[5], that a bail application should not be turned into a drawn out criminal trial. Accordingly, I

[5] 2002 (2) SACR 550 (SCA) para 25 at 561-G-I.

do not find that the trial court misdirected itself when it found that exceptional circumstances are absent.

SIX CONVICTIONS OR SIX COUNTS

[21] I consider the appellant's reliance on this ground a red-herring. The record shows that during argument, the presiding magistrate made reference to six convictions as opposed to six counts. However, in his judgment on bail, he makes reference to "six crimes involving dishonesty". In his reasons for refusal of bail, he makes reference to "six counts for which he was sentenced separately on each count". The appeal lies against the judgment and order and not against the record. I find no misdirection in how the court *a quo* referred to the appellant's previous convictions in both its judgment and reasons for refusal of bail.

THE DELAY IN THE FINALIZATION OF THE TRIAL

[22] In his affidavit, the appellant fails to deal with the reasons for the slow pace of the trial. His counsel did not address this issue, either in this court or in the court below. Therefore, there is no evidence on record to support any suggestion that the court *a quo* misdirected itself when it failed to consider that the delay in the finalization of the trial does not solely rest with the appellant.

THE OTHER GROUNDS OF APPEAL

[23] As to the other grounds relied on by the appellant, I agree with the state that the appellant sought to rely on his personal circumstances and family ties and that in this regard, there is nothing exceptional. See *S v Scott Crossley*.[6]

[24] In the premises I find no misdirection of a factual or legal nature in how the court *a quo* dealt with the appellant's bail application. Therefore I have no reason to interfere with its decision to refuse the appellant bail.

[25] In the premises, the following order is made:

1. The bail appeal in dismissed.

MADAM JUSTICE L. T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Appellants' Counsel	Adv Nel
Instructed by	A Nel Attorneys
Respondent's Counsel	Adv H H P Mkhari Office of the Director of Public Prosecutions
Date of Hearing:	6 March 2019
Date of Judgment:	8 March 2019

[6] 2007 (2) SACR 470 SCA.