REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A049/2021

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

DATE: 09/06/2021

SIGNATURE OF JUDGE

In the matter between:

PRESBYTARIAN LINDA NYAMAKAZI

And

THE STATE

JUDGMENT

MOLELEKI AJ:

Delivered: This judgment was handed down electronically by circulation to the parties by email. The date and time for hand-down is deemed to have been 10h00 on 09 June 2021.

[1] **Introduction:**

This is an appeal by the appellant against the refusal of bail by the Magistrate Germiston.

The appellant was born on 01 January 1979, he is 42 years old. He is a father of four children. Two of the four children were residing with appellant together with the appellant's sister and nephew from May 2016 to April 2019. There was no evidence presented as to the role of each family member in the lives of these children, including the role the mothers of the children played. The mothers of all the children were still alive as at the time of the bail application. The appellant has been incarcerated before, the lengthiest of such sentences being 10 years, of which he served 5 years and was placed on parole. He breached parole conditions and was incarcerated to complete the remaining 430 days. It was not placed on record before the Magistrate as to what became of the children during the period of his incarceration. However, it became clear during the bail appeal that, soon after the appellant was incarcerated for having failed to observe parole conditions, the two children moved in with their mother and maternal grandmother. Clearly, the children are not in the streets and there is, therefore alternative care in place. The children have to date, been with their mothers since the appellant's incarceration. By now already the children have strengthened relationships with their respective mothers.

[2] The background of the appeal can be summed as follows:

The appellant was arrested on 28 January 2020 on a charge of attempted extortion. The allegations are that he went into one of the stores and informed the owner that he was an official from the Department of Labour. He was in possession of an identification card which purported to be from the Department. He demanded an amount of R60 000 from the owner of the store in order to allow for the business to continue operate. When the owner of the store insisted on going to the police station for verification of his identity, the appellant ran to the vehicle he was travelling in and fled. It turned out, the vehicle had been rented from a vehicle rental company. His first appearance in court was on 30 January 2020, on which day the appellant made it known to the Magistrate that he intended to apply for bail. The matter was postponed to 10 February for the State to gather information for purposes of bail application. Thereafter, the matter was postponed to 17 February 2020 for the hearing of bail application, on which day the bail application commenced. The appellant engaged services of a new legal representative who then engaged with the State for mediation. The bail application had been postponed to 18 March 2020 for further hearing. It was on this day that the appellant abandoned his application for bail. From 7 April 2020 the matter was postponed for various reasons due to the nationwide lockdown that had been declared as an effort to curb the rapid spread of the Corona virus in the country. The appellant's bail application ultimately commenced on 29 July and was finalised on 14 September 2020 when the Magistrate refused his application for bail.

[3] The appellant was not legally represented during his bail application before the Magistrate. However, his rights to legal representation were explained and he elected to prosecute his bail application in person.

[4] Section 65(4) of The Criminal Procedure Act, 51 of 1977 governs appeals against refusal of bail and it provides that:

"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 shall have given".

The court in **S v Barber** 1979 (4) SA 218 (D) at 220 E-H held: "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. The 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 it would be 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..."

[5] In his affidavit filed together with his notice of appeal as well as per the attached correspondence, the appellant set out the delays that were occasioned by several postponements of the bail proceedings. There was also delays in him noting his appeal timeously due to failure by the administrative component of the Germiston Magistrate's court in ensuring that the record of the bail proceedings is transcribed expeditiously.

[6] The bail application was proceeded with as a schedule 5 offence in terms of which the appellant needed to satisfy the court that the interests of justice permit his or her release on bail. This, therefore, meant that the provisions of section 60 (11) (b) of the Criminal Procedure Act were applicable.

[7] The State maintained that it was a schedule 5 bail application on the basis that the appellant had previous convictions and pending matters against him. The Magistrate made a ruling that this was a schedule 5 bail application and explained the basis thereof. Although it is desirable for purposes of fairness that the Magistrate should have allowed the appellant to address on the issue prior to her making a ruling, of significance is that the Magistrate engaged the appellant at length. However, the court is not of the view that the Magistrate committed a material misdirection. The appellant does not dispute his previous convictions and pending matters and he has no grounds for challenging the schedule resorted to. In fact, in his affidavit in support of his bail application he did concede it was a schedule 5 bail application but later in the same documented contradicted himself on the issue. There is no indication that the Magistrate would have come to a different ruling with regards the schedule had he been afforded the opportunity to address. Therefore, the Magistrate was not misplaced by ruling that the bail application resorted under schedule 5.

[8] The court is not going to canvass each of the grounds of appeal. In general terms the grounds relate to the delay in the prosecution and finalisation of the bail application as well as the noting of bail on appeal due to administrative delays in obtaining the transcripts; that the Magistrate erred in failing to find that none of the factors (or likelihoods) mentioned in section 60(4) of the Criminal Procedure Act are present, failing to give sufficient attention to the best interests of his minor children by not considering that he was the primary caregiver and that he was not informed of his constitutional rights to legal representation.

[9] In so far as the issue of delay in commencing the bail application is concerned, ordinarily and as a matter of principle, a bail application should be

heard as a matter of urgency as it affects the right to be presumed innocent and the supremacy of the right to personal liberty. Therefore, seeing bail proceedings to finality is a matter of urgency. Once finalised and where bail is refused, such a decision can always be appealed against. However, the appellant contributed to the delay. On his first day of appearance on 30 January 2020 he was legally represented and his intentions to apply for bail were made clear. On 17 February 2020 bail application proceedings had commenced. On two occasions the applicant terminated the mandate of legal representatives. It is clear from the record that the continuation of the initial bail application was abandoned on 18 March 2020. The matter was therefore postponed to 7 April 2020 for further investigations. Subsequent thereto, the appellant was requisitioned but the renewed bail application was similarly postponed on several occasions due to the difficulties presented by the nationwide lockdown regulations. The reasons for such postponements included the State not being ready to proceed and case docket not having been brought, the appellant not being brought to court, prisoners arriving late, the appellant being in quarantine and the investigating officer not being present due to him presenting with Covid 19 symptoms. Thereafter, the investigating officer was not before court on three different occasions. However, the pathological report was presented to court confirming that his absence was not wilful.

The appellant submitted that the delay caused him prejudice and that it is therefore in the interests of justice that he be admitted to bail.

It cannot be disputed that the renewed bail proceedings were not prosecuted expeditiously. However, the delays appear to have arisen due to factors including the appellant terminating the services of legal representatives on two occasions as well as him abandoning bail application, after which lockdown regulations were implemented. There was a point when the appellant himself was in quarantine. Of significance however is that, these

delays have no bearing on the substantive considerations of whether he should have been granted bail or not.

[10] With regards other grounds upon which the appellant presents his appeal,

it is clear from the record of proceedings, that from inception his rights to legal representation were fully and properly explained and the Magistrate kept on reminding him of this right throughout the proceedings. This issue was taken up at length prior to the hearing of the bail appeal. The appellant still insisted he wished to proceed in person, this, despite the fact that The Judge President of this Division had even engaged the offices of The Legal Aid South Africa to consider offering him legal assistance. There is therefore, no merit to this ground.

[11] The appellant elected to adduce evidence on affidavit instead of testifying under oath. The appellant had to satisfy an onus and adduce evidence which satisfied the court that the interest of justice permits his release. However, through his affidavit, the appellant did not meet the onus. His affidavit did not contain factual averments that were sufficient enough to support the relief he sought. The State / Respondent on the other hand adduced viva voce evidence by the Investigating Officer, Sergeant Mmatli. The appellant's evidence carries less probative value when considered against the oral evidence by the Investigating Officer.

[12] The Investigating Officer set out all the evidence relevant and available to the State. The evidence recounts how the offence was committed. Previous convictions and pending matters some of which are of a similar nature to the charge he is facing were placed on record. These cases are as follows; he has a previous conviction of extortion and fraud; he has a pending case of

extortion in Benoni. He has a previous conviction of theft in 2000 in Witbank; fraud and extortion in 2011 for which he was sentenced to 10 years imprisonment; theft in 2009 and robbery common in 2016.

[13] The appellant has furnished false personal information for him to be granted bail in a matter pending in Port Elizabeth and he has a warrant of arrest out in respect of the same matter and he has breached bail and parole conditions. In Boksburg, the appellant is on bail in respect of five matters pending in that court and has falsified his death in which event he no longer is in existence at the Home Affairs database as he is considered to be deceased, the date of death being 1 November 2017. It is not, as a result easy to obtain his fingerprints. It was for these reasons that it was indicated that he is a flight risk and that if he were to fail to appear in court, it would be practically impossible to trace him.

[14] The appellant submitted that witnesses would not be able to identify him save when he is in the dock. There is evidence of video footage and that he was, at some point approached by police officers with the assistance of an employee of a vehicle Rental Company from which he rented a motor vehicle who was in a position to identify him. Therefore, the State has clearly set out the evidence it would lead in this regard. That being so, of significance in bail proceedings is for the State to outline the nature of its case and the type of evidence the State has against the appellant. It is not required of the State to prove its case at this stage of the proceedings.

[15] There is no substance in the submissions made by the appellant. The Magistrate dealt fully with the evidence before court, including the issue of the minor children of the appellant. It was nowhere indicated that the appellant was a primary caregiver of the minor children, but rather that he was the sole breadwinner. A primary caregiver, amongst others, is a person with whom a

child resides, who ensures that the child is provided with food, looked after and attends school regularly. As at the time of his arrest in respect of this matter the appellant was not residing with any of the minor children. When dealing with a primary caregiver, the court has to take into account the best interest of a child as provided for in section 28(2) of the Constitution. Children must be in a position to learn from the primary caregiver that individuals make moral choices for which they can be held accountable. Therefore, children must grow in an environment of moral accountability where crime is shunned upon.

[16] It was submitted the Magistrate misdirected herself by failing to find that none of the factors (or likelihoods) mentioned in section 60(4) of the Criminal Procedure Act are present. Essentially, it was submitted that the Magistrate failed to take into account the factors presented by the appellant on a balance of probabilities that should have satisfied the court that it was in the interests of justice that he be admitted to bail. However, from the record of the proceedings, the judgment does refer to the relevant sections which are to be taken into account. The Magistrate refused bail by referring to the likelihoods of the grounds as provided for in sections 60(4) and 60(9) of the Criminal Procedure Act. The Magistrate stated that:

He is a flight risk, he has concealed his identity by giving false names and falsifying his death, he has a propensity to commit schedule 1 offences, he is capable of generating a fake passport in the same way he was able to obtain a death certificate and that all of these he is doing so as to falsify his identity. Over and above the reasons furnished by the Magistrate, it is a well-known fact that our borders are porous.

It can therefore, not be found that the Magistrate did not take the likelihoods of the grounds as provided for in sections 60(4) and 60(9) into account.

[17] The offence with which the appellant is charged is serious. The issue of the appellant being released on conditions was sufficiently addressed. In other pending matters the appellant was granted bail on condition he reports at Boksburg police station three times a week. He did report as expected. That, however did not deter him from committing another offence. The submission by the State that there could be no suitable conditions imposed on the appellant was therefore with merit.

[18] There were objective facts before the Magistrate in support of the likelihood that:

The appellant was a flight risk. He had used false names and faked his death;

He has the propensity to commit further offences as he committed this offence whilst on parole and whilst he had other matters pending against him;

His release on bail would undermine or jeopardise the objectives or the proper functioning of the criminal justice system. Taking into account the number of cases the appellant is facing and the number of complainants involved in all these cases, his release on bail will undermine or jeopardise the public confidence in the criminal justice system. He has already flouted the bail conditions by failing to appear at the Benoni and Port Elizabeth courts. It is his fault that when he was expected to appear in Port Elizabeth he was in custody. When the matter was argued before me, the appellant stated that all the charges but for one had been withdrawn, but no such evidence was tendered. As a person bearing the onus the appellant ought to have dealt fully with this aspect.

The likelihood to intimidate witnesses. This aspect was however not fully canvassed. The appellant stated that he knew only one witness in this matter. The requirement in this regard is that there should be a likelihood and not just a possibility. There is, therefore nothing to support this finding. However, this is not the only factor upon which the State was reliant as already indicated above.

[20] The evidence adduced by the appellant in order to discharge the onus he bears was fully dealt with. The Magistrate was satisfied that the State rebutted the appellant's evidence and she was of the view that the appellant had failed to establish that it was in the interests of justice that he may be admitted to bail.

There can be no misdirection by the Magistrate. There is nothing to bring this court to the conclusion that the Magistrate exercised her discretion wrongly

[21] In my view, I am satisfied that the Magistrate was correct in her decision finding that the interest of justice do not permit the release of the appellant on bail.

[22] Accordingly, the appeal is hereby dismissed.

MOLELEKI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearing for the State: Adv. J.F Masina
Office of the Director of Public Prosecutions

Defence Counsel: In Person

Date of hearing: 04 June 2021

Date of Judgment: 09 June 2021