

**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: A113/2021**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

**04 February 2022**

In the matter between:

**ESIHLE MVAMBI** Appellant

And

**THE STATE** Respondent

**JUDGMENT**

**MALANGENI AJ:**

**INTRODUCTION**

[1] The relief sought by the Appellant is that, this court should set aside the decision taken by Magistrate Ms Brits in refusing to admit him to bail.

[2] It is common cause that the bail application falls within the ambit of Schedule 6. This means that the bail application is to be considered in terms of section 60(11)(a) of Criminal Procedure Act 51 of 1977.

## BRIEF BAGROUND

[3] The appellant is facing the following counts namely;

- i. Robbery with aggravating circumstances read with provisions of section 51 (2) of Act 105 of 1997.
- ii. Possession of a firearm.
- iii. Possession of ammunition.
- iv. Possession of stolen property.
- v. Kidnapping.
- vi. Kidnapping.

[4] During the bail application, his legal representative read into record the appellant's affidavit containing the following brief averments:

- i. He is a 24 years; he resides at [...] Nkandla Section in Thembisa with his parents.
- ii. He does not have any travelling documents.
- iii. His level of education is grade 10, he could not further his studies as his parents were not working.
- iv. He is single with a two-year-old child who resides with his mother in Extension [...], I[...] Park.
- v. He is a taxi driver earning an amount of R700 per week.
- vi. With that amount, he supports his child, his parents and his two siblings.
- vii. He does not have previous convictions and pending cases.
- viii. He will plead not guilty.
- ix. He will say on the date of the alleged incidents he did not go to work. He was from visiting his girlfriend and his child when he saw three African males running away. A few minutes, he saw a police vehicle. Police pointed him with guns and instructed him to lie down. He cooperated with them.
- x. The state does not have a strong case against him.

- xi. Should he be denied bail, his family will suffer.
- xii. The state does not have a strong case against him.

[5] This affidavit was marked as exhibit “A” and appellant’s case was closed in respect of this bail application.

[6] The prosecution read into record the affidavit of Malisela Labelo, the brief contents being;

- i. He is the investigating officer in this case.
- ii. Accused was found in possession of the hijacked motor vehicle and also in possession of unlicensed firearm.
- iii. The alleged vehicle was robbed a few hours before it was found in possession of the accused and his accomplices managed to run away.
- iv. The victim managed to identify accused.
- v. The accused’s residential address was visited and he is staying with his parents.
- vi. The accused person is well known around his residential area as the person driving local taxis.
- vii. The accused was very cooperative during investigation.
- viii. He does not have any ground to oppose bail.

[7] Mr Labelo’s affidavit was marked as exhibit “B”.

[8] The prosecutor read into record the affidavit of Visane Shivambu, the brief contents being:

- i. He is a police officer stationed at Rabie Ridge SAPS.
- ii. On Wednesday 20 October around 17h45, he reported on duty.
- iii. Around 23h45, he received a radio call about a car hijacking at 2748 Unity Street, Phomolong Section.
- iv. He proceeded to that address and found two victims namely Vushongwe Mashwana and Jacob Kwadla.
- v. He drove with them to the police station and on their way they met with the tracker personnel.

- vi. He followed them as they were following the lead of the tracker system that took them to Matshika street where the hijacked vehicle was.
- vii. They spotted accused and he tried to jump the wall of 12 Matshika street but Mr J Diedericks of tracker unit managed to catch up with him.
- viii. He searched him and found a firearm with its serial number filed plus eight rounds of ammunition.
- ix. A car key of that hijacked vehicle and two cell phones were found from him. One of the cell phones were identified by the victim.
- x. He asked him as to what was he doing in the vehicle, his answer was that they were stripping it.

[9] The affidavit was exhibited "C"

[10] The prosecutor further read into record the affidavit of Jacob Rhamaklode Ghotla, brief contents of which are as follows;

- i. On the 20th October 2021 around 20h20, he was working with Vushongwe Mashwana and was driving his Volkswagen Polo 61.4 silver in colour with registration number [...] and they were from buying food from the shop.
- ii. Then whilst stationed at the gate, he switched off the engine and left the car keys on the ignition and wanted to open the gate to enter the yard.
- iii. They were then suddenly approached by two unknown African males and two pointed him with a firearm and instructed them to get into the backseat and they complied.
- iv. One of them drove the car and the other two joined them at the back seat.
- v. They drove with them to an unknown place and later left them in the car saying they were going to fetch the screw driver so as to remove the tracker.
- vi. That is when they got a chance to escape to a certain house and explained to occupants of that house of what happened.
- vii. He asked for a phone to call the police and his brother.
- viii. Police arrived and they travelled with them. Through the tracker system, he managed to find his car with one African male. He identified that male as one of the suspects who hijacked him during that hijacking, he is the one who drove his vehicle.

[11] His affidavit was exhibited "D".

[12] The prosecutors further read into record the affidavit of Lloyed Moore, brief contents of which are as follows:

- i. On the 19th October 2021, around 20h45, whilst waiting for his sister in laws place, three men pointed him with a firearm and instructed to get to the back seat behind the driver. One of them drove the car and later dropped him at Klipfontein.

[13] His affidavit was exhibited "E" and the state's case in respect of the bail application was closed.

## GROUND OF APPEAL

[14] Appellant makes the following submissions to this court;

1. It is respectfully submitted that the Learned Magistrate erred and misdirected herself in refusing the Appellants application for bail.
2. It is further respectfully submitted that the Learned Magistrate erred and misdirected herself in failing to give proper regard to the following aspects;
  - 2.1. The Appellant was arrested on 20 October 2021 on charges of armed robbery, possession of unlicensed firearm, possession of ammunition, possession of stolen property, kidnapping and assault.
  - 2.2. The state presented no evidence to contest that evidence presented by the Appellant, and merely addressed the court stating that the Appellant failed to prove exceptional circumstances permitting his release on bail.
  - 2.3. The state did not allege that the Appellant is a flight risk, a danger to society or any witnesses, that there is a likelihood that the Appellant would commit further offences, or that their release will bring the administration of justice into disrepute.
  - 2.4. The only ground upon which the State relied to oppose the bail is that there is a strong case against the accused and it was conceded that during bail hearing that the evidence is circumstantial.

3. It is further submitted that the Learned Magistrate erred and misdirected herself in failing to give proper regard to the following personal circumstances of the Appellant;

3.1. The Appellant does not have previous convictions or any pending cases against him.

3.2. The Appellant is 24 years of age.

3.3. The Appellant is single but financially supports his minor who is 2 years old.

3.4. The Appellant is employed as a driver by Tembisa taxi association earning an amount of R700.00 each per week.

4. It is respectfully submitted that the Learned Magistrate further erred and misdirected herself in failing to consider that the cumulative factors mentioned herein above warrants bail to be fixed;

5. It is respectfully submitted that the Learned Magistrate erred and misdirected herself in failing to consider that;

5.1. The right to be released from detention lies at the heart of a bail application if the exceptional circumstances so require

5.2. Although the Appellant has the right to be presumed innocent, his right to appeal remains intact and setting the test where or not to be released on bail too high might negate this right.

5.3. It is respectfully submitted that the Learned Magistrate erred and misdirected herself by totally disregarding the personal circumstances of the Appellant and the inherent flaw in the State's case.

6. It is therefore submitted that the Learned Magistrate erred and misdirected herself in failing to find that there are exceptional circumstances showing that it is in the interest of justice that the Appellant be released on bail.

7. It is respectfully submitted that the decision to refuse bail was wrong, and the Learned Magistrate should have fixed bail pending further investigation, together with appropriate conditions.

## THE LEGAL PRINCIPLES

[15] The appellant notes this appeal in line with section 65(1)(a) of the Criminal Procedure Act 51 of 1977 providing that:

*“an accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting”.*

[16] Bail appeal is governed by section 65(4) of the Criminal Procedure Act 51 of 1977 which states 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 shall give the decision which in its or his opinion the lower court should have given”.*

[17] The meaning attached to this was stated by Heher J in *S v Barber* 1979 (4) 218 (D) at 220E-H that –

*“It is well known that the powers of this court are 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 the bail exercised that discretion wrongly”.*

[18] As I indicated that the bail application is in terms of section 60(11)(a) of Act 51 of 1977. This section provides that:

*“(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 satisfied the court that exceptional circumstances exist which in the interest of justice permit his or her release.”*

[19] This section places a burden on the appellant to prove that exceptional circumstances exist which in the interest of justice permit his release.

[20] It is not easy to explain what is meant by exceptional circumstances as such is not defined in the act. To me, for one to find its definition depends on the individual case. In *S v Jonas 1998 (2) SACR 677 (SE)*, it was held that –

*“the term “exceptional circumstance” is not defined. There can be many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with the commission of schedule 6 when everything points to the fact that he could not have committed the offence, e.g that he has a cast-iron alibi, this would likewise constitute an exceptional circumstance”*

[21] The Supreme Court of Appeal addressed the meaning of exceptional circumstances in *S v Bruintjies 2003 (2) SACR 575 (SCA)* at 577 ... as follows;

*“What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstance which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached the commission of schedule 6 offence”.*

At 577 the court went on to say –

*“If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interest of justice, warrant his release, the appellant must be granted bail.”*



[22] It cannot be said that normal or ordinary circumstances amount to exceptional circumstances. In *S v Scott Crossley 2007 (2) SACR 470 (SCA)* at paragraph 12, it was held that –

*“personal circumstances which are really ‘commonplace’ can obviously not constitute exceptional circumstances for purposes of section 60(11)(a)”.*

[23] A court is vested with a discretion to grant or refuse bail. In exercising its discretion, the court has to consider all the evidence presented by parties furthered by submissions by the parties. Kriegler J remarked as follows in *S v Dlamini; S v Dladla and others; S v Joubert; S v Schieteket 1999 (2) SACR 51 (CC)* at 88 H – I , 89 E and 90 B – D:

*“What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstance of a particular case, bail should be granted”.*

[24] In assessing the evidence, the court has to take into account factors listed under section 60(4). This section provides;

*“4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:*

- a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a schedule 1 offence; or*
- 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;*
- 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”.*

## EVALUATION

[25] During argument stage, I engaged the appellant's counsel on what factors constitute exceptional circumstances. He just referred me to the heads of arguments and nothing further. I further engaged the respondent's counsel as to what could be the reason for a disagreement between the prosecutor and the investigating officer in the court a quo. I raised the latter part simply because the prosecutor was opposing bail whereas the investigating office was not. The answer I got was that it is not peremptory for the prosecutor and the investigating officer to be on the same side. This shocked me as I always thought that the investigating officer is always the one with first-hand information about the case.

[26] In the bail application, I viewed the investigator's evidence in support of the applicant. He further said appellant is cooperative. However, this matters not because at the end of the day the onus is on the accused to prove that he meets the requirements of section 60(11)(a) of Act 51 of 1977.

[27] It is the contention of the state that the Appellant failed to discharge its onus whereas the Appellant's counsel disagrees. It is on record that the Appellant has a fixed residential address, he is working, does not have previous brushes with the law or pending cases.

[28] The main objective of bail is to secure the attendance of an accused at court. Surely when the investigating officer did not oppose bail, it means he does not see the accused as being a flight risk or a likelihood of him evading trial.

[29] From the evidence of the complainant, he was robbed of his vehicle at gunpoint by three people in possession of firearms. This means that other perpetrators are still at large. Since other suspects are still at large, the possibility is that he may interfere with the investigation that may lead to the arrest of other perpetrators. The evidence by the arresting officer is that the appellant during arrest tried to evade arrest by attempting to jump into the other yard. By so doing, the likelihood may arise that he may evade trial. One does not need a permit to evade trial. The Appellant is facing a serious offence, of which upon conviction, he may face 15 years imprisonment, which is a long term of imprisonment.

[30] The complainant said he was robbed of his vehicle whilst parking outside his yard with the intention of opening the gate and to get in. This means that the Appellant knows where the witnesses reside. The likelihood is that he may interfere with them. I am alive to the fact the Appellant is presumed innocent until proven guilty by a competent court of law. Section 35(3)(h) of the Constitution supports this view.

[31] Prima facie, the State does not lack of a strong case against the appellant. The evidence is that few hours from robbery, appellant was found in possession of the key to the vehicle, the vehicle in question and the cell phones of the complainant.

[32] What has been submitted by the Appellant as exceptional circumstances are just common place. Discharging the burden of proof in a bail application is a function which the criminal justice system requires an accused to perform with regard to section 60(11)(a) of CPA 51 of 1977. Once this burden is discharged, an accused then qualifies to be admitted to bail. The law on the matter is clear. The appeal court may only interfere with the decision of the court a quo if it finds that such decision was wrong.

[33] I am not persuaded that there is presence of exceptional circumstance in the Appellant's application.

[34] The magistrate correctly found that the Appellant failed to discharge the onus vested in him in terms of section 60(11)(a) of Act 51 of 1977, therefore I see no room for interference. The Appellant failed to meet the requirements of section 60(11)(a) for the relief he seeks.

[35] I therefore issue the following order:

1. The appeal is dismissed.

**Malangeni**  
**Acting Judge of the High Court**

**(Digitally submitted by uploading on Caselines and emailing to the parties)**

**Date heard:** **26 January 2022**

Date of delivery: 04 February 2022

Appearances:

On behalf of the Appellant: Mr Shilowa

On behalf of the Respondent: Mr Phaladi