REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A818/2012

DATE: 4 December 2012

In the matter between:

J M D[...] **FIRST APPELLANT**

P K SHONGWANE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] This is an appeal against the judgment granted on 13 September 2012 by the regional magistrate, Pretoria in refusing to admit the appellants to bail.

[2] The appellants are facing two counts of robbery with aggravating circumstances and one charge of robbery. In respect of robbery with aggravating circumstances it is alleged that two of the complainants were threatened with a knife. Two of the complainants are students and they were in their school uniform when they were so robbed. The appellants were identified firstly by the blue USV motor vehicle which they used as their getaway motor vehicle. One of the complainants identified the appellants as they walked into the charge office shortly after their arrest. Each of the appellants was further identified by the complainants at an identification parade.

[3] At the hearing of the bail application the state tendered *viva voce* evidence of the investigating officer,

Detective Constable Danavan Naicker. His evidence in short is to the effect that the appellants may interfere with the witnesses and the investigation because the appellants know which school two of the complainants attend as they were wearing school uniforms on the day they were robbed. He also could not confirm the addresses of the appellants because the people at the addresse provided by the 1st appellant did not know him and he could not find the 2nd appellant's girlfriend at the address which 2nd appellant said he resided with the girlfriend.

[4] The appellants were represented by Ms Els. They did not testify and submitted affidavits in court. According to the 1st appellant's affidavit he is twenty seven years old, unmarried and a biological father of a one year old boy and his girlfriend is pregnant and is to give birth in October 2012, he is responsible for the maintenance of the girlfriend and the child; he resides at 34 S[...] Street, A[...] - this is his girlfriend's place and he has been living there for four years; before his arrest he was working at UNB United Brewery for four months earning a salary of R1 600 every second week; he does not have a passport and does not have family or business interests outside South Africa; he is HIV positive since 2005 and receives treatment from Kalafong Hospital and since his arrest he has not received treatment; he does not have previous convictions, pending cases or warrants for his arrest; all the complainants in this case are unknown to him and undertakes not to interfere with them; he will comply with bail condition to report at the nearest police station in Atteridgeville and will be able to pay an amount of R1 000 for bail.

[5] According to the 2nd appellant's affidavit he is a single 29 year old man; before his arrest he was working as a private taxi driver for Mr Moses Manaku for the past three years earning a salary of R700 per week; he does not have a passport and does not have family or business interests outside South Africa; he is a healthy person; he does not have previous convictions, pending cases or warrants for his arrest; all the complainants in this case are unknown to him and he undertakes not to interfere with them; he will comply with bail condition to report at the nearest police station in Atteridgeville and will be able to pay an amount of R1 000 for bail.

[6] The court a quo's grounds for refusing to admit the appellants to bail were premised on the fact that the state had a strong case against the appellants. It considered the evidence of the investigating officer tendered at the hearing of the bail application and decided that it would be in the interest of justice that the appellants not be admitted to bail. It also considered the personal circumstances of the appellants and found that nothing turned on them.

[7] When addressing me at the appeal hearing the appellants' counsel contended that both appellants have made a case to be released on bail and referred me to the judgment in **S v BENNETT** 1976 (3) SA 652 (C), which held that there must be a real risk to interfere with witnesses and not that they may. According to

counsel, the state's case is based on the likelihood that the appellants may interfere with witnesses and that there is a strong case against both appellants. He argued that since the charges against the appellants were Schedule 1 offences the onus was on the state to prove that it is in the interest of justice that the appellants not be released and the state failed to do so as such the appellants must be released. He submitted that should the court decide to release the appellants his instructions is that an amount of R2 000 in respect of each appellant will be raised to pay the bail. And that a bail condition be attached that the appellants report daily at the Atteridgeville Police Station.

[8] The respondent's counsel on the other hand argued that a court of appeal can only interfere if it is satisfied that the trial court is clearly wrong in its refusal to grant the appellants bail. However, in this instance the trial court did not err.

The *onus* rested on the state and the state has discharged that *onus* through the evidence of the investigating officer, which is undisputed.

[9] According to her, the appellant's addresses as provided by them to the investigating officer could not be confirmed, both appellants had told the investigating officer that they were unemployed and the medical condition of the 1st appellant was also not confirmed. Her submission was that since the appellants did not lead evidence at the bail hearing, they failed to confirm their addresses and their employment and the investigating officer's evidence is therefore unchallenged. Her contention is that based on the totality of the evidence the trial court found no special circumstances and rightly so, refused bail.

[10] A further submission was that the appellants are facing a minimum sentence of 15 years and this increases the risk of absconding. There is also a strong case against the appellants in that: they were found in possession of the cell phones; they were found in the motor vehicle in which the complainants said they made their getaway; they were identified immediately after the commission of the offences. They used a dangerous weapon to threaten the complainants and they were brazen, the trial court was therefore correct not to release them.

[11] She conceded that it is indeed mere speculation that the appellants may interfere with the witnesses. She, however, argued that a possibility that they may interfere with the witnesses exists because the crimes were committed within a 3km distance. And that, taken cumulatively, all the facts of the case are enough to deny the appellants' bail.

[12] Section 65 (4) of the Criminal Procedure Act No 51 of 1977 (the Act) provides that a court of appeal may not set aside the decision of a lower court unless it is satisfied that the lower court was wrong, in which event that court shall give a decision which in its opinion the lower court should have given.

[13] In terms of section 60 of the Act before granting bail, a court hearing the bail application must be satisfied that the interest of justice so permit. The grounds that should be established in order for the court to be satisfied that it is in the interest of justice not to release the accused are set out is section 60 (4) of the Act. Some of these grounds are: the likelihood that the accused will abscond and the likelihood that the accused will interfere with witnesses.

[14] A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in section 60 (4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice and the accused should be released. **S vSWANEPOEL** 1999 (1) SACR 311 (O).

[15] In this instance, when refusing to grant the appellants bail, the court *a quo* based its reasoning firstly, on the strength of the state's case against the appellants, which is a ground taken into account when considering the likelihood that an accused might abscond. When addressing me in court, the state's counsel submitted that the fact that the appellants are facing two possible sentences of 15 year imprisonment should also be considered as a contributory ground for the likelihood of the appellants absconding.

[16] The strength of a case against an accused and the nature and gravity of punishment which is likely to be imposed are some of the grounds which in terms of section 60 (6) of the Act, a court should consider in determining whether there is a likelihood of the appellants evading trial.

[17] The court a *quo* considered, correctly so in my view, the following factors in coming to the conclusion that the state has a strong case against the appellants: that the appellants were arrested shortly after one of the offences was committed; one of the complainant whom they robbed on the day they were arrested, was able to identify them as they walked in the charge office immediately after their arrest whilst she was opening a case against them, her cell phone was also found in their possession; they were arrested in the motor vehicle which the complainants had described as their getaway motor vehicle and each of the appellants was also positively identified at an identification parade. These factors do strength the state's case and raise a possibility of conviction and when coupled with the imminent sentence of a long term of imprisonment, two 15 year terms of imprisonment, they make the appellants possible flight risks.

[18] The personal circumstances of the appellants, as the court a *quo* rightly found, are of no assistance to the appellants. Of great concern to me is that the investigating officer could not confirm the address of the 1st appellant and was not able to contact the 2nd appellant's girlfriend with whom 2nd appellant alleged to be residing with. They informed the investigating officer that they were not employed. If they had given the investigating officer the addresses of where they worked as alleged in their respective affidavits, he perhaps

could have traced and confirmed the addresses. Based on the aforesaid, my view is that there are strong probabilities that the appellants may not stand trial.

[19] Secondly, the court a *quo* took into account the likelihood of the appellants interfering with the witnesses. Although the court a *quo* did not express itself on the evidence of the investigating officer, it however did consider it and it is on the basis of this evidence that it decided that it would not be in the interest of justice to grant bail to the appellants. The appellant's counsel, however, is of the view that the evidence of the investigating officer, in so far as the appellants interfering with the witnesses is speculative and should not carry any weight. The state's counsel conceded this point but however, submitted that this evidence must not be considered in isolation but cumulatively with the other evidence before this court. I agree with her submission.

[20] My view is that, when all the evidence is considered cumulatively, probabilities are that the appellants may interfere with the witnesses. The strength of the state's case, the possibility of a long prison term if found guilty are to me grounds enough for the appellants to interfere with the witnesses.

[21] In the premises I find that the court a *quo* was not wrong in coming to the conclusion that it will not be in the interest of justice to admit the appellants to bail.

[22] The appeal is therefore dismissed.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

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