IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
9.2.2016
DATE **SIGNATURE**

CASE NO: A909/2015

DATE: 9/2/2016

IN THE MATTER BETWEEN

LESEGO MABUSELA	APPELLANT 1
AUBREY MALOSE CHUENE	APPELLANT 2
AND	
THE STATE	RESPONDENT

JUDGMENT

MSIMEKI, J

[1] The two appellants together with accused 1 (Thulani Masemola) face three charges in the Atteridgeville magistrate's court. They are charged with one count of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 ("the CPA"), one count of attempted murder and one count of possession of

two firearms without holding a licence, permit or authorisation issued in terms of the Firearms Control Act, 60 of 2000.

[2] On 12 October 2015 accused 1 and the two appellants applied for bail before district magistrate Ms E van Biljoen. Accused 1 approached the court by way of an affidavit while the two appellants testified. The second appellant, Mr Aubrey Chuene, testified and called a witness. The State called the investigating officer.

[3] On 19 October 2015, the court, at the end of the application, refused the application and the accused were remanded in custody until the case is finalised.

[4] The first appellant, Mr Lesego Mabusela, and the second appellant, Mr Aubrey Chuene, brought an appeal against the judgment of the magistrate's court (the court *a quo*). Accused 1 decided not to appeal.

[5] The appeal against the refusal of bail is based on almost identical grounds. The differences relate to the appellants' personal circumstances only. These grounds are that:

1. The learned magistrate erred in finding that the appellants failed to prove that exceptional circumstances warranting their release on bail exist.

2. The learned magistrate refused them bail on the basis that members of the community would obviously expect the court to refuse the application for bail.

3. The learned magistrate misdirected herself by failing to balance the factors referred to in section 60(4) to 60(9) of the CPA.

4. The court failed to adequately consider the following circumstances as constituting exceptional circumstances:

   4.1 the fact that first appellant has three children;

   4.2 the fact that no evidence was adduced proving that first appellant is a flight risk;

   4.3 the fact that first appellant takes care of his grandmother who is unable to move around and do things for herself.

5. The learned magistrate failed to have regard to:

   5.1 the fact that first appellant is a first offender with no pending cases against him;

   5.2 the fact that first appellant is self-employed running a car wash;

   5.3 the fact that first appellant has an alternative address; and

   5.4 the fact that first appellant is prepared to abide by any conditions which the court may impose.

[6] Regarding second appellant, the further grounds of appeal are that:

1. The court should have found that the following constitute exceptional circumstances:

   1.1 the fact that second appellant is a breadwinner with four children to support;

1.2 the fact that second appellant's fiancée is six months pregnant and unemployed and that she is unemployable;

1.3 the fact that second appellant is gainfully employed as a taxi driver; and

1.4 the fact that second appellant's wife is entirely dependant on him.

2. The learned magistrate failed to adequately have regard to the fact that:

2.1 second appellant only has one previous conviction with no pending cases;

2.2 second appellant, in the case he was convicted of and sentenced, attended court without fail;

2.3 second appellant's address was confirmed and that he is not a flight risk; and that

2.4 second appellant is prepared to abide by any conditions that the court may impose.

[7] Coming to the order of testifying in court the State gave itself the duty to begin even though appellants were the ones to begin and show the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit their release. (See *State v Rudolph* 2010(1) SACR 262 (SCA) at [9] and *Jacobs and others v S* [2004] All SA 538 (T) at [5].)

[8] It is noteworthy that where an accused, taking into account what is already on record, does not even make out a *prima facie* case, there is no duty on the prosecution to present evidence in rebuttal. This again demonstrates that the accused must start and

not the State. (See *S v Mathebula* 2010(1) SACR 55 (SCA) at [12] and *S v Viljoen* 2002(2) SACR 550 (SCA) at [25].)

[9] It is common cause that section 60(11)(a) of the CPA finds application in this case as the court here has to deal with a Schedule 6 offence.

[10] For the purposes of this appeal it is important to quote section 60(11)(a). The section reads:

> "(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 satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release." (My emphasis.)

[11] A proper reading of the judgment of the court *a quo*, in my view, does not show that the court *a quo* regarded public opinion as being a definitive factor which caused the court to refuse bail.

[12] The court had due regard to the seriousness of the offences that the two appellants and accused 1 are facing. Regard was also paid to the fact that violence was involved in that firearms were used in the robbery.

[13] The evidence of the investigating officer, Seargeant Lebohang Monareng, was duly considered by the court *a quo*. It is clear from the reading of the judgment that the court *a quo* regarded the investigating officer as a good witness. The court said:

> "In this matter the court can accept the evidence of the investigating officer since there seems (*sic*) no apparent reason not to when evaluated according to the applicable criteria."

[14] The court, referring to the use of firearms, said:

> "This could indicate that the accused are a danger or will be a danger to society and/or to these victims. It is also indeed so that if convicted the accused will have to serve a substantial sentence of direct imprisonment."

This, seen in context, clearly shows that the court was worried that the accused may, because of the sentence, be induced to evade their trial. The offences the three accused are facing are indeed very serious and carry heavy sentences. The State's case, also, appears to be very strong.

[15] The court *a quo,* when dealing with public opinion, merely expressed the view of society which, according to the court *a quo,* should be considered in light of the earlier court decisions. I see no contradiction in the court's dealing with public opinion. The court specifically said:

> "The court however takes notice of the fact that the community could in many instances, they also do overreact and already see the accused as being guilty and convicted."

This demonstrates no contradiction at all on the part of the court *a quo*.

[16] It is important to touch on what the term "exceptional circumstances" means. In *S v Jonas* 1998(2) SACR 673 (SEC) the court held that "exceptional circumstances" are established by the accused adducing acceptable evidence that the prosecution's case against him is non-existent or subject to serious doubt.

At 678e-i, the court said that the term "exceptional circumstances" is not defined and that there could be "as many circumstances which are exceptional as the term in essence implies".

In *S v Peterson* 2008(2) SACR 355 (C), a full bench case, Van Zyl J, at [55], said that there are wide-ranging opinions which do not encourage one to define the term "exceptional circumstances". According to him, "exceptional" denotes something "unusual, extraordinary, remarkable, peculiar or simply different". He noted that there are varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference". Of course each case will have its peculiar circumstances. For the court to be persuaded, the circumstances must be such that they demonstrate that it would be in the interests of justice that the release of the accused be ordered. Courts must be flexible in their judicial approach of the issue of exceptional circumstances. They have to exercise a value judgment and have regard to all the relevant facts and circumstances of each case as well as all the applicable legal criteria. (See *S v Mahomed* 1999(2) SACR 507 (C) and *S v Rudolph (supra)* at [9].)

[17] What the court has to ask itself is whether the circumstances of each appellant are such that these "exceptional circumstances" which in the interests of justice permit their release exist.

First appellant under cross-examination when challenged to demonstrate that exceptional circumstances exist in his case, answered that he only wanted to be free so that he could be with his family just like the prosecutor. Asked if he could give more exceptional circumstances he answered that he did not have.

His answers to the prosecutor's questions, regarding his children, led the prosecutor to doubt if he has children. The court *a quo* touched on this in its judgment.

First appellant testified that he has three children aged 8, 3 and 1. He supported them until his arrest with money which he generated at his car wash business. From the business he could make R500,00 to R1 000,00 per month depending on whether the month was good or bad. He also assisted his grandmother who is a pensioner when she needed something from different places. It appears that his children are living with their mothers. The children appear to be well cared for. The grandmother too is a pensioner and, in my view, can be assisted by others.

[18] Second appellant, Mr Aubrey Chuene, testified telling the court that he is a taxi driver. The investigating officer's evidence revealed that second appellant had informed him that he was unemployed. His attorney, cross-examining the investigating officer, put it to him that second appellant did not regard being a taxi driver as formal employment.

Second appellant was not arrested together with accused 1 and first appellant, Mr Lesego Mabusela. He was arrested two or three days after their arrest. The Avanza motor vehicle which he said he used as a taxi was impounded by the police on the day of the commission of the offences. The investigating officer explained that second appellant had been on the run. The Avanza motor vehicle, according to the

investigating officer, was used as a get-away motor vehicle. The owner of the taxi has been traced and is a witness in the case.

Second appellant has four children aged 8, 6, 6 and 2. The children seem to be well cared for during second appellant's incarseration. These children together with first appellant's children seem to be legible for child grants.

Second appellant has a previous conviction of possession of firearms. Approximately fifteen days after his conviction and sentence, the current offences were committed. The offences are *inter alia* robbery with aggravating circumstances, attempted murder where a firearm was used to shoot an innocent lady cashier working for Koto Supermarket and possession of firearms. This simply means that second appellant has a record of a related offence.

[19] The State led evidence which demonstrated that the offences that accused 1 and the two appellants are facing are very serious. In the process of the robbery an innocent woman was shot and injured. She remained in hospital for some time after the incident. She, in fact, according to evidence, is lucky to be alive. Should they be convicted they stand to be punished severely and this simply means that they are likely to be given long terms of imprisonment. This may lead to their attempting to evade their trial. The court dealt with all of this.

[20] Having regard to all that I have referred to above, the court *a quo* found that no exceptional circumstances exist which in the interests of justice permit their release. I do not agree that the court *a quo* misdirected itself in so finding. The appeal against the refusal of bail by the learned magistrate Ms E van Biljoen should fail.

[21] I, in the result, make the following order:

The appeal, in respect of the two appellants, is dismissed.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A909/2015

HEARD ON: 29 JANUARY 2016
FOR THE APPELLANTS: Ms M MOLOI
INSTRUCTED BY: LEGAL AID SOUTH AFRICA
FOR THE RESPONDENT: ADV C PRUIS
INSTRUCTED BY: STATE