IN THE HIGH COURT OF SOUTH AFRICA

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A 263/16

In the matter between:

SIPHO PIET MAIMELA Appellant

And

THE STATE Respondent

JUDGMENT

MAAKANE A J

1. This is a bail appeal in terms of Section 65 of the Criminal Procedure Act, Act 51 of 1977 *("the CPA").*

2. The Appellant, together with four (4) co-accused are standing trial in the Regional Court of Pretoria on a number of charges. He is the second accused in the main trial. These charges include:

2.1 Theft of a motor vehicle;

2.2 Robbery with aggravating circumstances;

2.3 Kidnapping

2.4 Possession of a firearm;

2.5 Possession of ammunition;

2.6 Possession of firearm;

2.7 Possession of ammunition.

3. Their arrest and charges emanate from their alleged involvement in an armed robbery that took place on 12 April 2012 at Cullinan, in the district of Pretoria. In that armed robbery, one Karabo Ndupe Ngeng is the complainant. He was employed by a company known as the British American Tobacco Company, as a driver delivering cigarettes.

He was allegedly ambushed, attacked and robbed at gun point of his delivery vehicle described as a Volkswagen, cash, and a quantity of cigarettes, among others.

The Appellant and his co-accused were arrested a few minutes after this incident. During their arrest, all the stolen goods were found in the possession of the suspects and therefore recovered.

On the 6th July 2012, the Appellant was granted bail in the amount of

R5,000.00. This was done subject to certain conditions which include firstly, that he reports to the Soshanguve Police Station twice a week on Thursdays and Fridays. Secondly, he was not allowed to leave the Magisterial District of Pretoria without permission from the investigating officer

What transpired thereafter is dealt with later in this judgment. Suffice it to state that the Appellant failed to honour his bail conditions and to appear in court for his trial. A warrant of arrest was authorised against him and his bail money was finally forfeited to the State. He was later arrested in execution of the said warrant of arrest, and kept in detention.

8. Following his re-arrest on a warrant of arrest, the Appellant unsuccessfully applied for bail in the Regional Court of Pretoria.
9. It was common cause at the hearing of the bail application that the bail application fell under Section 60(ii)(a) of the CPA and that the Appellant therefore bore the onus of satisfying the Court that exceptional circumstances exist and that the interests of justice will be served if he is released on bail pending his trial. The Regional Court Magistrate found that he has failed to discharge this onus, and dismissed his application for bail.
10. The Appellant's grounds of appeal have been set out in some length. There has been reference to argument and also, to some authorities in the same document. Be that as it may, paragraph 11 of the Notice of Appeal seems to be a summary and provides as follows:

"11. It is submitted that the Honourable Magistrate is wrong in the judgment to refuse bail in the following respects;

- *As pointed out in paragraph 1 supra the appellant was never given sufficient opportunity to explain his absence from court. The State cannot find that the evidence of the state gainsays his explanation in this bail application.*

As pointed out in paragraph 2 and in paragraph 6 of the Honourable Magistrate is wrong in not executing the duty in terms of subsection 60(9) and subsection 60(10) to weigh up the personal interests of the accused against the interests of justice. Subsection 9 provides amongst other as follows in considering the question in subsection 4 the court shall decide the matter by weighing up the interests of justice against the right of the accused to his or her personal freedom and particularly the prejudice he or she is likely to suffer if he or she were to be detained in custody. The Honourable Magistrate discarded a monitoring system on dubious grounds.

The main issue is apparent and that is whether the appellant will stand his trial. The State does not rely on any of the other provisions of section 60(4) of the CPA.

The magistrate failed to consider the strength of the State's case but focussed prophetically on appellants shall one, say failure to adhere to stringent bail conditions."

The Appellant presented evidence in support of his bail application, by way of an affidavit. This can be briefly summarised as follows:

He is a South African citizen, 33 years old. He is married to N M, who at some stage worked for the City of Tshwane as a member of Tshwane Metro

Police. He resides at 1 T S, D from 2013. The house belongs to him and his wife. They have four children;

He was the sole owner of a business entity known as Seun Barker Enterprises, which specialised in designer clothes. He also had a taxi business. His income was approximately R20,000.00 per month;

He has two previous convictions. One is for an armed robbery which apparently occurred more than ten (10) years ago, and for which a suspended sentence was imposed. The other one is a housebreaking with intent to steal and theft, and for which he was sentenced to a term of imprisonment in terms of Section 276(1)(i) of the CPA;

He at the time had two pending criminal cases. One was a robbery with aggravating circumstances. The second was the unlawful possession of a firearm. He states that in both cases the State has a weak case against him;

He undertook not to communicate with State witnesses, nor will he endanger the safety of any person. He has no travel documents to leave the Republic of South Africa. He has no intention to evade his trial;

He stated that he was initially unable to abide by his bail conditions in this matter, because he was hospitalised and later arrested on another unrelated matter;

While he concedes that the charges he is facing are of a serious nature, he states that the State does not have a strong case against him;

The trial is likely to take some time to be finalised, and further detention will

impede the preparation for his trial. He can afford R5,000.00 as bail.

In opposing the bail application the State called Ominus Mashego ("*Mashego*") as a witness. He testified that he is the investigating officer of the case. He is a constable and attached to a Police Unit known as BAT, which stands for British American Tobacco Company. This unit was established after a

series of armed robberies in which drivers and or delivery staff of this cigarette company were targeted and robbed at gun point. They were mostly robbed of cigarettes, vehicles and cash.

13. On the 12th April 2012, the police received information and report of an armed robbery which took place at Cullman that morning at about 09H45. A driver of the BAT cigarette company, was robbed of his delivery vehicle, cash, and the entire quantity of cigarettes. He was also kidnapped and taken along against his will.
14. Following this and further information, the police sprang into action. Shortly thereafter and following prompt police action, five suspects were arrested. These are the Appellant and his caucused in this matter. The robbery took place at about 09H30, and the Appellant and his co-accused were arrested at about 09H45.
15. After the arrest of the suspects, the police officers searched their vehicle and therein found firearms as well as ammunition. The police also recovered the vehicle that was hijacked, as well as the cigarettes that

were loaded therein.

An identification parade was held. The Appellant was positively identified and pointed out by witnesses, as one of the armed robbers.

The investigating officer also referred to a Rietgat case, Rietgat CAS 37/03/2012. This relates to counts 10 and 11 in the charge sheets. He says that the Appellant, was also positively linked to this case. He was positively identified at an identity parade. This the witness did with relative ease. He has therefore formally been charged in respect of that case as well.

After their arrest in the Cullinan matter, the Appellant and his coaccused were kept in custody. On 6 July 2012, he was granted bail in the amount of R5,000.00. The granting of the bail was subject to the condition that he reports to the Soshanguve Police Station twice a week on Thursdays and Fridays. Secondly, that he was not allowed to leave the province of Gauteng without permission of the investigating officer.

On the 11th January 2013, the accused failed to appear before court and a warrant of arrest was authorised against him. His mother was present in Court and she told the Court that the accused was admitted at Ga-Rankuwa Hospital receiving treatment for burn wounds.

Since then the accused never attended court again and all the efforts to try and trace him were fruitless.

On the 13th October 2013, Applicant was arrested at Dendron, which is in the province of Limpopo. This was now about nine months after the warrant of arrest was authorised. He was accused of and charged with robbery with

aggravating circumstances in which one Prafo Patel was robbed of R95,000.00 in cash, laptop, cigarettes, and cellphones. He was ambushed on the road and robbed at gun point.

He testified that this robbery was carried out in the same manner as is the case with Karabo Ngeng (Cullinan case) and Kaya Nkosi (Rietgat case). In that case, Patel was also an employee of BAT on duty delivering cigarettes. In all these cases, the *modus operandi* was the same.

According to Mashego, in the Dendron case Appellant was granted bail, and the Court attached the following conditions:

He must report to the Pretoria West Police Station;

He is confined to the area of Pretoria West, except when he comes to court in Dendron;

Otherwise he has to obtain permission from the Investigating Officer if he has to leave Pretoria West.

24. Mashego also referred the Court to a document attached to the record which reveals that the accused was placed on parole on the 19 June 2009, that was supposed to expire on 17 December 2012. The parole conditions were among others that during that period, he was under house arrest, confined to and not to leave his magisterial district without permission, not to commit further crimes, not to abuse alcohol and to commit to compulsory community work.

25. The effect of this he testified, is therefore that at the time the Cullinan and

the Rietgat robberies were carried out, Appellant was on parole and still bound by the conditions set out above. The two robberies were committed on the 12 April 2012 and 2 March 2012 respectively. Both of them were committed before the 17 December 2012.

Despite the length of time and all attempts, they were unable for a period well in excess of a year, to arrest the Appellant, on the strength of a warrant of arrest. They were only able to execute the warrant of arrest, after he was arrested by the police on another charge, the unlawful possession of a firearm.

The investigating officer was cross-examined at length by the attorney for the Appellant. He stuck to his version especially as regards the fact that the State has a strong case against the Appellant and the fact that if granted bail, he will according to him not stand his trial.

Having considered the evidence, the Magistrate dismissed the bail application.

A subsequent bail application was made on 24 July 2015, based on new facts. The new facts relied on was that the Pretoria case, in which the Appellant was charged with the unlawful possession of a firearm was withdrawn.

He submitted further affidavits, including that of his wife. Ayatola Matseke, ("*Matseke*") an official in the Department of Correctional Services, was also called to testify. In essence, he testified that it is possible to tag the

Appellant, for the purpose of monitoring him if bail was granted. According to him the

Appellant was such a candidate and qualified to be tagged. He also explained how the said monitoring device operates.

31. Having considered all the new evidence the Magistrate again dismissed the application for bail and gave his reasons.

32. Counsel for the Appellant has argued that the Appellant had made a good case to be released on bail with appropriate bail conditions, and that the Appellant had discharged the onus that rests on him. He submitted that Appellant has satisfied the court that there are exceptional circumstances justifying his release on bail and that such the interest of justice require that he be so released.

33. On the other hand counsel for the State argued that there was no misdirection and that the Magistrate has taken into account all relevant factors and circumstances of this case. He submitted that the Magistrate was correct in dismissing the bail application.

LEGAL POSITION AND APPROACH:

34. In terms of Section 65(4) of the CPA, the court hearing the appeal may not set aside the decision against which the appeal is sought, unless such court, that is the appeal court, is satisfied

that the decision of the court *a quo* was wrong. Consequently, my powers are limited for the reason that this matter comes before me on appeal and not as an application for bail to determine whether the magistrate who had the discretion to grant bail exercised the discretion wrongly.

34.1

The Appellant bears the onus, pursuant to the provisions of Section 60(11)(a) of the Criminal Procedure Act to produce *"evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."*

34.2

This is so by virtue of the fact that, as is common cause, the charges which the Appellants face fall within the purview of Schedule 6 of the CPA.

34.3

Furthermore, in order to successfully challenge the merits of the state's case in bail proceedings the Appellant must prove on a balance of probabilities that he will be acquitted **(S v Botha 2002 (1) 222 SCA at 23 h)**

CONSIDERATION AND ANALYSIS IF THE FACTS/EVIDENCE:

35. The following factors count strongly in favour of the Appellant:

35.1 He is a South African citizen with strong family ties;

35.2 He is married with 4 children and have fixed property in Pretoria west;

35.3 He also conducts a designer clothes as well as taxi businesses from which he earns an income of approximately R20,000.00.

36. On the other hand, the following factors count strongly against any suggestion that the State case against the Appellant is weak:

36.1 The Appellant, together with his co-accused were arrested only a few minutes after the Cullinan armed robbery. The robbery took place at about 09H30 and they were arrested at about 09H45. All stolen items were also recovered from them. On searching the vehicle in which they were travelling, the police also found more than one firearm.

Appellant's version that he was merely a passenger on his way to deliver clothing to a client, is not supported by any evidence or circumstances of the case. The client has not been named or even called as a witness. There is no evidence that these clothes were found in the car. This was not even suggested to Mashego, the investigating officer during cross-examination.

36.3

36.2

In my view therefore, the Appellant's denial of his involvement in the armed robbery at Cullinan is not substantiated by objective facts.

37.

Over and above that, the Appellant's previous conduct and complete failure to comply with parole and or bail conditions strongly count against him.

37.1

Both the Cullinan and the Klipgat armed robberies in respect of which he is now in custody and standing trial on, were committed while he was on parole. He has, therefore violated his parole conditions. This is common cause.

37.2

Again, after his conditional release on bail of R5,000.00 in respect of this matter, he was, while on bail arrested on

charges of armed robbery in Dendron. After his release on bail in the Dendron case and while same was pending, he was again arrest for unlawful possession of a firearm in Pretoria. Both incidents occurred while he was on bail.

37.3

In the third place, his bail was subject to the condition that he reports twice a week to the police, on Thursdays and Fridays. He was also not allowed to leave the Magisterial district of Pretoria without the consent of the investigating officer. Once again, he completely disregarded all these conditions and travelled freely until he was arrested in Dendron.

38.

The whole situation is summarised by the Magistrate in his judgment as follows:

" *Then the Court also took into consideration that he at some period he was on parole and before his period of parole* was *up, in April 2012 he wad involved in the commission of another offence in February 2012. In the current offences the Court took into consideration what he is facing, his involvement in the use of a firearm, acts of dishonesty and despite being granted bail or even being on parole he still found himself involved in the alleged commission of various offences involving dishonesty and violence."*

39. Unfortunately the Appellant has given no explanation or evidence whatsoever, for this apparent propensity.

40. In S v Rudolph 2010 (1) SACR 262 SCA, Snyder JA, while referring to this type of propensity held:

"None of these allegations are addressed by him. He has also not tendered any explanation for the charges of attempted murder..... Those charges also involve acts of violence. Thus the unchallenged allegations against him show that he has a propensity to violence. In those circumstances S60(4)(a) and (d) of the Act prohibits his release from detention" **at paragraph [12]**

41. Section 60(4) of the CPA provides as far as is necessary that:

[11] (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 or [sic]'

42. From the evidence on record and *facts* that are common cause between the parties, at least three of the grounds listed under Section 60(4) have been established. In my view grounds (a),

(b) and (d) have been established, based on the Appellant's previous conduct. This was also the evidence of the investigating officer which was not in this regard, challenged.

43.2
43.
43.1

In my view therefore there is no support for the *grounds upon which this appeal is based period of absence his business operations were prejudicially affected. In any event, the fact that his business was likely to be detrimentally affected by his detention, cannot be regarded as an exceptional circumstance (S v Mokgoje 1999 (1) SACE 233 (NC).*

Evidence clearly shows that from his previous conduct, Appellant's release on bail is prohibited by the provisions of Section 60(4). He continued to disregard his bail conditions and was arrested on other charges for crimes allegedly committed while on bail.

It is common cause that the Appellant and his co-accused were arrested

almost immediately after the Cullman robbery. The robbery occurred at 09H30 and they were arrested at about 09H45. All stolen goods were recovered, firearms were also found in the vehicle in which they were travelling. The State case against the Appellant, is therefore not weak. The Appellant bears the onus to prove the presence of exceptional circumstances, in order to be released on bail. Unfortunately the evidence led in the matter show that he has a propensity to violence. There is nothing from his side to, in the form of evidence to suggest that he will not continue to act in

accordance with his propensity to violence as he did in the past. There is therefore a likelihood, given his previous conduct and disregard of the bail and parole conditions that he will evade his trial and or commit schedule 1 offences ..

45. It is also clear that even stringent bail conditions such as house arrest or reporting to the police station have failed to deter the Appellant. He was arrested for crimes allegedly committed while on parole and also, while he was still on bail in respect of this very matter. These crimes have elements of violence and dishonesty.

46. In S v Peterson and Another 1992 (2) SACR 52 (C), the accused person was on several occasions arrested on drug dealing and then released on bail. The Court held:

"The purpose of granting an accused bail is to minimise interference in his lawful activities. But where there is evidence that the inference to be drawn is that the accused has abused the grant of bail by indulging in the same criminal conduct, ...

society is entitled to be protected against the risk of repetition of , of the same criminal behaviour. Then the interests of society outweigh the right of the lawless individual .....

47. The Learned Judge continues and concludes that:

"..... *it is not in the interests of society that the Appellants who have displayed complete disregard for the law, be granted bail."*

48. Petersen *(supra)* was referred to with approved in S v Mwaka 2015 (2) SACR 306 (WCC) where Le Grange J expresses himself as follows:

"22. *Even though the above matter was decided prior to the commencement of the constitutional era, and before the amended s60 of the CPA, I fully agree with thee sentiments and they are still relevant today. In the present instance, the Appellant showed a flagrant disregard for the law and unashamedly continued with the possession and trafficking of drugs of which he* was *subsequently found guilty and sentenced. In my view in consideration of all the relevant factors, to release the Appellant on bail again under these circumstances would bring the administration of justice into disrepute."*

Through his previous conduct, the Appellant has shown complete disregard for the law. This he demonstrated by the fact that he was arrested for crimes allegedly committed while on parole and or bail. He has failed to honour all his previous bail conditions in this matter. Arresting him on warrant of arrest proved futile, until he was arrested on another unrelated matter. Only then could the warrant of arrest be executed.

In my view, Appellant has failed to discharge the *onus* that rests on him, of

establishing, on a balance of probabilities, that exceptional circumstances existed which warranted his release and that his release on bail would have been in the interests of justice.

Consequently, I am not persuaded that the Court a *quo* misdirected itself in refusing the Appellant's application to be released on bail pending his trial.

I am not satisfied that in circumstances such as these it can be said that the decision of the Court a *quo* was so wrong as to justify my interference. In the circumstances I have no reason to interfere with the decision of the Magistrate.

53. Consequently, the following order is made:

1. The appeal is dismissed.

2. The Appellant shall remain in detention pending finalisation of his trial.

S S MAAKANE Acting Judge of the High Court of South Africa North Gauteng, Pretoria

Counsel for the Appellant Instructed by Counsel for Respondent

Instructed by

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