REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A517/2016
DATE: 23 AUGUST 2016
THAPELO KHOZA  Appellant
And
THE STATE  Respondent
JUDGEMENT
NKOSI: AJ

[1] The Appellant and his co-accused were arrested on 13 October 2015. They are both charged with two counts of robbery with aggravating circumstances as defined in

Section 1 of Act 51 of 1977 read with the Provisions of Section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997, kidnapping and housebreaking with intent to steal and theft.

[2] They both applied on the 11 September 2015 to be released on bail. Their application was dismissed by the presiding magistrate.

[3] The Appellant further brought an application for bail on new facts on the 19 May 2016. This application was also denied. He is now appealing to this court against the decision of the magistrate to refuse him bail.

[4] It is common cause that the Appellant is facing charges which fall under Schedule 6 of the Criminal Procedure Act 6 of 1977. As such he bears the onus to prove that exceptional circumstances exist which are in the interest of justice warranting his release on bail.

[5] In terms of Section 60 (4) of the Criminal Procedure Act, the interest of justice does not permit the release from detention of an accused person where one or more of the following grounds are established:-

a] where there is a likelihood that the accused, if released on bail will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;

b] where there is a likelihood that the accused, if released on bail will attempt to evade his trial;

c] where there is a likelihood that the accused, if released will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

d] where there is a likelihood that if the accused is released, 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 a likelihood that the release of the

accused will disturb the public order or undermine public peace or security.

MERITS

[6] It is alleged on behalf of the Respondent that:-

[6.1] On 11 August 2015 at house number [2….] [M…..] Street, [S…..], the Appellant committed housebreaking and stole several items inter alia, television sets, jewellery, laptop a play station and a Toyota Corolla with registration number [V…. 9… GP].

[6.2] On the 13 August 2015, the same Toyota Corolla with Registration [V… 9….. GP] drove into the premises of house number [3…...] [A…. A….. W….. K….].

[6.3] There was a car parked in the double garage and this Toyota parked next to that car inside the garage. The employee of that house was held at gun point and dragged into the house. All the other occupants of the house were also held at gunpoint tied up and kept in the bathroom of the house. A number of items were removed from the house. Fortunately one of the occupants of the house had locked herself in one of the bedrooms and sent a text message through her cellphone to the owner alerting him to call the police. The police were quick to respond and the suspects were arrested in the next door neighbour's yard.

[6.4] The Toyota Corolla in question was found at the scene of the robbery which had taken place at house number [3…. A…. A….. W….. K…..]. It was full of items which had been removed from the said house. The items were identified by the house owner as his property.

[6.5] The Appellant and his co-accused were positively identified by the occupants of the house as the persons who robbed them at gunpoint.

FIRST BAIL APPLICATION

[7] The Appellant and his co-accused did not testify during the first bail application. They both elected to tender into evidence their respective affidavits. The contents of

these affidavits were well summed up in the judgment of the learned magistrate. I quote from page 58 of the record in the first bail application:-

"There was no oral evidence adduced both parties proceeded by way of affidavits. There is no circumstance of both applicants reflected on the affidavits marked as EXHIBIT A and B. The affidavits are about their ages being 28 and 33 years respectively and that both applicants live in Mamelodi which is within the Court's area of jurisdiction and both applicants indicated that the state's case is relatively not strong. The State relies on solely circumstantial evidence. Applicants believe they will be acquitted during the trial. They do not have previous convictions. They only have one outstanding case, which is partly heard in court 8. They can afford to pay R2 000 bail each and that they will comply with any conditions if bail is granted. The State in opposing their application read out an affidavit by the investigating officer that the address of the accused was confirmed. "

[8] The Appellant stated in his affidavit that he has no previous convictions. However, that was not true. He later submitted a supplementary affidavit to the effect that he does have a previous conviction. The reason furnished by the Appellant for the discrepancy was that he forgot about his previous conviction. The presiding magistrate was not impressed with the explanation and made a finding that the Appellant was not honest regarding his criminal record. She further made a finding that the Appellant deliberately withheld crucial information. The Appellant does have a previous conviction of theft.

[9] It had been argued for the Appellant that the State's case was weak and that he had no knowledge of the several pending cases in various courts.

[10] Having considered the evidence before her, the learned magistrate concluded that the question before court was whether the Appellant (accused) was the

candidate for bail and whether he had discharged the onus to show the presence of exceptional circumstances.

[11] I find it necessary to reiterate the presiding magistrate's concerns about how the bail application was presented to her. I quote an extract from her judgement which reads as follows:-

"/ would like to express my dissatisfaction with the manner in which this application was presented before this Court. It was not presented properly. Affidavits presented on behalf of the Applicants are lacking as far as their personal circumstances are concerned. This Court does not know at this stage if they have any business or employment links to the Court's area. There is no information as to whether they have any families in the area or they hold any assets in this area. The State in opposing the application also did not properly present its case. "

[12] The Appellant always had the onus of proving that there are exceptional circumstances which are in the interest of justice and consequently warranting his release. The learned magistrate in this first bail application found that the Appellant and his co-accused failed to satisfy the Court of the existence of exceptional circumstances. The Appellant failed to prove that exceptional circumstances existed to persuade the court to grant him bail.

[13] I have studied the learned Magistrate's judgment and cannot faulter her finding that the Appellant was not a candidate to be released on bail. A subsequent bail application was brought by the Appellant on the 19 May 2016 on the grounds that there were new facts.

SECOND BAIL APPLICATION

[14] The new facts are that, the state has not made a prima facie case, the investigation is incomplete, the arresting Officer cannot give description of the suspects, there are no fingerprints linking the Appellant to the firearm that was found on the scene, there is nothing that links the Appellant to the offence and none of the items robbed were retrieved from the Appellant. The DNA result regarding the ring is

negative. There was no finger prints evidence linking the Appellant. The State witness in A1 could not identify the witness who pointed the firearm at him. Regarding the Sinoville house breaking or and robbery there is nothing linking him to the offence and his fingerprints were not found on the car.

[15] The correctional officer was called to testify for the Appellant. He compiled a report in terms of Section 62(F) of the Criminal Procedure Act. His report states that the Appellant has a monitorable address and that he meets the requirements which should see him released on bail subject to the relevant conditions. He recommended that the Appellant be released on bail, placed under the supervision of a correctional officer and that an electronic monitoring device be fitted to him. In response to the said evidence the learned magistrate found on page 9 of her judgement that; she would have taken into account the report by the correctional officer if the Appellant had been found to be a candidate for bail. I support the learned magistrate's finding because the correctional officer's recommendations are to a large extent relevant to the issue of the terms and conditions of bail.

[16] The magistrate noted in her finding the allegation that the Appellant was linked to the offence in question by DNA found on the jacket alleged to be belonging to one of the victims and that the DNA retrieved from the gloves found on the next door yard matched that of the Appellant. She further made a finding that it was not clear whether the finger ring was found on Accused 1 or the Appellant. The learned magistrate noted on page 5, paragraph 10 of her judgment that the matter was trial ready. The Appellant has a previous conviction and an outstanding case. The offence was committed whilst the Appellant was on bail in respect of the outstanding matter.

CONSIDERATION OF SUBMISSIONS

[17] The Court stated in S v Bruintiies 2003 [21 SACR at 577 that:-

"If upon 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"

[18] The court sufficiently considered and dealt with the new facts submitted by the Appellant. The court concluded that there was evidence linking the Appellant to the offence committed at the house in Waterkloof. The evidence of the arresting officers, the DNA, and the finger ring which was found in Appellant's possession were all, among other factors which was found in one of the accused's possession were all, among other factors which lead her to the conclusion that the case against the Appellant was not weak as argued by the Appellant.

[19] The Appellant was out on bail pending the matter in Court 8 when the offence in the Waterkloof house took place. He has a previous conviction of theft which is relevant to the present charge. In the first bail application the learned Magistrate made a finding that the Appellant was not honest in the first place about his criminal record. She maintained that view during the subsequent bail application. The court concluded that the Appellant's past and present criminal record show that he has a disposition to commit a Schedule 1 offence consequently he should not be released on bail as envisaged in Section 60 (4) (a) of the Criminal Procedure Act. The court went further and made a finding that his failure to disclose his previous conviction was intended to mislead the court and falsely induce it to consider the bail application in his favour.

[20] It does appear from the record that the matter is trial ready and the DNA results are available. The fact that the identity parade was not held is irrelevant in light of

the fact that the matter is trial ready. The Appellant's submissions suggesting otherwise, cannot stand.

[21] It was argued for the Appellant that he has already spent almost a year in custody and therefore bail should be considered in his favour. I am not persuaded by this argument. The period spent in custody before the commencement of the trial cannot on its own constitute an exceptional circumstance warranting his release. An overall assessment of the evidence before the court should be undertaken. The learned Magistrate's assessment is that the Appellant if released on bail is likely to commit a

Schedule 1 offence. The case against him is likely to result in a conviction and the sentence is likely to be a lengthy one.

[22] I have been referred to the case of Mooi v S [2012] ZASCA 79 [SCA Case Number 162/2012, 30 May 2012]. The circumstances of the case at hand are distinguishable from the circumstances in the Mooi case. Firstly, there is no argument before me indicating that the state delayed in prosecuting the Appellant or commencing with the trial. To the contrary the record indicates that since June 2016, the matter was trial ready. Secondly, the learned magistrate made a finding that the state case was not weak as alleged by the Appellant. Thirdly, the Appellant was not honest about his criminal record. Fourthly, the Appellant has a disposition to commit Schedule 1 offence if released on bail.

[22] It was also submitted that the Appellant has received an offer for employment and that this fact and other new facts should be considered in his favour for the granting of bail. The other new facts placed before court were efficiently and ably dealt with by the learned Magistrate. I shall not repeat the court's findings supra. The job offer remains the only new fact which was not disputed. However, in light of

the totality of the evidence before court, this fact on its own is insufficient to persuade me as it did not convince the court a quo that it warrants that bail be granted.

[23] I therefore find that the factors referred to in Section 60 (5) of the Criminal Procedure Act appear from the record of the bail application and were taken into account by the Magistrate namely:-

[a] Any disposition to commit offences referred to in Schedule 1 as is evident from the Appellant's past and present conduct.

[b] The prevalence of the particular type of offence.

[c] Any evidence that the Appellant previously committed an offence referred to in Schedule 1 while released on bail.

The learned Magistrate did not err in refusing bail. I agree with her finding that the Appellant is likely to commit an offence in Schedule 1 as indicated in Section 60(4) of the Criminal Procedure Act,

[24] I therefore make the following order.

[A] The appeal against the Magistrate's decision refusing bail is dismissed.

N NKOSI. AJ

Acting Judge of the High Court, Pretoria

22 August 2016