REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A226/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

.....6 May 2021..... .....

DATE MOKOSE SNI

In the matter between:

THABISO MOTHAPO 1st Appellant

LUCAS MOFOKENG 2nd Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] This is an appeal against the judgment of the Magistrate sitting in the Vereeniging Magistrates' Court handed down on 22 July 2020 refusing to admit the appellants to bail pending the finalisation of criminal proceedings against them.

[2] The appellants (two of nine accused) allegedly acted in common purpose and were charged with six counts namely, two counts of kidnapping, two counts of robbery with aggravating circumstances and two counts of possession of an unlicensed firearm and possession of ammunition without a licence. The first appellant is further charged with an offence of falsely impersonating a police officer, Section 68(1) of the South African Police Services Act 68 of 1995.

[3] The appellants had applied for their release on bail before a Magistrate on 28 February 2019 which application was refused on 21 May 2019. The appellants applied for bail on new facts and the application was refused by the Magistrate on 22 July 2020. The appellants now approach this court on appeal against the refusal to bail on the new facts.

[4] Appeals from the lower court are dealt with in terms of Section 65(1)(a) of the CPA. The section provides:

> ***"S65 APPEAL TO SUPERIOR COURT WITH REGARD TO BAIL***
>
> *(1)(a) 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.*
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> .....
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> *(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was*

wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[5] In terms of section 60(1) of the CPA, an accused is entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit. Further, Section 60(4) of the Act provides that:

"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".

[6] It is not in dispute that the offences for which the appellants were charged fell within the purview of Schedule 6 of Act 51 of 1977. Section 60(11) provides that:

[1] "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.

(b) In Schedule 5, but not 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 the interests of justice permit his release."

[7] In terms of Section 60(11) the onus falls upon an applicant to adduce evidence which would satisfy the court that exceptional circumstances exist in the interests of justice which would permit his or her release on bail. The Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*[1] stated the following pertaining to exceptional circumstances:

"[75] An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent ....

[76] ... In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those

[1] 1999 (4) SA 624 (CC) at paragraphs 75 - 76

enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case...".

[8] It was submitted on behalf of the appellants that the Magistrate erred in finding that the appellants had not shown that exceptional circumstances existed in the new facts which were presented to the court. In particular, the second appellant had not been pointed out in the identification parade, has no previous convictions, was not linked by the cellphone web to any offence and was not arrested at the scene of the crime. No evidence was placed before the court that he was a flight risk.

[9] Counsel for the first appellant submitted to the court that cellphone records which had been submitted to court failed to prove he location of the parties and as such, demonstrated the weakness in the State's case, in particular.

[10] Counsel for the State submitted that evidence showed that the second appellant had been in communication with the accused. He conceded that although the second appellant was not found at the scene of the crime, he was arrested in the area having alleged that he was performing official duties there. He was also pointed in the identification parade. The first appellant had also been pointed out when he was arrested approximately 150 metres away from the crime scene. Accordingly, they were acting in common purpose when committing the offences.

[11] In terms of Section 60(11)(a) of the CPA the accused bears the onus of adducing evidence which satisfies the court of the exceptional circumstances which exist. The standard of proof is a civil one, that is, on a balance of probabilities. The appellant must set up a prima facie case of the prosecution failing.[2]

[12] This court can only interfere with the decision to refuse bail, if it is found that the decision of the court *a quo* was wrong. (See section 65(4) of the Act and *S v Barber* 1979 (4) SA 218). However, in *S v Porthen and Others* [3] the court expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60 (11) (a) of the CPA.

[13] In S v Botha en 'n ander[4] the court held that "in the context of s 60 (11) (a) of the CPA, the strength of the State's case has been held to be relevant to the existence of 'exceptional circumstances'. A weak state case will not necessarily result in the granting of bail. On the other hand, a strong state case will not necessarily result in the refusal of bail.

[14] Bearing in mind the appellants' right to freedom which should not be unnecessarily restricted, I am satisfied that the court *a quo* correctly found that the appellants had not shown cause of the existence of exceptional circumstances justifying their release on bail in the interest of justice. No evidence has been adduced showing that the Magistrate who had the discretion to grant bail on the new facts exercised that discretion incorrectly.

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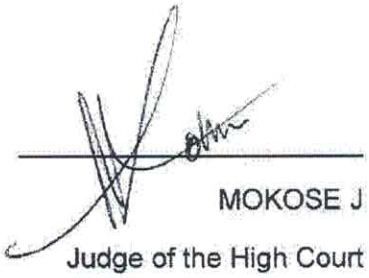
[2] S v Viljoen 2002 (2) SACR 550 at 561F-G
[3] 2004 (2) SACR 242 (C)
[4] 2002 (1) SACR 222 at para 21

[15] Therefore, in view of the fact that no evidence was adduced to show that the Magistrate had misdirected herself, I am satisfied that she had correctly assessed the totality of the evidence on a balance of probabilities in coming to the decision to deny the appellants bail.

[16] Accordingly the appeal should fail.

[17] In the result, the order I make is that the appeal against the order of the court *a quo* to refuse to admit the appellants to bail is dismissed.



MOKOSE J
Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

For the First Appellant:
Adv Mohohlo instructed by
Phehello Modise Attorneys

For the Second Appellant:
Adv KN Dhlakama instructed by
Mtumtum Inc

For the Respondent:
Adv LA More instructed by
The Director of Public Prosecutions
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Date of Hearing: 21 April 2021

Date of Judgement: 4 May 2021