




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A236/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
SIGNATURE	22/09/2021
	DATE

In the matter between:

AUBREY MPHAHLELE
VUSI MAHLANGU-GEBUZA

1st Appellant

2nd Appellant

v

THE STATE

JUDGMENT

MOSOPA, J

1. Initially, six applicants brought bail applications in the court below. On the date of hearing of the bail applications however, the second and third applicants abandoned their respective bail applications and the remaining four applicants proceeded with their bail applications. The appellants were the first and sixth applicants respectively, when the bail applications were determined.

2. This is an appeal against the refusal of bail by the below court on 6 November 2020, in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("CPA").
3. The appellants were legally represented during their bail applications in the below court. The offences which the appellants were charged with resorts under Schedule 6 of the CPA. This appeal is opposed by the State.

BACKGROUND

4. The appellants were arrested as a result of the robbery of a vehicle transporting money (cash-in-transit robbery). The first appellant collided with the cash-in-transit vehicle and fell to the ground not far from the scene of the robbery incident. He was found lying under a certain vehicle and a firearm was also recovered not far from where the first appellant was lying. The firearm seized had its serial number filed off.
5. After the arrest of the first appellant, he pointed out to the police other suspects who were hiding at Oxford Heights flats, in Montana. The police, when they attended the robbery scene, also saw a Chevrolet Cruze speeding out of the shopping complex, and they followed it until it reached Oxford Heights flats and its occupants ran away.
6. The police arrested two African males in room 114 of Oxford Heights. One rifle and a pistol were also seized in that room. A further two males were arrested outside the room and two pistols were seized when these arrests were effected. One of the pistols seized was one which was robbed from one of the cash-in-transit vehicle's security guards. Stolen money was also seized, along with the Chevrolet Cruze, which was also found to be a stolen vehicle.
7. From the evidence, it is not clear as to whether the second appellant was arrested inside the room or outside the room. However, what is important is that regardless of where the second appellant was arrested, firearms were

seized by the police, including a stolen firearm, and the vehicle used in the commission of the crime was also found to be a stolen vehicle.

LEGAL FRAMEWORK

8. Section 60(11)(a) stipulates two requirements in the event a bail applicant is charged with an offence referred to as a Schedule 6 offence;

8.1. (a) a bail applicant is to be detained in custody until he is dealt with in accordance with the law; and

8.2. (b) must adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permits his or her release.

9. The concept “exceptional circumstances” is not defined in the Act. In **S v Bruintjies 2003 (2) SACR 575 (SCA)** at 577F, Shongwe AJA, when dealing with exceptional circumstances, held that;

“...What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence...”

10. Section 60(11)(a) places an onus on the bail applicant to adduce evidence to prove the existence of exceptional circumstances. The subsection also describes how the onus is to be discharged and adds to its weight (**S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)**).

11. The functions and powers of a court hearing the appeal under the ambit of section 65 of the CPA are similar to those in an appeal against conviction and sentence (**S v Ho 1979 (3) SA 734 (W)** at 737H). In the matter of **S v Barber 1979 (4) SA 218 (D)** at 220E-H, Hefer J, when dealing with the powers and functions of an appeal court deciding the refusal of bail, remarked as follows;

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion.”

12. Section 60(4)(a)-(e) establishes certain jurisdictional grounds which in the interests of justice, does not permit the release of a bail applicant, if found to be present;

- 12.1. the likelihood that the accused, if he or she is released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, or
- 12.2. the likelihood that the accused, if he or she is released on bail, will attempt to evade his or her trial, or
- 12.3. the likelihood that the accused, if he or she is released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence, or
- 12.4. the likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, or
- 12.5. where in exceptional circumstances, there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

DISCUSSION

13. Both the State and the appellants adduced evidence in compliance with the requirements of section 60(2)(c) by means of affidavit. The requirement that evidence be adduced in terms of section 60(2)(c) should not be interpreted as a demand for oral evidence (see ***S v Hartslief 2002 (1) SACR 7 (T)***).
14. It was contended by Mr Joubert, on behalf of the appellants, that the Magistrate misdirected herself when she found that the dictum of the presumption of innocence is not a bail right, but a trial right. This issue was dealt with in the matter of ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*** (*supra*), where the Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right, but a trial right. I therefore find no misdirection on the part of the court below to uphold such dictum.
15. The first appellant provided two addresses which can be gleaned from the charge sheet and another in the affidavit in support of the bail application. The address which appears on the charge sheet is most probably the address which the appellant gave to the police immediately after his arrest. It is not clear as to why he provided the police with this address as the address which was positively verified as the correct address is the one appearing in his affidavit in support of the bail application.
16. The first appellant also averred in his affidavit in support of the bail application that he does not have a previous conviction. The affidavit opposing bail by the Investigating Officer reveals that the first appellant has a previous conviction of theft under CAS number; Vosman CAS 305/11/2007 and was sentenced to six (6) months imprisonment, wholly suspended for a period of five (5) years with relevant conditions.
17. Section 60(11B)(d) makes it an offence for the accused who wilfully gives false information about his or her previous convictions in bail proceedings.

The court below brought this aspect to the attention of counsel representing the first appellant and the explanation was that because the sentence was wholly suspended, it was construed as not amounting to a conviction. In my view, this is a flimsy explanation. The appellant failed to depose to a supplementary affidavit correcting that error.

18. The second appellant also has a previous conviction of theft. Bail proceedings are not penal in nature and the fact that both appellants have previous convictions must not be used as a bar to granting them bail. The below court when refusing the appellants bail did not consider this fact alone as a reason, but found that the appellants did not show the existence of exceptional circumstances.

19. Mr Joubert, in argument, contended that the court below misdirected itself in finding that there are no exceptional circumstances, mainly in that the State's case against the appellants is weak. The undisputed evidence is that the driver of the cash-in-transit truck, through the rearview mirror, saw the first appellant when he was robbing them of the money and followed him and eventually collided with him. The fact that the first appellant was there as an ordinary customer at the complex which was the scene of the robbery is a defence that the first appellant can raise in his trial. For the purposes of bail proceedings, it cannot be suggested that the State's case against the first appellant is weak. The stolen money bag and the firearm were found where the first appellant was arrested and surprisingly, he was found hiding under a vehicle.

20. It is so that the State never explained the circumstances under which the second appellant was arrested. Uncontested evidence is that two African males were found in the company of two African females in a room which is described as a "safe house", after the police followed a Chevrolet Cruze and after the first appellant pointed out the room to the police. A firearm and a rifle were found in that room. Two more African males were arrested outside that room with evidence linking them to the commission of the offence. No doubt

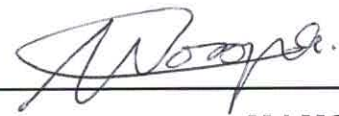
that the second appellant is one of the four people arrested inside or outside that room.

21. Mr Joubert's contention that he might have been visiting in the area, as the two females who were there were not arrested, has no merit. People ran away and escaped through windows of the room when they saw the police and the fact that the second appellant, if he was one of the people inside the room, did not run away, is not an indication that he was not part of the people linked to the robbery. Moreover, the second appellant does not raise any defence nor does he take the court into his confidence and explain the circumstances that led to his presence in that room, in his affidavit in support of the bail application.
22. It is therefore my considered view that the State did not present a weak case against the appellants, taking into account that the first appellant was arrested shortly after the robbery took place and assisted the police in pointing out the rest of his co-accused, which led to the arrest of the second appellant on the same day of the robbery. Why would the first appellant go on and assist the police in the arrest of people linked to the commission of the offence. The presence of the dangerous weapons where the second appellant was arrested also strengthens the State's case against him.
23. I find no misdirection committed by the court below which amounts to injustice and the court below did not exercise its discretion wrongly. I further find no reason to interfere with the decision of the court below.

ORDER

24. In the end, the following order is made:

1. The appeal against Magistrate Khan's refusal to grant the appellants bail is dismissed.

A handwritten signature in black ink, appearing to read 'MJ Mosopa', is written over a horizontal line.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant:	Mr F Joubert
Instructed by:	Moyo Incorporated
For the respondent:	Adv L Williams
Instructed by:	The DPP
Date of hearing:	21 June 2021
Date of judgment:	Electronically delivered