IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: **A44/2022**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14 March 2022
DATE

[redacted]
SIGNATURE

In the matter between: -

MBAYO PASCAL KANONGE	**FIRST APPELLANT**
PUHLE MAPHALALA	**SECOND APPELLANT**
NJABULO WISDOM NYONI	**THIRD APPELLANT**

And

THE STATE	**RESPONDENT**

Coram: Noncembu AJ

Heard on: 11 March 2022 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 14 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 14 March 2022.

Summary: Criminal law and procedure – bail – refusal of – schedule 6 - factors to take into account.

ORDER

On appeal from: The Pretoria Central Magistrate's Court (sitting as a Court of first instance), the following order is made:

(1) The appellants' appeal against refusal of bail is dismissed.

JUDGMENT

NONCEMBU AJ

Introduction

[1] The three appellants applied for bail before Magistrate Botha sitting at the Pretoria Central Magistrates Court. It was common cause between the parties that the bail application fell under the ambit of Schedule 6 of the Criminal Procedure Act 51 of 1977, and therefore the appellants bore the onus of proving on a balance of probabilities that there were exceptional circumstances which in the interests of justice permitted their release on bail.[1] The court a quo found that there were no exceptional circumstances warranting the release of the appellants on bail in the interests of justice, and refused bail on 14 June 2021. The appellants are now appealing against the said refusal.

The Merits

[2] The three appellants were first arrested on 29 March 2021 at a house in Olympus, Pretoria East, on various charges which included robbery with aggravating circumstances, kidnapping, possession of suspected stolen property and unlawful possession of a firearm and ammunition. Whilst they were in custody on this matter various other charges were added after an identity parade was held and they were positively identified and linked to other offences.[2] The first appellant was charged additionally with robbery with aggravating circumstances, allegedly committed in Sandown, Gauteng, in January 2021, after she was positively identified at the aforementioned identity parade (count 7). The second and third appellants were charged with robbery with aggravating circumstances, allegedly committed in Sandton in October 2020 (count 8).

[1] Section 60(11) (a) read with section 60 (4) (a) – (e) of the Criminal Procedure Act 51 of 1977.
[2] The ID parade was held on the 19 April 2021.

[3] The appellants tendered evidence in the form of affidavits in support of their application. The main contention in all of their affidavits, specifically with regards to the aspect of exceptional circumstances, was that the state's case against them was very weak and that they would be acquitted at the trial. The first applicant further added that she was a primary care-giver to a 10-year-old child and that her health was not good - since her incarceration she suffered from short breath and severe sinuses. Although she was getting assistance from her mother and her sister in taking care of her child, she was the main person responsible for his financial and emotional wellbeing as the child's father was unemployed.

[4] The affidavit by the second appellant indicated that he had an artificial eye which needed constant attention and chronic medication which he was not getting sufficient of at the clinic situated at the Correctional Centre where he was detained. But-for his detention, he contended, he was supposed to have gone for an operation to have the artificial eye replaced and that the prolonged use of same could jeopardise his other eye and could even lead to his blindness. He was also supposed to undergo another operation to have a bullet lodged in his head removed. In addition, he was financially responsible for his wife, who was unemployed, and child. Cumulatively, these factors were said to constitute exceptional circumstances warranting his release on bail.

[5] The third appellant, though in good health, stated in his affidavit that he was financially responsible for his wife who was unemployed, and his two minor children. He was a Zimbabwean national who intended applying for permanent citizenship seeing as he was married to a South African citizen. He could not renew his visitor's permit due to the National Lockdown. He was however, not a flight risk as he had a family in the Republic.

[6] All three appellants admitted to being arrested at the premises where robbery was taking place on 29 March 2021 but denied any involvement in the offences that were committed there. The first appellant contended that she had been invited there for a cleaning job by a certain Jeffery after she had advertised her services at the gate. She was told to wait at the gate of the said premise and would be

called later inside. She was arrested whilst still at the said gate by the police and had no knowledge of any robbery that was taking place inside. The second and third appellants had accompanied a certain Jeffery, who was a friend of the second appellant, to the said premises, and it appeared that unbeknown to them, Jeffery and other people committed the alleged offences in another room in the said premises. They only became aware of these activities when the police arrived at the scene and a shoot-out ensued, at which stage Jeffery and the other people escaped. The two appellants were arrested whilst trying to run away from the gunshots that were being fired.

[7] The investigating officer also submitted an affidavit wherein he opposed the release of the appellants on bail. In his affidavit he contended - that the appellants were positively identified as perpetrators in other robberies where the modus operandi was the same as in the Olympus robbery; a bank card belonging to the complainant was found in the possession of the first appellant, who was also identified by the complainants as having been inside the premises at the initial stages of the robbery; the second appellant had previous convictions and other pending matters relating to similar offences; and that the third appellant was a Zimbabwean national whose visitor's permit had expired, thus had family ties outside the Republic; the third respondent had indicated in his warning statement that the three appellants had travelled together to Olympus where the robbery was committed; and that none of the appellants had mentioned any Jeffery or fourth person involved in their warning statements. According to the Investigating Officer the appellants operated as part of a robbery syndicate and as such it would not be in the interests of justice to have them released on bail.

The legal principles applicable

[8] The appeal in question is regulated by section 65 of the Criminal Procedure Act [3] which provides, *inter alia:*

> "(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."

[9] The question to be answered in the current matter therefore is whether the decision of the lower court in refusing bail to the appellants was wrong. The answer to this question lies in whether or not the lower court was correct in finding that there were no exceptional circumstances which in the interests of justice permitted the release of the appellants on bail. Below I deal with the exceptional circumstances raised by the appellants in the matter.

The strength of the state's case

[10] It is common cause that all the three appellants were arrested at the scene of crime whilst the robbery was taking place in respect of counts 1 – 6 in the matter. The 1st appellant was at the gate on arrival of the police whilst the 2nd and 3rd appellants were inside the house. The undisputed evidence of the investigating officer is that a bank card belonging to one of the victims was found in possession of the first appellant. It is also the evidence of the investigating officer, which was not disputed, that all three appellants were identified as the people who were inside the house and had committed the offences in question on the said day. Further, the investigating officer stated in his affidavit that in his warning statement, the third appellant had indicated that the three appellants had travelled together to the said premises. Lastly, according to the investigating officer, none of the appellants mentioned a fourth person by the name of Jeffery in their detailed warning

[3] Act 51 of 1977.

statements to the police, and none of the witnesses mentioned additional people who had ran away; the premises in question were small and both the second and third appellants were arrested inside the premises.

[11] On the strength of the above, *prima facie*, the state has a very strong case against the appellants in respect of these charges. That being the case, in my view nothing turns on their challenge of the identity parade evidence linking them to counts 7 and 8 in the matter. I say this for the following reasons: In the first place, these are additional charges to counts 1 – 6 to which I have already shown above that a *prima facie* strong case has been shown by the state. Secondly, whilst the bail court is not required to make a finding on the guilt or innocence of an accused person, the very evidence of the appellants to the effect that some of the witnesses did not point them at the identity parade, coupled with the fact that they were pointed out in respect of different cases, weakens their argument that the witnesses thereat pointed them because they were shown the appellants' photos. Thirdly, it is not sufficient for the appellants to simply allege that the state's case against them is weak, they must prove on a balance of probabilities that they will be acquitted at the trial.

[12] In this regard, the Supreme Court of Appeal said the following in *Mathebula v S*[4]

> "But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted on the charge: *S v Botha 2002* (1) SACR 222 (SCA) at 230h,232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be available to the defence; … Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g."

[4] 2010 (1) SACR 55 (SCA) 11 – 13.

[13] The appellants have clearly failed in discharging the onus resting upon them, of showing on a balance of probabilities that they will be acquitted at the trial on the charges they face in the current matter.

The personal circumstances of the appellants

[14] Further to their challenge to the merits of the state's case, the appellants also raised certain aspects of their personal circumstances which they contend, cumulatively or individually also constitute exceptional circumstances. The first appellant stated in her affidavit that she is a primary care giver to a ten-year-old child who is also dependent on her financially and emotionally. It is trite that whenever a court considers the detention of a primary care giver of a minor child, the best interests of the minor child must also be taken into consideration.[5] In interpreting the constitutional paramountcy principle in respect of minor children, the Constitutional Court however, clarified that the principle did not mean that all other considerations must be overridden, but rather that appropriate weight be given in each case to the interests of the children concerned.[6]

[15] In her own evidence the first appellant indicates that she is being assisted by her mother and sister in taking care of her child. It follows from this therefore that her child's wellbeing and interests are and would be taken care of even in her absence. As it is clear from the dictum referred to above, a primary care giver of a minor child is not precluded from incarceration where circumstances so warrant, provided that the best interests of the minor child are considered. It is therefore my considered view that the best interests of her minor child are well taken care of in the present matter.

[16] Regarding her health condition that was also mentioned in her affidavit, as was correctly pointed out by the state, the Correctional Centre where she is detained has a medical facility where she can be attended, failing which she can be always

[5] Section 28 (2) of the Constitution of the Republic of South Africa, 1996.
[6] *S v M Centre for Child Law as Amicus Curiae*) 2007 (2) SACR 539 CC.

be taken for medical attention/treatment outside the Correctional facility where such is warranted. The same applies in respect of the health condition of the second appellant. Furthermore, other than their say so, there is nothing attached to the appellants' affidavits to objectively confirm their medical condition as well as the treatment required. The appellants opted to tender their evidence by way of affidavits, and as was pointed out in *Mathebula v S* (*supra*), unlike oral evidence, affidavits cannot be tested through cross examination and as such are less persuasive.

The interests of justice

[17] The second appellant has previous convictions that are directly relevant to the current charges he is facing. In his affidavit he only disclosed one previous conviction of robbery, but it turned out from his SAP 69's that he had seven convictions of robbery and one of murder, in which the sentences were ordered to run concurrently. From this alone one can easily see that he has a disposition to violence. The third appellant works for the second appellant and on the evidence of the investigation officer, the three appellants operate in a syndicate that specialises in robberies. Taking into account the number of pending cases the appellants are facing, the previous convictions the second appellant has, and the evidence that the three operate in a robbery syndicate, by all accounts point to a likelihood that if released on bail, the appellants would endanger the safety of the public or commit a schedule 1 offence.[7]

[18] In light of all the aforesaid, I cannot fault the lower court's finding that the appellants failed to discharge the onus resting upon them of establishing exceptional circumstances which in the interests of justice permit their release on bail.

[19] In the premise therefore, the appeal by the appellants before this court cannot succeed.

[7] Section 60(4) (a) of the Criminal Procedure Act.

[20] Consequently; the following order is made:

The appeal by the three appellants against refusal of bail by the lower court is hereby dismissed.

NONCEMBU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARRING : 11 March 2022

DATE OF JUDGMENT : 14 March 2022

For the Appellants : Mr D I J Mokgatle

Mokatle Lesole Attorneys

Pretoria

For the Respondent	: Adv C Pruis
	The Director of Public Prosecutions
	Pretoria