REPUBLIC OF SOUTH AFRICA

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

Case No: A 282/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE: 3/2/2022

SIGNATURE:

In the matter of:

Simphiwe Garrie Madoda and Another Appellants

And

The State Respondent

JUDGMENT

Maumela J.

1. This is a bail appeal which is opposed by the state. Before the Regional Court for the District of Gauteng sitting at Nigel, the court *a quo*; two accused persons appeared. They are Simphiwe Garrie Madoda and Banele Gift Mtsweni who was a co-accused to the Appellant. They shall henceforth be referred to as the 1st and the 2nd Appellant respectively. They are both male and were both 30 years of age at the time they were arrested.

2. The residential addresses of the Appellants are indicated to be No: […], Tsakane and No:[….], Tsakane respectively. Before the Regional Court**,** the two were charged with 2 (two) counts as follows:
   2.1. Count 1, where the offence is Robbery with Aggravating Circumstances, as defined in Section 1 of the Criminal Procedure Act 1977: (Act No 51 of 1977) – CPA, read with section 155 of the CPA, and section 51(2) of the Criminal Law Amendment Act 1997: (Act No 105 of 1997) - CLAA, as amended by Act No 38 of 2007 and
   2.2. Count 2, where the offence is Attempted Murder, (read with the provisions of Section 51 of the CLAA as amended by Act No 38 of 2007).

ALLEGATIONS.

3. The allegations against the accused are as follows:
   3.1. In Count 1;
   The allegations are that upon or about the 04th of July 2021, at or near Duduza in the District of Ekurhuleni East/Regional Division of Gauteng, the accused did unlawfully and intentionally assault Bongani Maise, and with force or violence, did take the following items to wit: a Toyota Conquest, ([….]), the value of which is R 22 000- 00, (twenty two thousand rand), his property or property in his lawful possession and therefore robbed him of same. It is alleged that aggravating circumstances were present in that before, whilst or after committing the crimes, the accused caused grievous bodily harm to the complainant and that the accused used a firearm with which the complainant was shot.
   3.2. In Count 2:
   The allegations are that upon or about the 04th of July 2021, at or near Duduza in the District of Ekurhuleni East/Regional Division of Gauteng**,** the accused did unlawfully and

intentionally attempt to kill Bongani Maise, a male person by shooting at him with a firearm.

4. The Appellant was arrested on the 25th of July 2021. On the 7th of September 2021, before the Regional Court, held at Nigel Court C; he unsuccessfully applied for bail. He subsequently filed a Notice to Appeal in terms of section 65 of the CPA on the 9th of September 2021. He was and still is represented by an attorney at the expense of Legal Aid South Africa. The application was opposed by the State, much as the Appeal also is.

SUMMARY OF FACTS.

5. The Appellant furnished the court with two sworn statements. One of the affidavits was made by the Appellant wherein he denied involvement in the robbery. The second was made by his co-accused in the matter, who confirmed the Appellant's version to the effect that he was an innocent passenger in the vehicle which turned out to be the one initially robbed from the complainant.

6. The Appellant sought to prove before the court *a quo* that substantial and compelling circumstances are attendant to his person which justify that he be released on bail. To that end, the Appellant placed the following before the court:
    - *6.1. That he is a South African Citizen;*
    - *6.2. He is 29 years old.*
    - *6.3. He has a permanent address where he lives with his twin brother since their birth.*
    - *6.4. His brother is disabled to such an extent that he cannot properly look after himself and there is no one else to look after him.*
    - *6.5. He is not in permanent employment, but does piece-jobs to earn an income.*
    - *6.6. He has a 7-year-old child for whom he is financially responsible;*
    - *6.7. He intends to plead Not-Guilty at the trial.*
    - *6.8. He indicated that if released on bail, he will not:*
        - *6.8.1. Commit another offence or*
        - *6.8.2. Interfere with the investigation, or witnesses in this case;*

6.9. *He will be in attendance at all times when the trial will run before court.*

7. It was also contended on behalf of the Appellant that the case the State is bringing against him is weak.

THE STATE'S CASE.

8. The State called the Investigating Officer, I/O, in the person of Bobi Boas Nene who gave a brief outline of the incident. It is undisputed that the Appellant was in the motor vehicle which was involved in an accident within 24 hours after the complainant was robbed of the same, (motor vehicle), at gunpoint. The Investigating Officer surmised that the Appellant was involved in the initial robbery because he was found in it after such a short period of time pursuant to the robbery. The fact that the Appellant left the scene of the accident, and remained untraced until his co-accused led the police to him also formed a basis on which to suspected that he is complicit in the commission of the crime.

9. The State concedes that its case against the Appellant is grounded on circumstantial evidence. On the main, the court *a quo* took into consideration the seriousness of the charges he is facing. The onus was on the Appellant to demonstrate before the court *a quo* that exceptional circumstances are attendant to his person, which if taken into regard should have swayed the court *a quo* to conclude that the interests of justice permit his release on bail. While he admitted knowledge about the offences charged; Accused number 2 provided no details whatsoever about what actually happened.

CONSIDERATIONS OFTHE INTEREST OF JUSTICE.

10. The legislature has promulgated provisions concerning the approach to be adopted in considering applications for bail, in particular where it has to be considered whether the interests of justice permit the release of the accused on bail or not. In that regard section 60(4)(a)-(e) of the CPA provides as follows:

"(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; or

(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."

11. Concerning a determination about whether the interests of Justice permit the Accused's release, the court has to take into regard that section 60 (9) is peremptory where it provides the following:

"(9). In considering the question in subsection (4), the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

(a). the period over which the accused has already been in custody since his or her arrest;

(b). the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c). the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d). any financial loss which the accused may suffer owing to his or her detention;

(e). any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f). the state of health of the accused; or

(g). any other factor which in the opinion of the court should be taken into account."

12. It was submitted on behalf of the Appellant that a reading of the judgment of the Court *a quo* does not provide clarity about whether the provision under section 60 (9) was duly considered. It is on the basis that the Applicant submits that the judgment of the court *a quo* be set aside and that the Appellant be admitted to bail.

EXCEPTIONAL CIRCUMSTANCES.

13. The legislature listed aspects to be considered in the process of determining an application for bail whenever the interests of justice are likely to be affected by the decision to grant or to dismiss an application for bail. In that regard, it has been determined that for bail to be granted, exceptional circumstances have to be attendant to the person of the applicant. While there is no closed list of circumstances that are considered to be exceptional, our courts have expressed on this concept.

14. In that regard, the Constitutional Court in the matter of *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; and *S v Schietekat*[1]*;* held the following at paragraph 89 e-f:
"In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those 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 interests of justice that release on bail be ordered notwithstanding the gravity of the case." In the same cases[2]; at Para 52, the Constitutional Court outlined the primary purpose of bail when assessing the concept of the 'interests of justice' where it stated the following: *"The focus must be primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of the case."*

15. In the case of *S v Rudolph,* at page 266 h-I, the Supreme Court of Appeal held the following: *"Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4) - (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified."* In the case of *S v DV and Others*[3]*,* the Court held the following at paragraph 8: *"In the context of s 60 (11) (a), the exceptionality of the*

[1]. 1999 (2) SACR 51 (CC).
[2]. S v Dlamini v Dladla and Others; S v Joubert and S v Schietekat.
[3]. 2012 (2) SACR 492(GNP).

circumstances must be such as to persuade a court that it would be in the interest of justice to order the release of the person of the accused. A certain measure of flexibility in the judicial approach to the question is required."

16. In the case of *S v H*[4], Labe J held as follows: *"The onus is clearly on the appellant who is charged with the commission of a crime referred to in the Sixth Schedule to establish that exceptional circumstances or unusual circumstances or circumstances which are out of the ordinary exist which in the interests of justice permit his or her release. I do not think that one should attempt an exhaustive definition of what is meant by the height and word exceptional circumstances."*

17. Concerning the interest of justice, and more in particular, the factors as enumerated under section 60 (4) (a)-(e), the Appellant stated in his affidavit that none of the instances intended to be avoided will occur. He submits that the court should consider setting aside the decision of the court *a quo*, thereby making it possible for him to be admitted to bail. In the case of *S v Diale* and Another[5], at paragraph 14, the honourable Kubushi J stated that: *"A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60 (4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released.'*

OBJECTIVE OF BAIL

18. It is submitted that in determining this appeal, the court has to bear in mind that the rights enshrined in the Constitution of the country, in particular the right to freedom, ought to be promoted and protected. In the case of *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*[6]**,** at par 6, the Constitutional Court held that the basic objective traditionally ascribed to the institution of bail is to maximise personal liberty. In the case of *Senwedi v S*[7] the Constitutional Court recently held the following at paragraph 27 with regard to a persons' right to freedom*: "Our Courts must defend and uphold the Constitution and the rights entrenched in it. One of the most important rights, from a historical perspective, is unquestionably the deprivation of an individual's liberty. This Court said in Ferreira that*

[4]. 1999 (1) SACR 72 (W), at 77 c – e.
[5]. 2013 (2) SACR 85 (GNP).
[6]. 1999 (2) SACR 51 (CC).
[7]. (CCT 225/20) [2021] ZACC 12 (21 May 2021).

"[c]onceptually, individual freedom is a core right in the panoply of human rights". The apartheid regime repulsively and capriciously deprived people of their freedom under illegitimate legislation that paid no respect to the rights to freedom and security of the person. We are therefore constrained to jealously guard the liberty of a person under our Constitution, particularly in terms of section 12 of the Bill of Rights."

19. In the case of *S v Branco*[8]*,* at 537 a-b the Court held the following: *"Finally, a court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion."* In *S v DV and Others*[9] Legodi J held the following at paragraph 54: *"Bail conditions have always served to ensure that whatever fears the state might have in the release of an accused person are taken care of. It is a necessary consideration, as also envisaged in s 60(6), which provides that, in considering whether the ground in ss (4)(b) has been established, the court may, where applicable, take into account the binding effect and enforceability of bail conditions which may be imposed, and the ease with which such conditions could be breached."*

APPROACH TO CONSIDERATION OF APPLICATIONS FOR BAIL APPEAL.

20. While the approach to applications for bail leans towards the promotion of freedom, it also has to be taken into consideration that on appeal, the court does not have a free latitude to set aside a decision by the court *a quo* where an application for bail was dismissed. Section 65 (4) of the CPA provides the following: *"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."*

RE: JUDGMENT.

21. In the case of *S v Barber*[10], the court stated the following: *"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*

[8]. 2002(1) SACR 531 (W).
[9]. 2012 (2) SACR 492 (GNP).
[10]. 1979 (4) SA 218 (D).

substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.

22. The Respondent submits that circumstances which are attendant to the person of the Appellant only constitute ordinary, day-to-day circumstances which are found to be attendant to the ordinary applicant for bail. When the offence charged falls under Schedule 2, Part I of the CLAA, the legislature intended for courts to find more than ordinary circumstances to be attendant to the person of the applicant before they consider applications for bail. In this case, evidence placed before the court showed that only ordinary, and not exceptional circumstances come attendant to the person of the Applicant. It is trite that under the circumstances, the Appeal against the refusal of the application for bail stands to be dismissed.

23. The Appellant submits that there are exceptional circumstances present, warranting his release on bail. He submits further that the decision by the learned Magistrate, refusing bail to the Appellant, was wrong, and that the appeal should subsequently be upheld, and bail be granted to the Appellant.

24. The Appellant is father and is financially responsible for a seven-year-old child who stays with her mother. He intends to plead Not Guilty when the charges shall be put to him; much as he contends that the case the state has against him is weak. He commits to be in attendance at all times when the case against him shall serve before court. He states that he shall not commit any crime while on bail or at any other time.

25. However, investigations by the Investigating Officer revealed that while the Appellant’s twin brother is disabled; the disability of which he is laden has not rendered him incapable of doing things for himself. Besides, although he gave no details, the very handicapped brother of the Appellant did state that the Appellant was warned or reprimanded about his illegal activities. That begins to provide an indication regarding the question whether the Appellant heeds or does not heed good counsel, especially when urged to stay away from the commission of crime.

26. While there is no direct evidence pointing to complicity on the part of the Appellant, the fact that he was within the vehicle of which the complainant had recently been robbed within 24 hours from the time the robbery was committed, formed a basis for the Investigating Officer to deduce that the Appellant participated in the robbery. Over and above that, the Appellant did not advance any reasonable explanation for why he fled the scene of the accident instead of awaiting those who would attend to it.

27. Should it be that the accident disorientated him, leading to him failing to await those who would attend to the accident, the question still arises why he did not do so at a later stage and why it took accused number 2 to lead the police to him before he was arrested. That in turn raises the question whether or not the Appellant is truthful in asserting that he will be in attendance at all times when the case against him serves before court. The court *a quo* found that the Appellant is likely to abscond is admitted to bail hands its dismissal of his application to be admitted bail.

28. Concerning findings by courts *a quo,* in the case of *S v Hadebe and Others*[11], the court stated the following: *"In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."*

29. In the case of *S v Francis*[12]*,* at 198*j*-199*a,* the approach of an appeal court to findings of fact by a trial court was summarised as follows: *"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."*

30. From the facts outlined above, this court has not found misdirection on the part of the court *a quo* on the basis of which it can interfere with the findings made. Those findings of fact stand

[11]. 1997 (2) SACR 641 SCA, at page 645.
[12]. 1991 (1) SACR 198 (A).

and consequently, interference with the judgment of the said court cannot be justified. The appeal against the refusal of bail in favour of the Appellant therefore stands to be dismissed. In the result, the following order is made:

ORDER:

30.1. The appeal against the refusal of bail in favour of the Appellant is dismissed.

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T.A. Maumela.
Judge of the High Court of South Africa.