REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No. 8774/09

In the matter between:

THULANI SIFISO MAZIBUKO	FIRST APPELLANT
AMBROSE SIMPHIWE CEBEKHULU	SECOND APPELLANT
and	
THE STATE	RESPONDENT

J U D G M E N T

RALL, AJ.

[1] The appellants are in custody. They are awaiting trial on three counts of armed robbery and two of murder. The charges arise from an incident which took place at 79 York Street in Greytown on 1 June 2009. The State alleges that on that day the appellants, together with others, robbed three people and that during the robbery one of the victims, Mr Mohammed Sayed was killed and one of the robbers was fatally wounded.

[2] The appellants and one of their fellow accused applied for bail in the Pietermaritzburg regional court. The State opposed bail, the regional magistrate refused bail to all three applicants and the two appellants now appeal against that decision.

[3] During argument it was common cause that the offences with which the appellants are charged are offences listed in Schedule 6 of the Criminal Procedure Act and therefore that section 60(11)(a) of that Act applied to this case. It was also common cause that as a result, the appellants bore the onus of proving on a balance of probabilities that exceptional circumstances existed which required their release in the interests of justice. Finally, it was common cause that in order to succeed on appeal, the appellants were required to satisfy me that the decision of the magistrate was wrong.

[4] What was not common cause was what was meant by the expression "exceptional circumstances" in section 60. At the outset I should point out that the magistrate was of the view that by using that expression the legislature's intention was to make it extremely difficult or almost impossible for an accused to make out a case for bail.

[5] The magistrate found that the ordinary grammatical meaning of the word "exceptional" should be given to it and therefore that it meant "unusual" or "different". On appeal, counsel for the State, Mr Dunywa supported this interpretation. On the other hand, Mr Barnard, who appeared for the appellants, contended that it was not required of an applicant for bail to show that any particular factor counted exceptionally in the applicant's favor. Instead, all that was required was that the applicant had to show, taking into account the factors mentioned in subparagraphs (5) to (9) of Section 60, that all of the factors in subsection (4)(a) to (e) counted in the applicant's favour, or to put it differently, that none of the grounds for refusing bail set out in subsection (4) existed. He conceded however, that if an applicant failed to discharge the onus on one of those five grounds, the application had to fail.

[6] In advancing this argument, Mr Barnard referred to a number of cases. He relied firstly on the following statement made at page 678I in S v Jonas 1998(2) SACR 677 (SEC):

> "I do not believe that it could have been the intention of the legislature, when it enacted the amending provisions of Section 60 (11) of the act to legitimize the at random incarceration of persons who are suspected of having committed schedule 6 offences, who, after all, must be regarded as innocent until proven guilty in a court of law."

This proposition can hardly be faulted. There clearly ought to be no randomness about the incarceration of accused persons.

[7] Secondly, he relied on S v C 1998(2) SACR 721 (C). In that case it was held that all that subsection (11) (a) required of an accused was to prove that he or she would stand trial, would not defeat the ends of justice and would not commit crimes if released on bail.

[8] Thirdly, Mr Barnard relied on the unreported judgment of Hugo J in S v Khan, a bail appeal in this division under case number 7200/1998. At page 9 of the judgment the following was stated:

> "They must, according to the definition, be circumstances which are the exception, rather than the rule. The unlikelihood that the accused will flee or interfere with witnesses would hardly qualify. These are circumstances one meets with in every single bail application. Indeed, it is questionable whether any of the circumstances which are mentioned in Section 60 (4), (5), (6), (7), (8) or (9) would qualify. Perhaps it would be exceptional if a number of favorable circumstances to the accused are found to be present together."

Mr Barnard emphasized the last sentence quoted above.

[9] Fourthly, Mr Barnard sought support in the judgment in S v Vanqa 2000 (2) SACR 371 (Tk), in which it was held that it was not required of an applicant to prove factors which are exceptional in the sense of being unusual and different to those enumerated in subsections (4) to (9). It was held further that it was wrong to attach the ordinary grammatical meaning to the phrase "exceptional circumstances". In coming to this conclusion, the court approved the following dictum from S v Yanta 2000 (1) SA CR 237 (Tk) at 243H -- 24 4 a:

> "The approach adopted by Kriegler J in the Dlamini case suggests that the exceptional circumstances as envisaged by subsection (11)(a) are not to be construed as requiring an accused to place before a court factors or circumstances in addition to those provided for in subsections (4), (9) and (10) of the act. The enquiry remains the same, namely, a weighing of the considerations referred to in subsections(4), (9) and (10) of Section 60 and then to exercise a value judgment according to all the relevant criteria on the facts placed before a court. At the end of the day the court has to decide if those factors which have been found to exist and which favor the release of an accused from detention are such, weighed against the interests of justice, so as to constitute exceptional circumstances for the purposes of subsection (11)(a). There can be as many circumstances which are exceptional as the term in essence implies. So for example factors such as an urgent serious medical operation, terminal illness or the lack of evidence implicating the accused in the charge may constitute exceptional circumstances when weighed against the factors set out in subsection (4)."

[10] It is important to bear in mind that the comments of Hugo J in the Khan case were clearly obiter because it was held that the offences which the appellant faced were neither schedule 6 nor schedule 5 offences. Secondly, it was clear that in the last sentence quoted above, Hugo J was not purporting to make a definitive statement of the law but was merely mentioning a possibility.

[11] The Khan and C cases were decided before the Constitutional Court gave its judgment in S v Dlamini and Others 1999 (4) SA 623 (CC). One therefore has to decide whether the statement in S v C , relied upon by the appellants, is still good law. In S v Mohammed 1999 (2) SACR 507 (C) the question was answered in the negative. I am in respectful agreement with this conclusion. It follows therefore that Hugo J's tentative suggestion of what the law might be, cannot be accepted as correct.

[12] What was held in S v C amounts to putting schedule 6 accused on the same footing as schedule 5 accused. Subsection (11) clearly distinguishes between the two categories of accused and to place them on the same footing would render this distinction meaningless. It was expressly held in Dlamini's case (at para [65]) that whereas in the case of schedule 5 accused the only factor which distinguishes those bail applications from those involving less serious offences is the question of the onus, Section 60(11)(b) imposes an additional requirement, namely, proving exceptional circumstances. I accordingly find that the interpretation contended for by Mr Barnard is not correct.

[13] What then is meant by the expression "exceptional circumstances" ? Firstly, in Dlamini's case it was held that the subsection does not say that there must be circumstances above and beyond, and generally different from those enumerated in subsections (4) to (9). By this I understand the learned judge to mean that it is not required of an accused to prove the existence of factors in addition to those enumerated in those subsections. This is evident from the examples given in paragraph [76] of the judgment. Each one of the final paragraphs in subsections (5) to (9) is a "catch all" paragraph reading "any other factor which in the opinion of the Court should be taken into account." In effect therefore the

Constitutional Court decided that an accused is entitled to rely on any factor expressly mentioned in subparagraph's (4) to (9) or any factor which is covered by the last paragraphs of subsections (5) to (9).

[14] I am in respectful agreement with the approach adopted in the Mohamed case. In my opinion, in order to give a meaning to the phrase "exceptional circumstances" it is essential to ascribe a meaning to "exceptional", and a good starting point is the dictionary meaning or meanings of the word.

[15] It was held by Comrie J in Mohammed's case, that "exceptional" has two shades or degrees of meaning. It can either mean unusual or different, or markedly unusual or specially different. Although Comrie J held that it was not necessary to plump for one or the other of the two shades of meaning, he appeared to place the emphasis on the degree of deviation from the usual. This is apparent from the following statement at page 515 of the judgment:

"So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release. And "sufficiently" will vary from case to case."

[16] It seems to me that "exceptional" can firstly denote the rarity of something (i.e. the infrequency with which something occurs) as in "It is exceptional to find a nocturnal animal walking around during the day". Secondly, it can denote the extent or degree to which a quality or characteristic is present, as in (to use the example of Comrie, J) "The musician has exceptional talent." The two meanings are however interlinked. Once again employing

Comrie J's example, the more talented a musician is, the more unusual or rare that musician would be.

[17] A reading of the cases indicates that the meaning apparently preferred by Comrie,J in the Mohammed case is widespread. So for example one sees that meaning used in Director of Public Prosecutions v Nkalweni 2009(2) SACC 343 (Tk) where the word was given the meaning "unique, unusual, rare and peculiar". In the present case the magistrate used the same meaning.

[18] With respect, I am of the view that the emphasis should be placed on the degree to which any circumstance is present. This is the terminology used by Kriegler J in Dlamini's case (in footnote 103) where the following was stated "There is no reason to believe that courts will find it impossible to find that release on bail is justified where " an "ordinary circumstance" (ie one of those mentioned in subsections (4) to (9)) is present to an exceptional degree." This appears to be logical because by definition an ordinary circumstance cannot be exceptional unless it is present to an exceptional degree.

[19] For the circumstance to qualify as sufficiently exceptional to justify the accused's release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out must be stronger than that required by subsection (11)(b), but precisely how strong, it is impossible to say. More precise than that one cannot be. Applying this approach, the process of deciding a bail application would be the same as in a case governed by subsection 11(b), save that the additional requirement of exceptional circumstances must be satisfied. This means that if an

accused does not satisfy the subsection 11(b) test, it is not even necessary to consider whether the additional requirement imposed by subsection 11(a) has been met.

[20] As I read the Yanta judgment, particularly the passage quoted above, this was in effect the approach taken by the learned judge in that case.

[21] In the example used by Van Zyl, J in the Yanta case, namely, a medical operation or illness, what would make the circumstance exceptional is not the rarity of the operation or illness, but the seriousness thereof and the impact it has on the grounds for refusing bail or the prejudice the accused will suffer if bail is refused. This, in my opinion, would be the case whether the circumstance is one expressly mentioned in subsections (5) to (9) or not. It goes without saying of course that any circumstance relied upon by the accused must be relevant to the question of whether the accused should be released on bail, that is, it should relate to one of the grounds set out in subsection (4) or to the question of the interests of the accused, dealt with in subsection (9).

[22] In the Vanqa case, although the learned judge stated that the circumstances must be blended with an element of exception or difference and it might appear at first glance therefore that what he meant was that the circumstances simply had to be different, a closer reading of the case indicates otherwise. The magistrate's finding that the appellant had failed to discharge the onus simply because the factors he had relied on, namely, his loss of income and his deteriorating health, are "ordinary factors generally expected in cases of incarceration" was wrong. The court held that the magistrate misdirected himself by requiring circumstances to be unusual and different to those enumerated in subsections (4) to (9). The court then analyzed the appellant's health and although the appellant was suffering from a relatively common illness, asthma, it was found that the

appellant's condition was serious and was exacerbated by the lack of treatment he was receiving in prison. These the court found to be exceptional circumstances. In effect therefore, it found that an otherwise ordinary circumstance was exceptional because it was present to an exceptional degree.

[23] Applying this test, it is insufficient for an accused who for example wishes to rely on the weakness of the State case to simply show that the State's case is weak. The accused must go further, i.e., show that the case is exceptionally weak and this must be done by showing on a balance of probabilities that the accused will be acquitted (S v Botha 2002(1)SACR (222) (SCA) at para [21]).

[24] Subject to two qualifications, the approach of the magistrate in the present case was correct. The first qualification is that "exceptional circumstances" has the meaning given to it by me and the second is that the magistrate's statement that the legislature intended that it should be nearly impossible to obtain bail is to set the bar too high. Whilst it is apparent that the legislature intended that it should be more difficult, perhaps exceptionally difficult, to obtain bail, it did not intend to make it as difficult as suggested by the magistrate.

[25] Before I deal with the evidence in this case I should emphasize, as has been stated repeatedly by our courts, that each case should be dealt with on its merits. Furthermore the amount of evidence which an accused is required to put before the court and the form that this evidence must take will vary from case to case. In this regard, it is important to bear in mind that the evidence presented by the accused cannot be considered in isolation but must be considered in the light of the attitude of the State to the application and the evidence tendered by the State. Whilst a court is not bound by

the State's attitude to bail, a statement by the accused which may be regarded as too brief and therefore inadequate in the face of a denial or contradictory evidence by the State, may be sufficient when admitted or left uncontradicted by the State (as was the case in Jafta's case) .

[26] The appellants and their co-accused elected not to testify at the bail application. Instead, an affidavit by each of the applicants was handed in. Thereafter, the investigating officer, Captain Pillay gave evidence under oath. Although, in the light of the Dlamini judgment, the appellants were free to put further evidence before the court, they did not do so. This has implications for the appellants. Firstly, evidence on affidavit is less persuasive than oral evidence (S v Pienaar 1992 (1) SACR 178(W) at 180H; S v Mathebula, an unreported Supreme Court of Appeal judgment under case number 431/2009). Secondly, a considerable amount of damaging evidence given by Capt Pillay stood uncontradicted.

[27] The State opposed bail on the ground that the appellants were flight risks. Accordingly, it can be assumed, as appeared to have been the case in the regional court, that the appellants discharged the onus on them in respect of all of the grounds mentioned in subsection (4), save for that in paragraph (b). The Appellants averred that they would stand trial. In addition, the appellants contended that if they were to remain in custody, they would suffer prejudice, inter alia, because they would not be able to run their businesses and would therefore suffer a loss of income. The magistrate found that in respect of neither issue did the appellants prove exceptional circumstances.

[28] Mr Barnard did not contend that any of the circumstances placed before the regional court by the appellants were exceptional. Instead, he contended that because the

appellants had shown on a balance of probabilities that none of the grounds set out in subsection (4) applied in this case, they had shown that exceptional circumstances existed. For the reasons that I have already mentioned, even if they did discharge that onus, that would have been insufficient. They would only have succeeded if they had proved that exceptional circumstances existed. This they could only have done if they proved that one or more factor relevant to the issues before the court was exceptional in the sense mentioned above.

[29] As far as their personal circumstances are concerned, the appellants stated in their affidavits that they were self-employed, earning R7000.00 and R6000.00 per month respectively, that they had permanent residences, in the case of the first appellant that he owned an immovable property, that they both owned vehicles and household possessions, and that they had dependents. However, the evidence of Pillay, which was not contradicted, cast serious doubt on the truthfulness of these assertions. Firstly, he stated that the first appellant had told him that he was unemployed. Secondly, despite being requested to do so, the second appellant was unable to supply Pillay with the registration number of the vehicle which he allegedly owned and used in his taxi business. Pillay was therefore unable to verify that the second appellant in fact owned a motor vehicle. Thirdly, Pillay established that the first appellant did not in fact own the property he claimed to own.

[30] The second appellant put up no documentary evidence to prove the existence of his taxi business. The first appellant did put up a document which showed that he was the sole member of a close corporation. However, the only documentary proof which he put up to prove that this corporation was operating, were unsigned letters from two firms

which purported to show, not that the corporation had any contracts, but that the first appellant was an employee of the firms in question.

[31] It was argued on behalf of the appellants, both in the regional court and before me, that the State had a weak case against them. The only evidence which the appellants put up in support of this contention was a denial that they were involved in the crimes, an allegation by each of them that their defence was one of mistaken identity and a statement by the second appellant that his defence was also that of an alibi. Despite knowing where and when the offences with which they were charged, were allegedly committed, neither appellant stated where he was at that time.

[31] In the circumstances, I am by no means satisfied that the appellants made out a case that they were not flight risks, let alone a case that there was an exceptionally good chance that they would stand trial. I am also by no means satisfied that they would suffer exceptional prejudice were they to remain in custody.

[32] I am accordingly not persuaded that the magistrate was wrong in concluding that no exceptional circumstances had been proved.

[33] In the circumstances, the appeals of both appellants are dismissed.

_____

A.J. RALL, AJ

Date of Hearing: 22 October 2009

Date of Judgment: 19 November 2009

Appearances

For Appellant : L. Barnard

Instructed by Ngubane Wills Inc.

For Respondent : N. Dunywa