REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: A41/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: YES
REVISED: YES
29/10/2021

In the matter between:

KHOLIZWE MASINA SHONGWE Appellant

and

THE STATE Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This bail appeal emanates from Barberton Magistrate's Court where the Appellant is charged with unlawful possession of a firearm and murder. The appeal follows on the Court *a quo* per Magistrate Ngcanga's refusal to admit the Appellant to

bail. The apprehension and subsequent detention of the First Appellant derived from the factual background that I will describe later below.

GROUNDS OF APPEAL

[2] The Court *a quo* is said to have erred in finding that the Appellants has not discharged the onus to show that:

2.1 There are exceptional circumstances and interest of justice which permit for his release on bail more specifically the following:-

2.1.1 that he will not interfere with state witnesses;

2.1.2 That he will not jeopardise the functioning of criminal justice system;

2.1.3 That he will not evade trial.

2.2 The Court *a quo* erred in finding that there is a strong case against the Appellant;

2.3 The Court *a quo* erred in over emphasizing the previous convictions of the Appellant and using them to deny him admission to bail;

2.4 The Court *a quo* erred in paying more attention to the seriousness of the allegations and downplayed whether or not the Appellant would attend his trial until finalized if he were to be released on bail.

FACTUAL MATRIX

[3] The Appellant claimed that he had just finished talking to a friend when he was suddenly surrounded by police officers pointing firearms at him. The police ordered him to lie down and not to look at them. They informed him that they were looking for a firearm whereupon they commanded him to take them to his place of residence where they were intending to search for a firearm. No one had the key to his place of residence consequently the police officers broke down the door, combed the place but could not find the firearm that they wanted.

[4] Upon finding nothing of interest to them, they demanded to see his vehicle. He advised them that he did not own one but nonetheless showed them his wife's vehicle in which they demonstrated lack of interest. They demanded that he accompany them to the place where he was arrested. On arrival, he noticed that there were other police officers surrounding his 'bakkie' motor vehicle. The vehicle was not locked and one of the police officers opened it. A search of the vehicle ensued resulting in a discovery of a firearm inside.

[5] The Appellant has previous convictions of one murder, six armed robberies, six possession of unlicensed firearms and one housebreaking. He was arrested in 2004, tried, convicted and sentenced in 2007. He does not have any pending cases. The Appellant admitted that he was on parole having been placed thereon by the Parole Board and deported to eSwatini. The parole had not been revoked yet because he has not been tried and found guilty. As such, he remains on parole.

[6] The Appellant gave his address in South Africa as Stand Number [....], Delile Section, Lehau, Msogwaba Trust. The Appellant also claimed that he had relatives in eSwatini. He told the Court *a quo* that his father was born in eSwatini. His aunts still live there but his grandfather has since died. He claimed that he had never lived in eSwatini but that he would normally visit. He holds no passport for either South Africa or eSwatini. On those occasions that he visited eSwatini, he did so by applying for a temporary permit at the border, which has always been granted without difficulty.

[7] He spent most of his elementary years in eSwatini herding cattle. He and others would occasionally cross over to South Africa through Mashobane for greener pastures for their cattle at Jeppe's Reef. He estimated the population of eSwatini to be approximately above one million. He was able to name four biggest cities in eSwatini. He was, however, unable to name number of national roads that eSwatini has.

[8] He claimed that his rights were not read to him when he was arrested. He did not make any statement to the police preferring to consult with his attorneys first. His explanation for his parole and deportation was that he deliberately withheld his parents' address from the authorities because his parents had died and his siblings were at each other's throats over matters of inheritance. Given those circumstances, he thought eSwatini would be the best option for him. The Appellant has two surnames *albeit* that he clarified that his actual surname is not Masina but Shongwe.

[9] Subsequent to his arrest, the Appellant was pointed out at an identification parade as the perpetrator of the murder with which he is charged. Furthermore, the State claims that it has recordings of the Appellant conspiring to commit murder. The State, through the investigating officer, asserted that the Appellant knows the State witnesses involved in this matter and that he was likely to interfere with them if admitted to bail.

[10] The Court *a quo* was alive to the fact that for the Appellant to succeed with his bail application he had to show the existence of exceptional circumstances. Finding that the Appellant had failed to establish the existence of exceptional circumstances, the Court *a quo* had the following to say:

> *"Then to determine that the court has to consider one if the accused person has got pending cases, previous convictions, nature of the said previous convictions, he has got a fixed address, employment. And also consideration*

in certain circumstances has to be made to the effect that if the said accused will stand his trial and also aspects pertaining to the fact that he will not interfere with the due administration of justice which will entail interference with the investigation. Intimidation of witnesses and all aspects related to the due administration of justice. Coupled with that important considerations have to be also if the strength of the state case is there and to what extend the said strength of the state case is so viewed that it by the court. That will be determined obviously from the evidence which the prosecutor brings through the investigating officer as we have seen that has been the case. Now applicant or accused in this case he has got previous convictions and those previous convictions they involved violence. It is alleged that he has got a murder and some robbery previous convictions and illegal possession of firearms. And evidence has been brought before the court that the accused was allegedly seen by a witness when he was committing the offence. And it has also been alleged that accused is further connected to the offence through cellphone recordings which apparently had to do with the execution or even the planning of the offence in question. Now evaluating all these aspects which I have mentioned in summary form and of importance considering the evidence brought forward that is by the accused himself and also his witness who is alleged to be his wife, the state submission also being its evidence the court is of an opinion that exceptional circumstances do not exist which will justify the release of this accused."

The above factual background is the essence of what led the Court *a quo* to refuse to admit the Appellant to bail.

ISSUES

[11] Since this is a Schedule 6 Offence, the issue becomes one of determining whether or not the Appellant has demonstrated exceptional circumstances warranting that he be admitted to bail. As correctly pointed out by the Court *a quo*, a court decides

that question by reference to the factors referred to by the Court *a quo* in the above quoted passage of its judgment. Additionally, I shall traverse the grounds of appeal to establish whether or not they constitute valid misdirections as alleged by the Appellant. Before considering the grounds of appeal however, I need to lay out the brief assertions of the parties.

ARGUMENT

[12] The Appellant contended that his apprehension and subsequent refusal by the Court *a quo* to admit him to bail constitute some form of pre-emptive punishment, which was rejected in *S v Acheson* **1991 (2) SA 805 (Nm).** The correct position, argued the Appellant, is that an accused person is presumed innocent until proved guilty. A natural corollary is that as a rule, courts will grant bail to accused persons.

[13] The Appellant stated that the investigating officer gave inconsistent testimony in court. The investigating officer said that the Appellant had told him that the firearm was locked inside his vehicle and that the key to the vehicle was in his possession. Given that information, the investigating officer chose to go to the Appellant's place of residence where he conducted a search whilst knowing that the item that he was searching for was inside the Appellant's vehicle.

[14] The Appellant argues further that the Court *a quo* could not have found that the case of the State was strong. The Appellant says the aforesaid must be so because he was only charged with murder subsequent to being singled out at an identification parade. Without the identification parade, the State would not have had a strong case of murder against the Appellant.

[15] The Appellant also attacks the testimony of the investigating officer that he has a mobile phone recording of the Appellant conspiring to commit murder. The Appellant's condemnation of that evidence is incredibly that that the deceased is not mentioned as the person against whom the conspiracy was to be executed. It appears that the

Appellant does not deny that there was a plot to kill someone but he argues that the State has failed to show that it is the deceased that he was planning to exterminate.

[16] The Court *a quo*'s decision is also impugned on the ground that it put undue weight to the previous convictions of the Appellant. These previous convictions played a significant role in the Court *a quo* refusing bail whereas they should not have been used to determine whether or not there were exceptional circumstances suitable for release. The Court *a quo* has failed to consider whether or not the Appellant, if admitted to bail, will attend trial until finalization of the matter.

[17] On the other hand, the State has contended that the Court *a quo* has considered all the relevant factors, which the Appellant says it has failed to take into account before refusing the bail. The Court *a quo* determined that the State indeed has a strong case against the Appellant. This is inextricably connected to whether or not the Appellant will attend his trial until finalized, if released on bail. Coupled with the aforegoing is the fact that, on the Appellant's own version, he commutes between eSwatini and South Africa illegally and with ease. Overall, the judgment of the Court *a quo* is unassailable. The Appellant has failed to show how the Court *a quo* erred in law and on the facts placed before it at the time when it made the decision, concluded the State.

LEGAL POSITION

[18] To the extent that the Appellant finds himself aggrieved by the decision of the Court *a quo* to deny him bail, Section 65(a) of the Criminal Procedure Act, 51 of 1977, is pertinent and ought to be the starting point. It provides that:

> *"An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by imposition by such court of 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 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."

[19] Section 65 (4) provides that:

"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."

[20] Section 60 (11) (a) provides that:

"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;"

[21] Section 60(4) 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; or [sic]

(1) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to any person;

(c) any resentment the accused is alleged to harbour against any person;

(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;

(e) any disposition of the accused to commit offences referred to inSchedule1, as is evident from his or her past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or

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

(2) In considering whether the ground in subsection (4) (b) *has been established, the court may, where applicable, take into account the following factors, namely-*

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

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

(3) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;

(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;

(g) the ease with which evidentiary material could be concealed or destroyed;

or

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

(4) In considering whether the ground in subsection (4) (d) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;

(b) whether the accused is in custody on another charge or whether the accused is on parole;

(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or

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

(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardized by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;

(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or

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

EVALUATION

[22] The question thus becomes whether or not a possibility exists that the Appellant will endanger the safety of the public or any particular person or will commit a Schedule 1 offence. The evidence levied before the Court *a quo* showed that the Appellant has a predilection to commit violent crimes. This is apparent from his previous convictions of murder and a whole string of armed robberies and possession of unlicensed firearms. I cannot find fault with the Court *a quo*'s reference to previous convictions because it did what the CPA requires. The crimes with which the Appellant was charged and convicted are grave and widespread. One only has to take a look at the criminal roll of this Court to confirm this fact.

[23] The next issue for consideration is the existence of likelihood that the Appellant will or will attempt to evade the attendance of trial until it is finalized. Here it is important to note that the Appellant has confessed that he crosses the border between eSwatini and South Africa illegally whenever he deems it necessary. Most disquieting is that he appears to be a Swazi national, if the fact that he was placed on parole and deported is anything to determine this, but he possesses no Swazi travel documents. It is common course that he has a South African Identity Book. How did he acquire this Identity Book

because he would not have been deported to eSwatini if he had an Identity Book at the time when he was placed on parole. The conclusion that it would be difficult to trace him in either country if released on bail is inescapable.

[24] Will it be easy for eSwatini to extradite the Appellant to South Africa in case he is released on bail and subsequently fails to attend his trial? It is fairly obvious that eSwatini does not know the movements of the Appellant at all especially if his confession of crossing the border undetected between the two countries back and forth are true. It is the opinion of this Court that the State might hear the last of the Appellant if he were to be admitted to bail. Moreover, it has to be taken into account that the offences with which the Appellant is charged are serious and are likely to attract long term sentences such as life, if he is found guilty.

[25] Perhaps I should add here that the fact that he was pointed out at an identification parade strengthens the State's case as found by the Court *a quo*. I am at total loss why Counsel for the Appellant thinks that the State does not have a strong case because had it not been the pointing out at a parade, he would not have been arrested. This is nonsensical. The point is that he was identified at a parade and that makes the State's case strong. The fact that he was initially arrested for unlawful possession of a firearm and only thereafter incarcerated for murder as a result of being identified at the parade is besides the point.

[26] I note the Appellant's assertion that the investigating officer had contradicted himself when he and his team chose to go to the place of residence of the Appellant instead of searching the vehicle said to have a firearm inside. I am unable to find such inconsistency. However, it is correct that the investigating officer opted to commence his search at the Appellant's place of residence and only thereafter did he go to the Appellant's vehicle where he discovered the unlicensed firearm. How this renders the case of the State against the Appellant untenable and constitutes a conflict in the evidence of the investigating officer leave me confounded.

[27] The suggestion that the mobile phone recordings of the Appellant conspiring to kill a person is not strong evidence militating against releasing the Appellant on bail is staggering. The mere fact that the Appellant was heard on record planning to kill a person is sufficient to deny him bail it being irrelevant that the person that he intends to murder was or was not the deceased. Releasing him on bail while mindful that intends to kill a person could be irresponsible in the extreme. The argument is thus vain and is rejected as devoid of any merit.

[28] Whichever way the circumstances of the Appellant are examined, the indication is that notwithstanding the Court *a quo*'s limited scrutiny of the facts, it was right to refuse bail to the Appellant. Accordingly, the appeal fails and I make the following order:

The appeal is dismissed.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 29 October 2021 at 10:00.

APPEARANCES:

Counsel for the Appellant:	**Mr Maseko**
Instructed by:	**MP Maseko Inc**
Counsel for the Respondent:	**Adv MB Marishane**
Instructed by:	**National Director of Public Prosecution**

Date of Judgment: **29 October 2021**