IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A108/21

In the matter between:

MOEGSIEN HAYWOOD Appellant

and

THE STATE Respondent

Coram: Kusevitsky,J

Heard: 14 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties'representatives via email. The date of hand-down is deemed to be 21 September 2021.

JUDGMENT

KUSEVITSKY, J

Introduction

[1] This is an appeal against the refusal of bail in the court a *quo*. The Appellant is arraigned on various offences of which some are listed in Schedule 6 of the Criminal Procedure Act[1]. These include robbery with aggravating circumstances, contraventions of the Firearms Control Act and contraventions of the Prevention of Organised Crime Act 121 of 1998. More details of the charges appear hereunder.

[2] The Appellant brought a formal bail application in the Mitchells Plain District Court on 13 September 2019 and same was refused on 16 October 2019.

[3] According to the State, the Appellant again on 19 May 2020 attempted a formal new facts bail application, in the Mitchells Plain District Court, however this bail application was abandoned.

[4] The Appellant now appeals against the refusal of the initial decision by the Magistrate in the court a *quo*.

[1] Act 51 of 1977

Application for Condonation

[5] On 24 March 2021, the Appellant gave notice of his intention to appeal the refusal of bail on 16 October 2019. He appeared on two counts of robbery, five counts of the illegal possession of firearms, one count of money laundering and one count of the acquisition or use of the proceeds of unlawful activities.[2]

[6] The Appellant states that the delay in filing the notice of appeal was not due to his failure or negligence, but based on the legal advice that he received from the legal representative that dealt with the bail application. He says that he was initially advised, after bail was refused, not to lodge an appeal but to apply for bail on new facts. This application was never completed as he was advised that there were insufficient facts to justify another bail application and that he had to rather lodge an appeal against the refusal of bail in terms of section 65(1) of the Criminal Procedure Act.

[7] His legal representative then attempted to obtain a record of the bail proceedings but was unsuccessful. Copies of the documents pertaining to the application were eventually obtained from the investigating officer. They say digital recordings were subsequently traced at court during March 2021.

[8] It is trite that condonation is not to be had merely for the asking; a full detailed and accurate account of the causes and their effects must be furnished so as to

[2] Notice of Appeal in terms of s65 of Act 51 of 1977 Against the Refusal of Bail and application for Condonation dated 24 March 2021

enable the Court to understand clearly the reasons, and to assess the responsibility.[3] The factors which a court considers when exercising its discretion whether to grant condonation include the degree of non-compliance with the rules; the explanation for it; the importance of the case; the respondent's interest in the finality of the judgment of the court below; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[4]

[9] In the case of *Sayed*, the application for condonation was refused on the basis that that application was deficient for want of an adequate explanation detailing the causes of delay and long periods in which nothing was done in prosecuting the appeal. The circumstances in this matter are however distinguishable. Here, it is not the wilful non-compliance and disregard for the rules of court[5], but rather the delay in obtaining the transcript of the lower court which unfortunately, is not an unusual occurrence which usually has the concomitant result of delaying further proceedings in a higher court. Condonation was accordingly granted in the interests of justice.

[10] The statutory framework and legal principles applicable to bail applications where the Appellant is charged with *inter alia* a schedule 6 offense are well established. The Appellant, on a balance of probabilities, must show the existence of exceptional circumstances which in the interests of justice permit his release.[6] Such circumstances are generally ordinary circumstances of an exceptional degree. See *S v Rudolf 2010 (1) SACR 262 (SCA)*

[3] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6; Sayed v The State (530/2017) [2017] ZASCA 156 (24 November 2017) para 8
[4] *Sayed supra* at para 9
[5] See Peterson v S (A63/2021) [2021] ZAWCHC 154 (11 August 2021)
[6] See s60(11) of the Criminal Procedure Act, 51 of 1977.

The case for the Appellant

[11] According to the affidavit in support of bail submitted to the court a *quo*, the Appellant was 61 years old at the time of that application, making him presently 63 years of age. He was arrested on 17 May 2019 and has been in custody ever since. He lives in Grassy Park and has been residing there for the past 30 years. He lives with his wife; there are three houses on the property and one of the houses is occupied by his brother-in-law. He has three children aged 35, 15 and 11. The youngest children reside with their mother in Mitchells Plain. His wife is a teacher at a primary school. He also stated that he was not in good health, having injured his back and has been prescribed ibuprofen.

[12] The Appellant argues that there are no indications that he is a flight risk and that he will seek to evade his trial.

[13] With regard to the strength of the States case, the following is stated: The Kensington case: the police searched the Appellant's premises and found a vehicle which had been reported as hijacked; in a kitchen cupboard they found two backpacks and a bag containing firearms and ammunition. The police also found a Suzuki motorcycle in a locked room on the property. It later transpired that that motor cycle was stolen in Johannesburg in an alleged robbery and both the Appellant and his son were positively identified in an ID parade by the complainants.

[14] Both the Appellant and his son Ziyaad, who had earlier been on the premises inspecting a motor vehicle, were arrested and subsequently released on R 5000.00

bail. That case was provisionally withdrawn against the Appellant as his son had failed to attend court. Sixteen months later, the police arrived at the Appellant's residence in Grassy park and found his son hiding in a cupboard. Both the Appellant and his wife were charged with the alleged harbouring of a fugitive. Both the Appellant and his wife were released on bail. Meanwhile, charges in the previous matter were reinstated against the Appellant after his son was re-arrested. After subsequent appearances, only the Appellant was released on bail and charges against him subsequently withdrawn. His son however remained in custody.

[15] With regard to the charges of the illegal possession of firearms, it is common cause that the Appellant was arrested in what is colloquially known as a 'trap', a procedure in terms of section 252A of the Criminal Procedure Act. The Appellant states that he was coerced by one "Bilal" to purchase firearms for resale so that he, the Appellant could raise money for his son's legal fees. He was ostensibly told by Bilal that he could purchase the firearms for very cheap, i.e. R 2 500 for each firearm and that it could be resold at a great profit. He was subsequently arrested for purchasing five firearms.

[16] In the grounds for the appeal, the Appellant *inter alia* complains that the ID parade was flawed in that their photographs were distributed beforehand. He also argues that he was incorrectly identified in that the ages of the alleged perpetrators, according to the complainants, who had committed the robbery, were approximately 35 and 28 years old respectively, whereas he was 58 years old with grey hair at the time of the alleged offence. He also maintains that the firearms were not actual firearms, since the police deactivated it prior to the transaction.

The case for the Respondent

[17] The State argued that the Appellant has a propensity to commit crime as is evident from his previous convictions. Other than the offenses listed here, the Appellant was also found guilty of various charges of theft with the most recent offence having been committed in 2016 where he was sentenced to two years imprisonment in terms of section 276 (1)(i) of the Criminal Procedure Act. The Appellant also admitted to purchasing the illegal firearms.

[18] The State contended that the Appellant is a danger to society. According to the affidavit of the Mr Joubert the investigating officer, he contended that they had received information from a source that the Appellant ordered fully automatic assault rifles, like AK47's, hand grenades or explosives and explosive devices. He also specified that the Appellant instructed that all of the weapons had to be clear of any serial numbers. An undercover operation ensued. On the designated day, the Appellant arrived at the designated meeting area. A purchase price of R 2500.00 per firearm was agreed upon. The Appellant arrived and a further three other persons, were identified as 'look-outs'. The Appellant approached the undercover agent who showed him a bag containing the firearms. The Appellant, after inspecting the firearms and handling it with a piece of toilet paper, went back to his vehicle and returned with the money, throwing R 17 000.00 in cash into the agent's car boot and collecting the bag containing the firearms. It is common cause that he was arrested on these charges whilst out on bail.

[19] The State maintains that the reason given by the Appellant for the purchase of the weapons is misleading. They argued that if it was the intention of the Appellant to purchase the firearms for a cheap price for resale at a profit, then why did the Appellant pay the seller nearly R5000 more than the agreed price for the firearms. The State also alleged that the Appellant in fact did not only order firearms, but specifically requested automatic rifles in the form of AK47's and explosives.

[20] When the Appellant's premises were searched and his son found hiding in a cupboard, the following items were also *inter alia* seized; 3 x semi-automatic weapons; 1 x silencer; 425 rounds of ammunition; 1 x signal jammer; 5 x High Court stamps and 1 x Official SAPS Identification Certificate. According to the record the Appellant was employed as a Messenger's Clerk for an attorney's firm up until January 2018 when he was harbouring a fugitive.

[21] In the *court a quo*, the magistrate dealt with the same defences raised in these grounds for appeal. He stated with regard to the ID parade, that it was common cause that the Appellant had an attorney representing him and whom had flown up to Johannesburg to attend the ID parade. That attorney indicated that there were no irregularities in the procedure of the ID parade.

[22] With regard to the health complaints, the investigating officer had made enquiries with the prison authorities as to whether the Appellant had complained about any medical issues. The prison records indicated that no such complaint was ever made by the Appellant. It was only after that investigation was made by the

investigating officer, that the Appellant presented to the prison authorities the following day that he was feeling unwell.

[23] The magistrate also maintained that it mattered not that the firearms purchased by the Appellant were not capable of discharging ammunition. The Appellant was unaware that the police had done so prior to the transaction and in his mind, he was purchasing fully functioning firearms. The court *a quo* found that the Appellant had known that he was purchasing firearms illegally.

[24] The court *a quo* also *inter alia* found that the Appellant, on the enquiry whether there was a likelihood that the Appellant would undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system, provided false information with regard to his health. Cumulatively, the court *a quo* found that there were no exceptional circumstances which in the interests of justice permitted the release of the Appellant.

Discussion

[25] The appeal to this court is in terms of Section 65 of the Criminal Procedure Act.

In terms of Section 65(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."

[26] In *S v Barber 1979 (4) SA 218 (D) at 220 E-H*, Hefer J remarked in respect

of s65(4) of the Criminal Procedure Act:

> "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. 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."

[27] As stated above, s65(4) does not empower me to set aside the decision unless I am '*satisfied that the decision was wrong*'. Based on the record and judgment alone, I can find no misdirection in the decision in the court *a quo*, to refuse bail.

[28] Further considerations solidify my conclusion. Prior to the hearing of this bail appeal, and during argument, the State presented evidence which amounted to new facts evidence. The evidence was presented to counsel for the Appellant in order for him to advance a response to these allegations.

[29] It is trite that presiding officers should have as much relevant information at their disposal in order to properly balance the public interest and the right to personal freedom of an accused person in bail applications[7]. A court may also take account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must not prognosticate. To do this it must have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that

[7] Phiri v S 1/2003 ECD 6 February 2003

'exceptional circumstances exist which in the interests of justice permit his release.'[8] A court has also greater inquisitorial powers in such an enquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court to disregard any of the factors listed in section 60 of the Criminal Procedure Act. [9] Having regard to the above, I am persuaded that it is in the interests of justice that I am obligated to take these new facts into account when evaluating whether or not the Appellant is entitled to be released on bail.

[30] The new facts are as follows: The State presented a copy of a J7E release form in respect of the Appellant. According to the State, it is a falsified document. On closer scrutiny, it is apparent that this document was 'signed' by a Judge of this Division, ostensibly sitting in the Mitchells Plain District court on 14 December 2020; bail was set in an amount of R 3000.00. From the document, it is apparent that the Judge's signature was forged in order to give the impression that bail was approved. Judges do not sit in lower courts hearing bail applications. It was also submitted that subsequent to enquiries being made as to the authenticity of the document, that the investigating officer Mr Joubert, opened a case of fraud in respect thereof and that that docket has since gone missing. The State alleges that the only person who could have benefited from the forged document is the Appellant, who would have been released immediately had someone presented the requisite bail money. The Appellant on the other hand argued that he is in custody and has no knowledge of the forged J7 document and that he should not be penalized for the existence of the forge J7 document.

[8] Schietekat *supra* at 247
[9] S v Mabene and Another (373/06) ZASCA 178; 2007 (1) SACR 482 para 7; [2007] 2 All SA 137 (SCA) (17 October 2006) para 7

[31] The interests of justice dictate[10] and do not permit the release from detention of an accused person 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 jeopardize 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. ("My emphasis")

[32] The Appellant argues that given the Appellant's advanced age; the fact that he has been released on bail before; and that his co-accused have been released on bail justifies the release of the Appellant on bail. The State on the other hand argues that the Appellant's co-accused have applied to be section 204 witnesses; his son has entered into a plea bargain and is already serving his sentence; and in any event, a trial date for the Appellant has already been set this month. I am of the view that in light of the seriousness of the charges, the strength of the state's case and

[10] Section 60(4) of Act 51 of 1977

the fact that the trial is not too far off, that it cannot be said that the interest of justice demands that he be released in those circumstances. The release on bail of his co-accused is also of no moment in these proceedings. As determined in *Solomons v S*[11], the record of those bail proceedings are not before me nor do I believe that such a record would be relevant. Each case has to be determined on its own facts.

[33] What is required in respect of schedule 6 offences 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 the release of an accused.

[34] I am of the view that given the existence of a forged J7 in the Appellant's prison file, and the subsequent disappearance of that docket to investigate the matter, that there is already *prima facie* evidence that the administration of justice has been compromised. These allegations, especially the forging of a presiding officer's signature in circumstances such as this, is of such a serious nature, that the interests of justice dictate that bail should in these circumstances, be refused.

[35] Another factor which this court has to take cognisanze of is the fact that the firearm offenses were committed whilst the Appellant was out on bail. It is only if, once the interests of justice permit, that he who is detained becomes entitled to be released[12]. In my view, on the totality of the evidence, the release of the Appellant on bail would bring the administration of justice into disrepute.

[11] [2019] 2 All SA SA 833 (WCC) at para 73
[12] S v Schietekat 1999 (2) BCLR 240 (C) at 245

[36] In the result, the application is dismissed.

DS KUSEVITSKY

Judge of the High Court, Western Cape Division

Counsel for the Appellant: Advocate KJ Klopper
Counsel for the Respondent: Advocate A Isaacs