In the High Court of South Africa
(Western Cape Division, Cape Town)

High Court Ref No: A71/21 and A43/21
Magistrate Serial Number: 16/500/2020

In the matter between:

SITHEMBELE YANTA **First Appellant**

LUDWE MGWELANA **Second Appellant**

And

THE STATE **Respondent**

JUDGMENT ON BAIL APPEAL

LEKHULENI AJ

INTRODUCTION

[1] This is an appeal against the refusal of bail against the two appellants. On 11 December 2020 the two appellants brought a formal application for bail in the Cape Town magistrate's court and the said court refused them. They now appeal against that decision in terms of s 65(1)(a) of the Criminal Procedure Act 51 of 1977 *("the CPA").* Both appellants, in the magistrate's court, were legally represented. The first appellant was legal represented by Advocate Ngoza and the second appellant was represented by Mr Dunga an admitted attorney. In this court, Mr Mafereka appeared

for the first appellant and Mr Njeza appeared for the second appellant while the respondent was represented by Mr Gertse. The first appellant lodged his appeal first and the second appellant followed sometime thereafter. As a consequence thereof, the parties agreed to consolidate the two appeals as they arise from the same facts.

[2] During the bail proceedings, the appellants did not testify. Instead, both appellants filed affidavits in support of their applications. In their affidavits the appellants categorically denied their involvement in the crimes that they were charged with. The respondent opposed the bail application.

[3] In its further opposition of the bail appeal, Mr Gertse submitted on behalf of the Respondent that the court *a quo* was correct when it refused to grant the appellants bail as both appellants faced serious charges; there is overwhelming evidence linking the appellants to the offences committed and that they failed to show exceptional circumstances for their release on bail, while Mr Njeza and Mr Mafereka held a contrary view. The respondent highlighted the following that; both appellants are facing two counts of robbery with aggravating circumstances; one count of murder read with the provisions of section 51(1)(a) of the Criminal Law Amendment Act 105 of 1997; one count of possession of an unlicensed firearm and one count of possession of ammunition. It is therefore common cause that the charges that the appellants face are referred to in Schedule 6 of the CPA. It then follows that the bar for granting bail in the crimes listed thereat is lifted a bit higher by the legislature.

[4] Detective Sergeant Luvuyo Maki *("Detective Sergeant Maki")*, the investigating officer in this matter also filed a comprehensive affidavit on behalf of the respondent opposing the granting of bail. In his affidavit, he detailed the extent of both appellants' alleged involvement in these crimes. The facts will then be summarised below.

BACKGROUND FACTS

[5] Detective Sergeant Maki's affidavit demonstrated that he based his evidence on, *inter alia,* the contents of the statements he obtained from some of the witnesses. He briefly stated that on 22 February 2020, eight African men entered the premises of ORMS Pro Shop in Roeland Street, Cape Town driving two vehicles namely, a White Polo and a Silver Grey Toyota Quest. According to an employee of ORMS, while he was busy assisting clients, he noticed two African males entering the store. One of them took out a firearm cocked it and pointed it towards him and instructed him to lie down. The suspect then started to remove cameras from the store. While the two suspects were still in the store the employees in the shop heard gunshots from outside. After the suspects collected the loot from the shop, they left the store. After the shooting, the suspects left the scene. A video footage from outside the ORMS shop shows the robbers arriving in two vehicles and the first appellant as the driver of the silver Toyota and he remained in the vehicle.

[6] In his affidavit, Sergeant Maki indicated that he dealt with the first appellant in a previous matter and he knows him very well. He received a video footage from ORMS and he identified the first appellant. He had knowledge of the first appellant 's

cell phone number and according to the first appellant's cell phone data, the first appellant was at Roeland Street at the address of ORMS (the crime scene) on the day and at the time the incident happened. He also stated that the second appellant was positively identified by an employee of ORMS shop in a photo identity parade as being in the store when the incident occurred. According to him, the witness (an employee) identified the second appellant as the one who pulled out the firearm and cocked it and said that everyone must lie down. The second appellant's finger prints were also found in the vehicle that was used in the commission of the offence.

GROUNDS FOR THE BAIL APPEAL

[7] The grounds of appeal as contained in the notice of appeal for both appellants dated 18 February 2020 and 16 March 2020 respectively are essentially that the magistrate failed to attach any weight or sufficient weight to the appellant's application in that:

7.1 The appellants were not flight risk;

7.2 There were no facts placed before court that the appellants would not stand trial if they were released on bail or that if released on bail they would commit a schedule 1 offence;

7.3 That the magistrate erred in failing to find that the tenuous nature of the state case was such that it provided no incentive for the appellants to avoid trial;

7.4 There were no facts placed before court suggesting that the release of the appellants on bail might endanger the safety of the public;

7.5 The appellants aver that the magistrate erred in denying them bail despite the existence of exceptional circumstances in that the appellants do not have passports; they have minor dependants; and they have fixed addresses with which strict bail conditions could have been imposed;

7.6 That the magistrates failed to hold that the aforementioned circumstances cumulatively amounted to exceptional circumstances.

THE ISSUES

[8] The issues to be determined are whether the appellants have discharged the burden placed on them by section 60(11)(a) of the CPA to be admitted to bail and whether the magistrate has indeed erred by refusing to grant the appellants bail.

PRINCIPAL ARGUMENT BY THE PARTIES

[9] At the hearing of this appeal, Mr Mafereka argued on behalf of the first appellant that the State's case against the second appellant is very weak. According to counsel, there is no witness which connects the second appellant to the scene save for the statement of the investigating officer and the cell phone records of the second appellant. Mr Mafereka implored the court to consider the degree of participation of the parties during the alleged commission of the offence. According to him, there is no act of violence that can be attributed to the second appellant during the alleged commission of the offence. It was also argued on behalf of the first appellant that the court a quo erred in attaching much weight to the statement of a defence witness, Mr Pama, a traditional healer who denied that he knows the first

appellant, nor he ever consulted with him and handed him a medical certificate at the time of the alleged commission of the offence.

[10] Meanwhile, Mr Njeza argued on behalf of the second appellant that the magistrate erred in rejecting the second appellants' application to be released on bail in that the State's case against the second appellant was not so strong as to incentivise the second appellant to evade trial. Counsel contended that the respondent relied on a finger print that was on a vehicle, a moving object and it was not clear when that vehicle was bought and when the fingerprints of the appellant could have been placed there. It was contended on behalf of the second appellant that the identification of the appellant in the photograph identification parade was fickle having regard to the fact that there is no indication of the relative length of the period of observation and the fact that the appellant was unknown to the witnesses. Mr Njeza contended that there are no factors provided by the evidence of the State to confirm a reliable identification. He asserted that the court *a quo* erred in so far as it found that the appellant' release would undermine or jeopardise the proper functioning of the criminal justice system, including the bail system.

[11] Mr Gertse argued on behalf of the respondent that the argument raised by the two counsels on behalf of the two appellants relates to the hearing of the matter on the merits which must be left for the trial court. He contended that there was nothing advanced by the two appellants that justified the interference with the findings of the court *a quo*. Counsel for the respondent contended that the first appellant has two pending cases of robbery with aggravating circumstances and possession of unlicensed firearm and ammunition. The first appellant also has two previous

convictions of housebreaking with intent to steal and theft. He stated that the second appellant has two previous convictions and has a pending matter of robbery with aggravating circumstances against him. He implored the court to dismiss the appeal for both appellants.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[12] It is trite that a court or a judge hearing an appeal in terms of section 65(4) of the CPA 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 shall give the decision which in its opinion the lower court should have given. Kriegler J, as he then was, made the following remarks in *S v Dlamini: Sv Dladla and Others; S v Joubert: S v Schietekat:*[1]

> "What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted".

[13] Against this backdrop, I turn to consider the question whether the lower court erred in refusing to admit the two appellants to bail. In my view, the starting point in addressing the issues before this court should be the Constitution. Section 35(1)(f) of the Bill of Rights provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permit, subject to reasonable conditions. From the reading of this section, it is abundantly clear that it is not absolute but its ambit is circumscribed by the interest of justice. The court must be satisfied that the interest of justice warrants the release of the

[1] 1999 (2) SACR 51 (CC).

accused from detention. In *S v Dlamini* (*supra*), the Constitutional court observed that if facts indispensable for establishing that the interests of justice permit the arrestee's release are not established, the arrestee is not entitled to the remedy under the subsection.

[14] Bail applications of accused persons in court are regulated by section 60 of the CPA. Section 60(1)(a) of the CPA provides that *'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit'.* 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 circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security".

[15] In *S v Bennet,*[2] this court stated that the court hearing the bail application must express a balanced value judgment taking into account the factors mentioned in section 60(4). The essence therefore of the principles and considerations underlying bail is that no one should remain locked up without good reason.

[16] In this case, the charges levelled against the appellants involved offences listed in Schedule 6 of the CPA and their application in the court *a quo* had to be determined in terms of section 60(11) (a) of the CPA, which provides as follows:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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"

[17] Section 60(11)(a) places a burden or an onus on an accused to satisfy the court by way of evidence that exceptional circumstances exists which, in the interests of justice, permit his release. In other words, the appellants had to prove on a balance of probabilities in the court a quo that they had to be released on bail. In *S v Bruintjies,*[3] the Supreme Court of Appeal, per Shongwe AJA, as he then was, gave the following exposition on what is meant by exceptional circumstances:

> "…What is required 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 his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence. …If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional

[2] 1976 (3) SA 652 (C).
[3] 2003 (2) SACR 575 (SCA) at para [6].

> have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail".

[18] In this matter, the personal circumstances of the appellants were placed on record and were considered by the magistrate. The first appellant is 27 years old. At the date of his arrest, he was residing at 2 Hlungulu Street, Joe Slovo in Milnerton. The first appellant stated in his affidavit that he has three children aged 4, 6 months and 5 months old. All these children are dependent on him as their mothers are unemployed. He averred that he has other dependants who depend on him too. He stated that he is involved in the taxi transporting industry and her mother is currently struggling to run this business on his behalf. He confirmed that he has a pending case against him.

[19] The second appellant also filed his affidavit in support of his bail application in the court a quo. In his affidavit, the second appellant avers that he is 26 years old and resides at No: 9 Nduli Crescent Illitha Park Khayelitsha. He is unmarried and has twins aged 2 years old. The children reside with their mother in Khayelitsha. He works as a DJ and he charged his clients R700 per hour. His income is dependent on how often he gets booked in a particular month. He does not know the complainant or witnesses in this matter. He has another pending matter of possession of firearm at the regional court in Wynberg. He was willing to pay the bail amount of R2000.

[20] As stated above, both appellant denied any involvement in the alleged commission of the offence. In my view, the innocence or the guilty of the accused is an issue which should be left to the trial court for consideration. What this court has

to consider is whether the court *a quo* erred in dismissing their application to be released on bail. The record reveals that the magistrate in the court below considered the real evidence in the form of photographs, cell phone location based evidence, corroborating evidence in photograph identification parade which identified both appellants as the alleged perpetrators of the crime. The magistrate also considered the fact that the second appellant was identified by the fingerprints that were lifted in the vehicle that was used in the commission of the offence. The magistrate also considered the photograph identification parade which connected the appellants to the charges levelled against them and came to the conclusion that the State has a strong *prima facie* case against both appellants. In my view, the finding of the court a quo in this regard is spot on and cannot be faulted. I agree with the view expressed by the court below that at least *prima facie*, the State case against both appellants is considerably strong.

[21] The court below also observed that the first appellant raised an *alibi* defence in his affidavit and obtained a medical certificate from a traditional healer one Mr Pama indicating that the first appellant was receiving treatment from him at the time when the offence was committed. This medical certificate was also used by the first appellant at the Bellville regional court to show that the first appellant was not wilfully absent from the court proceedings on 24 January 2020 but that he was busy receiving medical treatment from Mr Pama a traditional healer. According to this medical certificate, he consulted Mr Pama from 22 January 2020 to 25 February 2020 hence he could not appear in court on 24 January 2020.

[22] The investigating officer followed up on this *alibi* and obtained an affidavit from Mr Pama who deposed to an affidavit to the effect that he does not even know the first appellant. According to Mr Pama, the first appellant's mother attended to his offices and requested the relevant medical certificate indicating that the first appellant (her son) was in troubled of not attending court. He then issued the said medical certificate on her request.

[23] At the hearing of this appeal, the first appellant's legal representative deprecated the conduct of the investigating officer who followed up on the *alibi* of the first appellant. He also argued that the magistrate erred in attaching weight to it. In my view, this express disapproval of the investigation by the first appellant's legal representative was ill conceived and not well thought out. It is worth noting that during the bail proceedings at the magistrate's court, the first appellant requested the bail proceedings to be postponed as the first appellant indicated that he had an *alibi* defence and that he was going to submit an affidavit in support of his defence. The prosecutor requested the first appellant to favour the State with this affidavit as soon as it was available so that the State could follow up on the *alibi* defence of the first appellant before the hearing of the bail application. The first appellant's legal representative agreed to the State's request and even stated that he would honour the request of his colleague (the prosecutor) as the latter also honoured his request for allowing him to view the video footage relating to the commission of the offence. In other words, the first appellant's legal representative consented to the state following up on the first appellant's *alibi.* The suggestion that the investigating officer acted off-kilter in obtaining the affidavit from Mr Pama is with respect baseless and

unfounded. In my view, the court a quo was correct in considering and attaching weight to the affidavit of Mr Pama.

[24] It has also been argued that this court should not attach much weight to this statement as the credibility of Mr Pama is questionable and that the circumstances under which the statement was obtained are not known. In my view, this document forms part of first appellant's defence. It was filed as an annexure to the first appellant's affidavit and it forms part of this record. This affidavit was intended to be used by the first appellant in support of his *alibi* defence which in turn supported his averment that the State's case against him is weak. If the first appellant intends to challenge the circumstances under which this statement was obtained, the first appellant is at liberty to do so during trial. In my considered view, and *ex facie* the document, I am in agreement with the findings by the court *a quo* that the medical certificate was obtained by fraudulent means in a quest to mislead the court. I also agree with the views expressed by the magistrate that the first appellant misled the Bellville regional court by submitting a medical certificate that he was sick when in fact he was not. This is indicative of the fact that if he is released on bail he is likely to evaded justice.

[25] On a conspectus of all the evidence placed before court, I am of the view that the court a quo was correct in its finding that the two appellants have failed to show any exceptional circumstances which, in the interests of justice, would have permitted their release on bail. In addition, I am satisfied that the learned magistrate correctly applied the provisions of s 60(4), 60(5) and 60(9) of the CPA. Section 60(4) of the CPA clearly provides that the interests of justice do not permit the release from

detention of an accused where one or more of the grounds referred to in the subsections of section 60(4) are established.

[26] What I also find extremely disturbing and inexplicable is that the appellants are applying to be released on bail despite the fact that they were previously granted the same indulgence but messed it up. The appellants expect to be afforded yet another opportunity to be out on bail when they were released on bail in other matters. The current offences that the appellants are facing were allegedly committed while they were on bail. In my view, the finding by the court a quo that there is a likelihood that the released of the appellants on bail would disturb public order or undermine the public peace or security is beyond reproach. From the evidence placed before this court it cannot be disputed that the appellants have the propensity of committing serious offences. They are all facing serious charges some of which were committed whilst they were on bail. If they are released on bail they are likely to commit schedule 1 offences. In my view, it cannot be said that the magistrate was wrong in refusing to admit them to bail. There is no basis in law for this court to interfere with the discretion exercised by the magistrate. In my view, the appeal must therefore fail.

ORDER

[27] In the result, the following order is made:

27.1 The appeal is dismissed.

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT