



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

Bail appeal case number: A254/2021

Magistrate's Court case number: 16/235/2021

In the matter between:

TULISILE TENZA

First appellant

VUSUMZI GQHOBHOKA

Second appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 12 APRIL 2022

VAN ZYL AJ:

Introduction

1. This is an appeal by each of the appellants against the refusal of bail to them

by the Cape Town Magistrate's Court on 14 October 2021.

2. The appellants are both charged with two counts of robbery with aggravating circumstances. The State alleges that the appellants committed a robbery on 13 November 2020 at Visual Impact Terraces where firearms were wielded. The appellants also stand accused of a second charge of robbery on 27 April 2021, which involved in jewellery store in the Cape Town city centre.
3. Aggrieved by the refusal of their respective bail applications, the appellants appeal against the refusal in terms of section 65(1) of the Criminal Procedure Act, 1977 ("the CPA"). The appellants' grounds of appeal were contained in a combined documents and are, essentially, as follows:
 - a. The lower court erred in placing undue emphasis on the seriousness of the offences and finding that the personal circumstances of the appellants did not justify a closer look and do not warrant the granting of bail in the interests of justice.
 - b. The lower court erred in not finding that the following constituted exceptional circumstances:
 - i. The appellants had not conclusively been shown to be a flight risk and have fixed addresses.
 - ii. The appellants did not possess any passports which would enable them to flee the country.
 - iii. The first appellant had minor dependents and is the primary

financial source for his dependents.

- iv. The lower court ignored the “*glaring evidence*” presented by the appellants regarding allegations of the “*unorthodox*” manner in which the investigating officer conducted his investigations, allegedly going as far as manufacturing evidence.
 - v. The appellants pose no danger to the victims and witnesses in the case against them as they have no idea where those persons’ residential addresses are.
- c. The lower court erred in not giving due weight to the personal circumstances of the appellants which in the interests of justice permit their release:
- i. The appellants have fixed addresses and strict bail conditions will cure any flight risk.
 - ii. There were no facts placed before the court that the appellants would not stand trial should they be released on bail, except for the court taking into account the lengthy sentences that might be imposed should they be found guilty.
 - iii. There were no facts placed before the court that the appellants might endanger the safety of the public.
 - iv. The State did not show that the appellants had even been issued with warrants for intentional non-attendance at court.
 - v. There was no evidence to the effect that the appellants would not adhere to any strict bail conditions set by the court.

4. The appellants accordingly contend that they should be released on bail, subject to various conditions.
5. The State opposes the appeal upon considerations that will be dealt with in the course of the discussion below.

The appellants stand accused of Schedule 6 offences

6. The starting point in bail applications generally is section 60(1)(a) of the CPA, which provides that *“an accused who is in custody in respect of an offence shall ... 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.”*
7. Section 60(4) enjoins the Court, in determining a bail application, to have regard to the following factors in deciding whether to grant bail:

“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.”

8. Section 60(11) of the CPA constitutes an exception to the general entitlement to be released on bail as set out in section 60(1), read with section 60(4):

“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;

9. The crime of robbery with aggravating circumstances where a firearm was used is listed under Schedule 6 of the CPA.
10. In the premises, the appellants must show, by adducing evidence, that

exceptional circumstances exist which, in the interests of justice, permits their release on bail. In *S v Petersen* 2008 (2) SACR 355 (C) at para [54] it was stated that “...it is clear that the onus is on the accused to adduce evidence, and hence to prove, the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice”.

11. In paragraphs [55] and [56] of the same case the concept of “exceptional circumstances” was explained as follows (see also *S v Vanga* 2000 (2) SACR 371 (Tk)):

“Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, different degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.”

12. This notwithstanding, a charge in respect of a Schedule 6 offence is not an absolute bar to the granting of bail, and bail is not punitive in character. That much is clear from a proper interpretation of the relevant provisions of the CPA.

When may the magistrate's decision be overturned?

13. In terms of section 65(2) of the CPA, read with section 63(3), the Court is bound by the record, and there is no scope for placing additional facts before the Court for the purposes of the hearing on appeal (*S v Ho* 1979 (3) SA 734 (W) at 737G).
14. Section 65(4) of the CPA 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.*”
15. A court may interfere on appeal when the lower court misdirected itself materially in respect of the relevant legal principles or the facts of the case (*S v Essop* 2018 (1) SACR 99 (GP) at paras [34]-[35]), or where the lower court overlooked important aspects in coming to its decision to refuse bail (*Ramasia v S* (A24/2012) [2012] ZAFSHC 88 (3 May 2012)). The power of the court on appeal are thus similar to those in an appeal against conviction and sentence (*S v Ho* 1979 (3) SA 734 (W) at 737H).
16. Nevertheless, in *S v Porthern and others* 2004 (2) SA SACR 242 (C) the Court observed at para [17] that it remains necessary “*to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the*

question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's discretion to refuse bail was 'wrong'".

17. The mere fact that the reasons for refusing bail are brief, is not in itself a sufficient ground for the court of appeal to infer that insufficient consideration was given to the considerations set out in section 60 of the CPA (*S v Ali* 2011 (1) SACR 34 (ECP) at para [15]).
18. In the present matter, each of the appellants effectively contends that the lower court misdirected itself by overemphasizing the seriousness of the charge at the expense of the appellants, thereby disregarding their personal circumstances, and failing to consider the factors in section 60(4) – especially the factors relating to whether the appellants are flight risks or would interfere with victims and witnesses - as being exceptional in the context of the case.
19. It is against this background that I consider the facts at my disposal, and the argument presented by the parties.

Has the appellant shown the existence of exceptional circumstances warranting the grant of bail?

20. The first appellant's case is, essentially, that he has no knowledge of the crimes

and that he was not involved. He declined to testify on the merits of the matter during cross-examination. He mentions the following factors, which appears from the record:

- a. He is 31 years old, and unmarried. His parents are both deceased.
- b. He has one minor child.
- c. He has a fixed address (the State disputes this, and it was shown during the hearing that he had been living at least two different addresses) and works as a private taxi driver.
- d. He has no previous convictions, although there are two pending matters against him.
- e. He has no outstanding warrants of arrest.
- f. He has a passport.

21. The second appellant also denied any involvement in the crimes, and did not testify on the merits of the case. He relies on the following factors, which appears from the record:

- a. He is 42 years old, and has no children.
- b. He is unemployed and does not have a fixed address.
- c. He has twelve previous convictions, no outstanding warrants, and one matter pending against him.
- d. He does not have a passport.

22. There are, however, various factors that militate against the grant of bail in the present matter.

23. Firstly, the charges against the appellants are serious and there is a strong *prima facie* case against them, despite the appellants' argument that the Magistrate's Court misdirected itself in over-emphasizing the strength of the State's case. The appellants argued that the State's case was weak, and accused the State of not divulging all of its evidence to the appellants and to the court but, as the court correctly held, it was not empowered to compel the State to do as at bail stage. The appellants could have made a formal application for access to the docket at bail stage (*Shabalala and Others v Attorney-General of the Transvaal and another* 1996 (1) SA 725 (CC) but did not do so.
24. The fact that video footage of the appellants linking them to the crimes are available was, however, known to the parties and to the court.
25. The State placed evidence before the Magistrate's Court by way of affidavit from the investigating officer. It appears from the affidavit that, as regards the crime committed on 13 November 2020, the robbery entailed the removal of camera and other equipment to the value of R3 million. The robbery occurred in the morning at about 09:00 after two vehicles had arrived at the store. According to the video footage, the appellants entered the store and the first appellant held a customer and receptionist at gunpoint while further perpetrators entered the store and removed the goods.
26. After the incident, one of the vehicles was found in Langa (a tracker on the vehicle placed it at the scene of the crime). Through investigations it transpired

that the vehicle had been hired from a certain company, and a witness placed both appellants inside one of the vehicles that had driven up to the store on the morning of the robbery. The business premises had CCTV cameras. The footage was circulated on social media and in newspapers, and with the assistance of the public, the first appellant was identified. He was also identified by his brother-in-law who had viewed the footage. Despite the appellants' criticisms in this regard, there is nothing wrong in using social media as an investigative tool.

27. The second appellant was also linked to the scene via video footage. Apart from that, he was observed interacting with the first appellant on various occasions.
28. As regards the robbery that took place on 27 April 2021, the second appellant was identified on CCTV footage as the person breaking a gate to enter the jewellery store. Goods to the value of R245 000,00 were stolen and a firearm was used in the course of the commission of the offence. He was arrested during May 2021 and the same clothing seen on the video footage was found at his residence. The first appellant was arrested a day later and images of some of the stolen items were found on his cell phone. The appellants are further linked to the crime through cellphone communications with each other, as well as video footage from the scene.
29. The offences were premediated and well-planned.

30. It is therefore not “common cause”, the appellants argue, that they were not found in possession of anything that connected them to the robberies.
31. There is, of course, no obligation on an applicant for bail to challenge the strength of the State case – it is not necessary to do so in order to establish exceptional circumstances (*Panayiotou v S* (CA&R 06 /2015) [2015] ZAECHGHC 73 (28 July 2015) at para [56]). But if the applicant does choose to challenge the strength of the State’s case against him in bail proceedings, then he attracts a burden to of proof to show that there is a real likelihood that he will be acquitted at trial. In *Panayiotou v S* (at para [57]), the Court held that, in order to enable the court to come to the conclusion that the State case was weak or that he was likely to be acquitted, he was required to adduce convincing evidence to establish this.
32. This neither of the appellants did, despite their contentions that there was a lack of evidence against them. In the circumstances, I do not think that that magistrate erred in finding that the State had a strong *prima facie* case against the appellants.
33. Secondly, although both of the appellants made serious allegations of unethical conduct against the investigating officer, including allegations of torture, they did not produce any proof substantiating such allegations. They did not lay a complaint or charges of assault against the investigating officer, and did not furnish any medical evidence supporting their claims. An argument to the effect that there are corrupt police officers who engage in questionable behaviour

does not establish credible evidence of wrongdoing on the part of the investigating officer involvement in the present matter. It is therefore not correct of the appellants to criticize the State for not presenting “counter evidence to show that these were just malicious allegations”.

34. In the premises, the magistrate did not err in finding that she had no credible evidence before her to substantiate the claims. She could not make a finding that the investigating officer was not a credible witness.
35. Thirdly, given the evidence against the appellants at this stage and the fact that they face lengthy jail sentences, together with the uncertainties as regards their places of residence, the magistrate correctly held that there is a strong likelihood that they will not stand trial. In *Panayiotou v S* the Court held as follows at para [57]:

“...the magistrate was quite correct to consider as one of the factors in determining whether exceptional circumstances exist, the fact that the prosecution has a reasonably strong case. That factor, of course, is also relevant in the overall assessment of whether the appellant poses a flight risk and whether there is a real likelihood that he will evade his trial. In her judgment the magistrate noted that the likely consequence of a conviction was that the appellant would face potential life imprisonment, given the nature of the offence. This she found would serve as an inducement to evade trial. In so finding the magistrate did not misdirect herself in any manner.”

36. Fourthly, the first appellant was identified as one of the robbers by his own brother-in-law. He knows the witness and may well use the family connection to interfere with the witness.
37. Fifthly, the second appellant has twelve previous convictions, and seemingly a propensity to commit Schedule 1 offences. In terms of section 60(4)(a) of the CPA it is thus not in the interests of justice to grant him bail. He also has another pending case of robbery with aggravating circumstances against him, and may thus wish to evade his trial. The magistrate also found that the State furnished evidence of evasion of arrest on the part of both appellants, as there were sought by the police since November 2020 and could only be located in May 2021.
38. The magistrate did not err in finding that the evasion of arrest pointed to a risk of absconding so as to evade the trial.
39. In the sixth place, the personal circumstances advanced by the appellants do not constitute exceptional circumstances as contemplated by section 60(11). In *S v Botha* [2002] 2 All SA 577 (A) the accused advanced similar circumstances, which the Appellate Division (at para [17]) did not regard as exceptional in the face of a *prima facie* case.
40. In short, neither of the appellants provided any evidence in support for their contention that it would be “in the interests of justice” that they be released on bail. They have not placed any evidence on record which can be relied upon

to prove the existence of exceptional circumstances. On a consideration of the matter as a whole, I am not satisfied that the magistrate's court misdirected itself materially on the legal principles involved, or on the facts. The evidence on record, viewed as a whole, shows that the appellants failed, at the bail hearing, to discharge the onus of proving that exceptional circumstances exist that justify their release on bail in the interests of justice.

41. Given the nature of bail proceedings and in light of the circumstances of this matter, especially where Schedule 6 offences are concerned, this finding does not detract from what was said in *DJVV v The State* (A721/2010, North Gauteng High Court, Pretoria, unreported), upon which the appellants rely: "*To incarcerate an innocent person for an offence which he did not commit could also be viewed as exceptional. It could not have been the intention of the legislature in section 60(4)(a) of the Act to legitimize at random the 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.*"
42. The magistrate was very much aware of this, expressly stating in the course of a discussion as regards the nature and requirements of bail proceedings that the "*court must be very mindful that to arrest somebody, to detain a person to attend trial, is very serious and that [indistinct] of the person's right to freedom*".

Order

43. In the circumstances, it is ordered as follows:

In respect of the first appellant, the appeal is dismissed.

In respect of the second appellant, the appeal is dismissed.

P. S. VAN ZYL

Acting judge of the High Court

D. Zantsi for the appellants (instructing attorney unknown)

K. Uys for the respondent (Director of Public Prosecutions, Western Cape)