IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No. CA and R 1/03

In the matter between:

ISAAC PHIRI **Appellant**

And

THE STATE **Respondent**

JUDGMENT

PLASKET AJ:

[1] The appellant appeals against the refusal by a magistrate of a bail application brought by him. He appeared in person. The State, represented by Ms Williams, opposes the appeal.

[2] The appellant was charged with various offences. First, he was charged, along with three other accused, with the offence of theft in that, the State alleges, they conspired with each other and others to steal blank cheques from the Department of Justice.

[3] Secondly, they were also charged with a conspiracy to commit fraud, alternatively, inducing another to commit fraud, or attempting to commit fraud, in that they supplied two persons, Patel and Dowling, 'with a cheque made out for an amount of R395 275.00 drawn on the account of the Department of Justice in favour of a firm named Special Business Information of which Patel was the signatory, and with the intention to incite, instigate, command or procure them to commit fraud, requested the said Patel and/or Dowling to

deposit the said cheque in the bank account of Special Business Information, thereby falsely giving out that it is a valid cheque and that the drawee is entitled to the proceeds thereof and in so doing inducing the bank, to the loss and prejudice of the Department of Justice, to pay out the amount of R395 275.00 to the said Patel, which amount the accused would have divided among themselves'.

[4] The appellant was, furthermore, charged with the unlawful possession of a Z88 9mm pistol, in contravention of the Arms and Ammunition Act 75 of 1969. His co-accused were not charged with this offence.

[5] The trial of the appellant is part heard. It would appear that the State's case is almost complete. The appellant has, however, been in custody for over three and a half years. He brought an unsuccessful bail application prior to the bail application that is the subject of this appeal. When two other cases that were pending against the appellant were concluded – one was withdrawn and, in the other, the appellant was convicted on a charge of unlawful possession of a firearm and sentenced to a suspended sentence of imprisonment – the appellant brought the bail application in issue in these proceedings. He alleged that the fact that the above-mentioned cases had been concluded was a new fact of sufficient importance to justify his release on bail.

[6] The judgment of the magistrate, in dismissing the bail application, reads as follows:

> 'Mnr Phiri, u het vantevore voor my verskyn in 'n borgaansoek en by die vorige aangeleentheid, nadat ek getuienis aangehoor het en nadat die saak voor my gele is, het ek nadat ek al die feite oorweeg het, bevind dat ek nie oortuig is dat dit in die belang van die geregtigheid is dat u op borg vrygelaat word nie. Hierdie vorige uitspraak het ek gegee op 9 Mei 2001.

U doen nou weereens aansoek om borg. U doen aansoek om borg op nuwe feite. Die nuwe feite is vervat in ‘n document wat hier ingehandig is as bewysstuk ‘X’. Bewysstuk ‘X’ is ‘n volledige uiteensetting van die possisie envan die feite. Die nuwe feite, soos dit blyk, is dat daardie uitstaande sake wat voorheen teen u was, nou nie meer oor u hang nie. Dit is inderdaad die enigste nuwe feite waarop ek gevra is om te beslis.

By die vorige geleentheid was dit nie die enigste rede waarom ek borg geweier het nie. Ek het borg op die totaliteid van die feite geweier omdat ek nie oortuig was dat dit in die belang van regspleging is dat u moet vrygelaat word op borg nie.

In die lig van die vorige feite, soos deur my uiteengesit, tesame met die oorweging dat sekere van daardie aspekte verval het, is ek nog steeds nie oortuig dat ek u in die belang van geregtigheid op borg moet laat nie. U word in hegtenis aangehou.’

[7] When given the opportunity to comment on the letter from the appellant to the Chief Magistrate, Port Elizabeth which serves as a notice of appeal, the magistrate stated that he had nothing to add to his reasons set out in his judgment but stated that ‘[a]s in the original refusal I found that the appellant did not show that his release on bail would be in the interests of justice’. He also stated that the judgment in the first bail appeal has not been transcribed and was not before him when he considered the second bail application.

[8] Exhibit ‘X’, referred to by the magistrate in his judgment, is a document prepared by the appellant’s attorney and confirmed in all material respects by the appellant in his evidence. It sets out his personal circumstances as they relate to the issue of bail and a number of other relevant factors. The appellant admitted to having previous convictions but the list of previous convictions referred to in the record as exhibit ‘Y‘ is not part of the record. The only previous convictions that are on record are a conviction for escaping from

custody and the appellant's recent conviction for the unlawful possession of a firearm. For the rest, exhibit 'X', when taken with his evidence, contains factors that are in the favour of the appellant and factors that are to his detriment.

[9] The appellant's evidence, taken together with exhibit 'X', establishes the following: that the appellant is a 61 year old man who has a permanent address, and has resided at the same address for over 40 years; that he is married, although his wife appears to have left him, and has six children, three of whom are still minors; that he owns the property in which he lived prior to his arrest and that he worked, for four years prior to his arrest, as a truck driver; that, as stated above, he has previous convictions which include a previous conviction for the unlawful possession of a firearm and one for escaping from custody; that the offences in the present case were allegedly committed after the appellant had been released on bail in another matter; that he no longer has other cases pending against him but for this one; that in his previous dealings with the criminal courts, he has always presented himself at court when required to do so and he has never had his bail estreated; that he has been in custody for over three and a half years; that his co-accused have been released on bail; and that his children are struggling without him to provide for them.

[9] In addition, it appears from submissions made by the prosecutor from the bar that the case against the appellant and his co-accused is a strong one, particularly because two of the State witnesses are agents who infiltrated the syndicate and who taped various conversations that incriminate members of the syndicate; and that the charges are serious, particularly because of the amount involved and the fact that the offences were allegedly committed by a syndicate of which the appellant and his co-accused were members. It is conceded in exhibit 'X' that the charges are indeed serious and that the probable consequences for the appellant if he is convicted are also serious.

[10] The State has submitted that, as a result of the charges that the appellant faces, Schedule 6 of the Criminal Procedure Act 51 of 1977, read with s60(11)(a) placed the onus on the appellant to satisfy the court below that 'exceptional circumstances exist which in the interests of justice permit his or her release'. No written confirmation to this effect has been handed in by the State in terms of s60(11A) and the correctness of the state's submission in this regard must be answered with reference to the charge sheet and the evidence that has been adduced at the bail application.[1]

[11] In my view, Schedule 6 is not of application. It can only apply in this case, on the evidence before me, if the Schedule 5 offence that the appellant is undoubtedly charged with – that 'relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft … involving amounts of more than R100 000.00' where the offence 'was committed by a person, group or persons, syndicate or other enterprise acting in the execution or furtherance of a common purpose or conspiracy' -- is 'converted' into a Schedule 6 offence.

[12] Schedule 6 provides for such a 'conversion' in two sets of circumstances. First, it changes a Schedule 5 offence into a Schedule 6 offence when an accused 'has previously been convicted of an offence referred to in Schedule 5 or this Schedule' and secondly, it changes a Schedule 5 offence into a Schedule 6 offence if it was allegedly committed while the accused was released on bail in respect of a Schedule 5 or 6 offence.

[13] The evidence does not establish either set of circumstances. While it is true that the appellant has a previous conviction for the unlawful possession of a firearm (an R4 rifle, it would appear) and that he was released on bail in respect of that offence when the offence in issue in this case was allegedly

1 *S v Botha* 2000 (2) SACR 201 (T), 204h-205e; *S v Josephs* 2001 (1) SACR 659 (C), 661f-i.

committed, no evidence was tendered to bring this offence within the terms of the Schedule 5 offence of being in unlawful possession of an automatic or semi-automatic firearm.[2]

[13] I do not know whether exhibit 'Y', a list of the appellant's previous convictions, would have established that he fell within the terms of Schedule 6. This exhibit was not part of my record and, indeed, when I asked Ms Williams about it, she told me that it was also not part of her record. The appellant, not having been legally represented, cannot be blamed for this omission. If it was important to the State's case, I would have expected the State to make sure that the exhibit was part of the record. Even if it did not intend to rely on it, it is important that presiding officers have as much relevant information at their disposal in order properly to balance the public interest and the right to personal freedom of an accused person in bail applications.

[14] I intend to proceed on the basis that the appellant is not charged with a Schedule 6 offence but a Schedule 5 offence. This will mean that he was only to satisfy the court below, in order to be entitled to release on bail, that the interests of justice permitted his release.[3] This appears to be the test that the magistrate applied. I may only interfere with the magistrate's decision in the circumstances set out in s65(4) of the Act. This section provides that the court or judge hearing a bail 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] The magistrate stated in his judgment that he did not only take into account the pending cases when he first refused the applicant's bail

2 On the need for the state to prove that a firearm is a semi-automatic or automatic firearm for purposes of the application of the minimum sentence legislation contained in the Criminal Law Amendment Act 105 of 1997, and how this should be proved, see *S v Nziyane* 2000 (1) SACR 605 (T) and, on the limits of judicial notice in this respect, see *S v Ratte* 1998 (1) SACR 323 (T), 337h-338i.

3 Section 60(11)(b).

application and that there were a number of other factors that he took into account. As a result, he held, in effect, that the new fact was not sufficiently weighty to satisfy him that the interests of justice permitted the appellant's release on bail. While there are factors that are in favour of the appellant's release on bail, I am of the view that, in the light of the seriousness of the charges against the appellant, the strength of the State's case, the fact that the State case is nearing completion (and the end of the trial is therefore not too far off) and the high probability that, if convicted, the appellant will be sentenced to a term of imprisonment, it is not possible for me to conclude that the magistrate was wrong.

[16] I would add, however, that three and a half years appears on the face of it to be an inordinately long time for a person to spend in custody as an awaiting trial prisoner. I trust that the State will make every effort to ensure that when the case proceeds, it proceeds to finally as quickly as possible.

[17] The appeal is accordingly dismissed.

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C PLASKET
ACTING JUDGE

Date of Hearing: 31 January 2003
Date of Judgment: 6 February 2003