

/HJCB

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 12 MAY 2006

CASE NO: A303\2006

IN THE MATTER BETWEEN:

PHILLY MPHALELE

APPLICANT

AND

THE STATE

RESPONDENT

JUDGMENT

PATEL, J

[1] This is an appeal against the refusal by the Pretoria Regional Court Magistrate to admit the appellant to bail.

[2] The appellant is 27 years old. He is charged with the crime of robbery with aggravating circumstances. He brought an application, in terms of the provisions of section 60(11) of the Criminal Procedure Act 51 of 1977, to be admitted to bail.

[3.] The appellant stands accused of a crime falling under Schedule 6 to Criminal Procedure Act 51 of 1977.

- [4.] The appellant testified that he has a fixed address in Tembisa, where he is a tenant. He also furnished the court *a quo* with the address of his parental home in Limpopo Province. He is self employed and earning an income of R6000.00 from which he supports his two minor children, his unemployed mother and two siblings. All of them are dependant on him for their livelihood. The appellant also testified that his continued incarceration would result in him being financially ruined and that this will directly affect his children, his mother and siblings who are dependant on him for support.
- [5.] The appellant indicated that he does not have any previous conviction nor any pending case as contemplated by the provisions of 60 (11) (B).
- [6] According to the appellant that he was on his way home after visiting a cousin who is employed as a gardener and lives at his employer's premises. He walked for distance until he got a lift from a bakkie with three occupants. He climbed on the back of the vehicle. After a while, a security car emerged from behind the bakkie and knocked into the back of the vehicle. A shoot out ensued between the an occupant of the bakkie and the security

vehicle. The bakkie swerved after it was knocked by the security vehicle, and he fell off the vehicle and was rendered unconscious. When he regained consciousness he found himself in custody at the police station. He testified that he knew nothing about the robbery and will plead not guilty, at his trial.

[7] The appellant further testified that he does not have a passport and have never travelled outside South Africa. He stated that if he is admitted to bail, he will stand his trial and that he will abide by any bail conditions imposed on him. He indicated that he does not know any of the witnesses.

[8] The State relied on the evidence of the investigation officer, Inspector Manganye who testified that he arrived at the scene he found the appellant was bleeding and arrested him. He found a couple sitting in their bakkie and they were accosted by unknown males who robbed them of their bakkie at gunpoint. He further testified that someone saw what was happening and pursued the bakkie. A shoot out occurred and after a while the bakkie came to stand still. The occupants ran away in different directions and he pursued the appellant who was the person firing the shots. The appellant was arrested and was found in possession of a firearm.

[9] In a comprehensive judgment the magistrate gave reasons in denying the appellant bail to the appellant because he unable to show any exceptional circumstances

[10] In the argument before me, Mr Matome, counsel for the appellant, confined his submissions that the magistrate's erred in refusing to admit the appellant since by virtue of section 60(9)(d) a court may take into account any financial loss which a person may suffer owing to his continued incarceration. It was contended that the appellant's financial loss has a direct impact on his children, mother and siblings. This constituted exceptional circumstances. To support this contention, Mr Matome submitted that the appellant testified that he runs a business and his continued incarceration would result in him sustaining financial loss. The nature of his business is a tuck shop or in common parlance described as a "spaza shop".

[11] However, Mrs Du Preez-Esotka submitted that the appellant has a spaza shop, which is taken care of by a 12 year old boy and he not

sustaining any financial loss. The appellant is an informal trader. In refusing bail the magistrate applied her mind and found no exceptional circumstances, since financial loss by itself is not sufficient to constitute exceptional circumstances. Counsel for the State further submitted that having regard to all the relevant factors, the charge against the appellant is a serious one. The State has an exceptionally strong case. The witness places the appellant in the vehicle sitting in the passenger seat and he fired the shots, and he was found in possession of a 9mm firearm.

- [12] Mr Matome in reply conceded that this is a serious offence. However, he persisted in his submission that the financial loss that is sustained by the appellant constituted exceptional circumstance.

- [13] In *S v Makgoje* 1991(1) SACR 283(NC) it was held:

“dat die feit dat die appellant se besigheid deur sy aanhouding benadeel is, nie as ‘n buitengewone omstandighede beskou kan word nie.”

(cf: Kriegler & Kruger, *Hiemstra: Suid-Afrikaanse Strafproses*, led (2002) p 162)

[14] I am of the view that in some cases an accused person may have a substantial business interests and may be regarded as an exceptional circumstances. This will depend upon the nature, type and permanency of the business. An informal trader running a spaza shop or tuck shop lacks permanency In the absence of factual evidence it is not a substantial business entity to be regarded as an exceptional circumstances.

[15] In the final analysis, having studied the magistrate's judgment, I am satisfied that the appellant is charged with a Schedule 6 offence. That being the position, the magistrate was obliged to keep the appellant in custody pending the determination of this trial. The magistrate considered and weight the personal interests of the appellant against the interest of justice. The magistrate properly and judiciously came to the conclusion that the appellant failed to adduce evidence to satisfy the court to that exceptional circumstance existed which in the interest of justice permitted his release on bail. The magistrate found that no exceptional circumstance were established by the appellant, thus she was justified in refusing bail to the appellant. In my opinion, the magistrate neither erred nor misdirected herself in any way.

[16] Accordingly, the appeal is dismissed.

E M PATEL
JUDGE OF THE HIGH COURT

HEARD ON: 26 April 2006
FOR THE APPLICANT/PLAINTIFF: ADV MATOME
FOR THE RESPONDENT/DEFENDANT: ADV DE PREEZ PSOTKA
DATE OF JUDGMENT: 12 MAY 2006