SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. A188/2009

DPP Ref. No. JAP 2009/200

In the bail appeals of:

VICTOR TSHEPO TWALA	First Appellant
LEBOGANG IGNATIUS MOTSOANE	Second Appellant
THAPELO CLIFFORD MOGOSHI	Third Appellant
PATRICK SITHOLE	Fourth Appellant

and

THE STATE

MEYER, J

[1] This is an appeal by the four appellants against the refusal to grant them bail by the Regional Court, Protea. Their bail applications were heard and refused on 25 February 2009.

[2] Mr ES Classen, an attorney from Attorneys David H Botha, Du Plessis & Kruger Inc who represented the appellants in this bail appeal, was unable to shed any light on the extraordinary delay in the prosecution of this appeal other than to inform me that Attorneys David H Botha, Du Plessis & Kruger Inc. was initially instructed to appear on behalf of the appellants, but their mandate was terminated before the hearing of the bail application on 25 February 2009. The termination of their mandate appears from a notice dated 22 January 2009. The appointment of *inter alia* Mr Classen appears from the special powers of attorney signed by each appellant on 7 April 2009.

[3] The State, represented by Adv Kampa, conceded that the lower court's decision to refuse bail to the second and fourth appellants was wrong. This concession, in my view, was correctly made. The only evidence that the State placed before the court *a quo* in rebuttal of the second and fourth appellants' denials in their affidavits of their involvement in the commission of the offence under consideration, was an affidavit made by the investigating officer in which he stated that accused 1, who is the first appellant, made a confession, he was charged and he pointed out accused 2, who is the second appellant, who, in turn, pointed out accused 3, who is the third appellant, and accused 4, who is the fourth appellant. The first appellant's mere alleged pointing out of the second appellant is vague and meaningless. If it is accepted that the first appellant's alleged pointing out implicated the second appellant, then it is not clear whether

such pointing out formed part of the first appellant's confession or whether it formed part of a separate pointing out made by him. If it formed part of the confession, then it would be inadmissible in terms of s 219 of the Criminal Procedure Act 51 of 1977 ('the CPA'). If it formed part of a separate pointing out implicating the second appellant, then such pointing out may well amount to an admission by conduct, which constitutes hearsay evidence as defined in s 3 (4) of the Law of Evidence Amendment Act 45 of 1988 that may, subject to the provisions of any other law, not be admitted as evidence against the second appellant unless the requirements set out in ss (a), (b), or (c) of s 3(1) of that Act are satisfied. See: *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) and *S v Molimi* 2008 (2) SACR 76 (CC).

[4] At the conclusion of the argument before this Court yesterday morning, an order was issued for the release of the second and fourth appellants on bail of R5 000.00 each subject to appropriate conditions proposed by the State and the defence. Judgment on the bail appeals of the first and second appellants was reserved until this morning to afford me the opportunity of considering counsels' submissions overnight.

[5] No *viva voce* evidence was led either in support of or in opposition to the appellants' bail applications. The affidavits made by appellants were presented and first read into the record by their legal representatives, whereafter an affidavit made by the investigating officer was presented and read into the record by the

prosecutor. The record of the bail proceedings in the court *quo* shows that, from beginning to end, the State, the appellants, their legal representatives, and the learned regional magistrate approached the bail applications on the basis that s 60(11)(a) of the CPA applied to them, because the offence in issue was one referred to in Schedule 6.

[6] There is, however, no indication on the record that the appellants had been 'charged with a definite, circumscribed and understandable offence' [*Prokureur-Generaal, Vrystaat v Ramokhosi* 1997 (1) SASV 127 (OPA), at p 156 c – f and *S v Kock* 2003 (2) SACR 5 (SCA) at p 9 g – h], no written confirmation as envisaged in s 60 (11A) was handed in, and no evidence was led by the State to first establish the required jurisdictional fact for the application of s 60(11)(a) [*S v Kock* (*supra)* at p 9 f].

[7] In his affidavit the first appellant stated that he was being 'charged with business robbery', he denied that he 'participated in the said robbery', he stated that he would disclose the basis of his defence at the trial, and he stated that in his opinion there existed exceptional circumstances since the case against him was weak. The third appellant stated that he was charged with '[r]obbery aggravating circumstances' and he further stated that he 'did not commit any offence', he was taken by surprise when the police arrested him, and also that he would disclose the basis of his defence at the trial.

[8] The relevant rebutting evidence appearing from the investigating officer's affidavit reads:

> '3.
> Victor Twala [the first appellant] reported that he and the security guard were robbed of about five television sets. He Victor Twala later made a confession to a captain that he initiated the robbery because the owner of the pub or business does not pay them, firearm was used and recovered.
> 4.
> Victor Twala was charged and he pointed out Lebogang Motsoane [the second appellant] and accused no. 2 [the second appellant] pointed out accused no. 3 [the third appellant] and 4 [the fourth appellant].
> 5.
> All the television sets were recovered from a Mr. Nazeer Bhayat who said that accused no. 3 brought them to him in Lenasia at his house.'

[9] The allegations implicating the first and third appellants in the commission of the offence under consideration are extremely vague and unspecific. It is not known whether the *'confession'* referred to by the investigating officer was indeed one and what material incriminating the first appellant it contains. It may not be a *'confession'* at all despite its labelling as such by the investigating officer and his interpretation of its incriminatory content may be unsound. The second appellant's mere alleged pointing out of the third appellant is vague and meaningless. It does not implicate the third appellant in the commission of the Schedule 6 offence under consideration. If it does, then it may well amount to an admission by conduct, which constitutes hearsay evidence as defined in s 3 (4) of the Law of Evidence Amendment Act 45 of 1988. The allegation that the third appellant *'brought'* the television sets in issue to Mr Bhayat at his house in Lenasia does not, in the absence of more information, inferentially implicate the

third appellant in the commission of any offence, let alone the commission of the Schedule 6 offence under consideration. He could have done so at the request of Mr Bhayat and in ignorance of the commission of any crime. It should also be mentioned that the date or place of the offence under consideration was not disclosed and nor was the date upon which the third appellant *'brought'* the television sets to Mr Bhayat at his house.

[10] The record of the bail proceedings furthermore does not support the learned regional magistrate's finding that the appellants stood 'before court charged with robbery with aggravating circumstances, possession of a firearm and possession of ammunition. The affidavit evidence of the investigating officer, in my view, was also insufficient to establish the required jurisdictional fact for the application of s 60(11)(a) to the bail applications of the first and third appellants. I nevertheless proceed on the assumption that the totality of evidence established the required jurisdictional fact.

[11] The strength of the State's case against an applicant for bail is relevant to the existence of 'exceptional circumstances' within the context of s 60 (11)(a). See *S v Botha en 'n Ander* 2002 (1) SACR 222 (HHA), at p 230 g – i. The learned regional magistrate appears to have accepted the prosecutor's submissions of a strong State case against the appellants. Such was not established. On the evidence presented, the learned regional magistrate was in no position to even form a *prima facie* view as to the strength or weakness of the

State case and the appellants should have received the benefit of the doubt. See *Kock (supra)*, at p 11i – 12 b.

[12] The learned regional magistrate further appears to have accepted the prosecutor's submissions of the likelihood that the appellants might interfere with State witnesses. The State witnesses referred to are Mr Pillay and Mr Bhayat. Such a likelihood was simply not established. Both appellants undertook not to interfere with State witnesses. The imposition of a suitable bail condition prohibiting the appellants from having any direct or indirect contact with the said State witnesses would have protected the witnesses adequately.

[13] Adv Kampa submitted that the proper course would be to remit the bail applications of the first and the third appellants to the regional court for the learned regional court magistrate to act in accordance with the provisions of s 60(3) of the CPA. I disagree. The required jurisdictional fact for the application of s 60(11)(a) should have been established by the State and the prosecutor was at liberty to lead any evidence she considered appropriate on the merits. The appellants should have received the benefit of the doubt and to remit the matter in the circumstances of this case will merely afford the State a second bite at the cherry.

[14] The appellants have, in my judgment, established the requisite circumstances that permit their release in the interests of justice.

[15] In the result the following order is made:

A. The bail appeals of the first and third appellants succeed.

B. The order of the learned regional magistrate, Mr Mahungu, made on 25 February 2009 in terms whereof the first and the third appellants' bail applications were refused, is set aside and replaced by the following order:

1. Accused 1 and the accused 3 are released on bail subject to the conditions that each accused:

1.1 is to be released from custody upon payment of the sum of R5 000.00;

1.2 must report to the SAPS, Kliptown once a week on a Monday between the hours of 08h00 and 20h00; and

1.3 is prohibited from having any direct or indirect contact with the State witnesses Mr Pillay and Mr Bhayat;

1.4 must appear before court on the date and the place and the time determined for his trial.

P.A. MEYER
JUDGE OF THE HIGH COURT

30 April 2009