REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14 August 2023
DATE

SIGNATURE

CASE NUMBER: A69/2023

In the matter between:

KGATLE BONGANI APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO J:

Introduction

[1] This is an appeal against the refusal by the Regional Magistrate of Johannesburg to grant bail to the appellant pending his trial.

[2] The appellant is charged with an offence of robbery with aggravating circumstances which amounts to a schedule 6 offence. It is alleged that there was infliction of bodily harm by the appellant in respect to the complainant. Accordingly, the provisions of s60(11)(a) of the Criminal Procedure Act 51 of 1977 ('Criminal Procedure Act') apply.

[3] A formal bail application was held on 24 May 2022. The appellant proceeded with his bail application by way of affidavit to prove that exceptional circumstances existed which warranted his release on bail. The Court *a quo* denied the appellant bail on 24 May 2022.

[4] The appellant was legally represented during the bail application proceedings.

[5] In the appellant's notice setting out his grounds of appeal, the appellant contends the following:

'1. The learned magistrate erred in finding that the appellant failed to show exceptional circumstances that permit his released on bail.
2. The learned magistrate erred in finding that the state case is strong against the appellant and that the appellant is danger to the community.
3. The learned magistrates erred in finding that the appellant pose a flight risk.
4. The learned magistrates' erred in not taking into account the personal circumstances of the appellant, which includes "inter alliar" his age and his 3 (three) minor children as well is the purpose of bail.
5. The learned magistrate erred in ignoring the principal of presumption of innocence and his constitutional rights in chapter two (2) in the Bill of Rights.
6. The learned magistrate erred in not taking into account factors outlined in Section 60(4)(a) the -(e) of criminal procedure act 51 of 1977.'

[6] The respondent's counsel contended that the Court *a quo* dealt fully with these aspects and as a result, supported the refusal to admit the appellant to bail. The respondent contends that the appellant failed to discharge the onus resting upon him that exceptional circumstances existed and furthermore, failed to show that the judgment of the Court *a quo* was wrong as required by s65(4) of the Criminal Procedure Act.

[7] The State prosecutor in the Court *a quo*, did not file an affidavit to oppose bail, but elected to address the Court from the bar.

Legal principles

[8] The charge falls within the category of offences listed in schedule 6 of the Criminal Procedure Act. Robbery as defined in schedule 6 includes:

'(b) the infliction of grievous bodily harm by the accused…'

[9] In the matter *in casu*, it is alleged that the appellant stabbed the complainant and burnt him with a candle.

[10] Section 60(11)(a) of Act 51 of 1977 states:

'Notwithstanding any provision of the 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.' [my emphasis]

[11] In the context of s60(11)(a) of the Criminal Procedure Act, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed,*[1] it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed,*[2] it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. So the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[12] In the matter of *S v Mazibuko and Another,*[3] the Court held that for the circumstance to qualify as sufficiently exceptional to justify the appellant's release on bail, it must be one which weighs exceptionally heavily in favour of the appellant, thereby rendering the case for release on bail exceptionally strong or compelling.

[13] In the matter of *S v Kock,*[4] the Supreme Court of Appeal stated that:

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[1] *S v Mohammed* 1999 (2) SACR 507 (C).
[2] Ibid (note 1 above).
[3] *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP).
[4] *S v Kock* 2003 1 All SA 551 (SCA).

'In the context of s 60(11)(a) of the Act the strength of the State case has been held to be relevant to the existence of 'exceptional circumstances'…When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt.'[5]

[14] In the matter of *S v Mathebula*[6] the Supreme Court of Appeal held that:

'…In order [to] successfully challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha* 2002 (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556c.'[7] [my emphasis]

[15] In the matter of *S v Smith and Another*,[8] the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'.[9]

[16] In *S v Bruintjies,*[10] the Supreme Court of Appeal stated that:

'(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the bona fides or reliability of the appellant save by the say-so of his counsel.'[11]

[17] In the case of *Mathebula*,[12] the Supreme Court of Appeal stated that:

'In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive'.[13]

[18] In terms of s65(4) of the Criminal Procedure Act, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

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[5] Ibid para 15.
[6] *S v Mathebula* 2010 (1) SACR 55 (SCA).
[7] Ibid para 12.
[8] *S v Smith and Another* 1969 (4) SA 175 (N).
[9] Ibid at 177 e-f.
[10] *S v Bruintjies* 2003 (2) SACR 575 (SCA).
[11] Ibid para 7.
[12] S v *Mathebula* (note 4 above).
[13] Ibid page 59B-C.

Evaluation

[19] The affidavit which was read out and handed in by the appellant's legal representative in the Court *a quo* consisted of the following averments, namely;

(a) That he is a 25 year-old South African citizen, born in South Africa on 24 March 1987 and that he has been residing in Diepkloof, with his mother and three siblings and that this address is his permanent home.

(b) That he is single and the father of three minor children, aged seven, six and one years-old respectively.

(c) That he was self-employed repairing electrical appliances and was earning R500-00.

(d) That he does not own any immoveable assets.

(e) That he has no previous convictions or any pending cases.

(f) That at the time of his arrest he was not found in possession of any of the goods and no identity parade was held. As a result, there is a weak case against him and he will be pleading not guilty.

(g) That there is no likelihood that he will evade his trial or that he will interfere with any witnesses or that he will jeopardise the proper functioning of the legal system.

[20] In the appellant's heads of argument the additional factors were added, namely:

(a) That the accused has no relatives or friends outside the republic, and

(b) That he is not a violent person.

[21] The appellant's counsel referred this Court to the matter of *S v Dlamini and others*[14] where the Constitutional Court held that the purpose of bail is to strike a balance between the interests of society and the liberty of the accused person and to maximize personal liberty in accordance with the Bill of Rights.

[22] The appellant did not present *viva voce* evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of *Bruintjies*[15] and *Mathebula,*[16] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen them. In fact, it appears that the appellant's affidavit is a mere repetition of s60(4) of the Criminal Procedure Act. As stated in *Mathebula,*[17] parroting the

[14] *S v Dlamini and others* 1999(2) SACR 51 (CC); *S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC).
[15] *S v Bruintjies* (note 7 above).
[16] *S v Mathebula* (note 4 above).
[17] Ibid para 15.

grounds referred to in s60 (4) of the Criminal Procedure Act does not establish any ground to be released on bail.

[23] After a perusal of the record of the court *a quo*, this Court finds that there is no persuasive argument to release the appellant on bail. This Court's reasons are as follows:

(a) the evidence before the court *a quo* supports the finding that the appellant failed to prove or establish exceptional circumstances;

(b) the attack on the weakness of the state's case becomes less persuasive as it is not subjected to cross-examination.

(c) The evidence against the appellant is strong. The State prosecutor in the Court *a quo* informed the Magistrate that the complainant was attacked in his home and that he was stabbed. The complainant then followed the accused and he called back-up from the Community Policing Forum who then assisted to arrest the accused.

[24] The respondent's counsel added further information which was not placed before the Court *a quo*, namely:

(a) The complainant was awaked by three men in his own home.

(b) One man pointed a firearm at him and the other man pointed a knife at him. The complainant knows two of the men who have still not be arrested, namely, 'Zama' and 'Lesley'.

(c) The third man, who is the appellant in the matter *in casu*, was described by the complainant as being dark in complexion and stout. This man was arrested shortly after the incident had happened.

[25] The respondent's counsel stated that the investigation is complete and the trial is to commence on 7 September 2023.

[26] In the course of a bail application, the Magistrate need not make a finding as to the guilt or innocence of the accused. All the Court has to do is to weigh the *prima facie* strength or weakness of the State's case.

[27] This Court cannot find that the Court *a quo* misdirected itself. This Court finds that the appellant has not successfully discharged the onus as contemplated in section 60(11)(a) of the Criminal Procedure Act in that there are no exceptional circumstances which permit his release on bail.

[28] Accordingly, there are no grounds to satisfy this Court that the decision of the court *a quo* was wrong.

Order

[29] In the result, the appellant's appeal is dismissed.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 August 2023.

Date of hearing:	11 August 2023
Date of Judgment:	14 August 2023

Appearances:

On behalf of the appellant	Adv W. Makhubela
On behalf of the respondent	Adv J. Masina