IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

APPEAL NO: A604/2017

21/12/2017

In the appeal of:

OWEN BONGINKOSI SIKHOSANA **APPELLANT**

and

THE STATE

JUDGMENT

VUMA, AJ

[1] The appellant appeals in terms of section 65 of the Criminal Procedure Act 51 of 1977, hereinafter "the Act" against a decision of the Pretoria Regional Court delivered on 29 September 2017 in terms of which he was refused admittance to bail.

[2] He is arraigned as accused no. 2 in the Pretoria Regional Court on four charges, namely, robbery with aggravating circumstances (count 1); unlawful possession of firearms (count 2); unlawful possession of a fully automatic firearm and unlawful possession of ammunition (count 4).

[3] It is common cause that the offence mentioned in count 1 brought the appellant's bail application within the purview of Schedule 6 of the Act. It is so that once the incidence of onus has shifted to an accused person, then the accused will begin to lead evidence orally or by way of affidavit. The accused must prove the existence of exceptional circumstances on a balance of probabilities that it will be in the interests of justice for him or her to be released on bail.

[4] The appellant placed evidence before the court *a quo* raising, *inter alia,* the following issues:

1. abscondment;
2. interference with state witnesses; and
3. interference with police investigations
4. the strength of the state's case against him.

[5] Added to the above, the following circumstances of the appellant were placed before the court:

1. He is South African and a taxi driver by employment who, in the event he is admitted to bail, will reside at [….], Johannesburg with his sibling/s;

2. He has no travel documents;
3. He has no previous convictions nor pending cases;
4. He is married man with two minor kids;
5. His wife is employed as a domestic worker;
6. In the event he is released on bail, his then employer, Mr Ncube, will still offer him his job back as a taxi driver;

7. The State's case against him is weak since all the allegations made by the Investigating Officer (I.O) in his opposing affidavit is generalisation and vague;

8. Some of his co-accused have since been admitted to bail;
9. He has been in custody for a period of over 3 (three) years;

10. He owns no assets nor any immovable property (as alleged by the State); and
11. Some of the appellant's co-accused were admitted to bail after bail was set in the amount of R20 000-00.

[6] In terms of section 60(10) of the Act a duty is imposed on a court hearing a bail application to weigh up personal circumstances of an accused against the interests of justice. The prejudice the accused will likely suffer has to be balanced by taking into account factors enumerated in section 60(9) of the Act.

[7] The issue giving rise to the appeal are as follows:
The appellant was arrested together with 12 other suspects who were all travelling in a taxi. The Vodacom Store in Centurion Mall was robbed with firearms having been used. Item to the value of R900 000-00 were taken. Within 30 minutes of the robbery having taken place the appellant and others were arrested. All the occupants in the taxi including the driver were arrested. Inside the taxi were all the items robbed at Vodacom as well as five (5) 9mm pistols, and an R5 rifle and ammunition.

[8] On behalf of the appellant it is submitted that the court a *quo* misdirected itself by incorrectly interpreting and applying the provisions of section 60 of the Act in the following respects:

8.1 The finding that the incriminating evidence against the appellant was damning and overwhelming. The appellant's counsel submits, *inter alia,* that the Investigating Officer, hereinafter "the 1.0", failed to demonstrate the specific ambit and/ or cogency of the alleged incriminating evidence in respect of the appellant given the fact that a combined bail application for the appellant and accused no. 1 was held. It is further submitted that the said combined bail application made it unclear as to how the video evidence as stated in the I.O's affidavit implicated the appellant, given the generality and the vagueness of his explanation linking the appellant and accused no.1 to the alleged crimes.

8.2 The finding that the appellant's familial ties and assets did not count in his favour. The appellant's counsel submits that the fact that none of the appellant's siblings did not inform the 1.0 that the appellant was married with two kids does not negate the fact that the appellant is married with two minor children. It is further submitted that this fact is confirmed by the birth certificate of one of the said two minor kids which the appellant attached to his bail application affidavit.

- It was further submitted that the above facts coupled with the three years the appellant had been in custody awaiting trial and the prospects of his *alibi* defence, established that an exception be made and bail be granted. In respect of the appellant's *alibi* it is submitted that he will plead not guilty at the trial and that his *alibi* will be that although he admits being in the taxi at the time of his arrest, his defence will be that he did not commit the alleged offences.

8.3 The finding that the overwhelming evidence against the appellant constituted a real threat that the appellant will evade his trial if released. The defence submits that the State did not adduce factual evidence which directly showed or from which an inference could have been drawn that such likelihood existed.

8.4 The finding that the section 204 witness was at risk of being intimidated and/ or negatively influenced by the appellant if released. Counsel for the appellant submits that this cannot be so since the 1.0. did not voice this nor did the State adduce any clear evidence in this regard.

8.5 The finding that the State's evidence established factors listed in section 60(4)(a), (b), (c) and (d) of the Act. Counsel for the appellant submits that despite it being found that section 60(4) factors exist, the court a *quo* failed to weigh such grounds against the factors listed in section 60(9) of the Act.

[9] The appellant's counsel submits that on the whole the appellant did

succeed to prove that exceptional circumstances exist entitling his admittance to bail.

[10] The State opposes the bail appeal on the basis that the appellant's evidence is marred with discrepancies and contradictions; arguing that that on its own negates any such alleged exceptional circumstances. It is further submitted that the appellant's contradiction *vis-a-vis* the person he will be residing with in the event he is admitted into bail is another discrepancy. Also, the fact that the appellant makes mention of his illness in passing without taking the court into his confidence as to the nature of such illness and the treatment the said illness will require also militates against any possible exception to be made in his favour.

LEGAL PRINCIPLES

[11] Section 65(4) of the CPA sets out the basis on which this court can interfere with the refusal of bail by the court a *quo.* The test is the following: was the magistrate wrong.

[12] In the matter of ***S v Mpulampula 2007 (2) SACR 133 (E)*** it was held that where the court *a quo* misdirected itself materially on the facts or the legal principles the court of appeal may consider the issue of bail afresh. Interference is also justified where the lower court overlooked some important aspects in coming to it decision to refuse bail.

[13] The functions of the court hearing the appeal under section 65 are similar to those in an appeal against conviction and sentence. In **S *v Barber 1979 (4) SA 218 (DJ at 220 E-H*** Hefer J remarked as follows:

"It is well known that the powers of this court are largely limited where the matter comes before it on appeal..... This court has to be persuaded that the magistrate exercised the discretion which he has, wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of discretion".

[14] Counsel for the appellant referred to the matter of ***S v C 1998 (2} SACR 721 (KPAJ at 724 H-1*** (English translation from headnote) where the court held the following:

"It could not have been the intention of the Legislature that an alleged offender must be detained when he has established conclusively that he will attend his trial, that he will not interfere with the administration of justice, and that he will commit no further wrongdoing (i.e., the usual circumstances that arise for consideration in a *bai/"application). As soon as more is required of him, the procedure becomes punitive. That would be altogether objectionable. Therefore, all that the Legislature enacted, somewhat clumsily, is that* a *Court which is seized with* a *matter involving a Schedule 6 offence must exercise exceptional care when considering the usual circumstances. The Court must be able to hold with* a *greater degree of certainty that the detainee will do all that his bail conditions require of him. That is all."*

ANALYSIS

[15] It is common cause that the basis on which this court can interfere with the refusal of bail by the court a *quo* in a bail appeal is set out in terms of section 65(4) of the Act, namely: "was the magistrate wrong"

[16] The question for determination by this court is whether, from the Record of the bail application in the court a *quo,* the appellant succeeded to prove that exceptional circumstances **exist** warranting his release on bail. In the event this court finds that the factors adduced by the appellant do amount to exceptional circumstances, then this court must determine if the court a *quo's* decision to deny the appellant bail, under those circumstances, was wrong.

[17] Both the defence and the State's submissions are poles apart, with the former arguing that based on the factors borne in the bail application hearing, the appellant succeeded to show the existence of exceptional circumstances which entitles him to an admittance to bail. On the other hand, the State is of the view that there was no misdirection on the part of the court a *quo* and that neither was the court a *quo's* decision wrong. Regarding the appellant's employment

allegations, the State's main argument on which it basis its objections that the appellant was ever gainfully employed is the failure by the appellant to produce a confirmatory employment affidavit by his alleged employer, a Mr Ncube. The defence concedes that indeed more could have been done with regard to Mr Ncube's affidavit.

[18] With regard to the illness allegation by the appellant, it is submitted that same must be factored in as a circumstance or an exception entitling him to bail. I am of the view that for an illness to be regarded as exceptional, the appellant should have provided the court a *quo* with more detail than just a single sentence. I must mention further that even after stating more than just a single sentence, a further determination would still have had to be made by the court a *quo* to determine if the prison hospital could not avail to the appellant the required treatment. I therefore am not persuaded that the court a *quo* misdirected in this regard.

[19] With regard to the question of the long period spent by the appellant in prison whilst awaiting trial, it is common cause that neither himself nor the State are to blame for the non-commencement of the trial herein. It is further common cause that the trial *in casu* ought to have commenced in October 2017 but for the fact that one of the appellant's co-accused fired his attorney on the spot, thereby causing a further delay to the conclusion of the trial. The matter has since been postponed to February 2017 for trial.

[20] I may further add that I am aware of the appellant's right to a speedy trial. However, the circumstances of this matter are such that by virtue of there being multiple co-accused in this matter, this most unfortunately is eroding the right which the appellant is constitutionally entitled to, that to a speedy trial. The question is whether such an erosion or limitation of the appellant's right to a speedy trial is justifiable under the circumstances or that it qualifies as an exceptional circumstance. I am of the view that when one considers the provisions of section 60(9) read with section 60(4)(d) of the Act, the appellant's right of personal freedom is being limited or denied in the interests of justice. I find this limitation justifiable considering the strength of the State's case against the appellant. It is common cause that the appellant has advanced no credible

version or explanation to thwart the strength of the State's case. Save to state that he will admit at the trial that he was arrested whilst inside the said taxi, it was submitted on his behalf that he will deny that he committed the alleged offences. This response to the State's version is, according to my view, a bare denial that does the appellant no favour at the wealth of the overwhelming case the State has against him. It must be remembered that the appellant bears the duty to convince the court of his entitlement to release on bail.

[21] The argument by the appellant's counsel that the State's evidence against her client is vague and generalisation is not sustainable. I am of the view that for purposes of bail application the statement that a CCTV footage and witnesses will implicate the appellant suffices. The missing minute detail regarding the alleged implication of the appellant could not have encumbered the appellant to put up a reasonably detailed basis of his defence. I am of the view, therefore, that that on its own, in the absence of any reasonable defence being advanced by the appellant, is a ground enough for any person, the appellant *in casu,* to evade his trial in the event he is granted bail. The question of possible evasion must not be looked at in isolation of the possible sentence the appellant may receive, given the fact that count 1 he is facing falls within the Minimum Sentence Regime.

[22] With regard to the appellant's familial ties, I am satisfied that that the appellant is indeed the father of the minor child with the woman whose identity appears on the said minor child's birth certificate.

[23] With regard to the finding that the appellant might intimidate the section 204 witness, I find the defence's argument that such a possibility does not exist not sustainable. The fact that the I.O did not raise such a concern nor that the State adduce any clear evidence that the appellant presented such a risk is not a requirement for such a deduction or a finding to be made. I am of the view that the court *a quo's* finding was correct given the totality of the evidence during the bail application.

CONCLUSION

[24] From the totality of the evidence there exists *prima facie* indications that the proper administration of justice and safe-guarding thereof will be defeated or

frustrated if the appellant is admitted to bail. It is for this reason that I am of the view that this court would be justified to dismiss this appeal. The long incarceration of the appellant cannot be weighed in isolation of the totality of other factors. As provided for in section 60(9) of the Act, I am satisfied that interests of justice justifies the dismissal of this appeal.

[24] I am satisfied that the court a quo did not misdirect itself in finding that exceptional circumstances do not exist upon weighing the appellant's personal circumstances against the interests of justice.

[25] I am satisfied that the appellant failed to discharge the onus, on a balance of probabilities, that the administration of justice will not be jeopardised, defeated or frustrated if he is admitted to bail on the strength of the evidence placed before the court *a quo.*

[26] As provided for in terms of section 65(4) of the Act, I am not persuaded that the decision of the Magistrate in refusing to admit the appellant to bail was wrong and that decision is accordingly confirmed.

[27] In the result I make the following order:

ORDER

1. The court a quo's decision is confirmed.
2. The appeal is dismissed.

L.B. VUMA

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on: 18 December 2017

Judgment delivered: 21 December 2017

Appearances:

For the appellant: Adv M.M. Kalis

Instructed by: Schurmann Joubert Attorneys

For the respondent: Adv A. Johnson

Instructed by: Office of the OPP, Pretoria