

SOUTH AFRICA / JUDGMENT

Ramokgopa v S (Appeal) (A 47/2017) [2018] ZAMPMBHC 5 (26 April 2018) [2018] ZAMPMBHC 5

COURT

Mbombela High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

A 47/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS THE GAUTENG DIVISION MBOMBELA]

CASE NO: A 47/2017

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

SIGNATURE

DATE

In the matter between

KABELO RAMOKGOPA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT: BAIL APPEAL

JANSEN VAN RENBSURG AJ

1.

INTRODUCTION

1.1. The appellant is charged together with three other co-accused in the Magistrates Court for the District of Standerton on the following charges which forms part of schedule 6 offences read with the Criminal Procedure Act 51 of 1977 –

1.1.1. Count 1: Robbery with aggravating circumstances – the value of cell phones R 200 000 – 00.

1.1.2. Count 2 : Unlawful possession of a firearm.

1.1.3. Count 3 : Being in possession of a stolen Toyota Corolla vehicle robbed at Rietgat.

1.1.4. Count 4 : Pointing of a firearm.

1.2. The appellant was legally represented in the court a quo during the application for bail in the court a quo.

2.

APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE APPLICATION FOR LEAVE TO APPEAL AGAINST THE REFUSAL TO GRANT BAIL FOR THE LATE FILING OF THE APPELLANT'S APPLICATION

The court has received the appellant's bail appeal application and after hearing counsel for the appellant and the State, condonation is hereby granted to the appellant for the late filing of this application.

3.

EVIDENCE BY THE STATE

3.1. The State called the Investigation officer in this matter to testify under oath. He made reference to the following important aspects during the application for leave to appeal in the court a quo –

3.1.1. He was on duty on the day of the robbery.

3.1.2. He personally together with other officials saw the appellant, together with other suspects INSIDE the shop where the robbery took place.

3.1.3. Two firearms were discovered on the premises.

3.1.4. Another suspect was found in possession of a stolen vehicle with false number plates which were linked to the robbery.

3.1.5. There were video footage of the appellant, other suspects and the motor vehicle concerned and used in the robberies.

3.1.6. At no stage did the appellant inform him that the appellant was a taxi driver.

3.2. He confirmed the following –

3.2.1. That the appellant does not have previous convictions [page 76 confirmed by the court a quo].

3.2.2. That there were no pending cases against the appellant.

3.2.3. That the appellant had not informed him of being a taxi driver [page 32].

3.2.4. That the address of the appellant was confirmed [page 30].

4.

STATES CASE AGAINST THE APPELLANT IN OPPOSING BAIL

4.1. The State's case is based on four charges which relate to schedule 6 of the CPA 51 of 1977. Schedule 6 of the CPA 51 of 1977 requires from the appellant to adduce 'exceptional circumstances' to be released on bail. I will address this requirement later in the judgment.

4.2. Based on the evidence by the Investigation officer, Warrant Officer Phillip Motaung who testified under oath regarding the case against the appellant and co-accused.

4.3. The witness summarised the factors on which he relied to opposed bail on the following –

4.3.1. That the State has a strong case against the appellant being apprehended and arrested in the shop during the robbery.

4.3.2. That there is a good chance that the appellant would not stand his trial and evade the trial.

4.3.3. That the appellant stands a chance to be sentenced to imprisonment for a long period.

4.3.4. That there was video footage connecting the appellant to the robbery.

4.3.5. That these robberies were committed by syndicates from outside and it would be hard to trace the appellant should he be granted bail.

[Page 34, 54 and 55].

4.3.6. That there were witnesses to come who would testify to the effect that they were pointed with a firearm and threatened to open the safe inside the shop. It is clear to this court that there are witnesses to be called to testify in the State's case which would be for a trial court to determine their credibility and value.

5.

THE APPELLANT'S CASE

5.1. The defence cross-examined the Investigation officer, Warrant Officer Phillip Motaung, on various aspects referring to hearsay evidence, that the appellant was not found in possession of stolen goods and that the State's case against the appellant was very weak. The court is of the view that the defence did not succeed in contradicting or damaged the State's case in any way.

5.2. What is expected from an accused is to be able and be available to adduce evidence under oath in a court of law to be given the opportunity to place exceptional circumstances before a court of law and to be cross-examined on the evidence given in this regard. The appellant elected to depose to an affidavit which was read into the record by its legal representative and to confirm that information; that was all.

5.3. One would expect the appellant to have taken the court a quo into his confidence and to present viva voce evidence in this regard; it was never done. There was no opportunity for the court a quo to evaluate any exceptional circumstances by the accused in relation to the weight attached to the evidence by the State during the bail application in the court a quo. In essence the court a quo had only one version before it; that of the State.

6.

THE THEORY OF AN APPLICATION FOR BAIL

6.1. The pinnacle of an application for bail where serious offences has been committed lies in the interpretation of the requirements of schedule 5 and 6 of the CPA 51 of 1977.

6.2. Depending on whether the offences are classified under section 5 or 6, the onus of prove will shift. Where the alleged offence falls under schedule 6, the burden of proof would rest on the accused to show 'exceptional circumstances' why he or she should be granted bail.

6.3. An application for bail in an 'inquiry into the circumstances' and not a formal trial; the merit of the case has to be determined by a trial court. A court hearing an application for bail is not in a position to give a judgment and to sentence the convicted person in any manner –

6.3.1. What a court in an application for bail must do is to determine the release or not of the detained person and the factors considered in its evaluation and conclusion thereof.

6.3.2. It is expected of a court in this position to focus on the factors, the circumstances, the evidence [whether hearsay or not] before it and to apply its mind within the discretion of that court to grant or refuse bail.

6.3.3. In essence if there is only one 'version or set of facts' before such a court, that court is entitled to refuse bail unless the refusal of bail would be contrary to the constitutional right to freedom and if the refusal of bail would prejudice the applicant and be to the detriment of the administration of justice. 'Fairness' has been a cornerstone of the exercise of judicial powers and discretion.

6.3.4. With this in mind, on the other side of the coin is section 36 of the Constitution which allows the restriction of rights of a person with valid reasons. One could argue that the right to liberty in section 12 of the constitution is then balanced by section 36 of the same constitution. A court of law has to decide which way the pendulum would swing depending on the circumstances and the weight of the evidence before it; both for the State and the applicant.

7.

REQUIREMENTS FOR GRANTING BAIL

7.1. There is a fundamental difference between the objective of bail proceedings and that of the trial –

7.1.1. In a bail application, the inquiry is not really concerned with the question of guilt. That is the task of the trial court.

7.1.2. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the ‘interests of justice’ lie in regard to bail.

7.1.3. The focus at the bail stage is to decide whether the ‘interests of justice permit the release of the accused pending trial’ which entails in the main protecting the investigation and prosecution of the case.

7.1.4. Sub-sections (4) - (9) are not intended as deeming provisions at all. Those sub-sections list, respectively, the potential factors for and against the granting of bail to which a court must pay regard.

7.1.5. Neither subsection sub-sections (4) nor (9) instructed a trial court to come to an artificial conclusion of fact. Judicial officers should be made aware of ‘categories of factual findings’ that could and would support a conclusion that bail should be refused.

7.1.6. A court is not requested to accord decisive weight to the one or other or all the personal factors mentioned in section 60(9). The legislator merely provided guidelines as to what are factors for, and what are factors against the granting of bail.

7.1.7. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice which apply only to serious violent crimes enumerated in schedule 6 of the CPA 51 of 1977, whereby the accused would be required to adduce evidence to persuade the court to be released on bail.

7.1.8. In all cases involving bail applications, the courts are guided by certain considerations and factors in assessing the promotion of the interests of justice and the protection of the right of the individual. In doing so the court should not be allowed to be influenced and replaced by the legislative guidelines or the sentiment of the community and the public. These factors do not relieve the judicial officer of applying his or her mind to all the relevant facts and making an appropriate determination and thereby bridging the gulf between ‘positivism and rationality’.

7.2. Section 60 of the CPA 51 of 1977 deals with granting of bail by South African courts. This section includes the requirements of such an application. Every arrested person has the right to be released on bail except when the requirements of section 50(6) are applicable [to be informed by a court that the accused be detained pending further actions]. Section 60 is, therefore, a comprehensive and detailed section and must be read carefully.

7.3. Read herewith, the courts are required to take note of section 39 of the Constitution in promoting the spirit, purport and objects of the law and acts, included the rights of arrested persons including the right to freedom [section 12].

7.4. One of the ways to protect an accused or arrested person's right to freedom is by means of an application for bail which has been dealt with above. Further to this aspect, the following is of importance –

7.4.1. The classification of the offences which is serious.

7.4.2. That charges against the appellant falls under schedule 6 of the CPA 51 of 1977.

7.5. In these instances, the accused/arrested [the applicant] bears the 'onus of proof of innocence'. It is only a specific situation where the person is confronted with this principle whereas in all other criminal charges the person deemed to be 'innocent until proven guilty beyond reasonable doubt' [being in possession of stolen goods also fall under the principles of bail applications – the so-called 'reverse onus of proof'].

7.6. In terms of section 60(11) (a) of the CPA 51 of 1977, the applicant has to proof 'exceptional circumstances' before bail could be granted. The 'onus to proof' these circumstances are difficult and it takes time to put the circumstances in place. The state or prosecution has the benefit to object to the granting of bail by merely denying bail on little but none excuses – it only needs to create the doubt in the mind of the court to be successful in the opposing the granting of bail.

7.7. In the case where the first bail application fails, the applicant may in terms of section 65 of the CPA 51 of 1977, appeal to the High Court in the normal appeal procedure to be heard a second time –

7.7.1. Section 65(4) of the CPA 51 of 1977 prescribes that the High Court may not overrule the judgment of the court a quo unless the court a quo has misdirected itself in the dismissal of the bail or any other relevant matter thereto. The question is whether the court a quo has misdirected itself? [1]

7.7.2. The High Court can only rescind the bail proceedings in the lower courts if the court a quo has misdirected itself in the bail application in that court. [2]

7.7.3. The CPA 51 of 1977 has given Magistrates broader power to grant or decline bail in terms of section 65(4) of the CPA 51 of 1977 and for this reason, the High Court will not just merely intervene in the procedures of the court a quo.

7.7.4. An appeal to the High Court re bail and that of a normal criminal appeal is no different from each other. [3] Where the appeal is against the dismissal of a bail application in the lower courts, the High Court is bound to the interpretation of the appeal in the 'narrow sense'. This means that the High Court is bound by and to the proceedings in the court a quo.

7.8. In the matter of *Prinsloo v S* [4], the applicant was arrested for the purported sabotage/terrorism of the ANC conference in Mangahung [Bloemfontein]. The applicant applied for bail in the Magistrates court and bail was denied. The applicant appealed to the High Court Free State [Bloemfontein]. The importance of this bail application lies in the following aspects namely –

7.8.1. No viva voce evidence was lead.

7.8.2. The evidence produced was only statements by the applicant and the State.

7.8.3. Statements in bail applications cannot be adjudicated in the same manner as that in motion proceedings.

7.8.4. Bail applications are no a ‘criminal trial’ and therefore the procedure in motion court is not applicable.

7.9. There is one important requirement and that is that the applicant must prove ‘exceptional circumstances’ to be released on bail – especially when a schedule 6 offence has purportedly been committed. The court hearing the application cannot and may not hand down a judgment which is the duty of the trial court. Applications for bail are not a ‘criminal trial’.

[5] The bail application is no ‘pre-trial’ for the ‘trial to follow’– it is a separate application within the context of the Act. [6]

8.

The rules pertaining to evidence in bail applications differ from that in motion proceedings in that -

8.1. In terms of section 60(11)(a) of the CPA 51 of 1977, the applicant bears the onus to prove the ‘exceptional circumstances and that it would be in the interest of justice to be released on bail’. [7]

8.2. ‘Hearsay evidence’ is admissible in bail applications. [8]

8.3. The evidence on opinions is admissible. Here it is primarily the evidence of the Investigation Officer and the views of such a witness. [9]

8.4. It is important to note that schedule 6 offences sometimes place an ‘undue burden’ on the accused to refer to the ‘public opinion’ in bail applications.

8.5. The personal detail of the applicant does not always succeed and will be made off as ‘straw’.

8.6. The risk that the applicant will flee and not stand his trial.

[10] This refers to the probability that the applicant will flee the country and not stand its’ trial. [11]

8.7. That the applicant may commit suicide and should, therefore, be imprisoned to protect himself.

8.8. That the granting of bail would not be in the 'interest of justice' or the general public will be threatened by the action of the applicant.

8.9. The role of the applicants' personal circumstances in an application for bail.

8.10. The financial loss does not qualify as 'exceptional circumstances' where the family can look after such businesses.

8.11. The medical condition of the applicant will not succeed without expert medical evidence. [12]

9.

THE STATE'S STRONG CASE

The aim of the bail application or bail appeal is to secure the freedom of the applicant on the one side and the weight of the case of the state on the other side with reference to section 60(6)(g) of the CPA 51 of 1977. The state's case cannot be classified as 'relatively strong' as this would then implicate that all the states cases would inevitably be 'relatively strong'. Even where the state's case is weak, it does not mean that the case cannot be turned around in some form or in certain circumstances. What this means is that an applicant can be successful in an application for bail, but during the trial, the applicant can be convicted on the evidence before the trial court. [13] This is not the duty of the court in a bail application.

10.

EXCEPTIONAL CIRCUMSTANCES READ WITH SECTION 60(11) (a) OF THE CPA 51 OF 1977

10.1. A good example of the conflict between the state and the applicant re 'exceptional circumstances' is found in the matter of S v Botha and another supra. At the end of the analysis of all the factors of the application, the court must take into consideration the factors depicted in section 60(11)(a) of the CPA 51 of 1977. The court must thereafter make a finding and come to a conclusion whether the court a quo has misdirected itself or that the court a quo has given the correct order.

10.2. Some comments related to the following important aspects which the applicant must proof –

10.2.1. Any attempt upon affidavit evidence not open to testing by cross-examination is, therefore, less persuasive. [14]

10.2.2. Where the applicant suggested that the police had extracted an inadmissible confession from him (or his co-accused), he provided no detail which might have enhanced either his or their reliability or credibility.

10.2.3. That the state case to be frail may nevertheless sustain 'proof beyond a reasonable doubt' when put to the test. In order to be successful in the challenge the merits of such a case in bail proceedings, an applicant needs to go further. The applicant must prove on a 'balance of probability' that he will be acquitted of the charge. [15] An innocent person cannot be expected to have insight into matters in which the applicant was involved only on the periphery or perhaps not at all.

10.2.4. The state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence. [16]

10.2.5. Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him.

10.2.6. It has been held that until an applicant has set up a prima facie case against the prosecution, failing therewith, there is no call for the state to rebut the applicant's evidence to that effect. [17]

10.2.7. The personal factors must be 'unusual' or such as singly or together warrant the release of the appellant in the interest of justice. The requirements of sub-section (4) of section 60 must establish any of those grounds, without the addition of facts that add weight to his ipse dixit.

10.3. Should one not succeed with the above, the bail application and following an appeal will not succeed and would be dismissed. It is important for the applicant to prove facts to be granted bail as the failure to submit such factors, he or she would be deprived of his or her freedom which is contrary to public opinion and the Constitutional right of liberty.

11.

THE JUDGMENT BY THE COURT A QUO

11.1. The court a quo has given a thorough judgment on this specific application for bail by the appellant.

11.2. The Bill of Rights in the Constitution of the Republic of South Africa Act 108 of 1996 guarantees the following –

11.2.1. The right to be presumed to be innocent until proven guilty. [18]

11.2.2. The right to enjoy the freedom of the body and not to unlawfully be arrested and detained.

11.3. Section 60(11) (a) of the CPA 51 of 1977 reads as follows –

'Notwithstanding any provision of this 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 ...'

11.4. Generally speaking the meaning of the phrase 'exceptional' is indicative of something 'unusual, extraordinary, remarkable, peculiar or simply different'. In practice one experience that there are varying degrees of 'exceptionality, unusualness, extra-ordinariness, remarkableness, peculiarity or difference'. The interpretation and application would depend on its context and on the particular circumstances of the case under consideration. Bail is only granted where the accused could 'proof' the existence of 'exceptional circumstances' [schedule 5 and 6 offences].

11.5. In the context of section 60(11)(a) of the CPA 51 of 1977 the 'exceptionality of the circumstances' must be such as to persuade a court that it would be in the 'interests of justice' to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question.

11.6. In determining the concept of 'exceptional circumstances' the case of *S v Botha en 'n Ander* [19] could be analysed in this regard. In this case, the SCA named the factors to determine the existence of 'exceptional circumstances'. This case dealt with the application of the remainder of the accused to be released on bail –

11.6.1. Section 65A(2) of the CPA 51 of 1977 read with section 21(1) of the High Court Act 59 of 1959 [the old act] made provision for an appeal against the denial of bail by a court a quo. [20]

11.6.2. Sections 316 read with section 65A (2) (b) of the CPA 51 of 1977 made provision for 'leave to appeal' in such instance.

11.6.3. Section 35(1) (f) of the Constitution guarantees the freedom of a person if it is in 'the interest of justice'. This Constitutional right could be limited in 'exceptional circumstances' [21] by the limitation clause in section 36.

11.6.4. The requirements for 'exceptional circumstances' include the balance of the requirements of section 60(4) - (9) to be evaluated against the rights to freedom, the effect of the release in the 'interest and administration of justice'.

11.6.5. To deny the probabilities of events in section 60(4) (a) - (e) is not enough.

11.6.6. Section 60(11)

- (a) does not include a list or definition of 'exceptional circumstances'

11.7. The crisp is the probability of and proof of events and circumstances envisaged in section 60(4) (a) – (e). The circumstances of the case balanced by the context thereof are important. [22]

11.7.1. In terms of section 60(11)(a) en (b) the accused bear the formal proof to be released on bail and to lead evidence in this regard. The accused must prove on the 'balance of probabilities' that the release on bail would be based on 'exceptional circumstances' and secondly that the release would be in the interest of justice. There is no sequence of the evaluation of the above in determining the granting of bail or not.

11.7.2. The difference in the two subsections is that an accused charged with one of the scheduled offences, the accused must give evidence to convince the court that there are 'exceptional circumstances' to be released on bail.

11.8. In Dlamini supra, Kriegler J held the following –

'An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent.....Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that renders it in the interests of justice that release on bail is ordered notwithstanding the gravity of the case'.

11.9. In S.

v. Pienaar [23] the Court stated as follows –

'..in my view, therefore, there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously, an affidavit would have less probable value than oral evidence which is subject to the test of cross-examination. At the same time, an affidavit will carry more weight than a mere

statement from the Bar.'

12.

THE ANALYSIS OF THE CONCEPT OF 'EXCEPTIONAL CIRCUM- STANCES'

12.1. Referring to the common law, one could argue that 'exceptional circumstances' have overtaken the presumption of innocence. This factor has been included in bail applications as early as 1920. [24] The accused has to prove 'exceptional circumstances' exist to be released on bail.

12.2. The court, in S v H [25], concluded that the phrase in terms of the Concise Oxford dictionary defines the phrase as being 'unusual or not typical'. 'Exceptional circumstances' would be broad enough to accommodate any relevant circumstances of the applicant. The applicant might decide to refer to 'personal circumstances or anything which might be suitable for the application for bail'. [26]

12.3. The preamble to the 1997 amendment of the CPA read as follows –

‘...to detain an accused in custody unless the accused satisfies the court that exceptional circumstances exist why he or she should be released’

12.4. Section 60(11) (a) contains the requirements of ‘exceptional circumstances’. Schedule 6 includes three serious offences namely murder, robbery and rape committed under specific circumstances and have been included in the CLAA 105 of 1997 [the minimum sentence act] which prescribe a minimum sentence to be imposed if there are no ‘substantial and compelling circumstances’.

12.5. One of the factors to be released on bail is the ‘strength of states case against the accused’. [27] The courts have not defined or described ‘exceptional circumstances’ but some indications have been given –

‘..sterk, onafhanklike getuienis aanduidend van die beskuldigde se onskuld (in casu ‘n gestaafde alibi) in in S v Mohamed 1999 (2) SASC 507 (K) deur Comrie R in ‘n beredeneerde beslissing as buitengewone omstandighede soos bedoel in art 60(11) van die Wet aanvaar’

12.6. A further obstacle is that the Constitution does not guarantee an absolute right to bail. The right to bail lies in the following phrase [28] –

‘Everyone who is arrested for allegedly committing an offence has a right to be released from detention if the interest of justice permit, subject to reasonable conditions’

12.7. The requirement of section 35(1) (f) in the Constitution included a release on bail subject to the ‘interest of justice’. The 1997 amendment included the requirement of ‘exceptional circumstances’ and has no constitutional origine or reference. The requirement ‘in the interest of justice’ includes five grounds for the refusal of bail. [29] The argument follows that the rights of the accused are disregarded and that the amendment had the result of trials being delayed

unreasonably.

12.8. In the analysis of section 60 (11) (a), it is quite clear that a formal onus rests on an arrested person to satisfy the court that he or she should be released and not being kept in custody for some sinister

reasons. It is required form an arrested persons to in an informal manner and not under oath, to place relevant factors before the court without any insight into the investigation and the reasons for the arrest. It is required from the arrested person to actually adduce evidence in the application for bail.

12.9. The test for bail established by section 60 (11) (a) could be seen and argued as being more rigorous than that contemplated by section 35 (1) (f) of the Constitution. One could, therefore, argue that this section has a direct influence on the right to freedom of the accused. Section 60 (11) (a) does not contain an outright ban on bail in relation to certain offences but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. The important aspect here lies within the granting or refusal of bail which is

controlled by the judiciary, and judicial offices have the ultimate decision as to whether or not, in the circumstances of a particular case to grant or refuse bail.

12.10. One could well argue that the term ‘exceptional circumstances’ is so ‘vague and broad’ that an applicant for bail does not know what it is that has to be established. The applicant is given a ‘broad scope’ to establish the requisite circumstances whether it relates to the nature of the crime, the personal circumstance of the applicant or anything else that could be particularly cogent. The requirement referring to circumstances to be ‘exceptional’, the subsection does not define that the circumstances must be circumstances ‘above and beyond’ and being different from those enumerated in sub-sections (4) – (9). The evaluation is done judicially, which means that the court will look at ‘substance, not form’.

12.11. The requirement of ‘exceptional circumstances’ in section 60(11) (a) limits the right enshrined in section 35 (1) (f) it is a limitation which is reasonable and justifiable in terms of section 36 of the Constitution in the current circumstances in South Africa. The accused must be given a ‘reasonable opportunity’ to establish what the subsection requires.

12.12. ‘Exceptional circumstances’ as a concept has not been defined thus far. The Constitutional Court declined to define it in *Dlamini supra*, but made it clear in paragraph [76] that even so-called ‘ordinary circumstances’ may serve to establish ‘exceptional circumstances’.

12.13. In *S v Rudolph* [30] the court again dealt with what ‘exceptional circumstance’ are and reiterated that the applicant in a schedule 6 offence-bail application must, on a ‘balance of probability’, demonstrate that ‘exceptional circumstances’ in his or her case, indeed, do exist and that they ‘in the ‘interests of justice’ permit his release’. This, according to the court, involves the balancing ‘between the liberty interests of the accused and the interests of which’, society in denying the accused bail will be resolved in favour of the denial of bail, unless ‘exceptional circumstance is shown by the accused to exist’. The court further held the following –

‘Exceptional circumstances do not mean that ‘they must be circumstance above and beyond, and generally different from those enumerated’ in ss (60) (4)-(9). In fact, ordinary circumstances present to an exceptional degree may lead to a finding that release on bail is justified’.

12.14. There is no ‘onus’ on the state to disprove ‘exceptional circumstances’. The accused must on a ‘balance of probabilities’ prove that the State’s case was non-existent or subject to serious doubt. [31] In *S v Petersen*

[32] the Full Bench concluded as follows on the meaning and interpretation of ‘exceptional circumstances’ –

‘Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different...

This may, of course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question....in essence the court will be exercising a value

judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.’

12.17. An accused that alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a ‘balance of probabilities’. [33] Van der Berg loc cit [34] regards this as an ‘outrageous onus’. Where an accused, confronted with allegations that he has committed a schedule 6 offence, does not make out a prima facie case of the prosecution failing, there is no duty on the prosecution to present evidence in rebuttal. [35]

12.18. Personal circumstances which are really ‘commonplace’ cannot constitute ‘exceptional circumstances’ for purposes of section 60(11) (a).[36]

12.19. In *S v Mathebula*

[37] Heher JA summarised the position as follows –

‘[A] State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to 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 ...That is no mean task ... [T]he applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect.’

12.20. The issue to be determined is ‘whether the appellant has discharged the burden which rests on him in terms of section 60 (11) (a) of the CPA for him to be admitted to bail’. The question which immediately springs to mind is as to what these ‘exceptional circumstances’ are? In *S v Bruintjies*

[38] Shongwe AJA held the following –

‘...what is required is that the court considers all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence”.

12.21. In *S v Dlamini; S v Dladla and Others; S v Joubert, S v Schietekat*

[39] Kriegler J said the following with regard to ‘exceptional circumstances’ –

‘An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the

personal circumstances of the applicant or anything else that is particularly cogent.... In requiring that the circumstances proved to be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those

enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that renders it in the interest of justice that release on bail is ordered notwithstanding the gravity of the case.'

12.22. In *S v Scott-Crossley* [40] the court stated that an accused's personal circumstances which are common do not necessarily constitute 'exceptional circumstances' for the purposes of section 60(11)(a). Even where the case against the appellant was weak and non-existent it would not necessarily result in the granting of bail.

13.

THE CONSTITUTION ACT 108 OF 1996 AND THE RESTRICTION ON THE FREEDOM OF MOVEMENT

13.1. Section 35 (1) (f) of the Constitution itself places a limitation on the rights of liberty, dignity, and freedom of movement of the individual. In the evaluation of the application for bail, the arrested person does not have a totally 'undisturbed right' to be set free more pertinently than in the past. A court is now obliged by section 60 (2) (c), (3) and (10) to play a 'pro-active role' and assisted in this by sub-sections (4) – (9). It is expected that the court would apply its mind to all the factors

potentially in favour of or against the granting of bail.

13.2 Section 35(1) (f) presupposes a deprivation of freedom by the arrest that is constitutional. This deprivation is for the limited purpose of ensuring that the arrested person is duly and fairly tried. In the analysis of section 35(1)(f), one finds no expressed nor impliedly requirements which stand to be considered whether the 'interests of justice' permit the release of that detainee pending trial, only trial-related factors are to be taken into account. On the question whether or not an accused should, in the 'interests of justice', be released on bail, section 60(4) of the Act furnishes five grounds of which the existence of one or more of which would preclude such release. One of the grounds to decline bail is cited in section 60(4) (b) –

....'Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial'.

13.3. Section 60(6) emphasise a number of factors which a court may take into account in this regard, including 'any other factor which in the opinion of the court should be taken into account'.

[41] It must be bore in mind that the final decision whether not grant bail is in the hands and the discretion of the court. Should the applicant not disclose such information, the court will inform the applicant of the result thereof. [42] The accused does have the 'onus of proof' in bail applications in 'exceptional circumstances'. [43] The Constitutional court has ruled that section 36 of the Constitution could restrict the movement and freedom of an accused. Kriegler J held the following –

'An applicant is given the broad scope to establish the requisite circumstances whether they relate to the nature of the crime, the

personal circumstances of the applicant or anything else that is particularly cogent ... The accused charged with a Schedule 6 offence, could establish the requirement by providing that there are exceptional circumstances to his emotional condition that render the interest of justice the release on bail be ordered notwithstanding the gravity of the case in both sections 60(11)(a) and (b) there is a formal duty to prove the contrary'. [44]

13.4. 'Exceptional circumstances' does not include the requirements as per section 60(4) to (9). Other circumstances should be proven excluding those in section 60(4) (a) to (e). [45] In applying the principles and requirements of section 60(11) (a) of the CPA 51 of 1977, one needs to refer to the contents of this section. In the analysis of the above section, the following are of importance –

13.4.1. The 'onus of proof' is on the accused to adduce evidence, and hence to prove to the satisfaction of the court, the existence of 'exceptional circumstances' of such a nature as to permit his or her release on bail.

13.4.2. The court must also be satisfied that the release of the accused is in the 'interests of justice'.

13.4.3. On the meaning and interpretation of 'exceptional circumstances' in this context, there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept.

13.4.4. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of 'exceptionality, unusualness, extraordinariness, remarkable- ness, peculiarity or difference'.

13.4.5. These factors depend on their context and on the particular circumstances of the case under consideration.

13.4.6. In the context of section 60(11) (a) the 'exceptionality of the circumstances' must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of 'flexibility in the judicial approach' to the question.

13.4.7. In essence, the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria. [46]

14.

CONCLUSION

14.1. After reading the appellant's application for the granting of bail by this court, the court is of the view that the appellant was correctly refused bail by the court a quo –

14.1.1. The court a quo has dealt with the circumstances and the evidence presented in the appellant's bail application before that court.

14.1.2. This court does not find any misdirection by the court a quo and therefore could not intervene in the court a quo's denial of the granting of bail to the appellant.

14.1.3. It is clear from the record of the proceedings in the court a quo that the appellant did not testify to be cross-examined on issues important in his application for bail. This in itself leaves a gap in the application for bail.

14.1.4. The evidence by the investigation officer is acknowledged and the State has convincingly adduced evidence why it would not be in the interest of justice to release the appellant on bail.

14.1.5. This court is of the view that the reasons forwarded by the appellant in his application for this bail appeal does not meet the requirements at all.

14.2. In the case of *S v Barber* [47] Hefer J held in this regard –

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. 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 his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.' [48]

14.3. Following the dismissal of the application for bail by the court a quo, another application for bail came before this court in terms of section 65(4) of the CPA 51 of 1977. The section reads as follows –

'The Court or Judge hearing the 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 opinion the lower court should have given.'

14.4. As indicated this court may only intervene if the court a quo has grossly misdirected itself with the application for bail and the evidence in that court. However, the reading of the record of the application for bail in the court a quo together with the evidence by the State and the address by the parties in the court a quo, this court is of the view that the appellant failed to adduce evidence to be released on bail. This view must be read with the requirements put to the appellant to prove or provide 'exceptional circumstances' read with schedule 6 of the CPA 51 of 1977, to be released on bail.

15.

ORDER

The following order is made –

1. The appellant's bail appeal is dismissed.

H.C. JANSEN VAN RENSBURG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING : 26 APRIL 2018 DATE OF JUDGMENT : 26 APRIL 2018 COUNSEL FOR THE APPELLANT : ADV A.A. MILAZI INSTRUCTED BY : MASINGI ATTORNEYS COUNSEL FOR THE STATE : ADV A.T.S. POODHAN

[1] S v Barber 1979 (4) SA 218 (D) at 22 E – F.

[2] South African Criminal Law and Procedures Volume V Landsdown and Campbell (1982) at 333.

[2] South African Criminal Law and Procedures Volume V Landsdown and Campbell (1982) at 333.

[3] Van den Berg Bail (3rd ed) (2012) at 293.

[4] (A40/2013) [2013] ZAFSHC (4 March 2013).

[5] S v Van Wyk 2005 (1) SACR 41 (SCA) at par [6].

[6] S v Schott-Crosley 2007 (2) SACR 470 (SCA) at par [17].

[7] Yvonne Beetge v The State (925/12) [2013] ZASCA 1 (11 February 2013).

[8] S v Maki and Another (1) 1994 (2) SACR 630 (EC) at 635 d – g.

[9] S v Joone 1973 (1) SA 841 (C) at 847 A – B; Van den Berg 116 - 117.

[10] S v Dhlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (2) SA SACR 5 (CC) at [53].

[11] V.G. Hiemstra Suid Afrikaanse Strafproses 3de uitgawe (1981) at 131.

- [12] S v van Wyk 2005 (1) SACR 41 (SCA) at [9].
- [13] S v Mathebula 2010 (1) SACR 55 (SCA) at [12].
- [14] S v Pienaar 1992 (2) SACR 178 (W) at 180h.
- [15] S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c.
- [15] S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c.
- [16] Shabalala & Others v Attorney-General of Transvaal and Another 1996 (1) SA 725 (CC).
- [17] S v Viljoen 2002 (2) SACR 550 (SCA) at 561 f – g.
- [18] S v Budlender and another 1973 (1) SA 264 (C) at 269, S v Essack 1965 (2) SA 161 (D).
- [19] 2002
- (1) SACR 222 (SCA); [2001] ZASCA 146; [2002] All SA 577 (A); 2002 (2) SA 680 (SCA).
- [19] 2002
- (1) SACR 222 (SCA); [2001] ZASCA 146; [2002] All SA 577 (A); 2002 (2) SA 680 (SCA).
- [20] S v Mohammed 1977 (2) SA 531 (A) op 541 C-D.
- [21] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat [1999] ZACC 8; 1999
- (4) SA 623 (CC) at para 77.
- [22] S v Vanqa 2000 (2) SASV 371 (TkH) at 376 b-d.
- [23] 1992 (2) SASV 178 (W).
- [24] Alexander v R 1920 NPD 33, R v Mtatsala and another 1948
- (2) SA 585 (E), R v Lee 1948 (1) PH H 30 (CPD).
- [24] Alexander v R 1920 NPD 33, R v Mtatsala and another 1948
- (2) SA 585 (E), R v
- Lee 1948 (1) PH H 30 (CPD).
- [25] 1999 (1) SACR 77 (WLD).
- [26] S v Dlamini S v Dladla and another, S v Joubert, S v Schietekat 1999
- (4) SA 623 (CC).
- [27] S v Viljoen 2002 (2) SACR 550 (SCA).

- [28] Section 35(1) of the Constitution.
- [29] Section 60(4) of the CPA.
- [30] 2010 (1) SACR 262 (SCA) at 266 g-h.
- [31] Mathebula, loc cit.
- [32] 2008 (2) SACR 355 (C) at para [55].
- [33] S v Mathebula 2010 (1) SACR 55 (SCA) at paras [11] – [13].
- [34] At para 7.16.5.
- [35] S v Mathebula, loc cit, para [12] and S v Viljoen, 2002 (2) SACR 550 (SCA) at para [15].
- [36] Du Toit et al, loc cit at 9-62 and S v Scott-Crossley, loc cit, at para [12].
- [37] 2010 (1) SACR 55 (SCA) at para [12].
- [38] 2003
 - (2) SACR 575 (SCA) at 577f.
- [39] 1999 (4) SA 624 (CC) at para 75 – 76.
- [40] 2007 (2) SACR 470 (SCA).
- [41] Section 60(6)(j).
- [42] Section 60(11B)(d) and section 68(1)(e).
- [43] Sita supra at 448 and section 60(11) of the CPA 51 of 1977.
- [44] S v Dhlamini; S v Dladla and others; S v Schietekat [1999] ZACC 8; 1999 (4) SA 623 (CC) at para [77].
- [45] S v Vanqa 2000 (2) SASV (Tk) at 376 b to d.
- [46] S v H 1999 (1) SACR 77 (W) at 77b-i; S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999(2) SACR 51 (CC) par [75] - [79] at 89 a - 90 h; Herbay v S [1999] 2 All SA 216 (W) at 222 d - j; S v Botha en ‘n Ander 2002
 - (1) SACR 222 (SCA) par [19] at 229 I – 230 d; S v Yanta 2000
 - (1) SACR 237 (TK) at 241 f – 242 d; S v Bruintjies 2003
 - (2) SACR 575 (SCA) par [6] at 577 c - i.
- [47] 1979
 - (4) SA 218 (D) at 220 E – F.
- [48] S v Ngumashe 2001

- (2) SACR 310 (NC) par [20] at 314 f ; S v Branco 2002
- (1) SACR 531 (W) at 533 i ; S v Porthen and Others 2004
- (2) SACR 242 (C) par [3] - [7] at 246 b - j.
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