

SOUTH AFRICA / JUDGMENT

Sithubeni v S (Bail Appeal) (A 84/21)

[2021] ZAWCHC 283 (31 May 2021)

[2021] ZAWCHC 283**COURT**

Western Cape High Court, Cape Town

BEFORE

Nel

CASE / FILE NUMBER

A84/21

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE HIGH****COURT, CAPE TOWN)****Case****no: A84/21****In the matter between:**LUNGISA
SITHUBENI
Appellant
and
THE
STATE
Respondent**JUDGMENT****DELIVERED ON 31 MAY 2021****NEL AJ:****INTRODUCTION:**

1. The appellant appeals against the refusal on 23 August 2019 by Magistrate Jacobs in the Cape Town District Court of a bail application brought by him. He is represented by Mr. Caiger, and the State is represented by Ms. Engelbrecht, who opposes the appeal.

2. The appellant states that the delay in bringing the present application was as a result of a lack of funds.

3. The appellant was charged with the following offences:

3.1 Robbery with aggravating circumstances;

3.2 Possession of a firearm

3.3 Two counts of possession of ammunition;

3.4 Intimidation;

3.5 Compelled rape;

3.6 Rape;

3.7 Possession of stolen property;

3.8 Two counts of possession of a prohibited firearm;

3.9 Five counts of attempted murder.

SCHEDULE 6 OFFENCE:

4. The State has submitted that, as a result of the charges that the appellant faces, Schedule 6 of the Criminal Procedure Act 51 of 1977 (“the Act “), read with section 60(11)(a) thereof placed the onus on the appellant to satisfy the court below that “exceptional circumstances exist which in the interests of justice permit his or her release”. No written confirmation to this effect has been handed in by the State in terms of section 60(11A) of the Act, and the correctness of the State’s submission in this regard must be answered with reference to the charge sheet and the evidence that has been adduced at the bail application.
5. When due regard is had to the aforesaid, there can be no doubt that the appellant is charged with a Schedule 6 offence and his bail application accordingly fell to be dealt with in terms of section 60(11)(a) of the Act.

EVIDENCE ADDUCED AT THE BAIL APPLICATION:

6. The appellant elected to file an affidavit in support of his bail application in order to attempt to discharge the onus upon him of showing that exceptional circumstances existed which in the interests of justice permitted his release. I will deal with the contents of his affidavit below.
7. The State also filed an affidavit by the investigating officer, namely, Constable Tumani Mayekiso, who is employed by the South African Police Services (“SAPS”), in opposition of the bail application.
8. The affidavit of Constable Mayekiso states the following:

8.1 On 13 November 2018 as approximately 8am, the appellant together with a number of other persons, entered the U-Safe store in Koeberg Road. They were armed with firearms and were in pursuance of a plan to rob the staff members and customers in the store.

8.2 These staff members and customers were threatened with firearms and the robbers demanded that they hand over their belongings and also demanded that the safe of the said business premises be opened. Whilst waiting for the safe to be opened one of the suspects forced a female staff member to undress and open her legs. One of the customers was then forced to have sexual intercourse with the female staff member. When the customer failed to obtain an erection another customer was forced to have sexual intercourse with the staff member. That customer too failed to obtain an erection. The staff member was then forced to perform oral sex on the customer. After one of the accused unsuccessfully tried to get a third person to have sex with the staff member, he inserted his fingers into her vagina and forced her to lick his fingers afterwards. This suspect was extremely aggressive and rough with the female staff member and other victims. These events took place whilst some of the suspects were simply looking on.

8.3 The safe was opened and the suspects took R 15 000.00 and fled the scene. Numerous customers' and staff members' cell phones, money and other belongings were also taken. A Toyota Prado and a Toyota Corolla, with no number plates, fled the scene. They were chased by SAPS. The Toyota Corolla was occupied by five males. The rear door of the Toyota Corolla opened and one of the suspects sitting in the back of the motor vehicle began firing gunshots at the police vehicles. Another suspect also started firing shots at SAPS who returned fire and all five suspects in the vehicle were wounded. An innocent

bystander, who was a 53-year-old woman, was seriously wounded during the shootout between SAPS and the suspects. The Toyota Corolla collided with a pavement forcing it to come to a halt. Two suspects exited the vehicle with firearms in their hands and began running. The other three suspects were apprehended at the motor vehicle. The appellant was inside the motor vehicle at the time. He had sustained a gunshot wound to his abdomen.

8.4 The following had also been found inside the motor vehicle: one star 9-millimeter pistol laying on the front passenger seat with red moneybags containing some of the money stolen at the store; on the left rear seat a Webley .38 Smith and Wesson calibre revolver next to packets of cigarettes also stolen from the store; on the right rear passenger seat, a 9 millimeter parabellum Astra A70 pistol with two cellular phones. Moreover, approximately 10 cellular phones and a few wallets and various personal items of the

complainants were also found in the vehicle.

8.5 The majority of the money stolen during the robbery was not recovered.

8.6 The robbery was meticulously planned before execution thereof.

8.7 There is closed circuit television footage available of the robbery in which the appellant can clearly be seen.

8.8 The appellant's residential and work addresses were not known.

8.9 The appellant had a pending case for assault with intent to do grievous bodily harm in Molteno CAS 21/4/2013 but had no prior convictions.

9. The affidavit filed by the appellant was brief and contained the following material facts:

9.1 He was 28 years of age and resided in Dunoon. He was employed as a taxi driver at the time.

9.2 He was unmarried with a three-year-old child and was responsible for her financial support.

9.3 He had no prior convictions or pending cases.

9.4 He intended pleading not guilty to the charges he was facing.

9.5 The basis of his defence "is that of lack of knowledge about the allegations brought against me".

9.6 As exceptional circumstances he relied upon the following:

9.6.1 He has a fixed address;

9.6.2 He was responsible for the maintenance of his daughter;

9.6.3 He was not a flight risk;

9.6.4 He had no prior convictions or pending cases;

9.6.5 He had never been issued with a warrant of arrest;

9.6.6 There were no injuries to the complainant or the victims;

9.6.7 There was no possibility of interference with the witnesses;

9.6.8 There was no possibility of evidence being destroyed; and

9.6.9 The State could not show that he was not going to stand trial.

FINDING OF THE COURT A QUO:

10. The learned Magistrate found the following:

All 11 accused elected to adduce affidavit evidence which is not open to test by cross-examination and therefore less persuasive in bail applications certainly in Schedule 6 offences. That was the choice of the instruction or own making.

There exists a strong prima facie evidence before Court that the armed robbery was planned and well organized, committed by a group of persons acting in the execution or furtherance of a common purpose...

The personal factors urged on Court from the defence are neither unusual or such as singly or together warrant the release of the accused in the interest of justice. It can be best described as common place factors and looking at the objective facts are protecting the public interest.

11. The court a quo accordingly found that no exceptional circumstances existed in the interests of justice which permitted the appellant's release on bail.

LEGAL PRINCIPLES:

12. Section 65(4) of the Act provides that:

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 or his opinion the lower court should have given.

13. In considering this appeal, even if this Court has a different view, it should not substitute its own view for that of the court a quo, because that would be an unfair interference with the court a quo's exercise of discretion. It is after all the court a quo who would have been best equipped to deal with the question of bail, steeped in the atmosphere of the case.[1]

14. It is trite that section 60(11)(a) places a formal onus on the accused to adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice

permit his release.[2] The standard which the accused must satisfy, is the civil one, namely on a balance of probabilities.[3]

15. In *S v Petersen* 2008 (2) SACR 355 (C) at para

[55] Van Zyl J, writing for a full bench held that:

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. Generally speaking, "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration... In the context of s 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. See *S v Mohammed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 533) at 513f-515f. 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.

16. The appellant takes issue with the fact that the court a quo found that the appellant's election to adduce evidence by means of an affidavit was less persuasive than if had he elected to give oral evidence which would have been tested by way of cross-examination.
17. The court a quo's approach in this regard can however not be faulted.

18. In this regard in *S v Mathebula* 2010 (1) SACR 55 (SCA) at 59B-C Heher JA stated at para [11]:

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.[4]

19. The appellant moreover now states that as a result of the Covid-19 pandemic social distancing is not possible in prison. He does however state that the wearing of masks is compulsory. This, in and of itself, does not constitute exceptional circumstances as envisaged in section 60(11)(a) of the Act. If it did, it would mean that every awaiting trial prisoner facing a Schedule 6 offence would have to be released on bail. The appellant does not state that he has any health issues whatsoever which would render him more vulnerable.

20. Notably, the appellant also failed to disclose his pending matter in the affidavit filed in support of his bail application.

21. He further failed to provide the name of his employer and contented himself with generally stating that he a taxi driver. He also failed to state with whom his daughter was living and how much he had financially contributed to her upbringing prior to his arrest.

22. I am moreover in agreement with the finding in the court a quo that the appellant has not set out any facts which show that exceptional circumstances exist which in the interests of justice

permit his release.

23. I accordingly find that the court a quo correctly refused bail to the appellant.

24. There are no grounds to satisfy this Court that the decision of the court a quo was wrong. The requirements of section 65(4) of the Act have thus not been met.

25. In the circumstances I make the following order:

ORDER:

(a) The appellant's application for bail is dismissed.

NEL AJ

[1] See in this regard *Pataka v S* 2018 (2) SACR 135 (GJ) at para [24].

[2] See *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC).

[3] *S v Rudolph* 2010

(1) SACR 262 (SCA) at para [9].

[4] See also *Pataka v S* (supra) at para [25].

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