IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: A 4/2022

In the matter between:

CHARLES ZWANE Appellant

and

THE STATE Respondent

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 25 FEBRUARY 2022

DELIVERED ON: 2 MARCH 2022

[1] The appellant unsuccessfully launched a bail application in the Regional Court sitting in Frankfort. The appellant is charged with one count of robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition.

[2] The following background is relevant to these proceedings: It is common cause that the first count falls within the ambit of s60(11) (a) read with schedule 6 of the Criminal Procedure Act, 51 of 1977 (the CPA). The onus is thus on the appellant to satisfy the court that there are exceptional circumstances which in the interests of justice permit that he should be released on bail.

[3] The appellant chose not to testify or call witnesses in support of his bail application. He instead filed an affidavit as he is entitled to. The affidavit reveals that he was 41 years of age at the time of the application. He is a business man and has four people in his employment. He has resided in Gauteng his entire life. He is married with two minor children. He owns property. He has no previous convictions but has one pending case of robbery pending in the Gauteng Division of the High Court, Johannesburg. He is out on bail. The case dates back to 2015.

[4] His version is that he and his three other co-accused wanted to buy sheep in order to sell same. They set out on foot to go and look for the farmer who sold the sheep but could not locate him. While walking they suddenly heard gun shots. He ran for cover under a bridge. He was arrested and falsely accused of having committed robbery. He knows nothing about the robbery.

[5] In opposition the state called the investigating officer. He testified that the version of the state is that the complainant

was in his house with his two employees. It was around 11h15. The appellant and his co-accused entered the house and pointed the complainant and the employees with firearms. The victims were held hostage in the house and tied with ropes. The complainant was robbed of jewelleries, two firearms, hi-fi's and TV's. These were loaded in a motor vehicle which left with the alleged robbers and the property. The police and a security company were alerted of the robbery who went on the lookout for the vehicle. The motor vehicle fitting the description given to the police was spotted on the N3 highway and a high speed chase by the police ensued. The vehicle left the road and fell in the ditch. Three of the alleged robbers got out of the vehicle and ran in different directions. One alleged robber remained next to the vehicle. All four alleged robbers were arrested.

[6] The grounds of appeal are set out in six pages in the Notice of Appeal the essence of which is that the court a quo erred in finding that the appellant failed 'to prove on a balance of probabilities the existence of exceptional circumstances which would justify his release on bail."

[7] Section 65(4) of the CPA is paramount in the adjudication of this appeal and sets out 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 is wrong* (my emphasis), in which event the

court or judge shall give the decision which in its or his opinion the lower court should have been given."

[8] Section 65(4) limits the powers of the court of appeal. The interference with the discretion of the court a quo is only sanctioned where it appears that to the court exercising the appellate jurisdiction, that the court a quo exercised its discretion wrongly[1].

[9] The court in *S v Mathebula*[2] set out the proper approach in a bail application where the applicant is charged with a schedule 6 offence. It held as follows:

"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, the more especially as innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But 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. 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. Thus it has been held that until the applicant has set up a prima facie case of the prosecution case failing there is no call on the state to rebut his evidence to that effect. S v Viljoen at 561f-g…Despite the weak riposte of the State, the magistrate was left, after hearing both sides, no wiser as the strength or weakness of the State case than he had been when the application commenced. It follows

[1] S v Barber 1979(4) SA 218(D) at 220 E-H; S v Porthen and Others 2004(2) SACR © para 4.
[2] 2010(1) SACR 55 (SCA0 at para 12-13.

that the case for appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances."

[10] In his attack on the finding by the court a quo to the effect that the appellant failed to prove exceptional circumstances, Mr Monareng for the appellant relied on the issue of the weakness of the state case against the appellant. He attacked the case of the state by relying on some aspects in the affidavit of a witness of the state in effecting the arrest of the appellant. This attack is in my view unwarranted, firstly, having regard to the caution in *Mathebula* above, to the effect that the attack on the case of the prosecution is unnecessary in order to discharge the onus.

[11] Secondly, the investigating officer testifies on the contents of docket in order to give an overview of the case for the prosecution to the court. He did not testify as an eye witness. He will surely not be able to answer for a deponent in the docket. The essence of the argument of the appellant is that the affidavit of one Venter, a policeman did not establish that he saw the appellant running away but was only alerted by one Lt. Col. de Vos of a suspicious person on the bridge.

[12] It is common knowledge that the statements written for purposes of the trial do not generally explain in detail the testimony as witnesses who testify in court. It is not up to the investigating officer to answer for a deponent to a statement of what made him believe that the person under the bridge looked suspicious. It is common cause that the police chased

the people who ran away from the vehicle towards the bridge. The appellant was incidentally arrested under the bridge. The over-arching argument of the appellant seems to exclude the possibility that an accused person can be convicted on the basis of circumstantial evidence. This notion thus cannot be relied upon to argue that the state's case is weak.

[13] The appellant also attacks the finding of the court by relying on the evidence of identification. It appears that in a statement one of the witnesses deposed that she could only identify two alleged robbers but in the subsequent identification parade she pointed three people. This issue is in my view something to be evaluated at the trial. The Honourable Regional Court Magistrate correctly found that the reliability of the identification parade would best be dealt with by the trial court. The appellant failed to prove on a balance of probabilities that the State's case was weak. In my view the court a quo correctly found that the appellant failed to establish exceptional circumstances and this application ought to fail. I accordingly make this order:

ORDER

1. The appeal against the refusal of the appellant on bail is dismissed.

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P.E MOLITSOANE, J

On behalf of the Applicant:	Adv. Monareng
Instructed by:	Paul T. Leisher & Associates BASSONIA
On behalf of the Respondent:	Adv. Hoffman
Instructed by:	Director of the Public Prosecutions BLOEMFONTEIN