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.	
17 September 2015	.....
DATE	SIGNATURE

CASE NO: A265/2015

In the matter between:

TUMELO MICHAEL TSOTETSI Appellant

And

THE STATE Respondent

JUDGMENT

MUDAU AJ:

[1] This is a bail appeal as intended by virtue of the provisions of s65 of the Criminal Procedure Act 51 of 1977 ("the Act"). The appellant in this case and others appeared before the regional court, Germiston, for purposes of a bail application, on various charges that included 4 counts of murder, robbery as well as possession of a firearm. In terms of s75 (1) (c) of the Act, he has since

been arraigned for trial before this court together with 2 others on a total of 11 charges (including the ones referred to above) arising from an incident that occurred on 26 September 2013 at Wadeville, Germiston. On 12 November 2013 the appellant unsuccessfully applied for bail. On 4 July 2014 his application to be released on bail supposedly on new facts also failed.

[2] In this case the appellant appeared on charges that form part of a category of offences falling under Schedule 6 of the Act as amended. S 60 (11) of the Act provides:

"(11)

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. . ."

[3] S60 (11) has been subjected to judicial interpretation since its introduction in numerous judgments. In *S v Vermaas*[1], Van Dijkhorst J stated (at 530C-G) the following, which I respectfully agree with:

> "The amendment of the Criminal Procedure Act was passed amidst a full-blown debate about bail, bail conditions and the onus in bail cases. There were also conflicting cases in the Provincial Divisions on the question of the

[1] 1996 (1) SACR 528 (T)

onus. In the circumstances one must accept that the wording of s 60 as a whole and s 60(11) in particular was well chosen. Significant is the difference in wording between s 60(11) and the sub-sections which precede it. Section 60 is of general application but s 60 (11) is an exception to the general rule. The general rule set out in s 60(1)(a) is that the accused is entitled to be released on bail unless the court finds that it is in the interests of justice that he be detained in custody. That wording, in my view, creates an onus. The onus rests upon him who asserts that the accused should not be released, that is the State. In cases of doubt the accused goes free.

The converse is the case where s 60(11) is applicable, It is expressly worded as an exception by the use of 'notwithstanding any provision of this Act'. It is limited to only a number of crimes stated in Schedule 5 and commission of crimes set out in Schedule 1 while on bail. It is imperative, 'the court shall order the accused to be detained'. The accused is called upon to satisfy the court that the interests of justice do not require his detention in custody. Clearer wording cannot be sought for an onus on the accused."

The law therefore is that an onus is on a bail applicant to satisfy the court that exceptional circumstances exist, which in the interests of justice do not require his or her detention in custody in respect of Schedule 6 offences.

[4] It is to all the facts, including the new facts, as well as all other facts contemplated in section 60 of the Act to which I now turn with a view to determining whether exceptional circumstances exist which, in the interests of justice, permit the appellants' release, see *Vermaas*[2]; *S v Mohammed*[3]; *S v*

[2] *supra*
[3] 1999 (2) (SACR) 507 (C)

Petersen[4]. The facts, in brief as discerned from the affidavit of the investigating officer that led to the arrest of the appellant are as follows: On 26 September 2013 following a tipoff, members of the Metro police took positions at a business premises in Wadeville, Germiston. The information provided by the informant was that there was a planned armed robbery. The target was a company manager whose role it was to take money for banking that day.

[5] The manager swapped cars with members of the police. Two officers drove in the vehicle that was used to transport money to the bank, a Kia Serato sedan, disguised as the manager and an employee respectively. Along the way, they were intercepted by a motor vehicle driven by the suspected robbers who started shooting at their car. In the process, the 2 officers were shot and one fatally. Since there were already members of the SAPS in the vicinity, a shootout ensued between the police and the robbers. During the process the 2 Metro police members already shot, were removed from the car that carried the cash by the robbers who then sped off. The Kia Serato was along the way blocked off the road by the police. A shootout followed between the police and the suspected robbers. Three of the suspected robbers were fatally wounded. An amount of R16000-00 destined for the bank and firearms that belonged to the Metro police who were shot were recovered. The appellant was one of the two suspected robbers in the Kia Serato arrested at the scene.

[6] The appellant did not tender *viva voce* evidence but relied on sworn affidavits in both instances. In his first affidavit the appellant confirmed that he was arrested on the date consistent with the respondent's version. Briefly stated, he placed his personal circumstances and other relevant factors as envisaged

[4] 2008 (2) SACR 355 (C)

in terms of s60 (4) to (9) of the Act. He was 32 years old at the time, unmarried but a father to a minor child. He worked as a packer. He has no personal or other interests outside the country. He asserted that he would not evade his trial, influence or intimidate witnesses. He had no intention to jeopardise the objectives or proper functioning of the criminal justice system. It is his evidence that he did not commit the offence but was a victim of circumstances. He denies that he was arrested at the scene as alleged by the police.

[7] In his bail application on new facts he disclosed his HIV status. He asserted that his health was deteriorating as he was not receiving the necessary treatment or healthy diet in prison. As a result of his prolonged incarceration, he suffers from immense emotional, physical and financial hardship which extended to his family. In his view, the state did not have a strong case against him. It was merely a case of mistaken identity as he was in the wrong place, at the wrong time.

[8] S 65(4) of the Act provides:

"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."

The appellant still has to satisfy me, on a balance of probabilities, that the decision of the learned magistrate was wrong (*S v Hlongwa)*[5].

[5] 1979 (4) SA 112 (D)

[9] In both applications the learned magistrate refused bail as he was not inclined to accept the argument that the state's case is weak. The magistrate found that the only new aspect he had to consider in the second bail application was the appellant's HIV status. In refusing bail, he was of the view that the appellant could receive adequate treatment whilst in prison and endorsed the warrant of detention accordingly.

[10] It is not without significance that the appellant chose, as it is his constitutional right, to tender his evidence through affidavits, as opposed to oral testimony, in which event he would ordinarily have been subjected to cross-examination to test the veracity thereof. The court below was therefore compelled to consider both applications on the strength or otherwise of the averments contained in his affidavits. A bail applicant cannot be criticised for electing to present his case by way of an affidavit and not orally as the appellant did. However, it is trite that averments contained in an affidavit have little probative value when compared to oral evidence which can be subjected to cross examination (*S v Pienaar*[6]).

[11] The attack against the magistrate's refusal of bail as per the notice of appeal can be summarised as follows:

1. The magistrate had erred in refusing to grant the appellant bail. His discretion was not exercised judicially.
2. The state has no *prima facie* case against the appellant.
3. The magistrate should have considered that the appellant is emotionally and economically bound to the jurisdictional area of the court.

[6] 1992 (1) SACR 178 (W) at 180*h*).

4. The magistrate ought to have found that the absence of a strong case against the appellant constitutes an exceptional circumstance justifying the appellant's release on bail.

5. The appellant is not a flight risk and should have been granted bail with appropriate conditions.

[12] In *Mathebula v S*[7] Heher JA had the following to say:

> "But 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 (S v *Botha and another*[8]; S v *Viljoen*[9]*.* That is no mean task, the more especially as an 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; as to which see *Shabalala and others v Attorney-General of Transvaal and another*[10]. 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. 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 (*S v Viljoen*[11]*)"*.

[13] In this matter, the denial of complicity and the allegation that he was not arrested at the scene as the police averred, but conceded in argument, rested

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[7] [2010] 1 All SA 121 (SCA at para [12]
[8] 2002 (1) SACR 222 (SCA) at 230*h*, 232*c,* [also reported at [2002] 2 All SA 577 (A) – Ed]
[9] 2002 (2) SACR 550 (SCA) at 556*c* [also reported at [2002] 4 All SA 10 (SCA) – Ed]).
[10] 1996 (1) SA 725 (CC) also reported at [1996] 1 All SA 64 (CC) – Ed]
[11] *supra* at 561*f–g*

solely on his say-so with neither witnesses nor objective probabilities to strengthen them (*Mathebula*- above). The objective factors *prima facie*, as the magistrate correctly found, show that the appellant was arrested at the scene of the shootout between the police and the suspected robbers. The remainder of the personal factors urged on this court, are not unusual but common place. This includes the allegation regarding the appellant's HIV status. In any event singly or together, they do not warrant the release of the appellant in the interest of justice. In the contrary the magistrate must be commended for endorsing the warrant of detention accordingly and thus brought the appellant's plight to the relevant prison authorities. To this end s12 (1) of the Correctional Services Act 111 of 1998 provides that:

"The department must provide, within its available resources, adequate healthcare services, based on the principles of primary health care in order to allow a very intimate to lead a healthy lifestyle."

Finally, the recital of the provisions of ss (4) of s 60 of the Act, as the appellant did, without the addition of facts that add weight to his *ipse dixit*, does not establish any of those grounds.

[14] In the premises, the appeal is dismissed.

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T P Mudau

Acting Judge of the High Court,
Gauteng Local Division
Johannesburg

Appearances

For the Appelant	Mr H Saayman
Instructed By	Saayman Attorneys
For the Respondent	N Mpolweni
Instructed By	The DPP
Date of hearing	17 September 2015
Date of judgment	17 September 2015