IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D11892/2022

In the matter between:-

NJABULO MUSAWENKOSI BLOSE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

SINGH, AJ:

1. The Appellant in this matter stands charged before the Durban Magistrates Court in respect of the following charges:-

    1.1. robbery with aggravating circumstances as intended in Section 1 of the Criminal Procedure Act of Act 51 of 1977 read with the provisions of Section 51(2) Part 2 of the Criminal Law Amendment Act 105 of 1997 further read with Section 260 of the Criminal Procedure Act No. 51 of 1997[1];

[1] Record, page 7

1.2. corruption – giving a benefit and being guilty of the crime of contravening of the provisions of Section 4(1)(b)(i)(aa) read with Sections 1(2), 24, 25, 26(1)(a) of the Prevention of Combatting of Corrupt Activities Act No. 12 of 2004[2];

1.3. being in possession of stolen property in contravention of the provisions of Section 36 of the General Law Amendment Act No. 62 of 1955[3];

1.4. failing to safeguard his firearm in terms of the provisions of Section 128(a) read with Sections 1, 103, 120(1)(a) and 121 read with Schedule 4, Section 151 and further read with the Regulations as promulgated in Section 45 of the Firearms Control Act No. 60 2000[4].

2. The Appellant launched a bail application before the Durban Magistrates Court subsequent to his arrest and the said bail application was dismissed on 22 June 2022[5].

3. The Appellant lodged a bail application on new facts before the Durban Magistrates Court which was dismissed on 4 October 2022. This is an appeal against the dismissal of bail on the new facts.

4. It is trite that an Accused person's right to bail was set out in common law and reaffirmed by the provisions of Section 35(1)(f) of the Republic of South Africa Constitution Act of 1998 which provides that:-

"Every person who is arrested … has the right –

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[2] Record, page 8
[3] Record, page 9
[4] Record, page 10
[5] Record, pages 80 to 107

f) to be released from detention if the interests of justice permits, subject to reasonable conditions."

5. It is trite that the presumption of innocence which finds expression in the maxim "*in favorem vitae libertatis et innocentiae omnia praesununtur*" operates in favour of the Appellant even where there is a strong *prima facie* case against him.

6. A balance however has to be struck between the presumption of innocence of an accused and the interests of justice and in making this determination, in the case of **S v Essack**[6] the Court appositely stated as follows:-

> *"In dealing with an application of this nature, it is necessary to strike a balance as far as that can be, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice … the presumption of innocence operates in favour of the Applicant even where it is said there is a strong prima facie case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the Court must be fully justified in refusing to allow him bail."*

7. It is common cause that the Appellant stands charged for an offence which falls within Schedule 6 of the Criminal Law Amendment Act No. 105 of 1997 and that accordingly the provisions of Section 60(11)(a) applies in that "*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/her release*".

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[6] **1965 (2) SA 161 (D) at 162 C to E**

8. The Constitutional Court in the case of **S v Dlamini**; **S v Dladla and Others**; **S v Joubert**; **S v Schietekat**[7] it was held that although the inclusion of the requirement exceptional circumstances in 50(11)(a) limits the right enshrined in the Constitution, such limitation is reasonable and justifiable in terms of Section 36 of the Constitution. It has been held that exceptional circumstances for the purposes of Section 60(11) of the CPA does not posit a standard which would render it impossible for an exceptional but deserving Applicant to make out a case for bail[8].

9. In the initial bail application, the Investigating Officer furnished an Affidavit[9] .

10. In summary the Investigating Officer's Affidavit stated as follows:-

10.1. That three men parked on the corner of Smith & Field Streets, Durban in a silver Chev Aveo;

10.2. That one male got out of the back seat with a firearm and walked towards a clothing store known as Levisons. The Appellant who was the driver of the motor vehicle also got out of the vehicle and walked about signaling to the other person who also alighted from the vehicle that everything was clear. The backseat passenger entered the store with his firearm and after the robbery, the Appellant got into the Aveo motor vehicle and drove off whereafter he was intercepted a short distance from the crime by members of the South African Police Services;

10.3. The aforesaid events were witnessed by a member of the public who informed the police;

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[7] **1999 (2) SACR 51 CC**
[8] **2001 (SACR) 659 (C) AT 667.**
[9] Record, pages 47 to 49

10.4. At the time of his arrest, the Appellant was on duty and when intercepted by the police offered the sum of R50 000,00 to prevent being arrested;

10.5. Three cellphones were recovered from the vehicle which the Appellant could not supply and explanation for;

10.6. Further investigation led the police to Glebe Mens Hostel in Umlazi where two firearms suspected to be used in the robbery were recovered and one of the firearms belonged to the Appellant in that it was his state issued firearm which he had booked on duty at 5h45 on the morning of his arrest;

10.7. That the Appellant was part of a gang which targeted businesses in the Durban Commercial Business District in a recent spate of robberies, with the business in question having been robbed at least six times in eighteen months. Witnesses to the incident are aware that the Appellant is a police officials and are terrified for their safety;

10.8. At the hearing of the bail application, the Appellant testified on his own behalf regarding his personal circumstances one of them being that he required to be at home to assist his father with household chores, administering medication to his father who had sustained an injury and assisting his father with his father's transport business from time to time. The Appellant's father one Brian Blose also testified on behalf of the Appellant.

11. It appears from the record that the parties approached the initial bail application on the basis that the bail application fell within the ambit of Section 60(11)(a) of the CPA and therefore the Appellants bore the onus to satisfy the Court that

exceptional circumstances existed which, in the interests of justice, permitted his release.

12. At the end, the Learned Magistrate considered the evidence and was not persuaded that the Appellant had discharged the onus in terms of Section 60(11)(a) and bail was accordingly refused.

13. An application for bail on new facts was then launched in September 2022 and the basis for such application on fresh facts were as follows:-

    13.1. That there was a delay in the _____

14. The purpose for _____ new facts in a subsequent bail application is not to address problems encountered in the previous application or to fill gaps but to introduce facts discovered after the initial bail application was heard. The fresh facts are not to be an elaboration or embroidery of facts presented at the first bail application[10], [11].

15. The new facts which had to be considered by the Court a *quo*, were as follows:-

    15.1. That there was a delay in the investigations pertaining to Section 205 and the investigation of the cellphone records in respect of the cellphones recovered from the motor vehicle of which the Appellant was the driver and the mapping reports in respect of such records[12];

    15.2. The Investigating Officer stated that photographs of him were taken by members of the Accused's family and also of the Prosecutor's motor

[10] **S v Petersen 2008 (2) SACR 355 (C) at paragraph 57**
[11] **Davis and Another v S (unreported, KZDLD Case Number 2888/2015, 8 May 2015)**
[12] Lines 17 to 24

vehicle. There was also camera footage of the photographs being taken[13];

15.3. That the Appellant's sister who was a police officer stationed at Durban Central Police and who was charged with defeating the ends of justice in that she had allegedly removed the sim card of the Appellant's cellphone when he was arrested and brought to Durban Central Police Station, and who had also been suspended from her service as a police officer, was reinstated to her position at the disciplinary enquiry. The criminal proceedings at the time of the hearing of the bail application were however still pending[14];

15.4. That threats were being made to the investigating officer by the Appellant's father who alleged that he was a "taxi boss". A daily register from Mamfeka Staff Transport Logistics was handed in to form part of the record to show that the Appellant's father did not own taxis but rather a transport logistic company[15].

16. The Court a *quo* deal with each of the contentions raised by the Appellant and was not persuaded that either individually or cumulatively the contentions constituted new facts and on that basis the Court a *quo* refused the application for bail on new facts.

17. The learned Magistrate in the Court a *quo* approached the application on the basis that the Court still had to consider whether *"exceptional circumstances had been discharged … are the personal circumstances sufficient to establish exceptional circumstances?"*[16]

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[13] Line 25, page 215 to line 8, page 216, record
[14] Lines 11 to 19, record, page 216
[15] Lines 8 to 10, page 216; lines 21 to 25, record page 216
[16] Record, lines 14 to 18, page 225

18. The learned Magistrate referred to the case of **S v Mathebula**[17].

19. In determining whether the Learned Magistrate was correct, this Court must take cognizance of Section 64 of the CPA, which states that:-

> *"(4) 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."*

20. As in a criminal appeal this Court's powers to interfere with a Court a *quo*'s decision on appeal is limited to those instances where it is convinced that such a decision is wrong[18], [19].

21. This stance is also apposite in the case of **S v Barber**[20] where the Court stated:-

> "*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*

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[17] **2010 (1) SACR, 55 SCA at paragraph 12**
[18] **S v Janta 2000 (1) SACR 237 (TK) at page 240 F**
[19] **S v Sithole and Others 2012 (1) SACR 586 (KZD) at paragraph 12**
[20] **1979 (4) SA 218 (D) at 220**

that the Magistrate who had the discretion to grant bail exercised that discretion wrongly."

22. This Court has to consider whether the Appellant's case is "*reshuffling old evidence or an embroidery of it*"[21] or whether there are indeed new facts which warrant a reconsideration of the refusal.

23. In hearing this matter this Court will have to consider the facts presented at the initial bail application but only to the extent that it will enable this Court to draw a comparison with the new facts adduced. This approach is consistent with that of Her Ladyship Madam Justice Steyn in **Davis and Another v The State**[22] to which I align myself.

24. I am of the view that the new fact placed before the Court relating to the Appellant's sister's reinstatement in the South African Police Services is not a new fact in the sense that it does not constitute an exceptional circumstance and further her reinstatement is as at the time of the hearing of the bail appeal did not mean that the criminal proceedings which were pending.

25. In my view the high watermark point of the Appellant's case is whether there will be a delay in the finalization of the trial. It is evident from the record that the investigating officer was cross-examined extensively by the Appellant's Counsel in this regard. The Court a *quo* in its judgment was clear that though the investigating officer may have gotten confused under cross-examination, it did not mean that he was necessarily a lying witness. A perusal of the record certainly indicates that Counsel for the Appellant and the investigating officer may have been at cross-purposes regarding the use of the word report by the investigating officer[23].

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[21] **S v De Villiers 1996 (2) SACR 122 (T) at 126 E to F**
[22] **[2015] ZAKZDHC 41 at paragraph 8**
[23] Record, pages 134 to 135

26. As at the time of the hearing of the bail application under consideration, the investigations appeared to be complete and all statements were also obtained save for the Section 2015 report and the mapping report which the investigating officer advised had to be obtained from the Cyber Crime Department. This could take "t*hree months, three weeks, six months or less*"[24].

27. As at the date of the hearing of the bail appeal on fresh facts, the investigations were substantially if not almost complete. This also does not constitute a new fact.

28. Against that background, the Learned Magistrate considered that from the evidence available, the Appellant who was stopped shortly after the robbery was committed, acted in broad daylight and brazenly. His service firearm was subsequently found dumped in the Men's Hostel. She took cognizance that robberies are on the increase and there was a high prevalence of robbery[25].

29. Coupled with that, there was the evidence of the investigating officer that the Appellant being a policeman at the time of the commission of the offence if released would have access to information regarding identities of witnesses and that there might be interference of witnesses[26].

30. The Learned Magistrate's reasoning for refusing bail on new facts were, in my view, manifestly correct in that there were no new facts which constituted exceptional circumstances to warrant the Appellant being granted bail.

31. After careful consideration of all these factors, I am satisfied that there was no merit in this appeal and accordingly I dismissed the appeal against the Court a *quo*'s refusal to admit the Appellant to bail on new facts.

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[24] Record, page 242
[25] Record, pages 237 to 238
[26] Record, pages 239 to 240

SINGH AJ

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