



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Appeal Case: A 212/24

Regional Court Case No: BD2/584/23

In the matter between:

SEBENZILE DYASI

APPELLANT

AND

THE STATE

RESPONDENT

Coram: Siyo AJ

Delivered: This Judgment was handed down electronically by circulation to the legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 4 February 2025.

ORDER

On appeal from: The Regional Court, Blue Downs, Cape Town, Western Cape Regional Division (Regional Magistrate Mrs. Appelgryn sitting as court of first instance):

1. The appeal is dismissed.

JUDGMENT

1. On 16 June 2023 the appellant was arrested and subsequently charged together with four others with assault, kidnapping and murder read together with the provisions of section 51 (1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“CLAA”) in that the murder was premeditated and committed in the execution or furtherance of a common purpose or conspiracy.
2. It is alleged by the State that on 15 June 2023 the appellant and four others descended on the deceased’s home, which is situated at the Bosasa Temporal Houses, armed with an assortment of sticks, hockey sticks, golf club’s and various other weapons. The State further alleged that the deceased, who was home at the time of the attack, was assaulted and stabbed on the head and neck with various sharp weapons by the appellant and four others.
3. According to the State’s version, the assault took place in front of the deceased’s family whose desperate plea’s for clemency were ignored. The deceased was subsequently hauled by the appellant and four others to a nearby bush. Concerned, the deceased’s family followed the appellant and four others as they moved towards a nearby bush with the deceased. This was however thwarted by death threats that were directed to them by the appellant and four others.
4. Perturbed by what was unfolding, it was also alleged that the deceased’s family returned home and called the South African Police Service. The deceased was later found buried in a shallow grave not far from his place of residence.
5. On 22 June 2023 the appellant applied for bail before the Regional Court, Blue Downs, Cape Town, Western Cape Regional Division (“court *a quo*”). Bail was denied by the court *a quo* on the basis that the appellant had failed to prove, on a balance of probabilities, that exceptional circumstances exist which justify his release. Dissatisfied, the appellant appealed against this decision.

Grounds of Appeal

6. This bail appeal comes before this court in terms of section 65 of the Criminal Procedure Act 51 of 1997 (“Criminal Procedure Act”).
7. The first ground of appeal outlined in the notice of appeal is that the court *a quo* misdirected itself in finding that the appellant failed to prove on a balance of probabilities that there were exceptional circumstances which justified his release on bail.
8. In advancing this ground of appeal, the appellant sought to place reliance on circumstances such as that: (i) he has a fixed address and is not a flight risk; (ii) he has no previous convictions; (iii) there is no evidence to the effect that he would not comply with the bail conditions or that he has ever breached them before; (iv) he is currently unemployed but is looking for a job and that he has no dependants; (v) he does not pose any threat to State witnesses or is unlikely to interfere with investigations; (vi) the State’s case is weak as it only relies on a single witness in which the cautionary rule may apply.
9. Furthermore, the second ground of appeal advanced in the notice of appeal is that the court *a quo* misdirected itself in denying bail on the grounds that the state has made out a *prima facie* case against the appellant. According to the appellant, this was seen as some form of anticipatory punishment. In his view, bail cannot be used as some form of anticipatory punishment.
10. Moreover, the third ground of appeal advanced in the notice of appeal is that the court *a quo* misdirected itself in treating the appellant in the same manner with which it would have dealt with someone who has previous convictions or pending matters. The fourth and last ground of appeal advanced in the notice of appeal is that the court *a quo* misdirected itself by not exploring the option of attaching reasonable conditions as an alternative to the denial of bail.
11. Although the appellant had initially advanced these four grounds in his notice of appeal, in oral argument and in the heads of argument filed by his legal

representatives, he firmly nailed his colours to the mast of the exceptionality requirement in section 60(11)(a) of the Criminal Procedure Act. In other words, the appellant sought to assail the court *a quo*'s decision on bail only on the basis that the court erred in finding that he failed to prove that there were exceptional circumstances which justified his release on bail.

12. I address this ground of appeal below.

Court a quo's judgment

13. Mindful that the appellant had been charged with an offence referred to in Schedule 6 of the Criminal Procedure Act, the court *a quo* commenced its judgment by highlighting that the appellant carried the onus of convincing the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release on bail.

14. The court *a quo* found that "*there is nothing out of the ordinary*" in the appellants personal circumstances. Relying on *Ali vs State*¹, the court *a quo* held that financial loss is an inevitable consequence of the incarceration of any gainfully employed person. I pause to mention that according to that case, what might meet the exceptionality requirement in section 60(11)(a) of the Criminal Procedure Act, depending on the circumstances, is evidence that the appellant's dependants will starve if he is not released to fend for them. The appellant did not attempt to make out such a case.

15. In considering the interests of justice, the court *a quo* found that more than one of the risk factors identified in section 60 (4) of the Criminal Procedure Act had been established. In coming to this conclusion, the court *a quo* considered that when the deceased's relatives tried to intervene by stopping the assailants (including the appellant) from assaulting the deceased, they were threatened with death. Furthermore, the court *a quo* also placed reliance on the fact that the appellant

¹ *Ali vs State* 2011 (1) SACR 34 para 20.

knew the witnesses and where they live owing to that they all hail from the Bosasa Temporal Houses.

16. The court *a quo* concluded by stating that these risk factors weigh more than the appellants right to freedom and the prejudice he is likely to suffer from being incarcerated whilst awaiting trial. In conclusion, the court *a quo* held that the appellants release on bail would undermine the public's confidence in the criminal justice system.

Evaluation of the Appeal

17. Section 65 (4) of the Criminal Procedure Act, which provides a statutory context for determining bail appeals, 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.*"

18. In *S v Barber*, the court held the following in determining appeals in accordance with section 65 (4) of the Criminal Procedure Act:

*"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."*²

² *S v Barber* 1979 (4) SA 218 (D) at 220 E – H.

19. Furthermore, citing established authority on the test for interfering with a Magistrates judgment, the Court in *Panayiotou v S*³, held that:

“In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected himself or herself in some material way in relation to either fact or law (see Ali v State [2011 \(1\) SACR 34](#) (E) at para 14; cf. also S v M [2007 \(2\) SACR 133](#) (E)). If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the absence of a finding that the magistrate misdirected him or herself the appeal must fail (cf. S v Porthen and others [2004 \(2\) SACR 242](#) (C) at par [11]).”

20. While it was common cause that the offences for which the appellant had been charged fell under the ambit of Schedule 6 of the Criminal Procedure Act, it was submitted that the court *a quo* misdirected itself in finding that the appellant had failed to prove that there were exceptional circumstances which justified his release on bail.

21. It was argued by Mr Mondleki, who appeared for the appellant, that none of the factors enumerated in section 60 (4) of the Criminal Procedure Act were present in this case. According to Mr Mondleki, no evidence had been adduced in this regard by the State before the court *a quo*. The cumulative effect of this, so the argument went, was that this could lead to a finding that exceptional circumstances exist which justify the appellants release.

22. On the other hand, Ms Thaiteng, who appeared for the State, submitted that the factors advanced by the appellant in support of his bail application were ordinary and could not be regarded as exceptional. It was further argued by Ms Thaiteng that mere personal circumstances that are general and commonplace do not constitute exceptional circumstances.

³ *Panayiotou v S* (CA&R 06 /2015) [2015] ZAECGHC 73 para 27; *S v Ali* [2011 \(1\) SACR 34](#) (E) at para 14; *S v M* [2007 \(2\) SACR 133](#) (E); *S v Porthen & Others* [2004 \(2\) SACR 242](#) (C) at par [11].

23. Section 60(11) of the Criminal Procedure Act provides that: *“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.”*

24. What are exceptional circumstances? This question has been the subject of many judicial pronouncements. In *S v Petersen*⁴ the full bench interpreted exceptional circumstances as follows:

“Generally speaking “exceptional” is indicative of something unusual, extraordinary, remarkable, peculiar or simply different ... 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... In essence the court will be exercising a value judgement in accordance with all the relevant facts and circumstances, and with reference to all the applicable criteria”

25. The bail application was brought by way of affidavit whose content was read into the record before the court *a quo*. Apart from outlining his personal circumstances and declaring that he neither has any previous convictions nor pending criminal cases against him, the appellants affidavit outlined that he is a 47 year old unemployed man who wished to look for work in order to assist his father who was supporting him financially.

26. On the other hand, the investigating officer deposed to an affidavit in which he opposed bail broadly on the grounds outlined in section 60 (4) of the Criminal Procedure Act, including that (i) there is the likelihood that the appellant will endanger the safety of the public or any particular person or will commit a Schedule 1 offence if he is released on bail; (ii) there is a likelihood that the appellant will attempt to evade his or her trial if he is released on bail; (iii) there is

⁴ *S v Petersen* 2008 (2) SACR 355 (C) at 55.

a likelihood that the accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence if he is released on bail; (iv) there is the likelihood that the accused will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, if he is released on bail.

27. Faced with this evidence, in my view the court *a quo* correctly devoted time to analysing and evaluating the appellants and States evidence. The court *a quo* went to some length in considering the five broad considerations mentioned in paragraphs (a) to (e) of subsection (4) of section 60 of the Criminal Procedure Act. This was weighed against the appellants right to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody as provided as provided in subsection (9).

28. Furthermore the court *a quo* weighed up the appellants personal interests against the interest of justice. In weighing up the relevant factors, the court *a quo* exercised a value judgment.

29. I respectfully disagree with the appellants submission that none of the factors enumerated in section 60 (4) of the Criminal Procedure Act are present in this case. The States version that the deceased's relatives were threatened with death by the assailants (including the appellant) when they tried to intervene by stopping them from assaulting the deceased could not be gainsaid by the appellant.

30. Indeed, the appellant was linked to the offence by a witness who identified him. In my view, this gives credence to the court *a quo*'s finding that the appellant knew the witness and where they live owing to that they all hail from the Bosasa Temporal Houses.

31. The high watermark of appellants evidence in establishing the existence of exceptional circumstances is that he wished to look for work in order to assist his father who financially supported him. In my view, the court *a quo* correctly found that "*there is nothing out of the ordinary*" in the appellants personal

circumstances. The circumstances proffered by the appellant are general, common place and do not constitute exceptional circumstances. As held by the Supreme Court of Appeal in *Mathebula v S*, “parroting the terms of subsec (4) of s 60, as he did, does not establish any of those grounds, without the addition of facts that add weight to his ipse dixit.”⁵

Conclusion

32. The appellant was called upon to prove two things, on a balance of probabilities, in order to discharge the onus on him in the context of a Schedule 6 offence. First, the existence of exceptional circumstances; and, second, that those exceptional circumstances permit his release on bail in the interests of justice.⁶

33. In my view the appellant failed to prove, on a balance of probabilities, that exceptional circumstances exist which warrant his release on bail. For these reasons, I am of the view that the court *a quo*'s decision to refuse bail was correct.

Order

34. It is accordingly ordered as follows:

34.1. The appeal is dismissed.

LK SIYO, AJ

APPEARANCES

Counsel for the appellant:

Mr. Mondleki

⁵ *Mathebula v S* 2010 (1) SACR 55 (SCA) para 15.

⁶ *Barensse and Another v S* [2023] 3 All SA 381 (WCC) para 141.

Instructed by:

Xalushe Incorporated

Counsel for the Respondent:

Ms. PA Thaiteng

Instructed by:

Director of Public Prosecutions

Cape Town

Date Heard:

1 November 2024

Date Handed Down:

4 February 2025