HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

…… **8/6/2020…..** ……**(Signed)………**

DATE SIGNATURE

CASE NO: A107/2020

In the matter between:

H. FOURIE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

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1. The appellant was arrested on 13 January 2020. He is charged, together with three co-accused, as accused 3, with the following counts, namely:

1.1. Incitement to commit a crime in contravention of the provisions of section 18(2)(b) of the Riotous Assemblies Act No 17 of 1956;

1.2. Conspiracy to commit robbery with aggravating circumstances – Contravening section 18(2)(a) of the Riotous Assemblies Act No 17 of 1956;

1.3. Robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977(CPA), read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997;

1.4. Attempted murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997;

1.5. Malicious damage to property;

1.6. Contravening section 3 of the Firearms Control Act 60 of 2000 - unlawful possession of Firearm;

1.7. Contravening section 4(1)(a) of the Firearms Control Act 60 of 2000 – Unlawful possession of automatic firearm;

1.8. Contravening section 90 of the Firearms Control Act 60 of 2000 – Unlawful possession of ammunition; and

1.9. Contravening section 5 of the Explosives Act 26 of 1956 – Unlawful possession of explosives.

2. The charges against the appellant emanate from an incident of robbery of a SBV armoured cash in transit vehicle which took place on 7th January 2020 on the N4 Freeway near Bronkhorstspruit where a cash amount of just over R25 500 000.00 (Twenty five million five hundred thousand rand) was robbed. AK47 automatic rifles and explosives were, inter alia, used during the robbery. The robbery was executed with precision by a number of robbers travelling in different vehicles. The armoured vehicle was bumped intentionally from behind which caused the driver to swerve off the road and end up in a ditch on the side of the freeway. Several armed persons wearing balaclavas exited from their vehicles. Shots were fired at the driver's side window of the armoured truck. Eventually the driver opened his door and he was forced out of the vehicle. The robbers threatened to blow open the side door of the armoured truck by using explosives. This caused the driver and the crew in the back of the truck to open the truck's side door. The crew were taken out of the truck and made to lie down on the ground. The robbers then used explosives to blow open the door of the vault inside the truck. Before the robbers left, they set alight the Mercedes-Benz vehicle in which some of them had arrived at the scene and which was used to bump the armoured truck off the road. The robbers fled the scene in their other vehicles taking with them several cash bags and two 9 mm pistols belonging to SBV.

3. The appellant brought an application to be released on bail in the Magistrates' Court for the district of Tshwane East, held at Bronkhorstspruit.

4. The appellant, in support of his application for bail, deposed to an affidavit wherein he set out his personal circumstances and gave reasons why he should be released on bail. A report compiled by a Correctional Services officer in terms of section 62(f) of the CPA on behalf of the appellant was also handed in. The respondent opposed appellant's bail application by submitting an affidavit deposed to by the investigating officer in which he set out the case against appellant and reasons for opposing bail. Other affidavits were also submitted.

5. Appellant's bail application was dismissed by the Magistrate after she was unable to find any exceptional circumstances justifying his release on bail. The appellant now approaches this Court on appeal against the Magistrate's refusal to admit him to bail.

6. It was common cause at the hearing before the court a quo that the offences which the appellant is charged with, in particular, robbery with aggravating circumstances, fall within the confines of Schedule 6 of the CPA. Section 60(11)(a) of CPA stipulates, pertaining to Schedule 6 offences, that:

"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 interest of justice permit his or her release".

7. In the heads of argument supporting this appeal it was submitted on behalf of the appellant that the legal representative of the appellant in the court a quo erroneously made the concession that the offence with which the appellant was charged, falls within the ambit of Schedule 6 of the CPA and submitted that for purposes of bail his application should have been dealt with under Schedule 5 of the CPA. In this regard it was submitted that the case against the appellant was that he was not part of and/or linked to the actual commission of the alleged armed robbery, but is alleged to have recruited employees to plan the robbery and to manipulate the schedule of the service routes of the armed vehicle enabling the particular run to collect cash at the furthest point in order to enable the robbers to perpetrate the robbery. It was submitted that conspiracy to commit an offence does not fall within the ambit of Schedule 6 of the CPA and that the matter should have been dealt with under Schedule 5 of the CPA.

8. In my view this argument on behalf of the appellant cannot be supported. In order to commit a crime, a perpetrator need not always be at the scene of the crime. In this particular case the appellant can be a socius criminis and thus guilty of the crime of robbery if he committed the actus reus alleged by the State and if he had the necessary intent. I shall accordingly adjudicate this appeal with reference to Schedule 6 of the CPA.

9. The onus is thus on the appellant to prove exceptional circumstances in terms of section 60(11)(b) CPA, that justify his release on bail in the interest of

justice. The standard of proof is on a balance of probabilities. See: S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (2) SACR 51(CC) at [61], [78] and [79].

10. Exceptional circumstances as a concept have not been defined by the legislator. In S v Petersen 2008 (2) SACR 355 (C) at [55] the full bench concluded as follows on the meaning and interpretation of "exceptional circumstances":

"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."

11. In S v Mohammed 1999 (2) SACR 507 (C) the court pointed out that: "the true enquiry…is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release…".

12. Personal circumstances which are really "commonplace" cannot constitute exceptional circumstances for purposes of section 60(11)(a). See: S v Scott-Crossley 2007 (2) SACR 470 (SCA) at [12].

13. In S v H 1999 (1) SACR 72 (W) at 77E, the court stated that:

"The exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly, if I may use that word, to an accused person's specific application. What the court is called upon to do is to examine all the relevant considerations, not individually, but as a whole in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60(11)(a) of the Act".

12. The following was stated in S. v. Jonas 1998(2) SACR 677 (SE). Horn AJ said at p678e-i:

"The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g., he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.

In this matter the State did not place any evidence before the court, either in opposing the application for bail or in rebuttal of the appellant's denial of the commission of the offences with which he had been charged. It would appear that the State had adopted this line of approach on the assumption that the appellant had all to do in order to succeed with his application for bail.

On the strength of the onus which the amending provisions had cast on the appellant, the magistrate simply adopted the attitude that because the appellant had shown no exceptional circumstances, bail should be refused. The magistrate did not say what such exceptional circumstances might be. I do not believe that it could have been the intention of the Legislature, when it enacted the amending provisions of s. 60(11) of the Act, to legitimize the at random incarceration of persons who are suspected of having committed Schedule 6 offences, who, after all, must be regarded as innocent and proven guilty in a court of law."

13. In S v DV 2012(2) SACR 4492 (GMP) at para 8 Legodi J found that cumulatively the fact that the State case was subject to some doubt, the low risk pertaining to flight, the absence of likelihood of interferrence with state witnessess and the low risk of re-offending, constituted exceptional circumstances.

14. Regarding the manner to approach an appeal of this nature, Section 65(4) of CPA sets out the powers of courts hearing the appeal. It provides 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 was wrong, in which event, the Court or Judge shall give the decision which in its opinion, the lower court should have given".

15. In Chewe v The State (unreported case no: A702/2015 GDP-26/10/2015 [21] Ishmail J stated the following with regard to the approach on bail appeals:

"This appeal is advanced against the refusal of bail by the court having heard the initial and subsequent application. The task of this court is merely to ascertain whether the court of first instance exercised its mind judicially and correctly. In this regard I am enjoined to follow the approach laid down by the court in S v Barber 1979 (4) SA 218 (D) – " 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 the court's 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".

16. In S v Porthern and Others 2004 (2) SACR 242 (C), Binn-Ward AJ considered the above *dictum in* Barber-case in the context of section 60(11) and concluded, with reference to S v Botha 2002 (1) SACR 222 (SCA), that the appeal court's power to intervene in terms of s.65 (4) of the CPA is not strictly confined as suggested in *Barber*, above, and that the appeal court can undertake its own analysis of the evidence and come to its conclusion whether the appellant had discharged the onus in terms of s60(11).

17. 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 the facts or the law. In the absence of a finding that the Magistrate misdirected himself or herself, the appeal must fail. See: Panayiotou v The State (unreported case no: CA&R 06/2015 [2015] ZAECG 73(28 July 2015) at [27]).

18. According to the Notice of Appeal the appellant submitted that the Magistrate erred in finding that the Appellant had not discharged the onus to show that he will stand his trial; that he will not interfere with State witnesses; that he will not interfere with the police investigation; that he will not commit further crimes; and that he failed to proved that exceptional circumstances existed, thereby necessitating his release on bail in the interest of justice.

19. The State's case against the appellant briefly turns on the following. He is in the employ of SBV as the Head of the Logistics Department. Information received subsequent to the robbery suggested that there were persons inside

the SBV cash centre that assisted the robbers to ensure a successful robbery. The investigating officer also stated that something was suspicious regarding the schedules of the armoured trucks and that on this particular route the truck started at the nearest point collecting money to the furthest point before it turned back to its head office. This, apparently, is something that is not usually done. The investigating officer further stated that during the interview of witnesses the appellant was one of the persons implicated in the robbery.

20. It was however not suggested that the appellant physically took part in the robbery but that he assisted therein in that he manipulated the route to be taken as well as the allocation of personnel to serve in the particular vehicle. It was stated that the appellant utilised subordinate employees to recruit other employees to participate in the planned robberies of SBV vehicles. Also that he instructed subordinates to manipulate the schedule of the service run routes and also that he instructed staff to tamper with the vehicle's security systems.

21. The investigating officer also referred to another affidavit by an unknown person who works for SBV. That person said that after the police arrived on the day of the arrest of the appellant, the appellant handed to him a broken cellular phone and requested him to throw the phone away. He had to leave to visit a social worker and on his return he threw the cell phone away next to the road.

22. According to another affidavit handed in by the investigating officer the cell phone that had been thrown away was retrieved. No particulars regarding the cell phone was submitted to the court.

23. The last affidavit referred to by the State was that of Mr de Koker, a Senior Protection Officer and colleague of the appellant. According to this affidavit Mr de Koker says that his work at SBV entails route planning of armoured vehicles from the cash centre. For this purpose he uses the Trinity Roadshow and DRM applications. Every afternoon he loads the bank money orders and retail orders from the system because he needed the information to do the route planning for the following day. He is the one who allocates the service points for the SBV runs to be made by the armoured vehicles. He explained how he loads everything on the program.

24. Mr de Koker also explained that the appellant would contact him in the afternoons to enquire about the limits of the runs. This information is necessary to do the personnel allocations of every run which is done early the next morning. When the appellant is satisfied the information is again uploaded on the system and transferred to the RMC Route Management Centre.

25. Mr de Koker further stated that the appellant does the allocation of the relevant personnel by allocating them one by one as they arrive and report for duty in the morning.

26. Mr de Koker referred to Friday 29 November where the particular vehicle on run 16 was planned to travel from Jubilee in Hammanskraal to the Colonnade Centre. Mr de Koker told the appellant that the route should start at the Colonnade Centre but the appellant did not follow this suggestion. On the same day a truck was robbed on one of the other routes.

27. In his affidavit the appellant stated, inter alia, that he is still employed by SBV Services Pty Ltd as head of the Logistics Department. He denied the allegations against him and any complicity in the robbery and denied that he had made any threats of violence to any person. He stated that he has no resentment towards any person and has no disposition to violence.

28. The appellant has no previous convictions. He lives in a house in Pretoria registered in his name and had been there for the past five years. He lives with his wife and 11 year old son. There is a bond on the house, the bulk of which the appellant is still paying off. He is the main breadwinner of the family and from his salary he pays their monthly expenses in respect of the bond repayments, levies, water and lights, groceries and other daily living expenses. According to the appellant all his relatives are in South Africa and there are none abroad. The applicant has a South African passport which was last used during December to go on holiday to Mozambique.

29. The appellant stated that he would absolutely not interfere with any state witness or the State's case and that he has up to now given his full cooperation to the investigating team.

30. According to the appellant the police searched his office and took his laptop and his cell phone. Nothing was found in his possession which could implicate him with the robbery. He explained that at the time of his arrest he was questioned and asked whether he knew a particular person that was shown to him. He did not know that person and that person also did not know him. He was accused of changing the route and arranging the people on the armoured truck. He informed the police that he cannot change the route as only Mr de Koker could do so.

31. The appellant explained in his affidavit that as Head of the Logistics Department, he coordinates people with the routes and the required runs as well as ensuring that run limits are complied with on each run. He has access to the routes one day before the route is used and only knows who would be in the vehicles on the day of the run. He cannot change the route or the people on the run as this is done by Mr de Koker. They did speak on a daily basis with regard to the routes for it might be necessary to remove a route in order to coordinate the run with the vehicles and the people available. It might be necessary to have a spare vehicle at his disposal for other logistical purposes. Another reason is that they are regularly understaffed. He also has other duties.

32. The appellant explained that on the day before the robbery he received the route from Mr de Koker who had approved it. He explained that Mr de Koker uses a programme which he had developed and which determines the route

and the people on the route. The appellant himself only coordinates the information provided for logistical purposes. That is the normal modus operandi between himself and Mr de Koker. When he was interviewed he wanted to ask Mr de Koker whether he confirms what he was saying but he was prevented from doing so.

33. The appellant repeated that he has emotional, family, community and occupational ties with his residence and residential area and that he would never attempt to evade his trial. His roots and family attachments are in South Africa and he would not exchange that for a life as a fugitive from the law for the rest of his life. He submitted that he was not a flight risk and would stand his trial. All his relatives are in South Africa and he has no interest abroad. Reference was also made to the report of a Correctional Services Officer who submitted that he was a good candidate for house arrest.

34. The Magistrate found that the State has a strong prima facie case against the appellant. In my respectful view the Magistrates erred in this regard. In my view Mr de Koker in his affidavit corroborated the version of the appellant. Although the appellant can discuss routes with Mr de Koker, it would be for logistical reasons and the decision remains that of Mr de Koker. An important point is furthermore the fact that there was nothing to rebut the appellant's statement that as far as the allocation of personnel on the armoured trucks is concerned, the personnel for a particular vehicle is only allocated on the morning as and when the relevant personnel arrive at work. The aforesaid

facts, which were not rebutted by the State, are strongly in favour of the version of the appellant.

35. The Magistrate was of the view that the appellant was responsible for the armoured vehicle to start collecting money from the nearest point to the furthest point and that this enforces the view that that the appellant did so to assist with the robbery. This view is in conflict with the investigating officer's version that the appellant instructed subordinates to manipulate the schedule. In any event, in my view the conclusion by the Magistrate and the statement by the investigating officer do not, on the evidence before the court, have merit. From Mr de Koker's affidavit regarding the example of 29 November, referred to above, it appears that Mr de Koker himself decided that that run should commence at the nearest point namely the Colonnade Centre and that despite what the appellant advised, the run did start at the nearest point and ended at the furthest point. My impression is accordingly that the starting point of a run depends on the circumstances of the day and is not necessarily indicative of anything untoward. Again, in this regard, Mr de Koker's version corroborated that of the appellant.

36. The Magistrate also referred to the broken cell phone which was handed by the appellant to a colleague. Although the particular cell phone was apparently found, there is no evidence that anything improper can be deduced from these facts. There is no ground to suggest that the appellant attempted to conceal or destroy any evidence relevant to this case.

37. The Magistrate also referred to the investigating officer's statement that witnesses came forward who said that they are extremely afraid of the appellant as he had threatened them in the past. It was not stated how they were threatened or why they said what they did. The appellant loaned money to his co-employees and it is not impossible that they might have referred to that relationship. Furthermore, I find it highly improbable that if the appellant wanted to recruit co-employees to commit robberies, he would choose co-employees whom it was necessary to threaten. The statement that it is common knowledge that the appellant has a lot of power and influence over SBV staff is also, in my view, a statement to create atmosphere and nothing more. The appellant is, after all, in a managerial position at his employer. The Magistrate's reliance on the allegation that the appellant is allegedly a person who can influence possible state witnesses to come to the fore, is not supported by any facts but based on speculation.

38. Having regard to, inter alia, the aforesaid, the appellant has shown that he has a proper defence to the charges against him and that the State's case against him is, at least, subject to serious doubt. The State has failed to make out a prima facie case against him.

39. I am also of the view that the Magistrate erred in regard to her finding that the appellant is a flight risk. The applicant owns immovable property and is paying off the bond in respect thereto. If he remains in custody, he would in all probability lose his house. The appellant has strong roots in the community

and there was no evidence to suggest that he would be prepared to become a fugitive of the law for the rest of his life.

40. I also find that it is highly improbable that the appellant would interfere with potential witnesses and/or the investigation of the case. In my view the Magistrate erred in this regard for the reasons that she found against the appellant.

41. If regard is had cumulatively to the circumstances of the appellant's case, and more particularly his unblemished record and his fixed and strong emotional and occupational ties within the jurisdiction of the court, I find that the appellant has proved on a preponderance of probabilities that exceptional circumstances exist and that it will be in the interest of justice for him to be released on bail.

42. In the result, the following order is made:

1. The appeal is upheld.

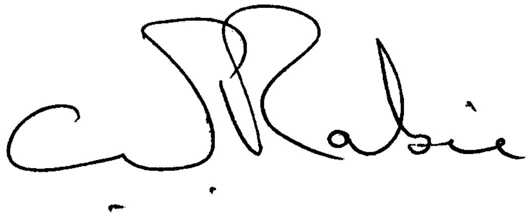
2. The order of the Court a quo is set aside and replaced with the following order:

"1. Accused 2 shall be released on bail on payment of the amount of R25,000, 00 and subject to the following conditions:

1.1 He shall report at the Hercules police station on Monday, Wednesday and Friday between the hours of 08:00 and 20:00;

1.3 He shall not leave the jurisdiction of Gauteng without the prior permission of the Investigating Officer, until the completion of the trial.

1.4 He shall hand in his passport to the Investigating Officer.



C.P. RABIE

JUDGE OF THE HIGH COURT

8 June 2020