

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA
In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NO: A200/17

In the matter between:

HEADMAN NOGQALA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT DELIVERED: 09 MARCH 2018

MANTAME, J

[1] Appellant appeals against the refusal of bail by the Athlone Magistrates Court on 13 May 2016.

[2] Appellant is currently facing charges of robbery with aggravating circumstances, possession of unlicensed firearm and unlawful possession of ammunition. It is therefore common cause that robbery with aggravating circumstances falls under Schedule 6 offences.

[3] The background facts according to appellant can be summarised as follows – On 16 January 2016 appellant and his co-accused in the court a *quo* boarded a taxi at Klipfontein Road and paid their normal fee. In the middle of the journey, the driver accelerated and he drove the vehicle fast. Shortly thereafter the gunshots were fired. They ducked the bullets while the motor vehicle was in motion. The driver jumped out of the vehicle and ran away. The taxi went out of control and bumped

into the wall. Both appellant and his co-accused in the court *a quo* were arrested by the police immediately thereafter.

[4] On the other hand, the investigating officer, Constable Mawande Nzilana testified that indeed the appellant and his co-accused in the court *a quo* boarded the taxi. There were no other passengers in the taxi. As the complainant (who was the driver of the taxi) approached the traffic lights between Jakes Gerwel and Klipfontein Road, the light changed to red and the taxi came to a stop. Appellant and his co-accused pointed him with a firearm and demanded that he get out of the vehicle. As complainant was in shock, he looked back and waded off the firearm with his hand. The firearm fell off. One of the accused got hold of the firearm and the other accused was pointing a firearm at the *guardjie* – as he is commonly known, who worked as a conductor in this taxi and he ordered him to get out of the vehicle. While the other accused was busy with the driver, he managed to get hold of the keys from the driver and they were both ordered out of the vehicle.

[5] One of the accused took over the vehicle and they drove to the direction of Manenberg. The complainant managed in the meantime to get a lift to Manenberg Police Station to report the matter where he was re-directed to Athlone Police Station where the incident took place.

[6] At that time, the complainant had already called the owner of the vehicle who immediately called the tracker company to track his vehicle. While they were busy at Athlone Police Station, they were advised by the tracker company that a police vehicle is following the taxi and they were entering Khayelitsha. The flying squad police gave a chase and the people inside the taxi shot at the police. The police retaliated with the shots. Apparently the driver lost control and the taxi vehicle ended up in somebody's yard and both accused jumped out of the vehicle, but unfortunately they were caught by the police.

[7] When complainant and the owner of the vehicle finished giving statements at Athlone Police Station, they drove to the scene. Complainant confirmed that the people who were arrested were the same people who earlier on robbed him.

[8] The court a *quo* observed that at the hearing of the bail application, in the court a *quo* the owner of the taxi sold his vehicle and did not want to give a statement to the police in the matter. Also, the owner of the house in which the taxi bumped the wall is not interested in furnishing the statement to the police. And that, the complainant's assistant or the *guardjie*, is untraceable as they change drivers almost on a daily basis.

[9] Both the state and the defence agreed in the court a *quo* that the bail application resorted under Section 60(11)(a) of the Criminal Procedure Act 51 of 1977 ("*the CPA*"), therefore the accused persons in the court a *quo* had to satisfy the court that exceptional circumstances exist which in the interest of justice permit their release. It was the magistrate's conclusion that "*The evidence or the version of the accused is untested, they were not taken under cross-examination as they handed in sworn statements. Everything taken into account the court is satisfied that the State has a strong case against the accused. Satisfied that the accused failed to show that there are exceptional circumstances on which the bail should be granted in this instance. Bail is refused for both the accused.*"

[10] It was appellant's submission that his co-accused was granted bail in the Wynberg Magistrate Court with strict bail conditions. The appellant has been in custody since 16 January 2016. Exceptional circumstances do exist for the granting of bail to the appellant. Reference was made to *Mooj vs The State (162/12) [2012] ZASCA 79 (30 May 2012)* – where Snyders JA concluded that the delay by the State in concluding its case taken together with deduced weakness of State's case constituted exceptional circumstances which in the interest of justice permit the release of accused.

[11] Respondent opposed this bail application on the basis that appellant admitted to having an attempted murder that is pending, and was released on bail in that matter when he was arrested in the present matter. When the court a *quo* refused bail, it took into account all these factors. The granting of bail in the current matter will jeopardise the objectives or proper functioning of the criminal justice system, including the bail system. The magistrate was justified in refusing bail.

[12] Section 60(4) of the CPA states as follows:-

"The interest of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or*
- (b) where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or*
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."*

[13] The magistrate in the court *a quo* refused bail on the basis that the state has a strong case against the accused. The magistrate did not refer to any of the abovementioned reasons in refusing bail. However, the magistrate noted that the appellant was a married 39 year old man, has 3 children and resides in Khayelitsha. He was employed as a general worker and earned between R300 – R500 per week. Nothing turned to his personal circumstances in the magistrate's findings.

[14] Appellant has been in custody for over two (2) years, and there has been no indication that the trial in the court *a quo* would be finalised soon. The inordinate delay in finalising this trial has not been explained convincingly during argument. It could be arguable that the appellant has a pending attempted murder charge at Bellville Regional Court and that the inordinate delay was not due to the state's fault. In my view, it cannot be a bar in his granting of bail, more especially after he

personally disclosed this pending matter in the court a *quo*. There has not been an indication that should he be granted bail, he will evade trial.

[15] Having considered the facts surrounding the appellant's arrest and his lengthy period of detention, I am satisfied that exceptional circumstances within the meaning of Section 60(11)(a) of the CPA justifies the release of the appellant. The delay in the finalisation of trial; the amount of time spent by the appellant as an awaiting trial prisoner and the unavailability of some of the state witnesses to give evidence are justifiable enough to release the appellant on bail. In light of the above, the interests of justice permit the release of the appellant.

[16] In the result, I grant this order;

16.1 The appeal is upheld;

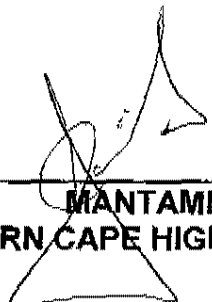
16.2 The order by the magistrate is set aside and substituted as follows:-

16.2.1 The appellant is released on bail in the amount of R5000.00 (five thousand rand) subject to the following conditions:

16.2.1.1 That appellant shall report at Site B, Police Station Khayelitsha every Monday, Wednesday and Friday between 07:00 and 19:00.

16.2.1.2 That should appellant change his residential address, he must inform the investigating officer Constable Mawande Nzilana or any other investigating officer available accordingly and furnish his new address.

16.2.1.3 That appellant should attend trial on each date the matter is postponed to and remain in attendance until excused by the court


MANTAME J
WESTERN CAPE HIGH COURT