

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **BASHAARD ALI AND ZIA UL-HAQ V THE STATE**

NOT REPORTABLE

Case Number: **CA& R 8/09**

1 High Court: **PORT ELIZABETH**

- DATE HEARD: **17 AUGUST 2009**
- DATE DELIVERED: **21 AUGUST 2009**

JUDGE(S): **EKSTEEN AJ**

LEGAL REPRESENTATIVES –

Appearances:

- [1] for the Plaintiff(s): **ADV T PRICE**
- [2] for the Defendant(s): **ADV THYSSE**
- [3]**

Instructing attorneys:

- Plaintiff(s): **D GOUWS INCORPORATED**
- Defendant(s): **DIRECTOR OF PUBLIC PROSECUTIONS**

CASE INFORMATION -

- [1] *Nature of proceedings:*
- [2] *Key Words:*
- [3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: CA&R 8/09

Date delivered:

In the matter between:

BASHARAD ALI

First Appellant

ZIA UL-HAQ

Second Appellant

and

THE STATE

Respondent

J U D G M E N T

EKSTEEN AJ:

[4] The appellants have been charged with corruption in terms of the Prevention and Committing of Corrupt Activities Act, 12 of 2004 and of defeating or obstructing the administration of justice. The appellants are both in custody and accordingly applied for bail in the Magistrates' Court, Port Elizabeth. Bail was refused and they now approach this Court in appeal against that refusal.

[5] Both the appellants are Pakistanis by birth and are currently resident in South Africa.

[6] The appellants, together with a number of other accused were charged earlier of murder upon Abdullah Seedat, a Pakistani businessman in Port

Elizabeth. Following on their arrest on the charge of murder the appellants applied for bail and they were both released on R10 000 bail on 30 July 2008. One of the conditions of bail is that the appellants were to hand in their passports to the investigating officer.

[7] The events which gave rise to the charges currently under consideration occurred whilst the appellants were on bail. The allegations upon which the State relies for purposes of these charges appear from the evidence of the investigating officer, one Hardy, during the bail application.

[8] Hardy testified that an approach was made to a member of the police services on behalf of the appellants conveying that the appellants wished to purchase the original docket of the investigation into the murder of Mr Seedat. As a result of this information an application was made to the Director of Public Prosecutions in Grahamstown in terms of the provisions of Section 252A of the Criminal Procedure Act, 51 of 1977 ("the Act"), for authority to make use of a trap or engage in an under cover operation as envisaged in the Section. Hardy testified that authority was obtained from the Director of Public Prosecutions to proceed with the operation under certain specified conditions, which were strictly adhered to.

[9] Having obtained such authority an operation was launched on 10 February 2009 at the Universal Cellular Shop in Traduna Mall, Port Elizabeth, a business conducted by the first appellant. The events which occurred

there were all recorded on a video recording and Hardy, who was present at the time, testified that he has viewed the content of the video.

[10]He states that two police agents entered the shop where the first appellant was present. They appeared to be talking to one another behind the counter for some time. When the shop was quite the first appellant retrieved a blue bread tin from under the counter and handed it to one of the police agents. In exchange the police agent handed the original docket to the first appellant. The first appellant, so Hardy testified, proceeded to page through the docket with the police agents pointing out certain statements to the first appellant. Thereafter the first appellant began to tear up statements in the docket before placing the docket in a black plastic refuse bag. Shortly thereafter the second appellant arrived. The second appellant then handed money to the first appellant.

[11]Hardy states that the docket handed to the first appellant in the operation was the original investigation docket into the murder of Mr Seedat. It is apparent from his testimony that the blue bread tin handed to the police agents contained an amount of money. Upon counting such money after the operation it transpired that an amount of R25 000 had changed hands. R22 500 was handed over by the first appellant originally, presumably in the bread tin, and the further amount of R2 500 was brought by the second appellant which he had handed in the operation to the first appellant. The circumstances under which this R2 500 was handed to the police agents is not canvassed in evidence. In addition Hardy testified that during the

operation the appellants had requested one of the police agents to retrieve their passports.

[12]The appellants both testified. They denied the charge against them.

Second appellant, however, admits that on the day in question he was phoned by the first appellant and requested to bring an amount of money to the shop in order to purchase stock for his business. He states that the amount was R2 300. The second appellant did proceed to the shop and did hand a certain amount of money to the first appellant. He states that whilst at the shop the police stormed in and they were arrested.

[13]It is common cause that the appellants stand charged of an offence set out in Schedule 5 to the Criminal Procedure Act both because of the nature of the offence of which they are accused and the fact that they are accused in a pending matter of murder against them. The terms of the provisions of Section 60(11) of the Act the appellants accordingly bore an *onus* to adduce evidence which would satisfy the magistrate that the interests of justice permit their release. The magistrate was not satisfied that the interests of justice permitted their release and refused their application for bail. The essence of the magistrate's reasoning is simply that the evidence indicates that the State has a strong *prima facie* case against the appellants. He concludes as follows:

“There is therefore, the court finds, a strong *prima facie* case against the accused. Now taking into account the strong *prima facie* case that the State has against the accused, their personal

circumstances, the accused in the court's view did not discharge the onus placed on them in terms of the Act, to show that it was in the interests of justice that they be granted bail."

[14]Mr **Thysse**, on behalf of the State, has urged upon me that by virtue of the provisions of Section 65(4) of the Act this Court is not empowered to set aside the decision of the magistrate unless I am satisfied that the decision was wrong. In my view this Section should not be over-emphasised. It does not create any greater limitation on this Court than is the case in any criminal appeal. Compare for example **S v Barber** 1979 (4) SA 218 (D); **S v De Abreu** 1980 (4) SA 94 (W) and **Hiemstra Suid-Afrikaanse Strafproses** (6th edition) p. 171.

[15]Mr **Price** who appears on behalf of the appellants emphasises the provisions of Section 60(9) of the Act which provides that this Court, in considering whether the interests of justice do permit the release of the appellants, should decide the matter by weighing the interests of justice against the rights of the appellants to their personal freedom and in particular the prejudice which they are likely to suffer if they were to be detained in custody. I do not intend dealing extensively with each of the considerations set out in Section 60(4) nor those set out in Section 60(9). Suffice it to say that some considerations will weigh more heavily than others. The weight to be attached to each must depend upon the circumstances of the particular case in issue. In considering the various factors set out in Section 60(4) of Act the Court is necessarily engaged in

an enquiry into the probable future conduct of the applicant. In this regard Ngcobo J in **S v Thornhill (2)** 1998 (1) SACR 177, at 182e-f said:

“This future conduct has to be determined on the basis of information relating, *inter alia*, to the applicant’s past conduct. What has to be determined, therefore, is not a fact or a set of facts but merely a future prospect which is speculative in nature even though it is based on proven facts.”

[16]I have already stated that in this matter the appellants had been released on bail facing a charge of murder when the events upon which the State relies for the present charges occurred. It appears from the evidence of Hardy that when the appellants were released on bail each of them attested to an affidavit in which they undertook, *inter alia*, not to intimidate witnesses or to destroy evidence. The current charges against them relates specifically to an alleged attempt to destroy evidence by seeking illegitimately to obtain the entire original investigation docket relating to the murder charge. It seems to me that if the magistrate was correct in holding on the evidence that the State probably has a strong *prima facie* case against the appellants then that would weigh very heavily in predicting the probable future conduct of the appellants relating to evidential material. Similarly if the evidence of Hardy is accepted that during the course of the operation the appellants requested the police agents to obtain their original passports that would serve as a strong indicator of the risk of flight were they to be released.

[17]I have already stated that the evidence establishes that the entire operation carried out was filmed on video. Hardy has related in his evidence that which he says is revealed by the video. In those circumstances I am unable to fault the conclusion drawn by the magistrate in respect of the first appellant. If that evidence were established at the trial the first appellant is shown to have been willing to expend a substantial amount of money in order to obtain and destroy the evidence which had been gathered over an extensive period relating to the murder of Mr Seedat. Using that as an indicator of his probable future conduct the likelihood of him endeavouring to obtain control of and destroy evidence in future is manifest. In these circumstances I do not consider it necessary to consider the effect of the evidence relating to his passport.

[18]The evidence of Hardy relating to the second appellant is, however, considerably weaker. Hardy does not state in his evidence who is alleged to have approached a policeman in order to obtain the docket. It appears to be common cause on the evidence that at the time when the operation was commenced the first appellant was alone in his shop. The second appellant arrived some time later with a further some of money. This is confirmed by the second appellant in his own evidence where he testifies that he was phoned at home by the first appellant and was requested by to bring to the shop a certain amount of money in order to purchase stock.

[19]Hardy testifies that when the second appellant arrived at the shop he approached the first appellant and handed over a sum of money to the first appellant. This can be seen on the video. Thereafter the signal was given that the transaction had been completed and the police arrested the appellants.

[20]The conduct of the second appellant during the operation is not in dispute on the evidence presented at the bail application, however, I am not persuaded that there is anything in the evidence relating to the second appellant which justifies the conclusion that he was probably a party to the attempted purchase of the docket. There is no evidence linking him to any prior information held by the police in respect of the purchase of the docket. On the evidence of Hardy, by the time the second appellant arrived the docket had already been placed in a black refuge bag and there is nothing to indicate that the second appellant was ever aware of the presence of the docket in the shop. He is not alleged to have handled the docket nor to have seen it. The evidence of Hardy is, in my view, fully compatible with the explanation of the second appellant. In these circumstances I am satisfied that the magistrate erred in holding that the evidence in the bail application reveals, *prima facie*, a strong case against the second appellant. There is nothing in the evidence of Hardy to suggest that the second appellant is likely to attempt to destroy evidence.

[21]One further matter remains to be considered. I have referred above to the statement by Hardy that during the operation the appellants requested one

of the police agents to steal their passports for them. This evidence was tendered in chief and was not followed up by the prosecutor. No greater detail appears from the record as to when in the course of the operation this occurred and who on behalf of the appellants made this request. On the evidence set out in the bail application it appears to be most unlikely to have been the second appellant. Hardy testified that on the arrival of the second appellant he handed over an amount of money to the first appellant and immediately thereafter the police closed in and arrested them.

[22]The evidence relating to the passports goes hand-in-hand with the somewhat tentative suggestion by Hardy in cross-examination that information had been received from a Pakistani citizen that the appellants wished to leave the country. Suffice it to say that Hardy was not convincing on this aspect of his evidence when cross-examined.

[23]As against this the second appellant testified that he is currently permanently resident in South Africa. The passport which he held and which was handed to the investigating officer under the bail conditions granted on the charge of murder is a South African passport. He has no other passport and has not left South African shores since 2001. He owns his own cell phone business known as "Cell phone Cellular Village" situated in Korsten, Port Elizabeth.

[24]I am advised from the Bar that the trial has been enrolled for 19 and 20 October 2009.

[25]On a consideration of all the evidence I am of the view that the second appellant has discharged the *onus* of establishing that the interests of justice do permit his release.

In the result the order which I make is the following:

1. The appeal of the first appellant is dismissed.
2. The appeal of the second appellant is upheld and the order made by the magistrate in respect of the second appellant is set aside and replaced with the following:
 - 2.1 Applicant No. 2 is granted bail in the amount of R10 000 (ten thousand rand) on the following conditions:
 - 2.1.1 he shall be confined to the magisterial district of Port Elizabeth and he may not leave the said district without the written consent of the Investigating Officer herein, Inspector Claude Hardy;

2.1.2 he is to report to an officer nominated by Inspector Hardy at the Mount Road Police Station, Port Elizabeth each day between 06h00 and 18h00;

2.1.3 he is to inform Inspector Claude Hardy in writing prior to his release of the residential address where he will be resident pending the conclusion of his trial and to inform the said Hardy in writing of any change in his residential address from time to time prior to such change;

2.1.4 he shall be confined to the said residential address each day between 18h00 and 06h00 and may not leave such premises during the said hours.

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT