

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

CASE NO.: CA&R14/10

In the matter between:

BASHARAD ALI

Appellant

and

THE STATE

Respondent

JUDGMENT

GROGAN AJ:

- [1] This is an appeal in terms of section 65 of Act 51 of 1977 (“the Act”) against a magistrate’s refusal to grant the appellant bail. The appellant, a Pakistani national, has been in custody since 10 February 2009 on charges of corruption and defeating or obstructing the administration of justice.
- [2] These counts were a sequel to earlier charges of kidnapping and murder brought against the appellant and a number of other individuals, including one Zia Ul-Haq. After their arrest on the latter charge, the appellant and Ul-Haq

were released on bail of R10 000 on 3 July 2008, on condition that they hand over their passports to the investigating officer.

- [3] Since the appellant relies in part on the length of his detention pending trial, I set out a brief chronology of events leading to the present appeal.
- [4] The appellant and UI-Haq were arrested on charges of corruption and attempting to defeat or obstruct the course of justice on 10 February 2009. Their application for bail (the first application) was dismissed on 25 May 2009. Both the appellant and UI-Haq appealed against that decision (the first appeal). The appeal was heard by Eksteen AJ (as he then was), who handed down his judgment on 21 August 2009. The appellant's appeal was dismissed, and UI-Haq was released on bail conditions set by this Court.
- [5] The appellant launched another application for bail on 10 December 2009 (the second application). That application was dismissed by the same magistrate. The trial on the charges of murder and kidnapping, set down for 19 October 2009 was postponed when the defence disclosed that the copy of the videotape upon which the State intended to rely had been handed to the appellant's attorney without a sound track. Both the appellant and UI-Haq were in court on that day. The matter was duly postponed to 29 March 2010. On that date, the State announced that the Deputy Director of Public Prosecutions (DDPP) had decided to withdraw the murder and kidnapping charges against the appellant in the magistrate's court and to consolidate those charges with those of corruption and defeating the ends of justice, and to arraign the accused in the High Court. UI-Haq did not appear in court on 29 March 2010. A warrant for his arrest was issued.

- [6] The appellant launched yet another application for bail on 7 April 2010 (the third application). This was refused, again by the same magistrate, on 21 April 2010. The present appeal against that decision was heard on 28 May 2010.
- [7] The appellant's arrest on the charges for which he has been denied bail followed a police trap which resulted in the arrest of UI-Haq and the appellant for allegedly handing money to undercover agents, who in turn handed over a copy of the original docket of the murder and kidnapping case. The police claim that after the agents pocketed the money, the appellant went through the contents of the file, tore up certain statements he found in it and threw them in a rubbish bag. The appellant then paid one of the agents R22 500. The police alleged that the balance of the "agreed" amount (R25 000) was handed over shortly thereafter by UI-Haq
- [8] This matter is somewhat unusual in that the present appellant has appealed twice against the same magistrate's refusal to grant bail. Since both appeals emanate from the same starting point, the record and judgment in the earlier appeal were properly placed before the presiding magistrate and this Court. I will not set out in detail the evidence led in the application that gave rise to the first appeal. Suffice it to state that, the Court found that there was a strong *prima facie* case against the appellant, but not against UI-Haq. The *ratio* of the judgment concerning the appellant is contained in paragraph [14] thereof. It reads:

"I have already stated that the evidence establishes that the entire operation carried out was filmed on video. Hardy [the police witness] has related in his evidence that which he says is revealed by the video. In these circumstances I am unable to fault the conclusion drawn by

the magistrate in respect of the first [and present] appellant. If that evidence were established at the trial the first appellant is shown to have been willing to expend a substantial sum of money in order to obtain and destroy the evidence which has 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 and destroy evidence in future is manifest.”

[9] It is apparent from this passage that the primary consideration which moved the Court to refuse the earlier appeal was the likelihood that the appellant would interfere with the evidence relating to murder and kidnapping charges.

[10] The reasons given by the magistrate for his third refusal to grant the appellant bail are scant but clear. I quote the relevant extract:

“The murder charge that was pending against Applicant No 1 [the appellant] was withdrawn and added to the corruption charge and he will then stand trial on both murder and corruption charges in the High Court. The Court then is of the view that it will only benefit Applicant No 1 to be trialled (*sic*) on the charges together and at one time as in the fact then decided by the Director of Public Prosecutions. The fact that Applicant No 2 disappeared is exactly what could happen if accused are released on bail on charges of this nature....

“The Court take (*sic*) into account that accused does have a right to a speedy trial and for the matter to be finalised. The new developments related to the change of forum in respect of where accused No 1 will be charged, it does not in any event influence the decision of the Court.

“The Court is still of the view that the interest of justice still does not permit the release of the applicant on bail.”

- [11] It is unnecessary, for purposes of this judgment, to set out all the considerations listed by the legislature that are to be taken into account when assessing bail applications. Suffice it to state that, while the magistrate was required to consider them all, he retained a discretion to decide the weight to be given each. Which considerations will be taken into account depends on the circumstances of a particular case. But a major consideration in all cases is the likelihood of an accused not facing trial or perverting the course of justice. I merely add that the charge in respect of which bail was refused is a Schedule 5 offence, which placed the onus on the appellant to satisfy the magistrate that it was in the interests of justice to order his release on bail.
- [12] Mr Dauberman, who appears for the appellant, conceded in argument that there remains a strong *prima facie* case against the appellant in respect of the charge of corruption and defeating and/or obstructing the administration of justice. However, he contended that the appellant's main argument will be directed at the legality of the trap. Since no evidence was led or submissions were made in that regard in any of the bail applications, this Court cannot evaluate the prospects of such a defence. The fact remains that the State has adduced evidence which gives rise to a strong if *prima facie* inference that the appellant in fact handed a substantial sum of money to undercover agents to obtain and destroy evidence in the State's possession.
- [13] The appellant now relies principally on the delay occasioned by the State's decision not to proceed with the charges against the appellant in the magistrate's court. It appears common cause that the matter will not be enrolled in the High Court before the fourth term in 2010. This means that the appellant must remain in custody as an awaiting trial prisoner for some seven

months longer than he would have been held in that status had the trial continued in the magistrate's court as originally scheduled.

[14] This Court cannot interfere with the magistrate's decision unless he misdirected himself in some material way when considering the bail application (*S v Barber* 1979 (4) SA 218 (D)). The appellant contends that the magistrate erred in a number of respects. But his grounds of appeal may fairly be distilled into the submissions that the magistrate failed to have proper regard to the effects of the DDPP's decision to combine the charges against the appellant and to arraign him in the High Court, and that the delay occasioned thereby has unfairly prejudiced the applicant by adversely altering his personal circumstances.

[15] I have already adverted to the brevity of the reasons the magistrate gave for his decision to dismiss the appellant's third bail application. However, brevity is not in itself sufficient basis for concluding that the magistrate ignored or gave insufficient weight to the considerations set out in section 60 of the Act. It is clear that the magistrate concluded that it was in the interests of justice that the magistrate should be denied bail because he is a flight risk.

[16] Mr Dauberman contends that the magistrate nonetheless misdirected himself by failing to have proper regard to the DDPP's decision to move the matter to the High Court, especially because the State led no evidence to explain or justify that decision. The short answer to this submission is that the State was under no obligation to justify its decision. Being *dominis litis*, the DDPP has a discretion on how to proceed with criminal actions. I can find nothing in section 60 which requires magistrates in bail applications to scrutinise the

procedures chosen by the State to prosecute suspected offenders. In the absence of proof that the State has acted *mala fide*, delays caused by decisions of the prosecution are not in themselves a reason for finding that arrested persons are entitled to bail. I cannot therefore agree that the magistrate misdirected himself in this regard.

[17] The same can be said of the appellant's averment that the magistrate misdirected himself by alluding to the fact that the appellant's co-accused had absconded after he was granted bail. While it would certainly be wrong to attribute intentions to the appellant on the basis of the conduct of another, I am not persuaded that the magistrate reasoned that the appellant should be denied bail merely because his co-accused failed to appear in court on 29 March 2010. The magistrate's remark about Ul-Hak's "disappearance" was merely illustrative. The illustration was apt. The disappearance of a co-accused in circumstances such as the present is indeed a warning of the risk inherent in granting the appellant bail.

[18] The appellant has already spent considerable time in custody as an awaiting trial prisoner. However, on the evidence before me I am unable to find that the passage of time has diminished the likelihood of the appellant's flight or of his making further endeavours to interfere with evidence, to which Eksteen JA referred. The magistrate cannot accordingly be criticised for reaching the same conclusion in the bail application presently under appeal.

[19] This leaves the appellant's personal circumstances. No evidence was led in this regard in the third bail application. The submission in that regard was simply that the situation outlined in the appellant's evidence in the second bail

application would inevitably be aggravated by the delay resulting from the DDPP's decision. The evidence led in the second bail application was that the appellant's cell phone shop (the same in which the trap was set) was losing money because he was unable to attend to the business personally. In addition, to avoid retrenchment, the appellant's wife had been forced to accept a reduction of her salary. The consequences were that the appellant's wife and their son must live on less than the amount to which they had become accustomed before the appellant's arrest, and that his business was suffering.

[20] Financial loss is an inevitable consequence of the incarceration of any gainfully employed person. In the present case, the evidence does not go so far as to prove that, straitened as their circumstances may be, the appellant's dependants will starve if he is not released to fend for them. I am prepared to accept that the withdrawal of the case in the magistrate's court will prolong and even exacerbate the privations of the appellant's dependants. But in the absence of proof of bad faith on the part of the prosecution or of any fresh evidence relating to the appellant's personal circumstances, I do not agree with the submission that the magistrate erred by failing to change his earlier finding that the appellant's personal circumstances were outweighed by the possibility that he might attempt to evade trial or tamper with evidence.

[21] In short, I find that the situation which prevailed on 21 August 2009, when Eksteen J dismissed the appellant's appeal against the magistrate's refusal to grant him bail, has not changed sufficiently to displace the conclusion reached by him. It follows that the appellant has failed to discharge the onus of proving that his release on bail is in the interests of justice.

[22] I accordingly make the following order:

The appeal is dismissed.

J G GROGAN

ACTING JUDGE OF THE HIGH COURT