

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: CA&R08/2011
Date heard: 12 May 2011
Date delivered: 17 May 2011

In the matter between:

BENZILE McDONALD ZWANE

Appellant

and

THE STATE

Respondent

B A I L A P P E A L J U D G M E N T

DAMBUZA, J:

1]The appellant applied for bail before the Magistrate, Port Elizabeth and his application for bail was refused by the magistrate on 11 March 2011. He now appeals against the refusal of bail.

2]The appellant presently stands charged with conspiracy to commit armed robbery. Before the Magistrate the evidence of the appellant himself and that of the Investigating Officer, Warrant Officer Christopher George Els, was led.

3]In summary, the opposition to the appellant being admitted to bail was premised on the strength of the state case against the appellant, which, in turn, is founded on what is described in the record as a “sketch plan” of the

Police Forensic Science Laboratory in Port Elizabeth, the appellant's previous convictions, a charge of housebreaking which was pending against him at the time of the bail hearing and further charges which the state intended to bring against him.

4]The appellant's case was that the state's case against him was weak and that his family and business interests were suffering in his absence and that there was no evidence that he would, in any way, undermine the administration of justice or not attend trial if released on bail.

5]The judgment of the court *a quo* barely sets out reasons for refusal of the bail application. In the judgment the magistrate starts by stating, correctly, that the appellant had a duty to persuade him that the interests of justice permitted that he be admitted to bail. That is so because the charge which the appellant is facing is regarded as a schedule 5 offence.

6]The first ground of appeal is that the magistrate erred in finding that the appellant is facing a schedule 5 offence, based on the fact that he had committed another offence whilst on bail in the East London case. This misdirection, so goes the submission resulted in an incorrect approach and refusal of bail.

7]Indeed the magistrate was wrong in finding that the charge which the appellant is facing is a schedule 5 offence because of him having committed this (schedule 1) offence whilst out on bail on another schedule 1 charge, i.e.

the East London case. The correct position is that the charge is regarded as a schedule 5 offence because of the appella's previous convictions which I set out more fully later in this judgment. *Ms Loots* who appeared on behalf of the respondent submitted that the misdirection on its own, did not result in the magistrate wrongfully refusing bail, as the charge which the appellant faced remained a schedule 5 offence and the determination of whether the appellant should be admitted to bail would still be as prescribed in law.

8]I agree that when all the evidence is considered, the misdirection by the magistrate as set out above did not necessarily result in an incorrect refusal of bail. Further, I am not persuaded that the magistrate was necessarily wrong in finding that the appellant committed the offence with which he is charged in these proceedings whilst out on bail in the East London case. As I explain later in this judgment, the state case is that the robbery or break in which occurred on 9 January is that which the appellant conspired in. The robbery is therefore, according to the state, linked to the sketch plan which was found in the appellant's possession on the 28 October 2010, regardless of the fact that, by the time the robbery occurred, the sketch plan had long been confiscated by the police from the appellant.

9]Be that as it may, more needs to be said of the judgment of the Court *a quo*. In terms of section 65 (4) of the Criminal Procedure Act (Act No 51 of 1977, the CPA or the Act) a court or judge hearing an appeal against refusal of bail by a lower court 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.

10] Section 60(11)(b) Act provides that :

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be kept 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 the interests of justice permit his or her release.”

11] In applying the approach set out in section 60 (11) (b) of the Act the magistrate looked at “whether there is any likelihood that if accused is released today in this present case, he will not commit another offence once he is out”.¹ The magistrate went on to state that:

“In order then for the court to have a clue, the court will have to revisit and look at the kind of a person the court is dealing with. It is not in dispute that the accused has been around. It is not in dispute that the applicant has been implicated in more serious offences in the past. It is not in dispute that the applicant is now having a pending case in East London.” (My emphasis.)

The magistrate then concluded that the interests of justice did not permit that the appellant be released on bail. There is no explanation in the judgment of what “*kind of a person*” the court *a quo* found the appellant to be, or what the magistrate meant by saying the appellant “*has been around*”. I can also find no explanation in the judgment of what the magistrate meant in his finding that the appellant “*had been implicated in more serious offences*”. But in as far as

¹ Page 99 lines 20 to 24 of the record

he took into account charges which had, in the past, been preferred against the appellant, but had since been withdrawn, the magistrate clearly misdirected himself. In any event mere implication in (past) cases is no proper basis for refusal of bail. I agree that the magistrate failed in his duty to give reasons for his decision. See **Sv Maake** 2011 (1) SACR 263 SCA. For this reason this court on appeal is entitled to consider the bail application afresh.

12]It is now trite that whilst section 60(11)(b) places an onus on the bail applicant to adduce evidence that the interests of justice permit his or her release on bail; the exercise of determining whether bail should be granted under section 60 (11) (b) of CPA is no different from that provided for in subsections 60(1) to (9) thereof. **S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC). The function of the court is to assess the *prima facie* strength of the state case and not to make a provisional finding of guilt or innocence. See **Du Toit et al**; Commentary on the Criminal Procedure Act; at 9-48C and the authorities cited therein.

13]The evidence before the court *a quo* was that the appellant was a 40 year old married man with 2 children. He had fixed abode at 3840 Hlakula Street Orlando East, Soweto, in Gauteng, where he lived with his family. He had owned two homes; the one he lived in together with his family in Soweto and a “*holiday house*” in Port Elizabeth. At the time of the bail application he had recently sold the “*holiday house*”. He was not certain, however, whether it had been transferred to the new owner. He was self employed, running an events management business. He supported his wife and children on his income

from the business. His passport had been confiscated from him by the police. He intended pleading not guilty to the charge of conspiracy to commit robbery.

14]As against the above factors, the appellant had a previous conviction of fraud (1990), two previous convictions of motor vehicle theft (in 1990 and 1994 respectively) and one of malicious injury to property (in 2010). There was also a charge of housebreaking that was pending against him. The charge of housebreaking related to an incident that happened in East London. It was when Warrant Officer Els was arresting the appellant for the East London housebreaking charge that he found the sketch plan of the Police Forensic Science Laboratory in the appellant's house. This resulted in the charge of conspiracy to robbery which charge was only brought against the appellant subsequent to the break in at the police laboratory.

15]It was common cause before the court a quo that in respect of the housebreaking charge the appellant was arrested on 28 October 2010. In respect of the conspiracy to robbery charge he was arrested in Johannesburg on 16 January 2011. On both occasions he was arrested by Warrant Officer Els together with other police officers.

16] Els testified that, having found the sketch plan of the police laboratory in the appellant's possession in October 2010, he became suspicious and suggested to his colleagues that drugs which had been confiscated by the police in other cases and which were kept at the laboratory, be removed

therefrom. This was done and indeed on 9 January 2011 there was a break in at the forensic laboratory. According to Els the particular storage facility where the drugs (estimated to be valued at R83 million, with a street value of R415 million) had been kept were targeted.

17]When the sketch plan was found in the appellant's possession fingerprints belonging to police officer Thando Tshazibana were found on the sketch plan. At the time, Tshazibana worked at the police forensic Laboratory. He (Tshazibana) was arrested subsequent to the break in at the laboratory. The appellant was also arrested following the break in at the laboratory.

18]According to Els, when the appellant was arrested in Johannesburg, 172 Ecstasy tablets and two new stolen car keys were found in a motor vehicle that the appellant was using. At the time of the bail application the appellant had not yet been charged in respect of the items found in his possession when he was arrested, although dockets had been opened and a warning statement obtained from him in respect thereof. The difficulty, according to Els was that the appellant had to be transported to Johannesburg to be charged in respect of the ecstasy tablets. He could be charged in Port Elizabeth in respect of the stolen car keys as they had been stolen in Port Elizabeth. However, Els had obtained information that there was a plan for the appellant's escape from police custody. Hence the difficulty in having the appellant transported from one location to the other. To this extent, the bail application hearing was held at the St Albans Prison, where the appellant was held in custody.

19]As I have stated the charge of conspiracy to commit robbery is founded on the sketch plan found in the appellant's possession, and the robbery that eventually occurred on 9 January 2011. There is no evidence that mere possession of the document in October 2010 is not the only basis for the charge preferred against the appellant. The evidence was that subsequent to the sketch plan being found on the appellant in October 2010, the police kept track of the appellant's movements. He had had communication with Tshazibana. Els had established that the appellant had flown from Johannesburg to Port Elizabeth on the day preceding the break-in at the laboratory. He admitted however that the identity of the culprits could not be established from the video footage of the break in. He had, however, obtained the DNA material from the appellant and, at the time of the bail hearing, the police were still awaiting the results of the DNA analysis.

20]The submission, on behalf of the appellant, that no evidence implicates the appellant in the incident that occurred on 9 January 2011 together with the appellant's personal circumstances may, at first glance, appear to justify a finding that the appellant has discharged the onus under section 60 (11) (b) of the CPA. The argument is that the only evidence implicating the appellant in the charge is the sketch plan. But that is not where the matter ends. Other factors such as the appellant's previous convictions and the evidence that when the police arrived to arrest him in Johannesburg, the appellant attempted to flee by jumping off the balcony of the building wherein he had been sleeping, remain relevant considerations. I also do not think I can ignore the evidence relating to impending charges relating to possession of drugs

and stolen motor vehicle keys. The explanation as to why the appellant has not been charged with in respect of these items is, in my view, credible. In terms of section 60 (4) of the CPA refusal to grant bail shall be in the interests of justice where one or more of the grounds set out in section 60 (4) (a) to (e) of the Act are established. Included in the grounds referred to are the likelihood that a bail applicant will commit a schedule 1 offence, will attempt to evade his or her trial, and/or his or her release will disturb public order or undermine public peace or security. The evidence that the appellant tried to flee when the police came to arrest him does not give an impression of a person who is willing to stand trial. It is in this context that the appellant's mere pronouncement that he will stand trial must be viewed. Further, it appears from the record that there was considerable media or even public interest in the matter. Possession, by an ordinary member of the public of a drawing depicting police exhibit storage facility cannot, in my view, engender confidence in the proper functioning of the criminal justice system. The appellant stands charged possession of such document in relation to a plan to commit armed robbery. The appellant's record of previous convictions does show a disposition to commit offences referred to in schedule 1 to the Act. Again I am mindful that some of the previous convictions are quite old. I am also mindful of the fact that the appellant has a fixed abode, a family and a business in the country, and that he has, in the past, on more than one occasion, stood trial and accepted punishment for his misconduct. But when all these are viewed against the evidence of Warrant Officer Els I am unpersuaded that the interests of justice permit that the appellant be admitted to bail in this instance.

21]Consequently:

The appeal is dismissed.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv J W Wessels instructed by D. Gouws Inc of Port Elizabeth

For the respondent: Adv I Loots on behalf of the Director of Public Prosecutions, Port Elizabeth