

Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: CA&R 04/2017
Date Heard: 23/02/2017
Date Delivered: 02/03/17

In the matter between:

MELUMZI CHRISTIAN NKOMBISA	First Appellant
LAWRENCE MZWANELE NGESE	Second Appellant
ANESIPHO TYIKI	Third Appellant
MZIYANDA FENI	Fourth Appellant
and	
THE STATE	Respondent

JUDGEMENT

MALUSI J:

[1] This is an appeal against a decision by the Magistrate for the district of Port Elizabeth to dismiss the appellants' application to be released on bail. Each of the appellants is charged with reckless or negligent driving, possession of suspected stolen property, possession or use of drugs and possession of vehicle breaking or housebreaking implements.

[2] On 12 January 2017 at the start of the bail application in the court *a quo* both the public prosecutor and the appellants' attorney submitted that the offences faced by the appellants were referred to in Schedule 5 of the Criminal Procedure Act (the Act). The basis of the submission was that the appellants either had previous convictions or were out on bail in cases involving Schedule 1 offences. That fact caused the present offences which were all assumed to be Schedule 1 to fall into a Schedule 5 category. I will return to this aspect later.

[3] Section 60(11) of the Act provides:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a)

(b) *In Schedule 5, but not Schedule 6, 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 the interests of justice permit his or her release”.*

[4] It is axiomatic that section 60(11)(b) places an onus on an applicant to satisfy the court on a balance of probabilities that the interests of justice permit his release. Likewise, the duty to begin is on the applicant as he must discharge the onus. It is clear from the record that the bail application proceeded on this basis.

[5] Each of the four appellants deposed to an affidavit in an attempt to discharge the onus placed on them. The affidavits are on a standard form with blank spaces for the appellants to complete their personal

particulars. Thus, all four affidavits have the same averments with only the personal particulars of each appellant being different.

[6] The first appellant averred in his affidavit that he had been residing at [...] A. S., New Brighton for the last thirty three years. He is single with five children. Two of the children reside with him, attend school and he pays their fees. He ostentatiously styled himself the Managing Director of MC & A Trading, an events management entity. He earns on average the sum of R3500.00 per month depending on events. He disclosed that he has one pending case of theft out of motor vehicle which is postponed to 6 March 2017. He has been released on his own cognisance in that case. He alleged the State does not have a strong case against him and he will be acquitted in that matter. He further disclosed that he has four previous convictions. It appears from the form SAP69 to which he referred that he has three previous convictions for theft and one for possession of a firearm.

[7] The second appellant averred in an affidavit that he has resided at [...] P. S., NU3, Motherwell for the past twenty five years. He is single, with two children aged twenty one years and eight years. Only the younger child still attends school though he is maintaining both children. He was employed on a temporary basis as a driver at AVBOB for the six months preceding his arrest. On average he earns a salary of R1500.00 per month. He disclosed that he has one pending case against him in which he was released on R500.00 bail. The charge he is facing in that case is theft out of motor vehicle. The state case against him is weak and

he will be acquitted in that matter. He has eleven previous convictions for theft and one for use of a motor vehicle without the owner's consent. He averred the State case against him is weak and he will be acquitted in that matter.

[8] The third appellant has resided all his life at [...] N. S., KwaZakhele. He is single and has no children. He has been employed for the nine months anteceding his arrest at Mthura Breakdown as a general labourer. He earns approximately R1800.00 per month. He disclosed three pending cases: possession of a firearm wherein he was released on bail of R5000.00; theft wherein released on bail of R5000.00; and "reckless driving" wherein released on his own cognisance. He has no previous conviction.

[9] The fourth appellant has been residing at [...] D. S., New Brighton all his life. He is single with four minor children, the three younger ones all reside with him. He is responsible for the maintenance of all his children. He is self-employed as a clothes merchant earning on average a sum of approximately R3000.00 per month. He has engaged in this trade for the three years preceding his arrest. He has one pending case wherein he was released on bail of R500.00. He alleged the State case against him is weak and he will be acquitted in that matter. He disclosed three previous convictions for theft.

[10] Each of the appellants regurgitated verbatim the grounds for refusal of bail listed in section 60(4) of the Act and undertook not to breach any

of the grounds. Each of them also denied having any warrants of arrest. Each appellant indicated an intention to plead not guilty to the charges. They all denied that the State has a strong case against them.

[11] The State submitted an affidavit by the investigating officer. The appellants' vehicle was noticed by the police officers on patrol as it was driven at high speed. The appellants' vehicle overtook three other motor vehicles which were stationary at a robot controlled intersection with the red light against them. She stated that the appellants were arrested after being chased by the police who were in a marked vehicle with a blue lamp turned on.

[12] The reason she opposed the release of the appellants was that they all had pending cases and previous convictions. She confirmed the pending case of theft in Oudtshoorn disclosed by the first, second and third appellants. She further alleged these appellants have a pending case in Cambridge, East London. She confirmed the three pending cases disclosed by the third appellant but disclosed a fourth one. She opined that the appellants were busy committing crimes whilst on bail and will continue to do so. She averred the appellants simply change names, surnames and dates of birth every time they have been arrested.

[13] The magistrate reserved judgment for delivery the next day. On resumption the magistrate requested further information as she was entitled to do in terms of section 60(3) of the Act.

[14] The investigating officer provided a further affidavit setting out in detail which items were allegedly found on each of the appellants. She attached a copy of the police exhibits register. She further disclosed that the case in Cambridge, East London was withdrawn pending the arrest of first appellant. She stated that she was unable to estimate the quantity of drugs found on the appellants. She set out in detail the appellants' previous convictions and their pending cases.

[15] Section 65(4) of the Act provides: "*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 or his opinion the lower court shall have given*".

[16] The proper approach for the Court hearing the appeal was set out in *S v Barber*¹ as follows:

"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. 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 it would be an unfair interference with the magistrate's exercise of discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly . . ."

¹ 1979(4) SA 218(D) at 220 E-H.

[17] The magistrate gave a comprehensive and reasoned judgment. She ruled that counts 1, 3 and 4 were not referred to in Schedule 1. It was only count 2 which fell under Schedule 5 due to it being a Schedule 1 offence allegedly committed by appellants who were either on bail or having previous convictions.

[18] The court a quo was placed in an invidious position by the State regarding the correct Schedule for the offences. The charge sheet annexures for all the counts had not been completed by the public prosecutor. The annexures had been attached but were left blank. At the start of the bail application there was absolutely no information or detail regarding the charges. It was hoped, I assume, that the State would provide detail during the bail hearing to cure this defect. Regrettably, that did not occur due to the scanty allegations in the two affidavits by the investigating officer.

[19] I am of the view that at the start of the bail hearing the State had failed to establish the objective jurisdictional facts which must exist before section 60(11)(b) could come into operation.² The appellants should not have started in adducing evidence as there was no onus on them. All the offences should have been treated as Schedule 1 offences. The magistrate was wrong in her ruling that counts 1, 3 and 4 were not referred to in Schedule 1. Indeed they are not mentioned by name in Schedule 1 but it provides:

² *S v Stanfield* 1997 (1) SACR 221 (C); *Gade v State* [2007] 3 ALL SA (NC) at paragraph 5; Commentary on the Criminal Procedure Act, service 55, 2015, 9-66A to 9-67.

“Any offence, except the offence of escaping from lawful custody . . . , the punishment where for may be a period of imprisonment exceeding six months without the option of a fine”.

The relevant statutes for each of the offence in counts 1, 3 and 4 provide the punishment as stated in Schedule 1 above.

[20] The lack of detail caused confusion throughout the bail hearing. This persisted even during the appeal hearing. Mr Wessels, who appeared for all the appellants submitted that there was no likelihood of the appellants being convicted on all the counts as a *prima facie* case had not been established at the bail hearing. His submissions were anchored on the lack of detail of the charges. Mr Stander, who appeared for the State, correctly conceded that on counts 2 and 3 a *prima facie* case had not been made out. He tremulously submitted that on counts 1 and 3 a *prima facie* case had been made out. I do not agree.

[21] Regarding count 1, the investigating officer only mentioned in her second affidavit that the first appellant was the driver. No basis has been shown why any of the other appellants were charged with this count. Even regarding the first appellant no evidence is provided why it is alleged he was the driver. A mere allegation that the police officers who chased the vehicle occupied by the appellants saw the first appellant driving or alighting from the driver's door would have sufficed. This is necessary in this case as there were four people inside the vehicle.

[22] Regarding count 2 Mr Wessels argued, citing authority, that unidentified current money is not “goods” within the meaning of section

36.³ It was not clear even during the appeal hearing on which of the counts the State wished to rely for the cellphones, the Audi key, the wire and the sparkplugs. Mr Stander correctly conceded this point.

[23] A similar paucity of evidence afflicts count 3. The investigating officer refers to “tik” throughout her affidavits. Not once does she make the allegation that she personally knows or a colleague alleged that this “tik” is a dependence producing drug. Mr Stander referred to an entry in the exhibits register annexure which mentions “methamphetamines”. At no stage did the State rely on this at the hearing. The annexure was submitted in answer to the query by the magistrate asking on whom was each item found. It is not allowed for a party in application proceedings to direct her opponent and the court to a particular entry in an annexure and later seek to rely on a different entry in the annexure without the opponent having had an opportunity to answer. I accept that the State at the stage of a bail hearing need not produce lab results that the “tik” is a dependence producing drug. All that is required is an allegation to that effect.

[24] No allegations were made by the State regarding count 4. It was speculated during the appeal hearing that the wire found in second appellants’ underwear related to this charge. But the State made no such allegation in the bail hearing and the annexure to the charge sheet was not completed. Once this analysis of each count and the evidence

³ *R v Monyane* 1960(3) SA 20(T); *R v Boshoff* 1962(3) SA 175(N).

relating thereto is done, the mirage that is the State case fizzles into thin air.

[25] It must not be understood that this Court has held that the State must prove the guilt or innocence of the accused in the bail hearings.⁴ What is emphasised is that there must be a minimum of facts or allegations (evidence) at least to establish a *prima facie* case against an applicant for bail. The paltry evidence tendered by the state in the bail application falls short of this requirement. This was exacerbated by the failure to provide the details in the charge sheet.

[26] In my view the magistrate was wrong in her finding that the State has a strong case. It appears, with respect, she failed to critically analyse the evidence before her in relation to the counts. An example will suffice. She stated that *“the affidavits of the investigating officer clearly indicated that the applicants led away from the police, drove recklessly by overtaking three stationary vehicles at a red light and when apprehended had a total of R18000.00, drugs, cellphones, an Audi key, a sparkplug and wire in their possession”* (sic). The magistrate’s summary of the evidence is wrong in light of the analysis above.

[27] I do not deem it necessary to separately consider the grounds for refusing bail set in section 60(4) as the magistrate had done. My strong view is that it will certainly offend against various rights in the bill of rights enshrined in the Constitution to detain the appellants based solely on their propensity to commit Schedule 1 offences in circumstances where

⁴ In this regard see *S v Van Wyk* 2005(1) SACR 41 (SCA); *S v Mathebula* 2010(1) SACR 55 (SCA) at paragraph 12.

the State failed to present a *prima facie* case. It certainly will be unjust and against the interests of justice.

[28] Each of the appellants has indicated in their respective affidavits that he may afford R500.00 bail. It appears to me the usual appropriate bail conditions will suffice.

[29] In the circumstances and for the above reason it is ordered.

29.1 The appeal is upheld.

29.2 The order by the magistrate denying bail to the appellants is set aside.

29.3 Each appellant is granted bail in the amount of R500.00.

29.4 Each appellant is warned not to interfere with the investigation by the State.

T MALUSI
Judge of the High Court

Appearances

*Adv JW Wessels for the appellant's instructed by SB Maqungu Attorneys,
Port Elizabeth.*

*Adv M Stander for the respondent instructed by the: Director of Public
Prosecution, Port Elizabeth.*

Date Heard: 23 February 2017

Date Delivered: 02 March 2017