



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: CA & R 6/2021
Heard: 12 / 08 /2021
Delivered: 03 / 09 /2021

In the matter between:

DAVID OCKHUYS

Applicant

and

THE STATE

Respondent

JUDGMENT ON BAIL APPEAL

Mamosebo J

- [1] The appellant, who appeared in person, appeals against the refusal of a Magistrate in Calvinia to admit him to bail on 02 January 2020, having been arrested on 11 December 2019 on a charge of murder of his 7-month old son. The appeal is brought in terms of s 65(1)(a) of the Criminal Procedure Act, 51 of 1977 (the CPA).¹ The State is opposing this application.

¹ Section 65(1)(a) stipulates: "An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting."

[2] Section 65(4) of the CPA stipulates:

"(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such a 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 [or her] opinion the lower court should have given."

[3] What stands for determination is whether the decision of the Magistrate not to admit the appellant to bail was wrong.

[4] The offence with which the appellant is charged falls under Schedule 5 of the Criminal Procedure Act, 51 of 1977, as amended. It therefore follows, as required by s 60(11)(b) of the CPA, that the appellant carries the *onus* to adduce evidence to the satisfaction of the court that the interests of justice permit his release on bail.

[5] The record of the bail hearing did not form part of the papers before me. I have only had sight of the transcribed record of the bail hearing before Magistrate Kemp. Ms Natasha Jannetjies appeared for the State while Mr Makhaza represented the appellant during the bail hearing at the Magistrates' Court.

[6] The appellant has submitted that the Magistrate was wrong in refusing him bail based on the following grounds as far as they could be extracted from his written heads and oral argument:

- 6.1 That he was misled by his attorney as his instruction to him was to depose to an affidavit but his attorney called him to testify;
- 6.2 That the bail-hearing transcript of 2 January 2020 is not a true reflection of what transpired in court that day;
- 6.3 Since he was not placed in possession of his wife's statement supporting her application for the interim protection order,

he was unable to defend himself properly against the allegations made that he posed a threat to his family and the community;

6.4 He was never given any chronic medication in prison; and

6.5 The Magistrate refused him permission to bring an application in terms of s 342A based on the delay for his 30-day mental observation.

[7] The appellant is a 43-year old man, married for about four years. He has resided at Loeriesfontein for approximately two years with his wife and two-year old daughter. He also has a 15-year old daughter who resides with her mother in Springbok. He is unemployed but has registered a private company for "Events Management, Catering and construction". He matriculated in 1995. In 2015, he obtained a BA Degree in Development and Environment as studied from Stellenbosch University. He is due to run a non-profit organisation (NPO) known as Loeriesfontein Advise Development Welfare Centre and is only awaiting the NPO Certificate to commence operations. He is not the holder of a passport or any travel document.

[8] The appellant has admitted the following previous convictions: That on 2 November 2006, he was found guilty of assault and was cautioned and discharged; on 02 November 2006 he was found guilty of abduction or kidnapping [the record does not show the sentence]; on 25 May 2009 he was convicted of malicious damage to property and sentenced to a fine of R2,000.00 or 90 days imprisonment which was wholly suspended for five years; on 16 April 2012 he was convicted of a contravention of s 17 of the Domestic Violence Act, 116 of 1998 and was sentenced to R800.00 or 3 months imprisonment; and on 13 February 2018 he was convicted of reckless and/or negligent driving but the sentence is not reflected on the record.

- [9] More importantly, in the appellant's further testimony he admitted that he was on a R500.00 bail in another matter and was to return to Court on 22 January 2020 at Loeriesfontein. When asked whether there were any bail conditions attached to his release this was his response:

"Mnr Makhaza: Was daar enige voorwaardes wat aan u gestel was toe u borg gekry het?"

Applikant: Ek praat onder korreksie, ek wil nie die hof mislei nie. Maar volgens my, dis hoekom ek aangevra het vir die vir die recordings, volgens my was dit ek moenie 'n soortgelyke misdaad pleeg nie, maar ek praat onder korreksie."

- [10] The following testimony also bears relevance:

"Mnr Makhaza: Soos ek ook vroeër vir u meegedeel het, is dit so dat wanneer u aansoek doen vir borg moet u redes aan die hof voorhou waarom u voel dit in belang van geregtigheid is dat u op borg vrygelaat word? Wat is u redes vandag wat u voel u moet op borg vrygelaat word?"

Applikant: Dankie, ja. My redes is as volg is dat ek voel ek word geviktimizeer deur die plaaslike polisie in Loeriesfontein. Soos ek sê ek het nou borg, maar dit was 'n onregmatige arrestasie. Dan op die oomblik ek het 'n gruwe misdaad gepleeg, maar die sielkundige sal dit bepaal en die maatskaplike werker, maar volgens my was ek nie myself nie. En op die oomblik, ek kry nie saans geslaap nie. Ek het nie 'n eetlus nie. Ek het al 'n hele paar kilos afgeval. So van my kant af voel ek net as ek kan op borg uitgegaan het, kan ek ten minste 'n sielkundige, want dit sielkundige verslae sal in elk geval by die hof verhoor moelik wees. 'n Sielkundige kan sien, die dokter kan gaan sien asook 'n maatskaplike werker kan gaan sien."

- [11] The appellant informed the Magistrate that he would afford bail of R1,500.00. When asked about his address should he be released on bail, he initially gave his parents' address which, seemingly, is in close proximity to his wife's residence. The appellant's wife and the

mother to his 15-year old child both took out protection orders against him.

- [12] Under cross-examination, it emerged that members of the South African Police Services (SAPS) were at the appellant's residence to serve him with an interdict. He confirmed having breached the conditions of his bail. The prosecutor put it to him that it was his attorney who informed the Court that the SAPS had stated that they were unable to guarantee the appellant's safety when he was demanding to attend his son's funeral.

The State closed its case without calling any witnesses.

- [13] Most of the incidents that the appellant was involved in took place after the bail hearing. For example, the period of delay for the 30-day observation as counted by the appellant went beyond the hearing date. Mr Hollander pointed out in this Court that the appellant is now number 13 on the list of those awaiting the 30-day observation. From the pattern of those assessed per month, it is possible he will only be assessed in the next four months.

- [14] I now consider the grounds raised by the appellant.

14.1 **Ground 6.1:** Being misled by his attorney on whether to file an affidavit or to testify. Schreiner JA in **R v Matonsi** 1958 (2) SA 450 (A) at 456 A – D, made the following insightful remarks:

"I have found no Roman Dutch or South African Authority which supports the view that the accused in a criminal case can question his counsel's conduct on the trial and claim relief because counsel "prevented" him from giving evidence... Such Roman Dutch writers as I have consulted emphasise the importance and high status of the advocate and I see no reason to doubt that his authority over the conduct of the

case which he had been instructed to fight on behalf of a client was quite as full as that of the English barrister (cf. Klopper v van Rensburg 1920 E.D.L. 239 at p. 242). The English cases show that in general, trials cannot be conducted partly by the client and partly by counsel. Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not. So in Seinfen v Lord Chelmsford 157 E.R. 1436 at p. 1449, POLLOCK, C.B., states the Court's view that,

"a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial".

See also **S v Majola** 1982 (1) SA 125 (A) at 133 D – G and **S v DD** 2015 (1) SACR 165 (NCK) at 170d – 171a.

Regard being had to the aforementioned authorities, it follows therefore, that the contention by the appellant cannot be a ground of appeal.

14.2 **Ground 6.2:** That the transcript is not a true reflection of what transpired in court during the bail application. The appellant does not explain in which way the attached bail record is (in)complete and has been rectified as correct. It follows that the contention by the appellant pertaining to the transcript also stands to fail.

14.3 **Ground 6.3:** Not being placed in possession of his wife's statement supporting her application for an interim protection order prevented him from properly preparing a defence on the allegation that he is a threat to his family and the community. It is not in dispute that the appellant was legally represented during the bail hearing. He was afforded

an opportunity to persuade the bail court that the interests of justice permitted his release and he and his attorney had placed his version before court. This contention, in my view, can also not be a ground of appeal.

14.4 **Ground 6.4:** He was never given chronic medication in prison. I have paraphrased the remarks by Comrie AJA in **S v Van Wyk** 2005 (1) SACR 41 (SCA) at 45 para 9 regarding proper medical attention. He has other legal remedies at his disposal. Bail is not the solution for medical shortcomings in prison. What is crucial is to weigh all the factors and not to isolate one over the others.

14.5 **Ground 6.5:** Being denied permission by the Magistrate to bring an application in terms of s 342A for the delays in respect of the 30-day mental observation. This issue also came after the bail application before the Magistrate. The appellant was arrested on 11 December 2019 and his bail application was heard on 2 January 2020. The issue of the delay did not arise. In any event, while it cannot be a sound ground to be admitted to bail, it is common cause that the appellant was initially number 58 on the list and is now number 13.

[15] The appellant's contention that the Magistrate had predetermined to deny him bail is not borne out by his well-written judgment. He considered the following factors:

- 15.1 that he was charged with murder;
- 15.2 there are two domestic violence interdicts issued against him;
- 15.3 he has five previous convictions and three pending cases against him;

- 15.4 of importance, as remarked by the Magistrate, is that while the appellant was out on bail he committed a further offence.
- 15.5 The following pronouncements by the Magistrate are also relevant:

"Maar dit is duidelik as 'n mens [na] die gemeenskap se houding kyk, as 'n mens u huidige vrou kyk wat bang is vir u en sy het reg om bang te wees vir u, dit is hoekom sy 'n interdik teen u gekry het. En na bewering vermoor u u eie kind. En dis juis wat die staat sê en die gemeenskap sê u is 'n gevaar vir die gemeenskap en soveel te meer vir u eie familie. So die hof beskou dit nie as in belang van geregtig [geregtigheid] nie. Ek gaan nie vir u borg toestaan nie."

- [16] It is trite that when a court is required to exercise its discretion to allow a detained person to bail, it has to balance his or her right to liberty against the interests of justice. The correct approach is as stated by Harcourt J in **S v Smith and Another** 1969 (4) SA 175 (N) at 177 E – F.

"The Court will always grant bail where possible and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby."

See also **S v Acheson** 1991 (2) SA 805 (NmHc)

- [17] The Magistrate has, in my view, considered the factors outlined in s 60(4) of the CPA, and attached weight to the first factor that, should he be released on bail, he will endanger the safety of the public which also includes his wife. I am, in considering this application and as enjoined by s 60(2A), mindful of the recommendation by Dr Christopher, Psychiatric Registrar, that the appellant is to attend a 30-day observation in terms of ss 77, 78 and 79 of the CPA.

- [18] The remarks by Hefer J in **S v Barber** 1979 (4) SA 218 (D &CLD) at 220 E – F are apposite:

"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 for bail. 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 that would be an unfair interference with the magistrate's exercise of his 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 exercised that discretion wrongly."

- [19] I am not persuaded that the Magistrate was wrong in his refusal of the appellant's application to be admitted to bail. He poses a danger to his wife and other members of society. He is standing trial for murder and must still be subjected to the 30-day mental observation. There was also a stage, particularly when he demanded to attend his own son's funeral that the South African Police Services had indicated that they were unable to guarantee his safety because the community was incensed. Those reasons, cumulatively considered by the Magistrate during the bail application constituted, in my view, cogent reasons for the refusal.

The appeal cannot succeed and stands to be dismissed.

- [20] Resultantly, I make the following order:

1. The appeal is dismissed.
2. A copy of this judgment must be forwarded to the appellant at Correctional Services, Van Rhynsdorp, by the Registrar of this Court.



M.C.MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Appellant:

In person

For the Respondent:

Adv. Q Hollander

Instructed by:

The Office of the DPP