



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 86184/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 28 May 2019

SIGNATURE:

In the matter between:

ONYEKA GUY OGUEGBU

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS GAUTENG Second Respondent
DIVISION, PRETORIA

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

- [1] This is an application for the permanent stay of the prosecution of the applicant in the Regional Court, Pretoria North.
- [2] The application is based on the applicant's constitutional right to a fair trial as enshrined in section 35 of the Constitution of the Republic of South Africa, 1996.

BACKGROUND

- [3] The applicant, who is accused 2 in the Regional Court, was arrested together with accused 1 and 3, on 13 June 2014 on a charge of the contravention of certain provisions of the Drug and Drug Trafficking Act, 140 of 1992 in that he dealt in *alternatively* was in possession of 11 kilograms of heroin.
- [4] The arrest was effected during an operation by the police in which an agent, a certain "Moosa" was utilised to buy heroin from the applicant. Accused 1 ("Ali") was instrumental in introducing the buyer, Moosa to the seller, the applicant.

- [5] The meeting between accused 1, Moosa and the applicant was recorded and transcribed. The applicant does not dispute the contents of the transcription. Bearing in mind the applicant's defense, dealt with *infra*, it is apposite at this stage to mention that Moosa had the money to pay for the heroin. The money for the payment of the heroin was kept by Moosa at a Lodge and the conversation between accused 1 and Moosa in this respect reads as follows:

"MOOSA: *Ali, do not make, do not talk ... [inaudible]. I cannot bring the money up first time there then take the stuff now. I am going with the stuff now because now this thing here I must be sure where I am packaging and packaging. I am not sleeping there that is what you must know because I have to be safe. I have to be safe.*

ALI: *No the money is not here, the money is sit somewhere.*

MOOSA: *In the lodge.*

ALI: *In the lodge.*

MOOSA: *It is in the lodge.*

ALI: *.... [inaudible] you know doing this business is ... [inaudible].*

MOOSA: *Now that is why I said now you come, I say we check, check the stuff is right, you can load it, they can follow me, we park, you can come ... [intervenes].*

ALI: *Here is the car. I will drive with you.*

MOOSA: *Ja, you can come with me, count the money, when we are finished I can come down, we can load it in my car, you can move, when you move me I am going to another place because I cannot sleep."*

- [6] The applicant's first bail application brought on 24 June 2014 was unsuccessful. A subsequent bail application was also unsuccessful, but succeeded on appeal on 20 March 2015. The matter was set down for trial on 7 November 2016.
- [7] The applicant states that it came to his attention during October 2016 that accused 1 had laid a charge of theft against the Investigating Officer, warrant officer, van Schalkwyk ("van Schalkwyk"). His legal representative requested disclosure of the case docket in the theft matter and received a document marked "A1" on 3 November 2016.
- [8] Upon perusal of the document, it became apparent to the applicant that the State was in possession of voice recordings of conversations between accused 1 and van Schalkwyk as well as counterfeit dollars. I pause to mention that the State's case against the applicant is not based on counterfeit money.
- [9] As stated *supra* the charge against the applicant is the dealing in or possession of heroin. In the result, the substance seized during the arrest forms the basis of the charge against the applicant. In the applicant's bail application, he refers to an affidavit in terms of section 212 of the Criminal Procedure Act, 51 of 1977, in which it is stated that the substance confiscated during the applicant's arrest weighs 10 750 grams and that it contains heroin.

- [10] There is no evidence on record that Moosa ever handed the money for the payment of the heroin to either accused 1 or the applicant.
- [11] The cell phone recordings and counterfeit money on which the applicant's application is based, does not relate to the charge preferred against the applicant. Van Schalkwyk stated under oath that after accused 1's arrest, he was taken to the police station. At the police station van Schalkwyk searched accused 1's vehicle and found the "*counterfeit*" money in the boot of the vehicle.
- [12] It appears that van Schalkwyk contemplated preferring a charge in respect of the "*counterfeit*" money against accused 1. Be that as it may, accused 1 denies that the money found in his vehicle is counterfeit and alleges that van Schalkwyk stole the money that was found in the boot of his motor vehicle.
- [13] According to van Schalkwyk the alleged theft of accused 1's money formed the subject matter of the conversations between them during or about August 2015, almost a year after the arrest of the accused. Accused 1, who was at the time in prison, apparently recorded the conversations on his cell phone.

- [14] Due to the fact that the possession of cell phones by inmates are forbidden, two cell phones were confiscated from accused 1 on 24 August 2015 and handed to a police official, Elphus Mushwane ("Mushwane"), in order to download the data on the cell phones.
- [15] Mushwane was initially not successful and handed the cell phones back to van Schalkwyk. On 7 November 2016, van Schalkwyk returned with the cell phones and on this occasion Mushwane took the cell phones to the Digital Forensic Laboratory for analyses. Mushwane, *inter alia*, found 43 audio clips and six deleted audio files.
- [16] On 17 August 2017, Mushwane was requested to determine whether there were voice recordings in the downloaded audio clips. Mushwane stated that only two of the remaining 43 audio clips were voice recordings.
- [17] Mushwane stated that one voice recording was audible enough to figure out that the person speaking was speaking in Sesotho. The second voice recording was not audible. A CD with the voice recordings were provided to the applicant's legal representative. The CD was thereafter taken by the legal representative to a court transcriber, Yolanda Malan ("Malan"), who was unable to access the recordings.

[18] Mushwane endeavoured to assist Malan, once telephonically and once by meeting in person, without avail.

[19] In respect of the money confiscated in accused 1's motor vehicle, an affidavit by Bradley Kagiso Sedumedi, an accounting clerk at Bookkeeping and Cash Flow Management within the Directorate: Financial Accounting at the South African Police's head office in Pretoria, reveals the following:

"

(2)

On Tuesday 2014/06/24 Lt. Colonel Kriel hand over to me foreign currencies and watches in Sinoville CAS 307/06/2014 as per Annexure. I signed for it and immediately after he left I recorded the currencies.

(3)

On 2014/11/19 my Commander: Bookkeeping and Cash Flow Management Lt. Colonel Kriel gave instructions that the forfeited property has to be exchanged at the bank. I went to the bank and they informed him that the USD are fake, the Chinese yuan currency is too small, UED currency too small and Naira they do not change this currency (as per Annexure).

(4)

On my return I reported the outcome to Lt. Colonel Kriel and he instructed me that these currencies must immediately be destroyed, this is common practice to prevent that these currencies put into the network again."

GROUNDS FOR RELIEF

[20] In order to appreciate the grounds on which the applicant relies for the relief claimed herein, it is apposite to have regard to the applicant's defence as disclosed in his application for bail:

"64. It is pertinent at this juncture to state that I deny I was knowingly involved in a drug deal as alleged by the State.

65. I had been in touch with a person whom I believe knows Applicant 1 ("Ali"). I was pressurized to assist them in dealing with a man whom I was led to believe was doing a dollar deal on behalf of these people and about whom they expressed certain misgivings. I was informed that they had already attended to the mixing, cutting and packaging of their product.

66. The parties came to see me in SA shortly before this incident and stayed at 8 Theresa Gables, Akasia where a friend of Applicant 3 (third accused), Wendy was renting. I had met them at the premises and they had conveyed to me in no uncertain terms that I should assist them in their deal as I owed them a substantial amount of money based on a money swop that had gone wrong failing which there would be serious repercussions. I also received threatening telephone calls. They were renting the premises for a short period of time and undertook to do a set off regarding monies owed. I was not destined to make a cent and was acting under duress. They also utilized a friend's vehicle, a Chevrolet Spark which they travelled around in during their stay at the aforementioned premises and in which Applicant 3 was arrested. At the time of our arrest they were still in the Pretoria area.

67. *As regards the allegation that I was being "pressurized" into assisting in what I was under the impression was a transaction about dollars and/or the substances used to colour the dollars commonly known as "black dollars"*

68. *The substance is usually mixed with a liquid and then utilized to change the appearance of dollars. One usually mixes the dollars with the rest of the paper and cuts the packets so that they are mixed up which is very confusing to the purchaser.*

A sample is normally given to the purchaser for testing purposes."

[21] The crux of the allegation that the voice recordings and money found in Accused 1's motor vehicle will assist the applicant in his defence, is set out in the applicant's founding affidavit as follows:

"59. I am advised that during the various cellular conversations between Accused 1 and the investigating officer, DWO Andre van Schalkwyk, Accused 1 exonerated me and specifically alluded to the dollars, that I was led to believe were being utilized in the transaction with the agent.

60. *The relevance and importance hereof are self-explanatory.*

61. *The resulting prejudice that I would suffer without access to the recording content is evident as Accused 1 now denies that the dollars were fake.*

62. *This coupled with the fact that the dollars confiscated from Accused 1 by the SAPS have in all probability been destroyed by the SAPS and are not available to either the State or defense, renders further irreparable trial prejudice given the conflicting versions between Accused 1 and the SAPS. The State via the investigating officer is as at 13 December 2017, unable to confirm or deny that*

the dollars have been destroyed as they are unable to determine this from Mr Sedumedi, the SAPS Accounting Clerk who alleges that he received instructions from his superior to destroy the dollars, whose whereabouts are currently unknown to the State.

63. *The lack of real evidence that was in possession, and in all probability destroyed by the State is extremely prejudicial to my case, as this evidence is fundamental to my trial preparation and the conducting of my defense."*

LEGAL POSITION

[22] An application for the permanent stay of prosecution is premised on an accused's rights in terms of section 35 of the Constitution. *In casu* section 35(3)(i) provides that an accused has the right to adduce and challenge evidence. This right underpins the right to a fair trial and entails that all available evidence, including evidence that will assist an accused in her/his defence, should be made available. Once evidence that could have assisted an accused in her/his defence has been lost or destroyed, the question arises whether the accused has been prejudiced thereby to such an extent that a fair trial is no longer possible.

[23] In *Bothma v Els* 2010 (2) SA 622 CC at paragraph [68], Sachs J described the inquiry to be conducted in such instances, as follows:

"[68] These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."

- [24] An example of such prejudice is to be found in *Broome v Director of Public Prosecutions, Western Cape and Others; Wiggings and Another v Acting Regional Magistrate, Cape Town and Others* 2008 (1) SACR 178 CPD. Broome was accused of committing fraud in his capacity as auditor of the Owen Wiggings Trust Group of Companies, whilst Wiggings senior and junior faced fraud charges in their capacities as directors of the group of Companies.
- [25] The fraud charges related to audits carried out from 1987 to 1994. The applicants alleged that their audit working papers which were lost by the State

formed an integral part of their defense. Le Grange J agreed and stated the following at 193 c –e:

"... It is common cause that the audit working papers have passed between various entities and the majority of the audit working papers have been lost or dissipated as a result of the passage of time. It is further common cause that these documents were under the control of the State and State-authorised entities when they got lost. Moreover, in respect of the year 1994, the audit working papers in their entirety have been lost. Having regard to the formulation of the charges against the accused, it is clear that these documents are fundamental to the case the accused have to answer."

- [26] Although the applicants were successful, Le Grange J in *Broome supra* at paragraph [80], referred to the caution a court should apply in considering a permanent stay of prosecution, to wit:

"The relief sought by the accused is, however, exceptional, drastic and radical. Our courts have consistently and constantly sought not to bar the prosecution before the trial begins. It indeed prevents the prosecution from presenting society's rules of conduct. Orders of this nature may also undermine public confidence in the criminal justice system and may adversely impact on the functions of democratic institutions in this country."

- [27] Lastly Sachs J in *Bothma supra*, emphasised that the nature of the crime should be given sufficient weight in evaluating the merits of the matter. [pars [62] – [66]]

EVALUATION

- [28] The voice recordings that is in possession of the State had been made available to the defense. The applicant, however, alleges that on all probabilities van Schalkwyk and/or other unidentified police officials have deliberately deleted the conversations between van Schalkwyk and accused 1, in order to prejudice him in preparing for his defense.
- [29] The allegations are speculative and without any factual foundation. I am, in any event of the view that the content of the conversations between van Schalkwyk and accused 1 does not constitute evidence that is crucial to the defense of the applicant.
- [30] The money, whether fake or real, was found in accused 1's vehicle after the arrest. As set out *supra*, Moosa, as purchaser of the heroin, had to pay the purchase amount. Accused 1 was a mere conduit between Moosa and the applicant. I am at a loss as to the importance of counterfeit money in a drug related charge.
- [31] Mr van der Merwe, appearing for the applicant, insisted that the money would assist the applicant in proving his defense that he was providing a substance to produce "*black dollars*". Having regard to the available evidence, I am the

view that the absence of the money found in accused 1's vehicle will not cause "*insurmountable damage*" to the defense of the applicant.

[32] The fear harboured by the applicant that the absence of the money would irreparably deprive him of a fair trial, is without substance.

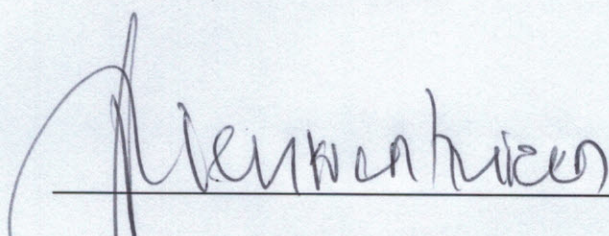
[33] The nature of the offence, to wit the dealing in *alternatively* being in possession of 11 kilograms of heroin also weighs against the granting of the relief. The harm that drugs cause to society, both emotionally and financially, is well recorded. Drugs in general have the potential of wreaking havoc in the lives of not only users but also in the lives of their loved ones. Families are torn apart and users that could contribute positively to society are rendered incapable of functioning properly.

[34] In the result, the applicant has failed to make out a case for the permanent stay of his prosecution and the application falls to be dismissed.

ORDER

[35] In the premises, I grant the following order:

The application is dismissed with costs.

A handwritten signature in dark ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. The signature is stylized with a large initial 'N' and a long, sweeping underline.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD

21 May 2019

JUDGMENT DELIVERED

28 May 2019

APPEARANCES

Counsel for the Applicant:

Mr S.W. van der Merwe
(with right of appearance)

Instructed by:

Alexander Montano Attorneys
(011 447 4954)
Ref: Oguegbu (CA)

Counsel Respondents:

Advocate A.M. Mphaga

Instructed by:

The State Attorney Pretoria
(012 362 3856/084 874 2607)
Ref: Adv. Andrew Mphaga