



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 76/2014

In the matter between:

THE STATE

Applicant

and

MACEBO JOSEPH RABELE

Respondent

HEARD ON: 28 SEPTEMBER 2016

JUDGMENT BY: MOLITSOANE, AJ

DELIVERED ON: 29 SEPTEMBER 2016

- [1] This is an application for the release of the accused on warning to be revoked and consequently for him to be kept in custody, pending finalisation of a partly heard criminal trial against him.
- [2] In support of its application the state called two witnesses. The first witness is the investigating officer of cases which are pending

in the Welkom Regional Court. Essentially of importance in his testimony is that while on warning the accused was arrested for conspiracy to commit armed robbery, contravention of section 36 of the General Laws Amendment Act, having being allegedly found in possession of a motor vehicle and that accused is also still to be charged with unlawful possession of a firearm.

- [3] The second state witness is the investigating officer in the current case. He testified that he is not the original investigating officer of this case. He requests that the release of the accused on warning be terminated. He testified that the accused in his bid to be released on bail/warning in this case he failed to disclose the previous convictions of abduction and theft.
- [4] He also indicated that while on bail the accused was arrested on other matters of attempted robbery, contravention of section 36 of the General Laws Amendment Act and he is of the opinion that the safety of the public is at risk as a result.
- [5] It was put to him by counsel for the accused that indeed the accused in his bid to be released on bail, in his affidavit handed in the lower court only indicated that he had a previous conviction of robbery of 1990.
- [6] It was further put to him that the previous convictions he did not disclose were thirty six years and twenty six years old respectively.

That was the state case.

- [7] The accused then testified in his opposition and he did not call a witness. He admitted that he did not mention the convictions of abduction and one of theft. He further indicated that at the time when he applied for his release on bail he was legally represented.
- [8] According to him he informed his legal representative of these previous convictions and the latter informed him that he will not mention them in the accused's affidavit as they were old.
- [9] During cross-examination it was put to him that though he claims he informed his legal representative about the previous conditions, he himself confirmed in court during the bail application that he only had one previous conviction.
- [10] Section 72A of the Criminal Procedure Act (the CPA) provides as follows:

“Notwithstanding the provisions of section 72(4), the provisions of sections 68 (1) and (2) in respect of an accused who has been granted bail, are with the necessary changes, applicable in respect of accused who has been released on warning.”

This therefore means that while the bail of an accused person can be cancelled, his release on warning can also be terminated – See **Classsen v Minister of Justice and Conditioned Development and Another** 2010 (2) SACR 451 (WCC).

Section 35(1)(f) of the constitution provides that ...” everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interest of justice permit subject to reasonable conditions.”

- [11] Therefore where one has been released on warning, such an order cannot be terminated unless the interest of justice requires so. In **S v Coetzee** 1997 (1) SACR 379 (cc) O'Regan J identified two relevant aspects of freedom:

“The first is concerned particularly with the reasons for which the state may deprive someone of freedom, and the second is concerned with the manner whereby is deprived of freedom.”

- [12] She goes on further to say:

“Our constitution recognises that both aspects are important in a democracy.the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.”

- [13] Section 68(1) and (2) provides guidelines as in what circumstances may termination of the release on warning should be done.

- [14] Section 68(1) provides as follows:

“Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath –

- (a) that the accused is about to evade justice or is about to abscond in order to evade justice;

- (b) the accused has interfered or threatened or attempted to interfere with witnesses;
- (c) the accused has defected or attempted to defeat the ends of justice;
- (d) the accused poses a threat to the safety of the public or of a particular person;
- (e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his/her release on bail;
- (f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail, or
- (g) it is in the interest of justice to do so."

[15] The grounds that may lead to the cancellation of bail or termination of the release on warning are related to the criteria considered in terms of section 60 (4) of the CPA at the initial stage when bail is being considered - see in this regard **S v Kyriacou** 2000 (2) SACR 704. In Kyriacou Lombard J had this to say:

"... the golden thread of the interest of justice continues to be extremely relevant if not dominant in all bail applications and has also found its way into the constitution."

[16] The consideration of the interest of justice is in my view also an important consideration in the cancellation of bail or termination of the release on warning.

ISSUES

[17] It appears to the court that the main reasons for the application for termination of the release of accused on warning is twofold, namely:

- (1) That the accused did not disclose all his previous convictions during bail application; and
- (2) that the accused poses a threat to the safety of the public .

FACTS NOT IN ISSUE

[18] The following facts are not in issue:

- (1) That during his bail application accused did not disclose that he was previously convicted of abduction and theft.
- (2) That while he was released on bail/warning he was arrested again on other charges.

EVALUATION

[19] It is not in dispute that the accused did not disclose the previous convictions of abduction and theft. It is further not in dispute that while he was released on warning he was arrested on other charges.

What, however, is important to consider is whether his failure to disclose his previous convictions and further his subsequent arrest on other charges while on warning warrant that his release

on warning be terminated is envisaged in section 72A read with sections 68(1) of the CPA?

[20] According to the accused he did inform his attorney that he had previous convictions of abduction and theft. He further indicated that his attorney informed him that these convictions were very old and it was not necessary for the accused to disclose them. These assertions are undisputed.

[21] In considering these assertions of the accused for not disclosing the previous convictions, the court must bear in mind that the state bears an onus to satisfy the court on a balance of probabilities that there are sufficient grounds or information on oath for the termination of the release of the accused on warning.

[22] It should be noted that:

- (1) the accused was convicted of abduction in 1988, about thirty six years ago;
- (2) the accused was convicted of theft in 1978, about 26 years ago.

[23] In terms of section 271A of the CPA, certain convictions fall away as previous convictions after expiration of ten years. It has been submitted by counsel for the state that this related to sentence only and not to section 60 (11B) in bail proceedings. The court shares the same sentiments with counsel for the state.

- [24] The question, however, which the court has to answer is whether a possibility exists that the accused might have received erroneous advice from his legal representative about not disclosing the previous convictions which are thirty six years and twenty six years old respectively. State contends that it is not possible as he disclosed one of 1996.
- [25] It is my view that in light of the provision of s271A, of the CPA, it is not farfetched that the accused might have received erroneous advice from his attorney. It is to be noted that the disclosure of the previous conviction was made by way of an affidavit. In practise it is not uncommon that the legal representative may read into the record the affidavit of the accused and the accused would be asked to confirm that which has been read in the record.
- [26] In the absence of any evidence to the contrary it is my considered view that it is possible that the accused was advised not to disclose his previous convictions of abduction and theft.
- [27] The second consideration is whether the accused poses a risk of threat to others when he has been released on his own recognisance. The state argues that while on warning he was arrested and charged on other matters.
- [28] This factor stands to be assessed in light of the provisions of sections 60 (4) (a) and 60(5) of the CPA.

Section 60(4) (a) of the CPA provides as follows:

"The interest of justice does not permit the release from detention of an accused while one or more of the following are established.

(c) where there is a likelihood that the accused, if he or she were released on bail will endanger the safety of the public or any particular person or will commit a schedule 1 offence ..."

- [29] Section 60(5) of the CPA on the other hand deals with factors the court must consider in making a determination in terms of 60(4) of the CPA. The list in section 60(5) of the CPA is not exhaustive.
- [30] In **S v Patel** 1970 (3) SA 565 (W) bail was refused as a result of the previous conviction of the accused and his actions immediately prior to his application for bail.
- [31] One must, however, bear in mind the primary aim of the release of the accused on warning or on bail, namely, whether if released on warning or bail is granted to him, the accused will stand his trial.
- [32] Admittedly while the accused was released on warning he was arrested on other similar offences. He has not been convicted of the said offences.
- [33] In **S v Du Plessis en 'n Ander** 1993 (2) SACR 379 (1) at 384 Van Dijkhorst J had this to say:

"Die toets by 'n borgaansoek is dat dit toegestaan moet word indien die regspleging nie daardeur benadeel sal word nie. Dit is al gesê so lank terug soos in R v McCarthy 1906 TS 657 op 659. Die grondslag

van die reël is dat vermoed word dat 'n beskuldigde onskuldig is en dat dit onbillik is dat onskuldiges in aanhouding sit. Die belangrikste vrae wat beantwoord moet word is:

- (a) sal die beskuldigde sy verhoor bywoon;
- (b) sal die beskuldigde die regspleging benadeel deur met getuies in te meng of die polisie ondersoek in die wiele te ry?"

[34] The test remains whether the interest of justice requires that his release on warning should be terminated.

[35] It needs to be mentioned that at one stage a warrant for his arrest was authorised and his bail money forfeited to state. He however went back to court and gave an explanation to court as to his failure to attend court. The court was satisfied with his explanation and released him on warning. He has since attended court religiously.

[36] I can accordingly not find that there are any sufficient reasons to terminate his release on warning and I accordingly cannot therefore find that the interest of justice requires that his release on warning should be terminated and consequently I make the following order:

ORDER

The application by the state in terms of s72A of the CPA for the termination of the release of the accused on warning is hereby dismissed.



P MOLITSOANE, AJ

On behalf of applicant: Adv F Pienaar
Instructed by: The Director of Public Prosecutions
3rd Floor
Waterfall Centre
BLOEMFONTEIN

On behalf of respondent: Adv. PL Van der Merwe
Instructed by Bloemfontein Justice Centre
Southern Life Plaza Building
41 Charlotte Maxeke Street
BLOEMFONTEIN