

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 9783/2012

In the matter between:

BRANDON GOUNDEN

Appellant

and

THE STATE

Respondent

J U D G M E N T

K PILLAY J

[1] This is an appeal against the court *a quo*'s refusal to admit the Appellant to bail on 5 September 2012.

[2] The appellant is charged with one count of assault with intent to do grievous bodily harm. It is common cause or not in dispute that the Appellant was released on bail for a charge of Robbery when he is alleged to have committed this offence. The accused also has a previous conviction for assault.

[3] This Court's power to interfere with the court *a quo*'s refusal to grant bail is circumscribed by the provisions of s 65(4) of Act 51/77 (the Act). The following remarks of *Hefer J* in *State v Barber*¹ 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

¹ 1979 (4) SA 218 (D) 220

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 a magistrate because that would be an unfair inference 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 acted wrongly..... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one."

[4] It is well established that an accused person is presumed innocent until his guilt has been proven in a court of law and courts should lean towards the granting of bail unless there is the likelihood that the interests of justice will be prejudiced. (See *S. v Hlongwa*)²

[5] The attack on the court *a quo*'s refusal to grant bail is founded on the following alleged misdirections:

- 1) That the court *a quo* did not afford sufficient weight to the provisions of Section 60(6)(i) of the Act, which permits her to consider the imposition of special conditions to allay any danger to witnesses, the administration of justice and the safety of the public.
- 2) That she placed great emphasis on the fact that the Appellant was charged previously with similar offences, notwithstanding that those charges were withdrawn.
- 3) She failed to consider the fact that the complainant in the Robbery charge had filed a withdrawal statement.
- 4) She failed to accord sufficient weight to the Appellant's personal circumstances or the presumption of innocence.

² 1979 (4) SA 112 ((O))

- 5) There was no tangible evidence to support the contention that the Appellant posed a threat to public safety or the complainant.

[6] The State, in opposition, asserted that the court a quo exercised its decision judicially and was not wrong in refusing bail.

[7] The parties accepted that this application fell within the prescripts of s 60 (11) (b) of the Act in as much as the accused was charged with an offence which fell within the ambit of Schedule 1 at a time when he had been released on bail in respect of another Schedule 1 offence, namely robbery.

[8] In terms of the aforesaid section, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless having been given a reasonable opportunity to do so, the accused adduces evidence which satisfies the court that the interests of justice permit his or her release. This section accordingly places an onus on an accused person to adduce evidence and to satisfy the court that the interests of justice permit his release.

[9] As is customary, notwithstanding the onus which the appellant bore, the State commenced the proceedings by presenting the evidence of Constable R Venkatrayadu. He stated that the allegations against the appellant are that the latter and his brother confronted the complainant at his place of residence and thereafter assaulted him in the car park with a bush knife and a slasher: that the complainant sustained serious injuries to his head, face and body and had to be hospitalised. The charge was instituted by the complainant's father as the complainant was still in hospital.

[10] There were two witnesses to the incident namely a family member and a neighbour. He stated that he was aware of the fact that the Appellant instituted a counter charge. His opposition to bail lay principally in the fact that given that the appellant lives in the same vicinity as the complainant and the witnesses, he feared that the appellant would interfere with those

witnesses.

[11] During cross-examination it emerged that this fear was based on the contention that there were other charges which the appellant faced, similar to the one in question, which were withdrawn. The witness could not dispute that a withdrawal statement was filed in the robbery matter.

[12] It also became clear that the witness did not have a sworn statement from the complainant in this matter and was accordingly unable to tell the court exactly what role the appellant played in the assault. It was also not clarified whether the two witnesses he referred to had by then made any statements.

[13] The appellant did not testify but instead handed in an affidavit in support of his application. Therein he stated essentially that he resides with his parents. He has an alternative place to reside, namely, with his uncle at 74 Russom Street, Veulam. He has a previous conviction for assault for which he paid a fine. He has a pending case of robbery in the Regional Court.

[14] He was advised by his attorney that the complainant had filed a withdrawal statement in that matter. He stated that he had resolved the issue with the complainant who no longer wished to proceed with the prosecution. He is not in possession of a passport and has strong emotional ties to Verulam. He was also permanently employed at Everest Flexibles. It was subsequently established that he was dismissed by the said firm. He suffers from Asthma and does not receive adequate medical attention whilst in custody.

[15] He intends to plead not guilty and has opened a counter-charge against the complainant. He knows the complainant and undertakes not to interfere with him or any other witnesses. His family including his girlfriend would be prejudiced by his continued incarceration.

[16] In argument the State contended that the prerogative to withdraw a charge lay with the State and not with a complainant.

[17] The paucity of detail presented by the State in opposition to the application for bail is unfortunate. However, the passivity of the presiding officer faced with such a dearth of information is equally alarming. For as was said in *S v Dlamini; S v Dladla and others; S v Joubert; Sv Schietekat 1999 (2) SACR 51* at para. 49, with regard to a bail enquiry in terms of Section 60 of the Act, that it '*It remains a unique interlocutory proceeding where the rules of formal proof can be relaxed and where the court is obliged to take the initiative if the parties are silent; and the court still has to be proactive in establishing the relevant factors*'.

[18] In this case no evidence was lead on the strength of the state case especially in regard to exactly what role the Appellant played in the assault of the complainant. It was also not clear if the witnesses had made statements and what the content of their testimony would be. Further the reasons for the withdrawal of the other "similar" charges were not canvassed. The learned magistrate had the power in terms of Section 60 (2) of the Act to postpone the application so that all relevant information could be placed before the court.

[19] In refusing bail the learned magistrate took into account the appellant's propensity to commit crimes of violence. She also appeared to have placed particular emphasis on the fact there were many matters which were withdrawn to reinforce her finding that that the accused is prone to violent conduct. This is a clear misdirection as the evidence of the investigating officer was both vague and unsubstantiated. She however found that the appellant failed to discharge the onus of demonstrating that the interests of justice permit his release.

[20] In dealing with issue of what the concepts "interests of justice" meant the Constitutional Court in *Dlamini supra* had the following to say:

"The interests of society' is 'the sense in which "the interests of justice"

concept is used in sub-s (4). The subsection actually forms part of a functional unit with sub-ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, sub-s (9) being predominant. If it is read first and “the interests of justice” bears the same narrow meaning akin to “the interests of society” (or the interests of justice minus the interests of the accused), the interpretation of the three subsections falls neatly into place. The opening words of sub-s (9) (“in considering the question in sub-s (4)”) refer to the question whether bail should be refused. That question, so the presiding officer is told, is to be answered by weighing up the societal interests listed in sub-s(4) and detailed in sub-ss (5) to (8A) against the personal interests adverted to in sub-s (9). And whatever the parties may contend, sub-s (10) obliges the presiding officer to ultimately assume responsibility for that evaluation.’

[21] It appears that the principal and perhaps only reason why Bail was opposed and refused are those falling within the prescripts of Section 60(4) (a) and (c). These sections read as follows:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established.

(a) Where there is the 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; or

.....

(c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal and destroy evidence....

[22] However, this section has to be read in conjunction with Section 60(5)

of the Act, which provides:

“In considering whether the ground in sub-section 4(9) has been established, the Court may, where applicable, take into account the following factors, namely:

- a) the degree of violence towards others implicit in the charge against the accused;*
- b) any threat of violence which the accused may have made to any person;*
- c) any resentment the accused is alleged to harbour against any person;*
- d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;*
- e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;*
- f) the prevalence of a particular type of offence;*
- g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or*
- h) any other factor which in the opinion of the Court should be taken into account.”*

and Section 60(7) which provides:

“(7) In considering whether the ground in subsection (4) c has been established, the court may, where applicable take into account the following factors, namely-

- a) *the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;*
- b) *whether the witnesses have already made statements and agreed to testify;*
- c) *whether the investigation against the accused has already been completed;*
- d) *the relationship of the accused with the various witnesses and the extent to which they could be influenced and intimidated;*
- e) *how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be.....”*

[23] It was emphasised in *S v Dlamini et al*³ that the above factors serve as a guideline to judicial officers and what weight each should be afforded should be left to the “*good judgment of the presiding judicial officer*”.

[24] This Court is now enjoined to consider, whether the court a quo misdirected itself in concluding that the appellant failed to discharge the onus of satisfying the court that the interests of justice permit his release.

[25] It was not suggested that the Appellant will evade trial. On the common cause facts such as they are, the Appellant faces a serious charge of assault with intent to do grievous bodily harm. He was released on bail on a charge of Robbery when he committed this offence. He also has a previous conviction for assault. The attorney representing him placed on record, that a withdrawal statement was filed by the complainant in that matter.

[26] Notwithstanding that the Appellant bore an onus in terms of Schedule 5, this evidence was not placed before the Court, neither did the Appellant testify to that effect. The Attorney representing him at the application should have played a more assertive role, in the interests of his client, in calling the

³ Supra at para 42 g-i

investigating officer in that matter to confirm or deny the assertion. The investigating officer who testified in this application clearly did not know much about that case and said so. The fact that a withdrawal statement is filed does not necessarily put an end to the charge. As stated before the prerogative to withdraw a charge lies with the state. Until that occurs, the charge, for all intents and purposes, has to be regarded as still pending.

[27] Thus in determining whether the refusal of bail was justified, this Court will have to determine, in the context of this case, whether it has been established that:

- 1) the accused's release will jeopardise the safety of the public;
- 2) the accused will interfere with witnesses;
- 3) the accused will commit offences, while on bail.

[28] In dealing with (1) above, it is so, from the undisputed evidence that the Appellant has a propensity for committing offences involving the element of violence, as the charge of Robbery, the current charge of Assault Grievous Bodily Harm, and a previous conviction for assault all indicate. The offence under question committed by the appellant whilst out on bail for Robbery, serves to indicate the real likelihood that the Appellant will commit further offences while on bail.

In my view the offences in question are inherently substantially harmful to the safety of the public.

[29] At the time of the application the investigation was incomplete. The complainant had not made a statement. It is also not clear whether the two witnesses did so either. The complainant resides close to where the Appellant resides. The address which he furnished to which he is prepared to move pending finalisation of the trial herein is within the small town in which they both reside. The investigating officer has been emphatic that there was a real likelihood of interference. This fear cannot be ignored.

[30] As correctly submitted by the State, the Appellant offered no

explanation under oath to the charges pointing to his innocence. He was content to put forward, in support of his application, what appears to me to be a hastily drawn up affidavit, which could not be challenged under cross-examination. This, notwithstanding the onus he bore. Any disputes of fact arising, will therefore have to be resolved against him. *S v Mungal* ⁴.

[31] My view, having considered the judgement of the court a quo carefully and the evidence placed before it, is that the learned magistrate was not wrong in refusing bail.

[32] The appeal is accordingly dismissed.

K PILLAY J

Date of Judgment:	9 October 2012
Applicant's Counsel:	Adv. N R Naidoo
Instructed by:	Shireen Amod & Company Applicant's Attorneys Shop 2, Golden Gate Centre 101 Wick Street VERULAM
Respondent's Counsel:	Adv Y Vahed The Director of Public Prosecutions KwaZulu-Natal DURBAN