

SOUTH AFRICA / JUDGMENT

Beyene v S (CA&R 01/2021) [2021] ZAECPEHC 7 (4 February 2021)

[2021] ZAECPEHC 7

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Gqamana

CASE / FILE NUMBER

CA&R 01/2021

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IN THE HIGH COURT

OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE

NO.: CA&R 01/2021

Heard

on: 21 January 2021

Delivered

on: 4 February 2021

In

the matter between:

ESTIFANOS

BEYENE

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

GQAMANA J:

- [1] This case comes before me as an appeal in terms of s 65(1) of the Criminal Procedure Act 51 of 1977, (“the Act”). The Appellant, Mr Beyene, an Eritrean national was arrested on 19 May 2020, and charged with 22 counts.[1] The charges against him relate to corruption, incitement to commit an offence, unlawful possession of counterfeit number plates, fraud, theft, falsification of vehicle licence, money laundering, possession of suspected stolen property and escaping from custody. He appeared before the Magistrate Court in Port Elizabeth for the bail hearing. During the bail proceedings, the Appellant and the State presented their respective case based on affidavits and no oral evidence was heard. On 29 September 2020, the learned magistrate handed down her judgment and refused to release the Appellant on bail. It is that judgment which is the subject matter of this appeal.
- [2] The grounds of appeal are set out detail in the notice of appeal,[2] but in argument Mr Price SC, Appellant’s counsel summarised them succinctly. The argument eventually advanced boils down to the contention that the learned magistrate misdirected herself on the facts and in law and consequently her decision to refuse the Appellant bail was wrong.
- [3] As a point of departure, it was common cause that the charges against the Appellant are the offences referred to in Schedule 5. That then automatically rendered the provisions of s 60(11) (b) to be applicable. It reads:
- “(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*
- (b) in Schedule 5, but not in 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, adduced evidence which satisfies the court that the interest of justice permit his or her release.”
- [4] In terms of s 60(4) of the Act, it is not in the interests of justice to release an accused if one or more of the consequences listed in paragraphs (a) – (e) therein are established. However, in considering the question in subsection (4), the court must weigh the interests of justice against the accused’s right to his personal freedom[3] and in that process the factors as listed in paragraphs (a) – (g) of sub-s
- (9) must be taken into account. Clearly this is not a one-way approach, but it is an assessment which requires a value judgment. A bail court must always be alert and not trample an accused’s right to personal liberty as entrenched in our Constitution. In *S v Mwaka*,[4] Le Grange J, expressed a view that ‘in terms of s 60(4), the basic principle in our law is that, bail ought to be granted unless it is not in the interests of justice.’
- [5] In *S v Dlamini*,[5] Kriegler J, (then) said:

“In deciding whether interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paras (a) to (e) of sub-section (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by sub-ss (9) and (10). Subsections (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution.....In making the evaluation, the arrestee therefore does not have a totally untrammelled right to be set free. More pertinently than in the past, a court is now obliged by s 60(2) (c), (3) and (10) to play a proactive role and is helped by sub-ss (4) to (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail.”

[6] In the instant matter, the learned magistrate was not satisfied that it was in the interests of justice to release the Appellant from detention, and consequently refused bail. From the judgment itself it is not pertinently clear which of those factors listed in s 60 (4) weighed heavily with the learned magistrate in arriving at her

decision. This uncertainty (at least from the Appellant’s side) existed even at the time when the judgment was handed down because from the record[6] clarity was sought from the magistrate. The relevant portion of the transcribed record on this point reads:

“MR PRICE : Your Worship, can I just make sure I understood correctly? The bail is being refused on the basis that he is a flight risk and it is not in the interest of the bail system that he be released, that is (c), sorry (b) and (d)?

COURT : (b) and (d)

MR PRICE: Yes, (b) and (c)?

COURT : (d). (b). Oh sorry.

MR PRICE : No, I just wanted to, I just wanted to make sure of that.

COURT : Hm.”

[7] Alive to this uncertainty, at the commencement of the appeal hearing, I enquired from Mr Price SC, his understanding of the reasons for the refusal of bail and his response was that, bail was refused by the learned magistrate solely on the basis that the Appellant was a flight risk and accordingly the Appellant’s case would be argued on that basis. That was also consistent with the grounds of appeal set out in the notice of appeal.[7] However, when I enquired from Ms Ford, counsel for the State at the beginning of her argument, whether the State is in agreement with the aforesaid contention, her response was that, bail was refused based on sub-s(4)(b) and (d), that is, the Appellant was flight risk and that there is likelihood of him undermining the objectives of the proper functioning of the criminal justice, including the bail system. As a result of her response I then afforded Mr Price SC, an opportunity to address me also on sub-s (4)(d). Grouchy and understandably so, Mr Price SC however, advanced submissions apathetically that, there is even more justification for this court to set aside the learned magistrate’s decision because the factors referred to in sub-ss

(8)(a)–(d), and

[9] were not even remotely considered by the magistrate. For fairness sake to both parties, this appeal will be decided on the basis that the learned magistrate refused bail because the Appellant is a flight risk. I now turn to deal with the facts.

[8] The offences which the Appellant is charged of are commercial crimes, save for that of escaping from custody. They are all serious offences. As indicated in paragraph 1 above, he was arrested on 19 May 2020, at Uitenhage. From there, he was taken to his flat in Humewood, Port Elizabeth where he resides and share same with his partner/wife and his two minor children. Search (without a warrant) at his flat was conducted by the police. The

lawfulness of such search is hotly contested by the Appellant, but such challenge is an issue that would have to be resolved on trial in due course and it is not an issue that the bail court had to resolve. Some documents were seized during such search.

[9] The Appellant arrived for the first time in South Africa in 2001/2002. His legal status in South Africa is seriously contested by the State. However, from his side, he contends to be a refugee from 2009 until September 2016 and blames the officials from the department of Home Affairs for the non-renewal to date of his refugee status. However, on the evidence on record from Home Affairs[8] as captured in the National Immigration Information System (“NIIS”) his application for asylum was submitted in July

2009. An asylum seeker permit was issued to him on 2 July 2009[9], with a condition that he must report to a Refugee Status Determination Officer (RSDO) for an interview. There is no evidence that he reported for such interview. The asylum seeker permit which was issued to him expired on 2 October 2009. There

is no information about him between then and until the 23 August 2012, wherein he was issued with a s 24 permit in terms of the

Immigration Act 13 of 2002 permit.[10] This permit expired on 23 August 2016. From thereon there are no records of the Appellant in the NIIS. In summary, according to the department of Home Affairs, there are no records of the Appellant from 2001/2002 to July 2009 and again from 23 August 2016 to date and accordingly, he is classified as an illegal foreigner.

[10] Without deciding his actual status, it is prudent to briefly set out the procedure for application for asylum (as it was applicable during the period contested by the parties.)[11] Such procedure is prescribed in the Refugees Act and the Regulations.[12] An asylum seeker must submit his application to an RSDO at any refugee reception office. Pending the outcome of such application, an asylum seeker must be issued with an asylum seeker permit in the prescribed form allowing an applicant to sojourn in the Republic temporarily subject to any conditions not in conflict with our Constitution or international law.[13] Such permit may be extended from time to time. The department of Home Affairs may at any time withdraw such permit under the circumstances prescribed in s 22 (6) of the Refugee Act. The RSDO must be the repository of the powers to make a decision regarding the application for

asylum.[14] Once an application is granted, a refugee is entitled to a formal recognition of refugee status and he enjoys full legal protection which includes the rights set out in Chapter 2 of the Constitution and is entitled to an identity document issued to refugees in terms of s 30 of the Refugees Act. If it is refused an applicant may either appeal or review such decision. Pending such an appeal or review, an applicant may not be deported.

- [11] Reverting to the facts herein, the Appellant came to South Africa in 2001/2002 as a 'refugee'. [15] His evidence was that on his arrival in South Africa, he applied for a temporary refugee permit and was issued with a formal recognition of refugee status in the prescribed form. He further contends that his refugee status expired in 2016 and he took steps trying to extend it, but there was a problem with the allocation of his file.[16] He had travelled and visited the offices of Home Affairs in Pretoria on six occasions trying to resolve his problem without success due to long queues. His last attempt was in December 2019, but even then he was not assisted due to long queue. According to him, his predicament was conveyed to one Mr Ntezo, an official from Home Affairs in Port Elizabeth. He was however, issued with 'immigration papers' which were valid for three months at a time pending resolution of his problem.[17] As a proof of his refugee status, he submitted annexure "ESGB2", which is a document issued in terms of s 24(3)(a) of the Refugee Act. In terms of it, the person whose particulars appear therein[18] was recognised as a refugee in the Republic of South Africa from 23 August 2012 to 23 August 2016. The legitimacy of this document was placed in dispute by the State.
- [12] On the evidence presented by the State[19], there are serious discrepancies between annexures "ESGB2" and "LM3" which cast doubts on the accuracy and legitimacy his refugee status. Both are copies of the Appellant's alleged formal recognition of refugee status.

However, these two documents are materially different in so far as the Appellant's date of birth, his passport number, his marital status, his first date and place of asylum seeker application, the validity period of his recognition of refugee status in South Africa. And to add more, the fingerprints on these two documents were from two different individuals. The aforesaid discrepancies were material factors which in my view could not simply be brushed off by the magistrate. It was an evidence which was vital to the court to consider.

- [13] The significance of this evidence it lends credence on how easy it could be for the Appellant to access official documents that could assist him to skip the country without being noticed and / or to remain in the country without trace.
- [14] Mr Price SC argued that the learned magistrate misdirected herself on the facts and in law and was accordingly wrong in refusing to release the Appellant on bail on the basis that he is a flight risk. It was argued that, the learned magistrate ignored the submissions that the police deliberately lied in their affidavits and presented false information on three points to the court about the Appellant. The first point was about an assault of a witness. Mr Price SC, argued that the purpose of bringing such false information in the affidavit was to paint a picture that the Appellant was a violent person in order to bring in the provisions of s 60(4)

(a) into account. The second point was that the Appellant had pending cases against him. All those cases were struck off without the Appellant appearing in court. The third point was that the

police acted dishonestly in that they obtained a statement from the Appellant's wife without informing her fully of her rights and that she was not a compellable witness against the Appellant as envisaged in s 195(2) of the Act.

[15] In response to these submissions, Ms Ford argued that, the police were in possession of a statement in the police docket that supported the assault contention.[20] As such, the investigating officer did not lie in his affidavit about this issue. On the second point, Captain Kriel in his affidavit had mentioned that he was an investigating officer of Humewood CAS 69/01/2017, Bethelsdorp CAS 53/01/2017 and Gelvandale CAS 41/01/2017, and that the matter was pending and may be enrolled in due course. It was disclosed in the said affidavit that the matter was not enrolled.[21] Therefore it was not a lie and in any event, the magistrate did not rely on it in arriving at her decision which is the subject matter of this appeal. On the third point the argument was that Warrant Officer Bosch, the police officer who took the Appellant's wife statement was an investigating officer in a murder case of Ms Belachew's brother and in the course of their conversation

about that case, she informed him that she had more information concerning the murder of her brother. An arrangement was then made with her for the following day. The case under investigation by Kriel did not involve the Appellant hence she was

not advised of her rights and that she was not a compellable witness against the Appellant. The contention that the police were dishonest was refuted.

[16] I agree fully with the submission by Mr Price SC that, the duty of the prosecutor and the police is not to keep an accused person in jail and deprive him his freedom arbitrary,[22] but they have a public law duty to assist the court in giving effect to and protect the accused's rights in terms of s 12 (1)(a) of the Constitution.[23] In the instant matter, the Appellant was given the opportunity to place before the bail court evidence to persuade it that interests of justice permit his release. The State in rebuttal also presented evidence on the strength of its case, its bases for opposition of bail together with supporting evidence thereto. Therefore, there was evidence before the learned magistrate for her to consider whether it was in the interests of justice to release the Appellant on bail.

[17] In the context hereto and having regard to all the evidence on record, I disagree that the police acted contrary to their public law duty and that they lied in court. On the contrary, the police (and the prosecutor, I must add) executed diligently their public law duty to assist the court in giving effect to the right of the Appellant in terms of s 12(1)(a) of the Constitution. All the evidence was presented to the learned magistrate and from that evidence, she was able to decide which of it was to be disregarded for purposes of consideration whether to release the Appellant on bail or not. The statement obtained from the Appellant's wife / partner was not taken into account in arriving at the decision to refuse bail. Also no reliance

was placed by the learned magistrate on the cases referred to in Warrant Officer Kriel's affidavit. The learned magistrate treated the Appellant on the basis that there was no pending case(s) against him. The Appellant was also not treated as a violent person and the provisions of sub-s (4)(a) were not brought into account. The Appellant's

release on bail was refused on the basis that he was a flight risk as contemplated in sub-s (4)(b).

[18] The facts that were advanced on the Appellant's behalf as factors that weighed heavily in his favour were the following, that he has been in South Africa since 2001/2002 and has never left this country since then. He has a wife and two minor children in South Africa. Both his minor children were born in South Africa and are accordingly citizens of this country. He was self-employed. He was the breadwinner and responsible for the maintenance of both his minor children and his wife. His ability to ambulate was extremely compromised, as he was in a wheelchair. He enjoyed a refugee status until 2016. He has no travel documents, nor means and funds to obtain same. Although he has a sister in the United States of America and a brother in Germany, but he has never been to any of them and has no funds or an understanding of how to travel there. He had no pending cases or previous convictions.

[19] In considering whether there is a likelihood that an accused person will attempt to evade his trial if he is released on bail, the bail court must take into account the factors listed in sub-s (6), (9) and (10).

[20] In *S v Acheson*[24], Mahomed J said the following:

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

[21] Where there is a cognisable indication that an accused person would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would have to be compromised under those circumstances. However, the decision to refuse bail must not be taken lightly based on speculation or possibilities but on probability. In *S v Dial and Another*[25], at [14], Kubusi J said:

"A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60(4) will result. The court must not grope in the dark and speculate : a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice and the accused should be released."

[22] A finding on whether an accused person is likely to evade his trial must be made after the court has considered the factors listed in sub-ss (6), (9) and (10).

[23] While the exact path travelled by the learned magistrate to arrive at her decision and the potholes encountered in her journey are not clear from the body of the judgment, but on objective reading and analysis of her decision, the order refusing to release the Appellant on bail is supported by the evidence adduced and a proper evaluation of the factors relevant in sub-ss (6)(9) and (10). Some of those listed factors weighed in favour of the Appellant and others against him. It was within her knowledge and was considered by the learned magistrate that the Appellant had family ties in this country (his wife and two minor children) and he had no pending cases nor previous convictions. However, some of the factors were against him. I have mentioned in paragraph 12 above the discrepancies documented and evident from annexures “ESGB2”

and “LM3” and the materiality thereof. The Appellant has the means and ability to access and obtain false official documents from Home Affairs.

[24] Although the Appellant has no travel documents, but viewed from this perspective and having regard to this evidence, he has the means and ability to obtain travel documents. There is a real probability that he may skip the country or may simply disappear on the radar. In *Novella v S* (A340/16), [2016] ZAWCHC 141 12 October 2016) at para [28], Le Grange J said:

“... the lack of travel documents in recent times is hardly a deterrent to persons who are serious and have the means to skip the country.”

Experience in courts has shown that these documents can readily be obtained and one may depart the country with ease.”

[25] Furthermore, the Appellant has no assets in this country. It would not be difficult for him to disappear from the radar. He has no bank account despite being an astute businessman with a lucrative income of an average of R30 000.00 per month.

[26] The State has a strong case against him. Mr Price SC, argued that it was difficult to comment of the strength of the State case because the Appellant is not in possession of the police docket, however he intends to plead not guilty. The request to have access to the police docket was declined by the magistrate. The decision to decline his request for access to the police docket is not a subject matter of this appeal. Mr Price SC, raised doubts on the strength of the State case and the basis upon which his argument was premised was the fact that, the police indicated that they still need to obtain statements from four accomplices. It was argued that if the State has a strong case, why is still necessary to obtain more statements from four accomplices. It further argued that the fact that there is still more statements to be obtained points to the fact that the State case is not that strong. Assessment of the strength of the State case at this stage is not whether there is watertight evidence against an accused person which guarantees a conviction on all the charges, otherwise to

give such an interpretation, the court will be setting the bar too high. Therefore, the strength of the State’s case weighed against the Appellant.

[27] Another factor which played heavily against the Appellant as evident from the magistrate's decision is the fact that, he attempted to escape from the police. This finding is criticised by Mr Price SC on the basis that, on Appellant's version his intention was never to escape but to get away from the torture, bullying and threats perpetrated against him by the police and to protect himself. The argument was that when he was arrested in Uitenhage, he co-operated with the police and took them to his residence and at no stage he attempted to escape. Furthermore, the police did not see him jumping from the balcony and no statement was obtained from the alleged witness that informed the police that he was hiding in the outside toilet.

[28] The learned magistrate rejected Appellant's version as being improbable. The Appellant's version that he was tortured, threatened and bullied by the police during the search at his flat was not corroborated by his wife. Further, the police conceded that they did not see him jumping from the balcony on the second floor down, but the investigating officer was told by the Appellant's children that "daddy jumped" through the balcony. When the police went to the ground floor to search for him, they found him hiding in an outside toilet. I must add further that the Appellant seriously injured himself when he jumped out of the balcony and landed on the cement slab on the ground. He had to be admitted at hospital for such injuries and as a result he had to ambulate using a wheelchair.

[29] It is hard for me to accept and believe that the Appellant would risk his life and jump from the balcony merely to get away from the alleged police conduct which in any event was not corroborated by his wife, instead of standing firm and contest such conduct. In the circumstances, I am unable to agree with Mr Price SC that the learned magistrate misdirected herself in this regard. The Appellant's version was improbable having regard to all the evidence adduced

during the bail proceedings. This was a relevant factor to be considered and weighed up against all other factors in the

determination of whether the Appellant was a flight risk.

[30] The fact that the Appellant was a breadwinner and was responsible for the maintenance of his wife and minor children, and the impact of his further detention to his ability to earn a living and to provide such maintenance was also considered by the magistrate. As well as his health and that his mobility was restricted were also considered by the magistrate. I am aware that the investigation has not been completed and that the case will on probabilities not be trial

ready soon, however on cumulative assessment of all the evidence on record, the factors against the Appellant reduces my confidence that he would stand trial if he were to be released on bail.

[31] Therefore, upon careful consideration of all the facts and the circumstances based on the evidence on record pertaining to the case herein, weighing up the interests of justice against the right of the accused to his personal freedom and any potential prejudice because of his

detention, I am satisfied that interests of justice does not permit his release on custody. There is a likelihood that he will attempt to evade his trial. In the circumstances, I am not persuaded that the learned magistrate misdirected herself on the facts and in law in her decision to refuse the Appellant bail.

[32] Accordingly, the appeal is dismissed.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant

:T Price SC

Instructed by

:Griebenow Attorneys

PORT ELIZABETH

Counsel for the Respondent C Ford

Instructed by

Director of Public Prosecutions

[1] Record Vol 1, pp1–36, the provisional charge sheet.

[2] Vol III paras 1–10 thereof.

[3] S 60 (9) and (10) of the Act.

[4] 2015(2) SACR 306 (WCC) at para [16].

[5]

[1999] ZACC 8; 1999

(2) SACR 51 CC.

[6] Vol II p 254 lines 14 – 21.

[7] Pages 3 and following, from paras 4 onwards.

[8] Annexures “RS2” and “RS3” to exhibit H, “LM1” and “LM3” to exhibit C.

[9] Annexure “RS2; “p1”

[10] Section 24 reads: (1) The Department may issue a cross-border pass with the same effect as a multiple admission visitor's permit to a foreigner who is a citizen of a prescribed foreign country with which the Republic shares a border and who does not hold a passport but has received a prescribed identity document by the Department and is registered with the Department. (2) The Department may issue a transit visa authorising a foreigner

travelling to a foreign country to make use of the transit facilities at a port of entry.”

[10] Section 24 reads:

(1) The Department may issue a cross-border pass with the same effect as a multiple admission visitor's permit to a foreigner who is a citizen of a prescribed foreign country with which the Republic shares a border and who does not hold a passport but has received a prescribed identity document by the Department and is registered with the Department.

(2) The Department may issue a transit visa authorising a foreigner

travelling to a foreign country to make use of the transit facilities at a port of entry.”

[11] From 1 January 2020, the Refugees Amendment Act 11 of 2017 and Refugees Registration as published in the GG 42932, GNR 1707 27 December 2019, came into operation and which governs the new procedure,

[12] GN R366, GG 21075, 6 April 2000 as amended by GN R938, GG 21573, 15 September 2000.

[13] S 22 of the Refugee Act.

[14] S 24 of the Refugee Act.

[15] Exh C, p2, para 5 presumably the use of the word “refugee” was an error from his legal representative(s) that assisted him in drafting and settling of his affidavit, and I assume they intended to say he was “an asylum seeker.”

[16] Exhibit C, p3 paras 7 and 8.

[17] Exhibit C p4, para 8.6–8.8.

[18] Estifanos Ghebre Selassie Beyene, born on 10/10/1985.

[19] Exhibit G, read with annexures “LM3” and “LM4” thereto.

[20] Exhibit G, p27, para 113.

[21] Exhibit N pp 1, paras 5–15.

[22] National Director of Public Prosecutions v Hyron Swarts unreported judgment of Ronaasen AJ, CA 164/2019, dated 17 June 2020.

[23] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).

[24] 1991

(2) SA 805 (Nm) at 822 A – B, at para [14].

[25] 2013

(2) SACR 665 (GNP).

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