

SOUTH AFRICA / JUDGMENT

Bux v S (B533/2018, D12361/2018) [2018] ZAKZDHC 57 (21 November 2018)

[2018] ZAKZDHC 57**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Gorven

CASE / FILE NUMBER

B533/2018, D12361/2018

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Source record**IN THE****HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****Not****Reportable****Case No:**

B533/2018

Appeal No:

D12361/2018

In the

matter between:

JUNAID

HOUSEN BUX

Appellant

and

THE

STATE

Respondent

JUDGMENT**GORVEN J**

[1] This is a bail appeal from the Magistrate's Court, Verulam. The appellant faces one count of murder which the State alleges was planned and premeditated. It is common cause that the offence in question falls within Schedule 6 to the Criminal Procedure Act 51 of 1977 (the Act). This requires the appellant to show in a bail hearing that 'exceptional circumstances exist which in the interests of justice permit his . . . release on bail'.^[1] Bail was refused on 25 September 2018.

[2] The appellant sought to discharge the onus on him by producing evidence on affidavit. The State called the investigating officer, Warrant Officer Perumal, to testify orally.

[3] Section 60(4) of the Act provides:

'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
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; 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 or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

It goes without saying that, if any of these is found to be present, it cannot be said that the interests of justice permit release on bail. If none are present this does not, in and of itself, mean that the interests of justice permit such release since these factors do not constitute a definitive, closed list.^[2]

[4] Likewise, the courts have refrained from attempting to list what might constitute 'exceptional circumstances'.^[3]

'Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the "interest of justice" were to be applied.'^[4]

This goes beyond the onus on an accused person confronting a Schedule 5 offence to show that the interests of justice permit his or her release on bail. In addition, an accused must show exceptional circumstances.

[5] The approach on appeal is to determine whether the court a quo exercised its discretion incorrectly in refusing bail.[5] In Barber, Hefer J said:

‘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.’[6]

In other words, that it misdirected itself as to fact or law in finding that the appellant had failed to discharge this onus.

[6] The appellant put up an affidavit in support of the application. This dealt largely with his stability of family life, accommodation and employment over the previous number of years. None of this is contested. He is a 37 year old person without any convictions and no other criminal charges pending. He conducts a tow truck business and a call centre business and assists a family member in another call centre business. He asserts that the two call centre businesses have ground to a halt since his arrest and that, as a result, a total of 26 employees are no longer working. He has never travelled abroad and does not have a passport. He maintains his parents and his wife's parents. He wishes to resuscitate his businesses to continue this support and to raise the means to place his legal team in funds. Although he has resided in the same property for some 34 years, he intends, if released on bail, to stay at his sister's property in Stanger rather than in the area in which the offence took place.

[7] He deals with the charge confronting him by saying ‘I intend to plead not guilty to the charge of murder and that at all material times are acted in self-defence having been a victim of a robbery.’ He says no more. He claims that he does not know the witnesses in the matter.

[8] Warrant Officer Perumal testified that there are independent eyewitnesses to the offence. On the night in question, the deceased and two friends encountered the appellant and a friend. The appellant slapped the deceased whereupon he and his two friends ran away. Sometime later, the appellant and his wife went to the home of the deceased, which appears to be something of a communal abode

accommodating a number of people. The landlord told the appellant to leave because he was drunk. However, the appellant returned with a male friend after approximately 10 minutes and shouted at the gate of the property, whereupon the deceased and a number of residents emerged onto the road. The appellant then shot the deceased in the head and his companion struck the

deceased with a beer bottle. The deceased fell to the ground and the appellant continued to fire several shots at him. The others ran away. Seven cartridges were found at the scene. The deceased sustained gunshot injuries to his head, chest, arm, above his private parts and to his leg. The appellant then made off in the direction of Johannesburg, passing the Tongaat toll plaza. The police telephoned him and persuaded him to return. He arranged to meet them at a hospital which took place about three hours after the incident. He claimed to them that he had been injured but no injuries were noted on his booking into the police cells. He also claimed that the deceased had made use of a bushknife which he handed to the police. None of this was dealt with by the appellant in his affidavit.

[9] Warrant Officer Perumal conceded that the appellant was not a flight risk. He also conceded that it was unlikely that the appellant, if released on bail, would endanger the safety of the public or a particular person. It was reported to him that threats had been made against witnesses, ostensibly by members of the appellant's family. He agreed with counsel for the appellant that the killing appears to have been an incident that got out of control. However, he stated categorically that the appellant knew the State witnesses. Also that, apart from the occupants of the property, there were independent eyewitnesses standing in the vicinity of a supermarket across the street. He conceded that his concerns could be adequately accommodated by way of imposing proper and strict conditions if bail was granted. He also conceded that he had heard that a robbery had taken place earlier that night. DNA

matching was sought for blood found on the appellant's clothing and for aspects relating to the bushknife. The further investigations

concerned would take approximately three months. He mentioned a petition by about 100 members of the Shastri Park community against

the release of the appellant on bail. No specifics were mentioned as to why this was opposed.

[10] The learned magistrate gave a very comprehensive judgment. She quite correctly pointed out that, even if the police or a prosecutor conceded certain points, a court hearing a bail application must apply its mind independently to the facts to see whether or not the criteria for bail are satisfied. She stressed very strongly the violent nature of the crime and the fact that the appellant appears to have persisted in his attempt to confront the deceased by returning, first with his wife and later with a friend, to his place of accommodation. Likewise, that a number of gunshots were fired at and struck the deceased.

[11] She then concluded that the conduct of the appellant on that day 'points to a possibility which cannot be said to be remote that the applicant is likely to continue to be a danger to the public or any particular person should he be released on bail.' This, in my view, amounts to a misdirection. There is no indication that his release is likely to have this outcome. It was allegedly others who threatened witnesses. This will not be affected by the release or otherwise of the appellant. She also misdirected herself in finding that the alternative accommodation outside of the area of Shastri Park had not been verified. This was at the home in

Stanger of the appellant's sister. Warrant Officer Perumal testified that he had verified the address as also that the sister

had consented to the appellant staying with her if granted bail. His only complaint was that, since this was outside the area, he would himself not be able to monitor the appellant. He readily conceded, however, that if a condition of bail was imposed requiring the appellant to report to the police station nearest to him, this concern of his would be adequately addressed.

[12] These misdirections by the learned magistrate, however, do not end the enquiry. It simply means that none of the factors mentioned in s 60(4) of the Act, as amplified in s 60(5) to (9) could be said to be present. There remained an onus on the appellant to show the exceptional circumstances which made it in the interests of justice to release him on bail.

[13] Counsel for the appellant conceded that the appellant had put up nothing of substance concerning his defence. He did not mention the bushknife or how it came to be in his possession if it had been used against him or why, if that were so, he tampered with the crime scene in removing it. In the light of this failure, and the evidence of the investigating officer, it must be concluded

that the case the appellant is called to meet appears to be extremely strong.

[14] On the other hand, it cannot be concluded that the appellant has a propensity to commit crimes of violence. He is 37 years old without having been convicted of any offence. The investigating officer correctly conceded that the events of the night in question appear to have simply got out of hand. The indication by the landlord that the appellant was drunk might explain why this happened.

[15] The investigating officer is the person best fitted to assess whether or not the imposition of strict bail conditions will ensure the safety of witnesses and that the appellant will stand trial. In other words that, if the appellant is released on bail, the trial is likely to take place without being adversely influenced by the appellant once the investigations are complete.

[16] The appellant has an extremely stable family life, accommodation and work life and is not a flight risk. He is integrally involved in three businesses. He wants to make these viable once more so as to continue with a privately funded defence at his trial. This can be done without his entering the area where the State witnesses reside and the wider Shastri Park area. It cannot be said that his alleged violent conduct will reassert itself if he is released on bail. The misdirection of the magistrate concerning this and the potential interference with witnesses appears to me to have led her to the conclusion that the appellant had failed to show the exceptional circumstances necessary in this matter. I am of the view that, despite the appellants somewhat cursory account of his defence and the apparently strong state case, there are no factors that are likely to undermine a proper outcome of the trial. The learned magistrate ought, in my view, to have found that the appellant discharged the onus on him.

[17] Counsel for the State and the appellant have agreed conditions of bail in the event of the bail appeal succeeding. These conditions appear to meet the situation. If anything emerges requiring further conditions to be imposed, that matter may be addressed in due course.

[18] In the premises the appeal is upheld and the appellant is admitted to bail on the terms set out in annexure 'A' hereto.

DATE OF HEARING: 21 November 2018

DATE OF JUDGMENT: 21 November 2018

FOR THE APPLICANT: DD Naidoo instructed by Nivesh Harilall Attorneys

FOR THE RESPONDENT: DC Macdonald instructed by The Deputy Director of Public Prosecutions.

[1][1] Section 60(11)(a) of the Act.

[2] S v Mbele & another 1996 (1) SACR 212 (W) at 242b.

[3] S v Bruintjies 2003 (2) SACR 575 (SCA) para 6.

[4] S v Dlamini; S v Dladla; S v Joubert; S v Schietekat

[1999] ZACC 8; 1999 (2) SACR 51 (CC) para 64.

[5] S v Barber 1979 (4) SA 218 (D) at 220E-H.

[6] Ibid.

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