

SOUTH AFRICA / JUDGMENT

Conradie v S (A248/2020) [2020] ZAWCHC 177 (11 December 2020)

[2020] ZAWCHC 177

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

A248/2020

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case

number: A 248/2020

Before:

The Hon. Mr Justice Binns-Ward

Hearing: 9 December 2020

Judgment:

11December 2020

In

the matter between:

OSWIN

PETER

CONRADIE Appellant

and

THE

STATE Respondent

JUDGMENT

BINNS-WARD J:

- [1] This matter concerns an appeal against the decision of a magistrate at the district court at Blue Downs refusing to admit the appellant to bail. The appeal lies in terms of s 65 of the Criminal Procedure Act 51 of 1977. Section 65(4) provides that ‘The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given’.
- [2] The appellant applied for his release on bail pending his trial on charges of murder, attempted murder and contraventions of the Firearms Control Act 60 of 2000. The charges arise from an incident that occurred in Heather Park, Eerste River on the night of 28 July 2020. It may be inferred from the evidence adduced in the bail application, all of which was on affidavit rather than viva voce, that a shooting incident took place in N Crescent that night involving two groups of persons (probably members of rival gangs).

During the course of the fusillade a young girl of only 3 years of age who had been with her parents by a fire outside their house at [...] N Crescent was struck by what may have been a stray bullet and fatally injured. There is evidence from a number of witnesses, including the deceased’s parents, that the group of four males that appears to have initiated the shoot out had arrived on the scene in a white VW Polo motor vehicle. The deceased’s parents were not in a position to be able to identify any of the persons that had emerged from the vehicle, other than to say that they had been wearing yellow reflective vests, which had led them initially to believe that they were members of the police force.

- [3] Two other witnesses claimed to have recognised the appellant on the scene as the driver of the vehicle. The appellant was known to both of these witnesses by the sobriquet ‘Ougat’.[1] The witnesses claimed to know that the appellant was a member of the Beach Cats gang, which is apparently aligned to or affiliated with the notorious 26’s gang. One of them said that the appellant was the leader of the gang. The Beach Cats were in a state of gang warfare with a rival group known as the Skombizo Gang at the time. The shooting happened in an area known to be the territory of the Skombizo Gang.
- [4] The police arranged a photo-ID parade at which both of the witnesses who had identified the driver of the VW Polo as ‘Ougat’ pointed out a photograph of the appellant as being that of the person they had recognised. According to the investigating officer, one of the identifying witnesses had remarked that he was ‘a little bit confused by the picture because he was used to seeing the applicant with a bald head’ whereas in the photograph the appellant was shown with short hair. The appellant testified that his attorney who had attended the photo ID session had reported to him that the witness concerned had said ‘Ek voel onseker oor die ene. Die persoon wat geskiet het, het ’n bald head gehad’, to which the officer conducting the session had responded by asking ‘Sy kop was skoon geskeer?’, to which the witness answered

affirmatively.

- [5] The appellant denies having been involved in the incident. His evidence was that on the evening in question he had been attending a birthday party of a friend. He provided the friend's name and ID number, which confirms that 28 July was his birthday. The appellant testified that upon his arrest he had immediately disclosed his alibi to the police, but that they had failed to investigate it.
- [6] The appellant was arrested on 3 August 2020 and brought to court for his first appearance on 6 August. The presiding magistrate on that occasion was of the view that the appellant had been detained beyond the maximum period prescribed in terms of s 50(1) of the Criminal Procedure Act and struck the matter from the court roll, thereby obliging the police to release the appellant from detention. The police maintain that the magistrate acted erroneously because the 48 hour period after the appellant's arrest had expired outside ordinary court hours on 5 August and it had therefore been lawful to bring him to court on the morning of 6 August. It was not necessary for the magistrate hearing the bail application to determine whether the first appearance magistrate had been misdirected in striking the matter from the roll or not.
- [7] Some weeks after the appellant's release, application was made to a magistrate in terms of s 43 of the Criminal Procedure Act for a warrant to be issued for his rearrest. The application was supported by an affidavit explaining the circumstances in which the appellant had previously been released. A warrant for the appellant's rearrest was issued on 1 September 2020. The warrant was executed on 5 September at approximately 13h00 and the appellant was brought to court again on 7 September 2020, since when he has been remanded in custody pending trial.
- [8] At his subsequent bail application, the appellant raised what was characterised as a preliminary point concerning the legality of his rearrest after his case had been struck from the roll. For reasons not apparent to me the point took the form of an objection to the state's 'locus standi'. The magistrate rejected the objection. It is not clear how the magistrate's determination in that regard has any bearing on her subsequent refusal of the bail application or this appeal. I therefore do not propose to dwell on the point, which was persisted with before me in the appeal hearing. To the extent that it had any relevance in the bail appeal, which I doubt, I consider that the point was devoid of any merit.
- [9] The first appearance magistrate's decision to strike the matter from the roll was predicated on that magistrate's view that the appellant had been brought before court in unlawful circumstances. The decision did not preclude the appellant's rearrest and lawful arraignment on the preferred charges. I consider that it was prudent in the circumstances for the police to have applied for a warrant in terms of s 43 instead of merely rearresting the appellant without a warrant under the provisions of s 40, which could have been done in respect of the charge of murder. The course adopted avoided any contention being advanced that the appellant's rearrest had been contemptuous of the striking order – compare in this

regard the situation that arose in the matter of *S v Hewu and Others* 2017 (2) SACR 67 (ECG). A striking off order can never preclude an accused person's re-arraignment. The only requirement is that the accused must be brought back before the court in a legitimate manner; see s 38 of the Criminal Procedure Act and, in respect of matters struck off in terms of s 342A, s 342A(3)(c). That was done in the current case.

- [10] Reverting then to the matter of the bail appeal proper. The charge sheet reflected that the appellant was to be charged with murder simpliciter, but the Director of Public Prosecutions issued a written confirmation, in terms of s 60(11A)(a) of the Criminal Procedure Act, that it was intended to charge him with murder that was planned and/or premeditated and committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy, i.e. an offence listed in Schedule 6 to the Act. In the result, and by virtue of s 60(11)(a) of the Act, the court was obliged to order that the appellant be detained in custody until he was dealt with in accordance with the law, unless, having been given a reasonable opportunity to do so, he adduced evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release.
- [11] The leading authority on the effect that s 60(11)(a) has on applicants for bail who are charged with offences listed in Schedule 6 is the judgment of the Constitutional Court in *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat*
- [1999] ZACC 8 (3 June 1999); 1999 (4) SA 623 (CC). The Court noted that the provision 'singles out for more rigorous treatment applicants for bail who are awaiting trial on more serious charges'. [2] It stated, with reference to the amendment to s 60 introduced by sub-sec 11, that '[c]learly the legislative intention remained to curtail bail for suspects in very serious cases'. It noted that whereas a person charged with a Schedule 5 offence had only to satisfy a court that the 'interests of justice' permitted his or her release, one charged with a Schedule 6 offence was required to adduce evidence to satisfy a court that 'exceptional circumstances' exist which permit his or her release. [3] The Court held that the provision meant that the 'exemplary list of considerations set out in sub-secs (4)-to (9) [of s 60] has to be applied differently. ... the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that 'exceptional circumstances' exist.' [4] The judgment proceeds by stating that '[s]ection 60(11)(a) contemplates an exercise in which the balance between the liberty interest 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) [of the Constitution]. Its effect is to add weight to the scales against of 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'. [5]

- [12] The Constitutional Court rejected an argument that the concept of ‘exceptional circumstances’ was so vague that a bail applicant could not know what needed to be established. It pointed out that ‘[a]n applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent.’[6]
- [13] At the end of the day a court seized of an application for bail that is affected by s 60(11)(a) has to make a judicial evaluation as to whether the evidence adduced by the applicant, weighed with any countervailing evidence adduced by the state, satisfies it that, exceptionally to the norm in such cases that there should be continued detention, circumstances exist that permit the applicant’s release in the interests of justice. The making of a value judgment, in the sense that I described the term in *S v Porthen and Others* 2004 (2) SACR 242 (C) at para 12-13, is entailed.
- [14] The magistrate gave a comprehensive judgment in support of her finding that the appellant had not shown exceptional circumstances establishing that his release on bail would be in the interests of justice. The question on appeal is can it be found that her decision was wrong.
- [15] The appellant’s counsel argued, with reference to the judgment of Traverso J in *S v Stanfield* 1997 (1) SACR 221 (C), that the magistrate had erred in overlooking that the state had not established any of the grounds set forth in s 60(4) of the Criminal Procedure Act. In *Stanfield*, the learned judge held that ‘only if a court is satisfied that any of the four grounds set forth in sub-sec 60(4)[7] has been established as a probability, is a finding justified that the continued detention of the accused is in the interests of justice’.[8]
- [16] The judgment in *Stanfield* has, at least as far as my researches have found, not been referred to or relied on in any reported judgment for more than 12 years.

This is understandable, not because there was any flaw in the judgment, but rather on account of the significant changes effected

to the applicable legislation in the period after September 1996 when *Stanfield* was decided, including to both sub-secs 60(4) and 60(11). As far as its application in the circumstances of the current case is concerned, it also bears mention that the case in *Stanfield* was in any event concerned with a bail appeal by a person charged with a Schedule 5 offence, whereas the appellant faces a charge on a Schedule 6 offence. The bar for obtaining bail in the latter circumstances has always been higher than in the former.

- [17] The approach enunciated in *Stanfield* has been overtaken by the legislative amendments and the Constitutional Court’s judgment in *Dlamini supra*, which, as pointed out earlier in this judgment, recorded that the effect of s 60(11), as substituted by s 4(f) of the Criminal Procedure Second Amendment Act 85 of 1997 (with effect from 1 August 1998), is that sub-secs 60(4) to (9) have to be applied differently. The signal difference is the obligation placed on the applicant for bail to show exceptional circumstances justifying a departure from the

legislative determination that continued detention should be the norm for persons charged with Schedule 6 offences. A court's evaluation of the facts with regard to the considerations in sub-secs 60(4) to (9) is required to be undertaken in accordance with the aforementioned statutory precept.

[18] The basis for the criticism directed by the learned judge in Stanfield's case at the magistrate's failure in that matter to have adequate regard to the state's failure to establish any of the considerations listed in s 60(4) just does not arise in the materially different circumstances of the current matter. On the contrary, the indications in the magistrate's judgment are that she adjudicated the bail application acutely conscious that the appellant had to satisfy the court of exceptional circumstances why it would be in the interests of justice that he be released on bail. It perhaps bears reiterating in that regard that the appeal court held in *S v Botha en 'n Ander*

[2001] ZASCA 146 (30 November 2001); [2002] 2 All SA 577 (A); 2002

(1) SACR 222 (SCA) at para 18 that a mere denial by an applicant for bail affected by s 60(11)(a) of the probability of any of the considerations in s 60(4)(a) to (e) pertaining would be insufficient to show exceptional circumstances. More is required; the applicant is required to adduce convincing factual evidence to support any contention by him or her that the considerations do not apply in the circumstances.

[19] The appellant's counsel also argued that the magistrate had failed to have sufficient regard in her evaluation of the evidence to presumption of innocence. In this regard counsel emphasised that the remark by Steyn J in *S v Mbaleki and Another* 2013 (1) SACR 165 (KZD) in para 14 that the Constitutional Court had decided in *Dlamini supra*, that 'the right to be presumed innocent is not a pre-trial right but a trial right' found no support in the text of the *Dlamini* judgment. It appears to be correct that the Constitutional Court did not express itself in those terms. It is clear,

however, that the Court considered that the provision of the Constitution most pertinent to its treatment of bail applications

affected by s 60(11) of the Criminal Procedure Act was 35(1)(f), which provides that 'Everyone who is arrested for allegedly committing an offence has the right - ... to be released from detention if the interests of justice permit subject to reasonable conditions'. That is a qualified liberty right, not a fair trial right. The presumption of innocence is indeed a peculiarly trial-related right as evidenced by its entrenchment as one of the fair trial rights listed in s 35(3) of the Constitution.[9] I therefore agree with Steyn J's stated view that the presumption of innocence does not play an operative role in bail

applications.

[20] A court seized of a bail application fulfils a very different function from a trial court. Its role is not to determine the guilt or innocence of the accused person. The bail court's concern with the interests of justice, in the sense of weighing in the balance 'the liberty interest of

the accused and the interests of society in denying the accused bail', will however in most cases entail that it will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment.

- [21] Mr Liddell, who appeared for the appellant in this court, argued that the magistrate had insufficient regard to the evident weaknesses in the state's case. Counsel relied in this connection on
- (i) the apparent uncertainty of one of the identifying witnesses at the photo ID session described above, (ii) the notorious fallibility of human powers of observation (*S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C) especially having regard to the night-time conditions that prevailed, and (iii) the apparent failure of the police to investigate and rebut the appellant's alibi.
- [22] It is not altogether clear on the evidence whether there was any uncertainty by the identifying witness who said at the photo ID session that he was used to seeing the appellant with a shaved or bald head. The context of the supposed uncertainty or confusion might have been elucidated had the record of the session been produced. When I put that proposition to Mr Liddell, he responded by pointing out that the appellant was not entitled at the stage of his bail application to have insight into the police docket. He reminded me of the Constitutional Court's judgment in *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12 (29 November [1995] ZACC 12; 1995); 1995 (12) BCLR 1593 (CC); 1996 (1) SA 725 (CC). I do not think that was an adequate answer to the point. Section 60(14) of the Criminal Procedure Act, whilst confirming that an applicant for bail has no right of access to the docket, nevertheless allows that the prosecutor may otherwise direct. If the appellant had so desired, he could have requested access to the record of the ID session, and if the prosecutor had denied the request, the magistrate could have been asked to draw an adverse inference. That was not done.
- [23] As things stood, I do not think that there was much capital to be made from the so-called 'confusion'. It is evident that both of the identifying witnesses knew who the appellant was before the ID session. They had both reported separately having seen someone known to them as 'Ougat' driving the VW Polo in which the shooters came to the scene. What the witnesses were doing at the ID session therefore was merely picking out the photograph of a person already known to them.

They were looking for a picture of the person they knew as Ougat. They both picked out the appellant. It was in that context, one of established familiarity with the already identified suspect, that the second identifying witness's remark that he was used to seeing the appellant with a shaven head and not with short hair, as he apparently appeared in the photograph, must, *prima facie* at least, be understood. It did not detract from his certainty that the person he had seen driving the vehicle was Ougat.

[24] No doubt the reliability of the identification of the appellant by the two identifying witnesses will be tested at the trial. There was nothing in the evidence before the magistrate to suggest that the lighting conditions were such that the witnesses would not have been able to make out and, if they knew him, recognise the driver of the vehicle. On the contrary, the evidence before the magistrate suggested that at least one of the identifying witnesses will be able at the trial to say not only that he saw the appellant in the vehicle, but also that the visibility was sufficient for him to be able to note in some detail the nature of the appellant's gestures while he was in the vehicle. The availability of two eyewitnesses able to testify to the appellant's involvement in the incident was a factor the magistrate was entitled to take into account as indicative that the

state had a strong *prima facie* case against the appellant.

[25] What about the appellant's alibi then? Counsel emphasised that it is well established that at trial the onus is on the state to negative an alibi defence; there is no onus on an accused person to prove an alibi, see *R v Hlongwane* 1959 (3) SA 337 (A) at 340H – 341B. But as pointed out in that passage, which has been endorsed in numerous subsequent decisions of the appeal court, 'The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses'.

[26] The appellant's alibi has him attending a friend's birthday party somewhere else in the Eerste River area. I think the probabilities are that he was indeed at such a party for a large part of the day. However, his attendance at such a party does not necessarily exclude his involvement in an apparently gang-related shooting somewhere else in the suburb at some stage in the evening. As I pointed out to Mr Liddell during argument, the position would be entirely distinguishable if there were a credible indication before the magistrate that the appellant had been at a birthday party in Johannesburg on the evening of the shooting. In the face of the indication that he had been independently identified by two eyewitnesses, I cannot fault the magistrate for not having attached decisive weight to the appellant's alibi in weighing whether there were sufficient considerations in his favour to justify his release on bail as being in the interests of justice.

[27] The appellant's counsel was also critical of the magistrate's notably heavy reliance on the approach of the Supreme Court of Appeal in *S v Mathebula* [2009] ZASCA 91 (11 September 2009); 2010 (1) SACR 55 (SCA); [2010] 1 All SA 121 (SCA). Mr Liddell submitted that the magistrate had failed to acknowledge the features of that case that counsel considered materially distinguished it from the current case. As I understood him, Mr Liddell understood the appeal court's judgment in *Mathebula* to imply that the accused in that case had made a written confession. It is not altogether clear to me that that was so.

The judgment records that the accused had alleged in his bail application that he had been severely tortured in order to extract a confession. Whether the torture had succeeded in its objective is not expressly stated. I accept that it is implied that that was the case, but the situation is not altogether clear. Whatever the actual position, I do not consider that it makes for a materially distinguishing feature.

[28] The point of relevance in Mathebula in respect of applicable principle is the statement that if an applicant for bail in a matter affected by s 60(11)(a) seeks to rely on the weakness of the state's case against him as proof of the existence of 'exceptional circumstances', he must show on a balance of probabilities that he is likely to be acquitted; see Mathebule at para 12. The court in Mathebule cited *S v Botha en Andere* supra, at para 21, where Vivier ADCJ stated that proving a likelihood of acquittal would make out 'exceptional circumstances'. For the reasons already discussed, the appellant cannot be said to have proven on a balance of probability that he is likely to be acquitted. His acquittal is dependent on how his alibi defence stands up in the context of the incriminating testimony of at least two eyewitnesses.

[29] I can understand why the appellant's counsel sought to distinguish Mathebule. It is apparent that many of the factors that the appellant in that case urged as cumulatively constituting 'exceptional

circumstances' and were not accepted as such are the same as or similar to those relied on by the appellant in this matter. Thus, in Mathebule, as in the current case, the appellant relied on (a) having a fixed address, (b) a stable family set-up with dependent

children (c) being the family breadwinner (d) being the owner of a business employing himself and other persons (e) not

being a flight risk (f) having no relevant previous convictions

(g) being the object of alleged police victimisation and

(h) having an alibi. In Mathebule, the appellant also relied on the adverse effect of his continued detention pending trial on his pregnant wife who was suffering from stress. The appeal court concluded in para 15 of its judgment in Mathebule 'The remainder of the personal factors urged on us, are neither unusual or such as singly or together warrant release of the appellant in the interest of justice. Parroting the terms of subsec (4) of s 60, as he did, does not establish any of those grounds, without the addition of facts that add weight to his *ipse dixit*.' The court dismissed the appeal against the High Court's refusal of the appeal to it against the magistrate's dismissal of the bail applications made at first instance. It is impossible to fault the magistrate for being influenced in her approach by the SCA's decision in Mathebule. I certainly cannot find that she was wrong in that regard.

[30] Of course, there will almost always be some aspect of a matter that will serve to distinguish it to a greater or lesser degree from other cases with it might be contended to be comparable. In the current matter, for example, unlike the situation in Mathebule, the appellant was at large for a month after his matter was struck from the roll when he was first

arraigned. It is important that each case be decided on its own peculiar facts. It was argued that the fact that there was no indication that he had interfered with the state's witnesses or the investigation of the case during that time or that he had endangered the safety of the public or any particular person lent substance to his claim that his release on bail would not offend against the interest of justice as defined by the considerations described in sub-sec 60(4) of the Criminal Procedure Act. There was undoubtedly some validity in the argument, but the supporting facts had to be assessed in the context of all the evidence, some of which had a materially countervailing effect, and the indications are that that is precisely what the magistrate did. The fact that she did not canvass in her judgment every single aspect of the evidence, or deal with every point of argument addressed to her does not warrant the inference that she failed to have proper regard to any matter. It is rarely necessary for a judgment in any matter to do that.[10]

- [31] Factors that the magistrate was also bound to take into account in the current case included the unrebutted evidence (i) that the appellant is a gang member and leader, (ii) that the incident in respect of which the charges against him are preferred appears to have involved gang-related violence, (iii) that the area in which he lives is infested by gang-related criminality and (iv) that the appellant had a previous conviction for a firearms-related offence. It is notorious that gang-related violence is closely bound up with the possession and use of unlawfully possessed firearms.
- [32] I consider that in the circumstances the magistrate was entitled to consider that the sense of peace and security amongst members of the community could be undermined by the appellant's release and also that his release could undermine confidence in the criminal justice system. The evidence before the magistrate concerning the appellant's firearms-related conviction suggested that he had claimed that the firearm found in his possession on that occasion had been left with him for safekeeping by a friend, but the fact that he admitted to having tried to conceal it by hiding it under the floor tiles during a police search of his premises was indicative that concealing or destroying evidence was a feature of his historical conduct.
- [33] The magistrate also took into consideration other aspects of the appellant's criminal record and the fact that he was facing a charge of intimidation concerning threats allegedly made to a police officer during August 2020. She weighed these considerations with all the other aspects of the evidence.
- [34] I do not consider it has been demonstrated that in weighing the total conspectus of relevant considerations the magistrate can be held to have been wrong in concluding that the appellant had failed to show exceptional circumstances existed which in the interests of justice permitted his release. She cannot be faulted for acknowledging, with reference to *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP),[11] that '... for the circumstance to qualify as an exceptional circumstance, the accused's release on bail must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for the release on bail exceptionally strong or compelling'. In the circumstances the appeal must fail.

[35] The following order will issue:

The appeal is dismissed.

A.G. BINNS-WARD

Judge of the High Court

[1] The official record of the appellant's previous convictions that was put in evidence at the bail application hearing confirms that he does go by the name Ougat.

[2] In para 58.

[3] In para 60.

[4] In para 61.

[5] In para 64.

[6] In para 75.

[7] There are five grounds listed in the current version of s 60(4).

[8] At p. 234 e. (My translation from the Afrikaans original.)

[9] Sec 35(3)(h).

[10] Compare, for example, the approach adopted by Nugent JA in *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) in para 68, and that by Van den Heever JA in *Concrete Construction (Pty) Ltd v Keidan & Co (Pty) Ltd* 1955 (4) SA 315 (A) at 325A-B.

[11] In para 19.

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