

SOUTH AFRICA / JUDGMENT

Faku v S (13/2015) [2015]

ZAECPEHC 50 (8 September 2015)

[2015] ZAECPEHC 50

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

13/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
PORT ELIZABETH
C.A. & R.: 13/2015
DATE: 08 SEPTEMBER 2015

In the matter between:

SOMWABO

FAKU.....Appellant

And

THE

STATE.....Respo
ndent

JUDGMENT

EKSTEEN J:

- [1] This is an appeal against a finding by the magistrate for the district of Port Elizabeth dismissing the appellant's application to be released on bail. The appellant is to be charged with various offences including one count of murder, alternatively, conspiracy to commit murder. The Director of Public Prosecutions has issued a written confirmation, pursuant to the provisions of section 60(11A)(a) of the Criminal Procedures Act 51 of 1977 (herein the "CPA") to the effect that he intends to charge the appellant together with two other accused, of murder. It is therefore not in dispute that the appellant faces a prosecution on an offence set out in Schedule 6 of the CPA. The appellant denies guilt.

- [2] Captain Wolmarans, the investigating officer testified that he has obtained an affidavit from one Du Pisani which affidavit was handed in as evidence. Du Pisani conducts a public bar in Swartkops. He states that on 5 April 2014 the deceased in the charge of murder, one Thamsanqa Jola (alias Tititi, to whom I shall refer as “Jola”) broke into his bar. Du Pisani reported the matter to the police and Jola was duly arrested and detained at St Albans Prison. Thereafter Du Pisani received a telephone call from one Wanda from the St Albans Prison. Wanda suggested that against a cash payment he would teach Jola a lesson for his misconduct. A while later Du Pisani again received a call from Wanda, still in the St Albans Prison. Wanda indicated that Jola was being detained in another section of the St Albans Prison but that he would find a solution to the problem.
- [3] Du Pisani proceeds to record that Wanda indicated to him that someone would phone him and come to see him at his business. A few days later a man did phone and indicated his intention to visit Du Pisani. On 26 June 2014 three men arrived at the business of Du Pisani in Swartkops and advised that Wanda had sent them in respect of Jola. They proposed that they would pay R300 bail to ensure the release of Jola from prison and thereafter get rid of him. Du Pisani declares that he advised them that he was not interested in their conduct and indeed, when Wanda again called Du Pisani, Du Pisani advised him of the visit by the three men and protested that he did not want anything to do with the situation. Notwithstanding this protestation Wanda continually phoned for the next three days thereafter and Du Pisani declares that he did not take the calls.
- [4] Du Pisani proceeds to allege that at approximately 19h30 on 1 July 2014 he received a short message system message from Wanda that the job was done and that the men were on their way to meet Du Pisani. He says that he was on his way home when two men met him in the parking area and approached him.
- [5] Wolmarans testifies that after interviewing Du Pisani he confirmed, and it will be his testimony, that these two men were both present on 26 June. One of the men revealed a photograph on a cellphone to Du Pisani and advised that it was Jola. He stated that they had shot him and, Wolmarans declares that Du Pisani advised him that the photograph, although not particularly clear, purported to reflect the back of a man’s head and the person appeared to be dead.
- [6] The men advised Du Pisani that after they had last met with him they had been informed by Wanda that Du Pisani had changed his mind and that they should proceed with the killing of Jola. They advised that Wanda had informed them that Du Pisani had undertaken to pay them R150 000 for the murder of Jola. Du Pisani, at this stage, again protested that he had not done so and denied that he had spoken to Wanda again. Du Pisani states that the man who was lighter in complexion of the two then addressed his friend (who is a co-accused) stating: “(I) told you that we cannot trust Wanda”. He then proceeded to phone Wanda and handed the phone to Du Pisani. Du Pisani states that he spoke to Wanda and that he asked Wanda why he involved him in these events and

why he had misled these persons. He also advised Wanda that he did not have that kind of money. Wanda, in response, indicated that they could negotiate about the money.

- [7] On the following day Du Pisani approached his attorney, one Gouws. In due course Gouws contacted the investigating officer who went to interview him on 24 July. Following this meeting Du Pisani agreed that if he was again contacted by the persons he should arrange a date and time for a meeting. This he did on 31 July 2014 and arrangements were made for Du Pisani to record their meeting. Three men arrived and a meeting occurred. In due course Du Pisani left the meeting and the police entered to arrest the appellant and his two co-accused. Their cellphones were thereupon seized. Considerable contact between Wanda and one of the co-accused (accused no. 2) was revealed by the telephones. Furthermore the appellant was a contact recorded on the telephone of accused no. 2 and contact was established between them.
- [8] A post-mortem report in respect of Jola is available. It reveals that he died as a result of a gunshot to the head and neck. Wolmarans states that the deceased was shot on 1 July 2014 at approximately 19h30, approximately the same time as Du Pisani received the telephone call on 1 July. A statement has also been obtained from a witness who paid the bail in respect of Jola in the amount of R300 on 1 July 2014.
- [9] The investigating officer, Wolmarans, testified that on a second interview with Du Pisani Du Pisani confirmed that the two people he had met on 1 July had both been present at the meeting on 26 June. They were also both present on 31 July. It is not in dispute that the person of pale complexion arrested on 31 July 2014 is the appellant. The magistrate confirmed, from her own observation, that the appellant is of paler complexion than his co-accused.
- [10] The appellant admits that he was present at the meeting of 26 July and 31 July. He denies, however, that he was present at the meeting with Du Pisani on 1 July. The appellant alleges that the purpose for his meetings related to the transport of abalone.
- [11] Wolmarans testified that he had listened to the recording which Du Pisani made on 31 July and it did not contain any reference at all to abalone. Moreover Wolmarans states that on the recording Du Pisani had asked the three accused why they had done this to Jola. Their response, he says, was:
- “(We) do not want to talk about the murder.”*
- [12] In summary therefore, the State intends to tender evidence of a meeting, attended by the appellant, which occurred prior to the death of Jola where it was suggested that the accused would pay R300 bail to insure the release of Jola and would thereafter get rid of him. On 1 July a second meeting occurred where Du Pisani was confronted by two men who admitted that they had killed Jola and that Wanda had advised that they would be paid R150 000 for the murder. At this occasion, the man with the lighter complexion phoned Wanda and handed the phone to Du Pisani who spoke to Wanda. The man with the lighter complexion

was the appellant.

[13] In an application for bail where the applicant is charged under an offence listed in Schedule 6 to the CPA the applicant bears the onus to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release. The onus is therefore upon the accused to satisfy the court on a balance of probability that there are firstly, exceptional circumstances and, secondly, that such exceptional circumstances permit his release on bail in the interests of justice. Circumstances which would not permit the release of an accused in the interests of justice are set out in section 60(4)(a) to (e) of the CPA. The factors to be considered in evaluating evidence in respect of each of these circumstances are set out in section 60(5) to

(9) of the CPA. (See *S v Botha* 2002 (2) SA 680 (SCA).)

[14] The special circumstances contended for on behalf of the appellant are, firstly, that he is not guilty; secondly, that he has children who are dependent upon him, thirdly, that he operates a taxi business and that the operation of the taxi business is dependent upon his participation therein. The magistrate held that these do not constitute special circumstances and that he had failed to discharge the onus of showing, on the balance of probability, that any of these circumstances permitted his release in the interests of justice on bail. In particular she found that he had failed to establish that he would not evade his trial.

[15] A court hearing an appeal against a refusal to release an applicant on bail will not set aside the decision of the magistrate unless the presiding Judge is satisfied that the decision was wrong. (See CPA section 65(4).) In *S v Barber* 1979 (4) SA 218 (D) 220E-H Hefer J remarked in respect of an appeal against a refusal of bail as follows:

"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. 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 it would be an unfair interference with the magistrate's exercise of 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 but exercised that discretion wrongly ... Without saying that the magistrate's views are actually the correct one, I have not been persuaded to decide that it is the wrong one."

I am in agreement with the approach set out therein.

[16] Although the thrust of the case presented to the magistrate was based on the weakness of the State's case, Mr Daubermann, who appeared before me in the appeal, conceded that on an acceptance of Wolmarans's evidence and the affidavit of Du Pisani there is strong circumstantial evidence of the appellant's involvement in the murder. He acknowledged therefore that the appellant had no established prima facie that the prosecution would not succeed. (Compare *S v Viljoen* 2002 (2) SACR 550 (SCA) and *S v Matabula* 2010 (1) SACR 55 (SCA).) I consider that that the concession is fairly made.

[17] I turn then to consider the magistrate's finding that the appellant may evade his trial. Section 60(4)(b) of the CPA provides that the interests of justice do not permit the release from detention of an accused where there is a likelihood that the accused, if he or she were released on bail would attempt to evade his or her trial. As set out earlier, by virtue of the nature of the offence of which the appellant is charged, the appellant bears the onus to establish on a balance of probabilities

that he will not attempt to evade his trial.

[18] Section 60(6) sets out the factors which the court should take into account in considering whether the appellant has established, on a balance of probability that he will not evade his trial. The factors listed are as follows:

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be affected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial.
- (h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charge against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court.

[19] On the undisputed evidence the appellant has no travel documents and he has no family living outside of South Africa. These considerations militate in his favour.

[20] The appellant testified, and it's not in dispute, that he has five children from three different women. They are all resident in the Port Elizabeth area. There is no evidence as to the association which he has with any of the children or the regularity of contact. He does, however, testify that he contributes towards the support of the minor children. There is no evidence as to his association or contact with the mothers of the children, save for his evidence that he is still in love with one of them. He is however not resident with her and

neither her address nor the address of either of the other women is disclosed.

- [21] He has testified that he conducted a taxi business and that the business requires his attention. Under cross-examination it appears, however, that the appellant owned two motor vehicles with which he states that he conducted a taxi business. He operated one and employed a third person to operate the second. He has kept no record of his earnings from the business but estimates that he earned approximately R6 000 per month from the taxi business. During cross-examination he revised his estimate to indicate that he earned approximately R1 200 per week. It is not apparent from his evidence that the taxi business owned or hired any property from which it operated nor that it had any financial obligations. Shortly after the arrest of the appellant, he testifies, the single employee was dismissed as he did not deliver the income which he collected. The appellant and his girlfriend, he says, then took a conscious decision that they did not wish to have the vehicles operate as a taxi service in his absence as a result of the difficulty experienced with the single employee. Currently, therefore, there is no business and there are no employees.
- [22] The appellant testified that he was resident with his uncle, one Mvovo, at a given address at the time of his arrest. Subsequent to his testimony the investigating officer visited the premises. He interviewed Mvovo. Mvovo indicated that the appellant used to sleep over there occasionally. The home, Wolmarans observed was a one bedroomed home. In the single bedroom there is a double bed and a cupboard. The home also has a lounge and a kitchen. The structure of the home testified to by Wolmarans was not challenged under cross-examination.
- [23] After the close of the State's case an application was made to reopen the case for the appellant. The appellant did not seek to be recalled to respond to the evidence of Womarans. He sought to call Mvovo in order to establish that he stayed permanently with him. Mvovo, did not make a good impression upon the magistrate. She considered him, correctly in my view, to have been an unreliable witness. Of significance, however, is that Wolmarans was unable to find any possessions belonging to the appellant at the home of Mvovo. Mvovo acknowledged that immediately after the arrest of the appellant his girlfriend had removed all his

clothing from the house and another of his girlfriends had removed his furniture. Mvovo protested that the home in question is in fact a two bedroomed home and all that remains at the premises which belongs to the appellant is a double bed and some blankets in the second bedroom. The magistrate rejected Mvovo's evidence in this regard and accepted the evidence of Wolmarans, which was unchallenged at the time that he testified, that Mvovo's residence is a single bedroomed home. Mr Daubermann was constrained

to concede that the magistrate had not erred in coming to such a

conclusion.

- [24] The magistrate held, on the strength of this evidence, that the appellant had dissociated himself from any business in the township or from the premises occupied by Mvovo. Neither the appellant nor Mvovo disclosed the whereabouts of the appellant's movable assets. The appellant ventured an estimate of the gross value of his movable assets, excluding the motor vehicles, at R20 000.
- [25] The appellant faces a charge on a Schedule 6 offence which carries a prescribed recommended minimum sentence of life imprisonment. As set out earlier the magistrate found, correctly, that there is a prima facie case against the appellant. The appellant tenders to deposit an amount of R500 as bail.
- [26] In view of the aforestated evidence relating to the business and the residence and assets of the appellant there was no evidence of emotional, community or occupational ties with Port Elizabeth and there is no evidence of the extent of the relationship between the appellant and his children and girlfriends. In respect of the welfare of the children it appears that they are all cared for, however, the appellant contends that they have insufficient means of maintenance without his contribution. He, however, is entirely unaware of whether or not welfare grants are paid to them or whether they are eligible for such grants. There is no evidence of any immovable property which he owns nor has he disclosed the whereabouts of his movable property. Given the gravity of the charge, the prima facie case against him and the extent of the bail which is tendered the magistrate held that there was a reasonable incentive for him to evade trial.
- [27] I do not think that it can be found that the magistrate was wrong in this regard. The appellant contends that the magistrate had erred in failing to accept the appellant's undisputed evidence in regard to his personal circumstances. The judgment reveals that the magistrate did accept his personal circumstances and gave consideration to all his personal circumstances. The only issue in dispute relating to his personal circumstances is that of his permanent address. I have set out above the evidence in that regard and it appears to me that, at best, the appellant may have been resident with Mvovo prior to his arrest. On the evidence, however, he has no ties whatsoever to that address at present.
- [28] In the appeal it is argued that the magistrate had failed to give adequate attention to the fact that appellant supports five children. Again, the judgment of the magistrate reveals careful consideration to the plight of the children. In these circumstances I am not satisfied that the magistrate was wrong in concluding that the appellant had failed to establish, on a balance of probability, that he will not evade his trial.
- [29] Section 60(9) of the CPA provides that in considering of whether the interests of justice permit the release of an applicant on bail the court should decide the matter by weighing up the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice which he or she is likely to suffer. Two considerations in this regard were raised. Section 60(9)(d) requires the court to have regard to any financial loss which the

accused may suffer owing to his or her detention and section 60(9)(f) to have regard to his state of health.

[30] I have alluded earlier to the appellant's case relating to his transport business. It is recognised that were he to be released from prison he would be in a position to earn an income, whether from the use of his vehicles or otherwise. The extent of his total earnings as it emerges from his evidence is, at best, R6 000 a month whilst there is no clear evidence in this regard it would appear that he would be required to pay the salary of his employee from this money and maintain the vehicles. The loss of income is therefore, although it is a material consideration, not astronomical. It is, of course, an inevitable consequence of the detention of any person that he is deprived of earning an income, whether it be from his private enterprise or a salary. I do not consider that this should constitute exceptional circumstances.

[31] Finally, the appellant contended that he is HIV positive and at the time that he testified was taking medication which he already possessed prior to his arrest. He had not reported his status to the prison authorities and had not attempted to obtain medication from them. There is no evidence that he would be deprived of medication as a result of his detention. In all the circumstances I am not satisfied that the magistrate was wrong in holding that there were no exceptional circumstances.

[32] In the result, the appeal is dismissed.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr P Daubermann

Instructed by Peter Daubermann Attorneys, Port Elizabeth

For Respondent: Adv C Kempff

Instructed by the Director of Public Prosecutions, Port Elizabeth

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Prepared on 12 October 2026 · Esheria