

SOUTH AFRICA / JUDGMENT

J.S v S (CA01/2020) [2020] ZANCHC 36 (17 June 2020)

[2020] ZANCHC 36

COURT

Northern Cape High Court, Kimberley

BEFORE

Makoti

CASE / FILE NUMBER

CA01/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case NO: CA 01/2020

Heard on: 11/06/2020

Delivered on: 17/06/2020

In the appeal between:

J S Appellant

And

THE STATE Respondent

JUDGMENT ON BAIL APPEAL

MAKOTI AJ

- [1] The appellant, Mr J S ('S'), is facing criminal charges in the district court sitting in Kakamas. He applied for but was denied bail by that court in terms of the ex tempore judgement delivered by magistrate Me Du Toit on 14 January 2020. The magistrate found that the appellant failed to show that the interests of justice favoured his release on bail.
- [2] S is a citizen of Mozambique who has resided in the country for a considerably long time that he is now legally in possession of a South African identity document. He is fifty (50) years of age, married to two wives who reside in his native country with eight of his

children. In this country the appellant has one child with his girlfriend. He gave his local residential address as No. [...], Springs. In his statement, the appellant indicated that he has resided in that address for the past four years. The state did not dispute that this was the appellant's fixed address.

- [3] This appeal was noted in accordance with the provisions of section 65(1)(a) of the Criminal Procedure Act ('the CPA').^[1] The provisions stipulate that an accused person who has been denied bail may appeal against such refusal of bail in a superior court that has jurisdiction to determine the matter. The appellant is aggrieved by the court a quo's decision to deny him bail, hence this appeal. The grounds of appeal are listed in the notice of appeal. Before me the parties focused on only two grounds as I shall deal with below. I do not burden this judgement by repeating the grounds of appeal as listed in the notice. Appellant is self-employed with earnings or profit ranging between R2000 and R3000 per month.
- [4] A careful consideration of the appeal grounds as listed in the notice reveals that the appeal was predicated on two main grounds, that the magistrate had erred in her findings: (a) that the appellant is likely to commit a schedule 1 offence^[2] if released on bail; and, (b) additionally, that the appellant was a flight risk and likely to attempt to evade trial^[3] should he granted bail. The appellant's counsel, Mr Nel, placed much emphasis on these grounds when making oral submissions in court. Mr Kgatwe opposes this bail appeal on behalf of the state.
- [5] It is common cause that the offence that the appellant is facing falls within the ambit of schedule 5 of the CPA. This imposes a burden on a person (in this case the appellant) applying for bail to show that the interests of justice will be served by his or her release on bail. This, the parties agreed that it is in accordance with the provisions set out in s 60(4) of the CPA. The court a quo was equally alive to this,^[4] that the appellant had to discharge the burden before bail could be entered in his favour.
- [6] The essence of s 60(4) is that the interests of justice would not permit the release of an accused person from detention in circumstances

where one or more of the grounds listed in that sub-section are found to be in existence. Among the listed grounds are instances where the court forms the view that an accused person is likely to commit a schedule 1 offence and where the court finds, on probabilities, the accused person to be a flight risk who is likely try to evade trial. When denying the appellant's release on bail, the court a quo found that he was likely to evade trial and that there exists real likelihood that he will commit a schedule 1 offence if he is released.

Whether appellant is likely to evade trial

- [7] The first ground that the court below considered in its judgement relates to the question whether there is likelihood that the appellant may attempt to evade trial. It is common cause that the court a quo concluded that the appellant is a flight risk and that he was likely to attempt to evade trial. To reach this conclusion the court relied on the oral testimony of the police's investigating officer, Sergeant Moses.
- [8] The only reason why Sgt Moses believed that the appellant was a flight risk was because he is originally from Mozambique. This piece of evidence was only elicited during cross-examination of Sgt Moses. The court accepted this and the fact that the appellant had two wives and eight children in Mozambique as proof that he is likely to evade trial. Because of that the court a quo formed a view that the appellant is emotionally invested in Mozambique where he may flee to in order to avoid standing trial. In this regard the court a quo held as follows:

"... First of all he is from Springs. Furthermore he is originally from Mozambique. It is general knowledge that our borders are not guarded well. So in order for a person, although his passport is taken by the police or his ID, will not have a major problem to cross the border."

- [9] The above excerpt shows that the court a quo took judicial notice of the porous nature of the country's borders for its finding that the appellant is a flight risk who should not be granted bail. Based on that the court held that it would not prevent the appellant crossing the borders into Mozambique, in an attempt to skip trial, even if he was to hand his passport(s) over to the police. Although this may be possible, there is no shred of evidence to support this conclusion. In the absence of proof of the likelihood that this may eventuate, the court erred in arriving at this finding.
- [10] Furthermore, the court reached the conclusion as to the likelihood that the appellant would attempt to evade trial after taking into account the seriousness of the charges that he is facing. The court a quo missed an important factor in this regard. It did not take into consideration that the appellant previously faced similar charges on two occasions. In both these instances he, even though he was faced with serious offences similar in nature to the present one, he attended court until he was convicted and sentenced. There was no factual evidence before the court a quo that, due to the seriousness of those offences, he attempted to skip the country in order to evade trial.
- [11] During his cross-examination the investigating officer, Sgt Moses, confirmed that he did not have any information to back up the statements that the appellant will in all probability attempt to evade trial. He was not able to tell if the residential address given by the appellant was correct because the police had not yet investigated it, some 26 days after the arrest. Further, he was not able to deny that the appellant had a girlfriend and a child living in the country. At best, Sgt Moses's evidence can best be described as only proving the existence of a possibility for the appellant to evade trial. I agree with counsel for the appellant that the mere existence of possibility to evade trial is not sufficient for denying an accused person bail.

[12] It seems that the court placed much reliance on the investigating officer's whims for reaching the conclusion that the appellant should be denied bail as he was considered to be a flight risk who may try to evade trial. Without evidence to support this finding, the court a quo committed misdirection in finding that the appellant is likely to try to evade trial. There simply exists no persuasive evidence to support such finding. The statement of the investigating officer is just what it is, a statement without supporting evidence. It should not have been relied upon. In *S v Acheson*[5] Mohamed J said:

"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 unless this is likely to prejudice the ends of justice."

[13] Having considered the record, I find that the court a quo erred in using this ground to deny the appellant release on bail. However, I am mindful that this was not the only reason why the magistrate denied the appellant bail.

Is appellant likely to commit schedule 1 offence if granted bail?

[14] The record shows that, when determining whether the appellant is a person that is likely to commit an offences listed in schedule 1 of the CPA the court a quo took into consideration that he has two previous convictions on similar offences, namely: (a) a conviction in January 2017 of motor vehicle theft, for which he was sentenced to serve a period of five (5) years imprisonment but which was wholly suspended for five years; and, (b) in 2018, according to his statement in the bail application, he was convicted for housebreaking and theft and the prison sentence was also suspended.

[15] The court also took into consideration the degree of violence that accompanied the offence, noting that a number of dogs were killed with poison on the night in question. It is not in dispute that a number of dogs were poisoned on the day or morning of the incident even though it is still to be determined as to who served poison to the dogs. It is in dispute that the poisoning of the dogs was committed by the appellant. The police found a dust-like substance in the motor vehicle that was stolen, which, according to their statement, was driven by the appellant when they stopped it. The substance was sent to be tested at the laboratory but the results were still not available when bail was heard.

[16] Further, the court a quo relied on the appellant's criminal history and found that he was predisposed to commit schedule offences as provided for in s 60(5)(e) of the CPA. The appellant is serving two suspended sentences for crimes involving theft, which are schedule 1 offences. If the appellant's statement is to go by, the second case of theft was accompanied with housebreaking, just one year after

his first conviction for motor vehicle theft.

[17] The appellant's counsel could not strongly criticise the magistrate's finding that he was predisposed to committing

schedule 1 offences. He submitted that the court should take appellant's mature age of fifty years into consideration in

determining whether he is disposed to committing schedule 1 offences. The gravamen of his submission was that, because the appellant had not had criminal convictions before the two referred to earlier, it should be considered in his age should count in his favour. I disagree. The offences that the appellant was previously convicted for were committed while he was already in his mature ages of forty-six (46) and forty-eight (48), respectively. In my view, the fact that the appellant is 50 years of age does not dispel the finding that he is disposed to committing schedule 1 offences.

[18] This court is required to determine whether, from a factual basis, there was enough reason for the magistrate to have found the appellant to be predisposed to committing schedule 1 offences, and, therefore, whether there exists real likelihood that he may commit such offences if granted bail. It is important to note that five years' suspended prison sentence for motor vehicle theft did not deter the appellant from committing another offence involving housebreaking and theft. The similarity of the offences is also a significant factor to be considered. It is not as if the appellant was convicted of theft first and, later on, for a different crime.

[19] In determining whether the appellant is likely to commit further schedule 1 crimes, the magistrate placed much emphasis the appellant's criminal record or history. That is one of the factors that the court relies upon for making such determination, but not the only one. Other factors such as the employment of the bail applicant are also relevant for consideration. In addition, the court took heed of the modus operandi used by thieves when stealing property from homes, motor vehicles in particular. The court a quo held in this regard that:

"So in the light of the circumstances of this matter the Court is of the opinion that apart from the fact that he is a flight risk, the likelihood that he will commit a schedule 1 offence is of the utmost importance. Th IO gave evidence to the effect that this kind of offence that is a poisoning of dogs in order to steal older bakkies are prevalent in Kakamas vicinity. This is not the first occurrence. Thus far no one has been arrested. The bakkies were also not traced."

[21] The CPA envisages that the criminal conduct of an accused person may be taken into account when considering bail. That is by no means a decisive factor or the only consideration. It is constitutionally acceptable for a court to take into account the existence of a likelihood that an accused person may commit a serious offence when deciding whether to grant or refused bail. In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*[6] it was held that a court determining an application for bail must be satisfied of the existence of a likelihood or a probability that an accused person will commit a schedule 1 offence. Mere possibility is not a sufficient reason for court to deny bail.

[22] The court a quo went further to consider the seriousness of the offence(s) against the appellant and observed that there was a developing pattern for stealing Toyota and Isuzu bakkies in the area of Kakamas. Bolstered by evidence of the investigating officer, the court took

cognisance of the modus of operation that has accompanied the theft of bakkies, the poisoning of dogs ostensibly to prevent them from barking and thereby alerting (waking up) their owners of the criminality taking place. These were relevant considerations which a court hearing an application for bail is expected to take into account. There is no exaggeration in my view.

[23] As indicated, the nature of the offences that the appellant has been convicted of, viewed in light of the present charges is indicative to the possibility that he may commit further offences if he is allowed to go out on bail. As noted by the court a quo, the courts which have previously convicted him have tried their utmost to keep him out of jail. Despite the fact that he is still serving suspended sentences for the two previous offences, the appellant is again facing serious criminal charges of theft. This is equally not the only reason why someone should be denied release on bail. Possibility alone is no good ground for denying bail.

[24] This court is mindful that counsel for the appellant has argued that the state has a weak case with no real prospects of attaining conviction against the appellant. Mr Kgatwe for the state contended to the contrary.

[25] Counsel for the appellant overly criticised the magistrate her finding that he is likely to commit a schedule 1 offence while on bail. There is no blueprint on which the magistrate court rely when making this determination, save for the history of the appellant's past crimes. The criticism overlooked this important consideration and it is neither fair nor warranted.

[26] In spite of what I have stated above, I find that the court a quo should still have taken consideration of the fact that the crime referred were committed some four and three years ago, with no indication that the appellant was involved in any similar transgressions from then to the date of this present case. I am not suggesting that the appellant is a model resident of this country, but am taking view of the length of time between the commission of those previous offences to the current. The finding, therefore, that the appellant is predisposed to committing schedule 1 offences was erroneous.

Further considerations

[27] Preservation of human liberty is one of the fundamental tenets of the present day Constitution. It is part of the constitutional design to, where appropriate, limit or even deprive an individual his or her freedom. The temporary deprivation of liberty is embodied in the provisions of s 35(1)(f) of the Constitution, which may be necessary to secure an accused person's attendance in a court of law.[7] In *S v Dlamini*, to which I have earlier referred, the court held amongst others that:

"... The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that unless the equilibrium is displaced, an arrestee is not to be released."

- [28] The governing provisions of s 65(4) of the CPA read as follows regarding the role of the court hearing bail appeal:

"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 shall have given." (Emphasis added)

- [29] It is not important that this court may have a different view to that of the magistrate. The fundamental question is whether the court decided the matter correctly, that is, whether the court's exercise of its discretion was correctly done. This in line with what was determined by the court in the case of *S v Barber*[8] where it was held that:

"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 it 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 ..." (Emphasis added)

- [30] One of the grounds raised by the appellant when applying for bail in the lower court, and before this court, was that the state has a weak case against him. His counsel based this argument on the fact that the police had not conducted an identification parade to positively link to the crime. This is raised in light of what was said by the Supreme Court of Appeal ('SCA') in *S v Mathebula*,[9] where that court held that an applicant for bail must show on a balance of probabilities that he will be acquitted of the charge.

- [31] The fact that the identification parade was not held is in my view not helpful to the appellant. This is because of the police's arresting officers gave statements to the effect that they forced the stolen bakkie to be stopped, and that the person who was driving it when they stopped it was the appellant. In this regard the appellant relied on the authority in *S v Kock*[10] in which the SCA held that where a bail applicant is faced with the flimsiest of cases, there should be reason not to consider releasing him on bail.

- [32] I am not persuaded that the state has a particularly weak case. The record points to the contrary. In any case it is unfathomable why they would have needed to conduct a parade when their evidence is so direct in identifying him as the driver of the vehicle. He was arrested on the scene and there is no question as to his identity from the arresting officers' point of view.
- [33] The paucity of facts used to support the assertion that the appellant has a strong case is palpable. He did not adduce any facts to support the contention that he will be acquitted of the charge, fell considerably short of the target. The state's riposte, though not strongly presented, cannot be called weak. The two conflicting versions relate to whether the appellant was the driver of the motor vehicle or if someone else was driving it. Nonetheless, the court must presume the appellant to be innocent until the contrary is proven beyond any reasonable doubt.
- [34] There was another criticism that was levelled against the magistrate was in relation to her utterances that the appellant ought to have been deported to Mozambique. On consideration of the judgement, one can clearly tell that the magistrate was improperly frustrated by what she called the leniency that was extended to the appellant. The led to her asking a rhetorical question as to why was the appellant still in the country. She seems not to have taken it into account that he was in the country legally and that he held a valid South African identity document.
- [35] The consternation seems to have somewhat had influence in the decision not to release the appellant on bail. When considered together with the magistrate's utterances that the courts which previously convicted the appellant have tried their best to keep him out of prison, implying that he has not used the opportunity to remain out of jail and, possibly, deserved to be penalised by the refusal of bail. In this regard, also, I find that the magistrate erred but letting her frustrations influence her judgement.
- [36] Taking a holistic view the facts of this case, I am of the view that the appellant had done enough to secure a release on bail. In light thereof, I take heed from what the court said in *S v Dlamini*, supra, where it was held that:[11]
- "Bail serves not only the liberty interests of the accused, but the public interest by reducing the high number of awaiting-trial prisoners clogging our already overcrowded correctional system and by reducing the number of families deprived a breadwinner."*
- [37] On the balance of the facts and the evidence considered above, I am persuaded that the application for releasing the appellant on bail ought to have been granted.
- [38] I add that, there are two important considerations that the court a quo failed to properly deal with. The first relates to its finding that there exists a likelihood that the appellant would try to evade

trial. There was no factual basis to support this finding. The second pertains to the magistrates' expression, out of possible

frustration, that the appellant ought to have been deported following his previous convictions. Her frustrations were magnified by her expression that the appellant had been given a chance by the courts before to stay out of jail. By that she possibly implied that she was not going to be lenient with the appellant as the other courts, in her view, did.

[39] Most worrying is the magistrate's mistrust of the systems that are designed to keep the appellant in the country. She took judicial notice of this fact without any shred of evidence. That the appellant may leave the country without a passport is merely a possibility, but that was not shown to be a real likelihood or probability.

[40] In the premises, find that bail appeal should succeed and that the appellant should be offered release on bail, with conditions.

Order

[41] I make the following order:

[1] The appeal against bail refusal is upheld;

[2] The order dismissing the appellant's bail application is set aside and replaced with the following:

[a] The appellant is hereby granted bail, which is fixed in the amount of R5,000.00 (Five Thousand Rand) on the following conditions:

[i] The appellant shall hand the passports issued in his names by both the governments of Mozambique and South Africa over to the police officer charged with the investigation of this case;

[ii] The appellant is required to report at the police station near to his place of residence on or before 10h00 every Monday, that is, from the date of his release on bail until finalisation of the trial of this matter;

[iii] Should the appellant relocate from his present residential address, he shall inform the investigating officer in writing of his new address 7 days prior to relocating to such address; and

[iv] The appellant shall attend all court appearances until the trial is finalised.

MAKOTI AJ

Acting Judge of the High Court

Northern Cape Division, Kimberley

Appearances:

For Appellant: Adv I J Nel

Instructed by: Kruger & van Zyl Inc

Upington

For the State: Adv K M Kgatwe

Instructed by: Director of Public Prosecutions

Northern Cape, Kimberley

[1] Act No. 51 of 1977. S 65(1)(a) reads: “An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if that court is not then sitting.”

[2] S 60(4)(c).

[3] S 60(4)(b).

[4] Judgement – D7 p 35 lines 10-13.

[5] 1991

(2) SA 805 (N).

[6]

[1999] ZACC 8; 1999 (4) SA 623 (CC) at par [53].

[7] S v Dlamini, et al, supra.

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

[9] 2010 SACR 55 (SCA) par [12].

[10] S v Kock 2003 (2) SACR 5 (SCA).

[11] At par [15].

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