

SOUTH AFRICA / JUDGMENT

Levy v S (A77/2021) [2021] ZAWCHC 162 (23 August 2021) [2021] ZAWCHC 162

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

A77/2021

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In
the High Court of South Africa
(Western
Cape Division, Cape Town)

Case No:	A77/2021 Magistrates Court Case No: 16/413/2020 In the matter
between:	MOEGAMAT ZAMEER LEVY Appellant AND THE STATE Respondent Date of Judgment: 23 August 2021 Delivered via email to the parties' legal representatives and released to SAFLII

JUDGMENT

LEKHULENI AJ:

INTRODUCTION

[1] This is an appeal in terms of section 65 of the Criminal Procedure Act 51 of 1977 (“the CPA”) against the refusal by a magistrate from Cape Town Magistrates Court to grant bail to the appellant.

BACKGROUND

[2] In the matter resulting in this appeal the appellant is charged with three counts namely:

Ø Count 1: contravening the provisions of section 3 read with section 120(1)(a) of the Firearms Control Act 60 of 2000 - Possession of firearm.

Ø Count 2: Contravening the provisions of section 90 read with section 120(1)(a) of the Firearms Control Act 60 of 2000 – Possession of ammunition.

Ø Count 3: Contravening the provisions of section 5(b) read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 – Dealing in drugs.

[3] The appellant was arrested on 29 July 2020 for the alleged commission of the above offences. Prior to his arrest, the appellant faced charges of assault with intent to do grievous bodily harm and pointing someone with a firearm which were allegedly committed on 19 July 2020. The appellant was released on R1000 (one thousand rand) bail in respect of this incident. These counts were subsequently combined with the three charges mentioned above which were allegedly committed on 29 July 2020. As mentioned, the appellant was released on bail in respect of the offence allegedly committed on 19 July

2020. He was denied bail on the latter incident. It is against this order that this appeal was launched.

[4] The investigating officer opposed the release of the appellant on bail. She informed the court a quo that on 29 July 2020 in the early morning, police officers entered the appellant’s premises after they were informed by members of the public that the appellant was dealing in drugs and had a firearm in his property. The police indeed found a firearm with live rounds underneath the appellant’s mattress and a lot of drugs in the room. The firearm that was found was a 7.65 calibre Browning firearm. The serial number was filed off. The appellant was then arrested by the police. The investigating officer further told the court a quo that the investigations in the matter were still incomplete as the ballistic report and the medical report of the complainant on the assault charge were still outstanding. She was opposed to bail because the accused was found in possession of an unlicensed firearm and that the accused was released on bail two weeks before he was rearrested for possession of

firearm and drugs. The accused denied that he was found in possession of drugs or the alleged firearm. According to him, he does not bear knowledge of the firearm and drugs.

- [5] At the commencement of the proceedings in the court below, it was accepted by both the state and the defence that the bail application fell within the ambit of Schedule 5 of the CPA. That being the case, it was common cause that the appellant had the duty to prove that it was in the interest of justice to permit his release on bail. The

appellant presented viva voce evidence in support of his case and the state led the evidence of the Investigating officer in opposition of the appellant's application.

GROUND FOR THE BAIL APPEAL

- [6] The grounds of appeal as contained in the appellant's notice of appeal are essentially that the magistrate failed to attach any weight or sufficient weight to the appellant's application in that:

6.1 The appellant set out in detail all of his personal circumstances. These circumstances indicated that he has a fixed address and that he has four dependants as well as an elderly mother who all rely on him financially.

6.2 That the appellant's record of previous convictions does not reflect that he has a propensity to commit offences as his personal circumstances have dramatically changed from the time he committed most of the offences which are now his previous convictions.

6.3 That the magistrate erred in finding that the appellant has a predisposition to commit a schedule 1 offence or that the community would be endangered by his release as the presumption of innocence favours him in respect of his pending matter.

6.4 That the magistrate incorrectly drew the conclusion that due to the appellant's readmission owing to a breach in parole conditions was an indicator that the appellant would not stand his trial in this matter.

6.5 That the magistrate erred in finding that the appellant was a danger to the public particularly the complainant.

6.6 While the magistrate did note that the appellant had allegedly committed these offences while out on bail the charges against him have not been proved.

SUBMISSIONS

BY THE PARTIES IN THIS COURT

- [7] Due to the spike in Covid-19 infections and the unavailability of both legal representatives on the same day, this court in concurrence with the legal representatives invoked the provisions of section 19(a) of the Superior Courts Act 10 of 2013 to dispose of the appeal on the written submissions of the parties without the hearing of oral argument. To this end, both parties filed comprehensive heads of arguments and I am indebted to them.
- [8] Mr Booth argued on behalf of the appellant that the magistrate erred in finding that the appellant has a predisposition to commit these types of offences or that the community will be endangered by his release. He contended that the presumption of innocence favours the appellant in respect of his pending matter. He also argued that the appellant was initially released on bail in the pending matter and had attended court for the pending matter until he was arrested for this matter. It was contended on behalf of the appellant that the court below erred in failing to consider the effectiveness of bail

conditions to cure any fear alleged by the state including checking in at the Police Station regularly. It was asserted that the

magistrate erred in finding that the appellant was a danger to the public and for failing to consider the provisions of section 60(9) of the CPA in particular. More importantly, it was submitted that the appellant would attend court and stand trial in the present matter if he was released on bail.

- [9] Mr Sityata for the State argued that the appellant is not a suitable candidate to be released on bail as the appellant has twelve previous convictions, four of which were drug related and thus similar to the current charge of possession of drugs that the appellant is facing. Counsel contended that there is a propensity on the part of the appellant to commit schedule 1 offences and that should he be released on bail, there is a real likelihood that he will further commit schedule 1 offences. Mr Sityata stressed the fact that it was common cause that at the time of the commission of the offences, the appellant was on bail for a mere two weeks having been released on other schedule 1 offences. This, it was argued, shows a complete disregard for the rule of law by the appellant who was aware that one of the most important condition of his release on bail was that he should not commit any further offences until his matter was finalised. Mr Sityata contended that if the appellant was released on

bail with conditions, there was a real likelihood that he will not adhere to those conditions.

THE

ISSUES

- [10] The issues to be determined in this matter are whether the appellant has discharged the burden placed on him by section 60(11)(b) of the CPA to be admitted to bail and whether the magistrate has indeed erred by refusing to grant the appellant bail.

THE APPROACH OF THE APPEAL COURT

[11] In dealing with an appeal matter such as this, the powers of this court are governed by the provisions of s 65(4) of the CPA. The section provides as far as is necessary as follows:

'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.'

[12] From a careful reading of the above section, it is clearly discernible that this court will only interfere with the decision of the bail court if the magistrate has misdirected herself materially. In applying the provisions of section 65(4) the court hearing the bail appeal must approach it on the assumption that the decision of the court a quo is correct and not interfere with the decision, unless it is satisfied that it is wrong. See

S v Mbele & another 1996

(1) SACR 212 (W) at 221H-I. The appeal court will interfere if the magistrate overlooked some important aspects of the case or unnecessarily overemphasized others, in considering and dealing with the matter - See S v Mpulampula 2007

(2) SACR 133 (E); State v Essop 2018

(1) SACR 99 (GP) at para 23.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[13] In this case, the appellant had the onus to show that on a balance of probabilities it was in the interest of justice for him to be released on bail. It is not in dispute that the charges levelled against the appellant are very serious in nature. The appellant has twelve previous convictions and four of which are drug related. In addition to other counts, the appellant is also facing a charge of possession of drugs. In S v Smith and Another 1969 (4) SA 175 (N) at 177, it was stated that 'the court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.' The essence therefore of the principles and considerations underlying bail is that no one should remain locked up without good reason.

[14] Against this backdrop, I turn to consider the question whether the lower court erred in refusing to admit the appellant to bail. In my view, the starting point in addressing the issues before this court should be the Constitution. Section 35(1)(f) of the Bill of Rights provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permit, subject to reasonable conditions. From the reading of this section, it is abundantly clear that it is not absolute but its ambit is circumscribed by the interest of justice. (See S v Yanta and Another A71/21; A43/21) [2021] ZAWCHC 96 (14 May 2021) at para 13. The court must be satisfied that the interest of justice warrants the release of the accused from detention.

[15] Bail applications of accused persons in court are regulated by section 60 of the CPA. Section 60(1)(a) of the CPA provides that ‘An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit’. Section 60(4) provides that 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;
- (e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

Section 60(5) to s 60(9) details the factors to be considered when having regard to subsections 60(4)(a) to (e) discussed above. This court must consider whether on the facts and the evidence presented in the court a quo, the magistrate misdirected herself or erred when she found that the appellant had failed to satisfy the court on a balance of probabilities that the interests of justice permitted his release on bail.

[16] In this case, the charges levelled against the appellant involved offences listed in Schedule 5 of the CPA and this application in the court a quo had to be determined in terms of section 60(11)(b) of the CPA, which provides as follows:

‘Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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, adduces evidence which satisfies the court that the interests of justice permit his or her release.’

[17] This section proceeds from the viewpoint that bail is not granted unless the accused offers evidence after a reasonable opportunity has been given why the court should grant him bail. It clearly places an onus upon the accused to adduce evidence satisfactorily why the interest of justice permits his release. In terms of section 60(11) (b), the accused has to satisfy the court that the interests of justice do not require his detention in custody. In other words, the interest of justice should justify the accused’s release on bail. Therefore, an accused person

on schedule 5 offence will be granted bail if he can show that the interest of justice permits such order. It follows

therefore that the success of this appeal is dependent on whether the appellant in the court a quo discharged the onus in terms of section 60(11)

(b) of the CPA.

[18] A formal bail application was conducted at the instance of the appellant in the court below. In the bail application proceedings, the appellant testified under oaths. He did so with a view to comply with the provisions of section 60(11)(b) of the CPA in discharging the onus resting on him to satisfy the court that it was in the interest of justice that he should be released on bail. In support of his application, the appellant testified that he is 31 years old. He resides with his mother at no 11 Regina Court in Maitland. He has been living there since he was a child. He has four minor children. The minor children are currently leaving with their mothers and he pays R1000 maintenance in respect of each child. Prior to his arrest

he was self-employed selling takkies and clothing and he approximately earned twelve to fifteen thousand per month. He testified that he has no outstanding warrants against him and he had one pending case which was since combined with the main charges in this matter.

[20] He testified that he has twelve previous convictions, ranging from possession of drugs, housebreaking with intent to steal and theft, theft etc. He testified that he is suffering from chronic asthma and gastric refluxes. He was released on bail in respect of his pending matter and he attended court without fail. He testified that he will stand trial if he was released on bail. He intends to revive his business and continue to provide for his family as his incarceration caused him severe sufferings.

[21] As stated above, the appellant denied any involvement in the alleged commission of the offences levelled against him. In my view, the innocence or the guilt of the appellant is an issue which should be left to the trial court for consideration. What this court has to consider is whether the court a quo erred in dismissing the appellant's application to be released on bail. The record reveals that the magistrate in the court below considered the seriousness of the charges faced by the appellant; his personal circumstances, the provisions of section 60(4) discussed above as well as section 60(6) and 60(7) and concluded that there is a real likelihood that the appellant might commit a scheduled 1 offence.

[22] The court a quo also found and correctly so in my view, that the duty of the trial court in a bail application is to assess the prima facie strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. The magistrate was alive to the fact that bail proceedings are not to be viewed as a full dress rehearsal of the trial but that should be left for the trial court. As far as the strength or otherwise of the case against the appellant is concerned, the magistrate acknowledged that the appellant was arrested after the police reacted to complaints by community members. The police arrested the appellant after there were complaints that he

was dealing in drugs and that a firearm and drugs were found in his property. She found that the community and the broad public look up to the courts to ensure that the administration of justice is not brought into disrepute and need the assurance of the proper functioning of our criminal justice system including our bail system. After considering all these factors, she came to the conclusion that it was not in the interest of justice for the appellant to be released on bail.

- [23] I can find no fault with this evaluation. In my considered view, the appellant failed to discharge the onus resting on him of proving that it was in the interest of justice that he be admitted to bail. Furthermore, it cannot be said that the state's case against the appellant is non-existent, or weak and that the appellant in all likelihood will be acquitted after the trial. The appellant has not in my view been able to show that he will in all likelihood be acquitted. I am aware that the presumption of innocence favours the appellant in respect of his pending matters, however I need to stress the fact that the right to be presumed innocent is not a pre-trial right, but a trial right. See *S v Mbeleki and Another* 2013 (1) SACR 165 (KZD) at para 14. In *S v Dlamini*
- [1999] ZACC 8; 1999 (2) SACR 51 (CC) at para 100, the Constitutional Court noted that not only the innocent are entitled to their release on bail pending trial. On the contrary, even those who have been convicted and sentenced to imprisonment can be and often are released on bail pending appeal.
- [24] I am also alive to the fact that the bail proceedings are not punitive in nature however, I am of the view that on a conspectus of all the evidence placed before the magistrate, it cannot be said that she misdirected herself when she refused the appellant's application to be released on bail.
- [25] It has been argued that the magistrate failed to consider section 60(9) of the CPA in particular the prejudice that the appellant would suffer if he were to be detained in custody. The court a quo did not specifically mention section 60(9) in its judgment however the magistrate was alive to the personal circumstances of the accused placed on record which in my view encapsulated the provisions of section 60(9). In her judgment, the magistrate indicated that when considering whether or not bail must be granted in a particular case the court must consider the personal circumstances of the applicant, the seriousness of the offence and the interest of justice. In my view, she considered section 60(9) and was correct in her finding that it was not in the interest of justice for the appellant to be released on bail. In addition, I am satisfied that the learned magistrate correctly applied the provisions of s 60(4), 60(5) 60(6) and 60(7) of the CPA. Section 60(4) of the CPA clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of section 60(4) are established.

[26] What I find extremely disturbing is that the appellant is applying to be released on bail despite the fact that he was previously granted the same indulgence a week before he allegedly committed the second offences. He messed up the indulgence that was given to him by the court. The appellant expect to be afforded yet another opportunity to be out on bail when he was released on bail in respect of the assault and pointing someone with a firearm. It is a common cause factor that

the current offences that the appellant is facing were allegedly committed while the appellant was on bail. In this regard, I agree

with the views expressed by the respondent's counsel that the conduct of the appellant shows a complete disregard for the rule of law in that he was aware that one of the most important condition of his release was that he should not commit any further offences until his matter is finalised.

[27] In my view, the finding by the court a quo that there is a likelihood that if the appellant is released on bail he might commit schedule 1 offence is beyond reproach. The finding by the magistrate that the appellant has the propensity of committing serious offences cannot be faulted. He is facing serious charges some of which were committed whilst he was on bail. If he is released on bail, I repeat the appellant is likely to commit schedule 1 offences. In my view, it cannot be said that the magistrate was wrong in refusing to admit him to bail. There is no basis in law for this court to interfere with the discretion exercised by the magistrate. It follows therefor that the appeal must fail.

ORDER

[28] In the result, the following order is made:

28.1 The appeal is dismissed.

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT

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Prepared on 13 October 2026 · Esheria