

SOUTH AFRICA / JUDGMENT

Naidoo v S (A178/2020) [2020] ZAGPPHC 566 (10 September 2020)

[2020] ZAGPPHC 566

COURT

North Gauteng High Court, Pretoria

BEFORE

De Vos

CASE / FILE NUMBER

A178/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A178/2020

In the matter between:

NICKYLE NAIDOO

APPELLANT

and

THE STATE

RESPONDENT

J U D G E M E N T

DE VOS J:

[1] This is an appeal against the refusal of the Magistrate Nigel to grant the appellant bail. The appellant (accused no. 1 in the court a quo) together with his co-accused (accused no. 2, Mr Stephanus Greyling) are charged with five counts, to wit two counts of kidnapping, two counts of assault with the intention to do grievous bodily harm, and a contravention of s 5(a) of Act 140 of 1992 (i.e. to wit 63 Cannabis trees), which was found at a premises known as 57 Voortrekker Street, Nigel.

[2] The two male complainants in the kidnapping and assault with the intent to do grievous bodily harm counts are 14- and 17-years old respectively.

- [3] It is also common cause that the bail applications of both the appellant and accused 2 were based on the contents of sworn affidavits handed in during the bail proceedings. The State opposed the bail applications and based their opposition on an affidavit deposed of by WO Wilkinson, the investigating officer. WO Wilkinson was subsequently called to give viva voce evidence to clarify certain aspects.
- [4] It is further common cause that the appellant, at the time of the hearing of the bail application, was out on bail on another criminal case where he is charged with assault common.
- [5] The Magistrate held, after hearing the application, that the appellant's bail be refused. Accused 2 was granted bail in the amount of R5000 read with additional conditions imposed.
- [6] The appellant's counsel argued that the court a quo ruled that the bail application of the appellant resorted under Schedule 5 of the Criminal Procedure Act 51 of 1977.

[6.1] This ruling constitutes a misdirection due to the fact that the appellant is out on bail on the pending matter on a charge of assault common and not assault with the intent to do grievous bodily harm. Common Assault does not fall under the umbrella of Schedule 5, as the appellant was released on bail on a Schedule 1 offence. The only type of offence specifically mentioned in Schedule 1 is 'assault when a dangerous wound is inflicted'. The pending assault matter does not allege that a dangerous wound was inflicted. It is therefore clear that assault common is not an offence which falls within the ambit of Schedule 1.

[6.2] The State correctly conceded during argument that the pending case cannot resort under Schedule 1 since it cannot be argued from the record that a dangerous wound was inflicted.

[6.3] I concur with the interpretation of both Counsel. The ruling that the appellant's application resorts under Schedule 5 had the effect that the appellant was placed under the incorrect onus to prove that it is in the interest of justice that he be released on bail. Instead, the appellant's bail application should also have been dealt with (as in the case of accused 2) as an application under Schedule 1, and not as a Schedule 5 application.

[6.4] The appeal should therefore be upheld on this point alone. However, that is not the end of the matter. Section 65(4)(b) of Act 51 of 1977 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'.

In *S v Barber* 1979 (4) SA 218 (D) the approach to be followed upon appeal was consequently held to be the following:

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may

have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of 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'.

In *Masoanganye v S* 2012 (1) SACR 292 (SCA) para 15 the following was held:

'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case'.

- [7] Before me the version of both the appellant and the State forms part of the record. The State contends that notwithstanding the misdirection referred to above, the appellant's application for bail should be refused as it is common cause that the charges in casu are two counts of kidnapping and two counts of assault with the intent to cause grievous bodily harm. The one minor complainant sustained a broken elbow and the other minor complainant sustained an injury to the head. It is submitted that the appellant has a propensity to commit violent crimes; that the State has a strong case against the appellant; that the appellant admits, on his own version, that he caught the two complainants who were trespassing on the property known as 57 Voortrekker Street, Nigel, but can conveniently not remember what happened. It was further submitted that regard should be taken of the statement and evidence under oath of the investigating officer, who submitted that the appellant will evade his trial and will interfere with the State witnesses. To conclude, the State submitted that it has proved that it is not in the interest of justice for the appellant to be released on bail as the evidence of the investigating officer was not challenged, as was held in *Mathebula v S* (431/09) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA); [2010] 1 All SA 121 (SCA) (11 September 2009).
- [8] Counsel for the appellant contends that this Court should grant the appellant bail. The decision to place a burden of proof on the appellant was wrong, in which event this Court shall give a decision which, in its or his opinion, should have been given by the lower court. Having regard to bail being granted to accused 2 by the court *quo* appearing on the same charges, it would be speculative to draw a clear distinction between the position of the appellant and that of accused 2. It was further submitted that the appellant complied with all the requirements as set out in the Criminal Procedure Act to be released on bail.
- [9] The charges set out in the charge sheet do not allege that the appellant and accused 2 acted with a common purpose. During the bail application the State placed on record that it will amend the charge sheet in due course by adding common purpose as an element. I will accept therefore that the State will rely on the doctrine of common purpose when the trial proceeds.
- [10] I also considered that both the appellant and accused 2 are arraigned on the same charges which are probably based on the same facts.

- [11] I also considered the facts as they emanate from the record. The only real difference between the appellant's bail application and that of accused 2 is, firstly, the fact that two different onuses of proof were applied by the court a quo. In *S v Nel & Others* 2018 (1) SACR 576 (GJ) a similar misdirection occurred. The facts in *Nel* are almost identical to the facts of this aspect. Secondly, the investigating officer directly opposed the appellant's bail, which is in contrast to his attitude towards accused 2. It therefore becomes necessary to consider the reasons for opposing the appellant's application for bail. I will take into account that it is not my task to determine the merits of the State case against the appellant or accused 2. At the outset it is important to note that the affidavit filed by the appellant contains a denial that he committed the offences charged with. I also disregarded the Magistrate's finding against the appellant that he is obstructive by withholding his signature to have his cell phone activated. There is no legal duty upon the appellant to do so. I will also disregard the Magistrate's finding that the appellant has three different addresses. The appellant's version is clear. He resides at 57 Voortrekker Street, Nigel. The fact that he has a girlfriend who lives in Durban has no effect as to where he resides.
- [12] The real issue to be decided is whether it is in the interest of justice that the appellant be released on bail. There is a real threat of reprisal from the complainants' families and the community as a whole. It appears from reading the Magistrate's judgement that the community is sick and tired of drugs infiltrating their community.
- [13] The crux of the case starts at the time the two complainants were kidnapped and the time of their escape after a lapse of about three hours. The investigating officer's affidavit discloses that the two complainants were near a swimming pool when a grey Fortuner stopped in front of them. Two men climbed out and demanded that the two complainants climb into the vehicle. Inside the vehicle they were assaulted and they were accused of stealing the 'zoll' from the two men. They were taken to an unknown house in the Nigel area with a lot of vegetation. They were taken to the backyard where they were assaulted with fists. The two complainants were ordered to undress and their hands were tied with cable ties. The two complainants were forced into a cage while naked. One of the males took a garden hose and started to spray the boys with water. The two complainants were taken out of the cage and they were assaulted with broomsticks and belts. They were placed back in the cage and sprayed with water again. The younger of the two males went into the house. He came out with a gun in his hands and said he will shoot both of the complainants. Threats were made that they will be taken to Durban and that their parents will not see them again. The younger of the two males, referred to as the Indian male, then assaulted the complainants using the backside of the gun. One of the suspects video-recorded the whole assault using his cell phone. One of the complainants were taken from the cage and into the house. At that stage the two complainants managed to free their hands and escaped from the premises. The J88 medical reports obtained confirm that both complainants sustained serious injuries.

[14] The appellant's version as set out in his affidavit is that the complainants were arrested while trespassing on their property situated at 57 Voortrekker Street, Nigel. They were called by the stepfather, Johannes Greyling (accused 2), who noticed movement in their backyard. He, his stepfather, and Phillip (a friend) detained the two intruders. The intruders had dagga with them, which they attempted to steal, as the appellant's stepfather grows same for personal consumption. The appellant states that he cannot remember exactly what transpired that led to the intruders escaping before the police could be phoned. He did not report the matter to the SAPS but did report it to the Community Policing

Forum, better known as CPF.

[15] The appellant deliberately failed to take the court into his confidence as to what happened after the detention of the two complainants; whether at the house or the swimming pool is irrelevant. He is also telling an untruth that accused 2 is growing the dagga for his own personal use. I say without hesitation that 63 dagga trees, which are about 1,76 metres tall according to the investigating officer's viva voce evidence, is so excessive that it cannot be said to be for personal use only. I have no doubt that the background to this case is drug-related. Whether the complainants have stolen a 'zoll' or were stealing dagga will be decided by the trial court. What is relevant, is that both complainants were injured. The appellant failed to give any explanation as to how and when and by whom they were injured while detained on the premises. Instead, he merely says he cannot remember what happened after the complainants' detention and their escape.

[16] On the appellant's own version he was present at the premises when the two complainants were detained. At this stage, and for purposes of considering bail, it must be accepted that in the absence of any explanation the appellant participated in the assault of the two complainants. Subsequent to the complainants' escape they reported to the police, as testified by WO Wilkonson, that threats were made to the complainants that they would be taken to Durban and that the parents will not see them again. Furthermore, death threats were made to the complainants. The importance of the video footage taken while the complainants were detained and subsequently placed on social media can also not be ignored. Firstly, why was the video taken and secondly, why was it distributed? In my view, its purpose is clear: to inform people, including the community, the complainants' and their families, that they will not tolerate any intervention in their

dagga cultivation enterprise. According to WO Wilkonson's evidence the appellant also uses or will use his friends in the area where the complainants reside to intimidate them. He says in his affidavit that the public was shocked by the blunt distribution of the self-recorded video of the assault and that the community will not take it lightly if the appellant is released on bail. In his view, the appellant's life would be in danger if he is released on bail and if it was not for the swift arrest of the appellant and accused 2, the community would have attacked the appellant.

- [17] I also considered the facts stated by the appellant in his affidavit. No real value can be placed on the appellant's version due to the vagueness thereof. For example, the appellant told the investigating officer that he is unemployed. When he deposes of his affidavit, he says that he is partly employed. He denies his guilt and says he is unable to say what happened to the complainants after their arrest until their escape. The video footage, on the other hand, tells a totally different story and places the appellant squarely at the scene where the complainants were arrested.
- [18] In my view, taking into consideration that the complainants are young and sustained serious injuries, that they were assaulted with broomsticks and fists and hit with a gun, manifestly proves that the appellant is a person of violent nature who participated in the assault on the complainants. The threats issued to the complainants confirm that the appellant can, and will if necessary, execute his threats. His failure to call in the assistance of the SAPS after detaining the complainants for stealing his dagga was a deliberately made decision. On his own version, there was nothing stopping him to call the police and/or to take the intruders to the police station. The question is, why did he not do so? The assault and the injuries inflicted speak for itself. He took the law into his own hands and punished the complainants at will.
- [19] In my view the appellant is not at this stage a suitable person to be released on bail. Not only is he a threat to the community, but his own safety can also not be guaranteed. With all the grounds set out in WO Wilkinson's statement opposing bail, which I find unnecessary to reiterate, I hold the view that there is a strong possibility that the appellant, if released on bail, will endanger the safety of the public or the complainants and there is a likelihood that he will attempt to influence or intimidate witnesses.
- [20] I also take into consideration the degree of violence used against the complainants, the threat of violence made to the complainants, the appellant's disregard for the legal system, his inability or unwillingness to prove on a balance of probabilities that he will be acquitted on the charge proffered against him and lastly, all relevant circumstances pertaining to both the State and the victims of the appellant. I conclude that it is not in the interest of justice that the appellant be released on bail.
- [21] I conclude therefore that the Magistrate correctly refused the appellant's release on bail. Therefore, the following order is made:

[a] The appeal against the refusal of bail is dismissed.

DE VOS J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING:

01 September 2020

DATE OF JUDGEMENT:

10 September 2020

LEGAL REPRESENTATIVES

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Prepared on 13 October 2026 · Esheria