

SOUTH AFRICA / JUDGMENT

Onwuakpa and Others v S (CA&R271/2015) [2015] ZAECHGC 108 (19 October 2015) [2015] ZAECHGC 108

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

CA&R271/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA&R271/2015

DATE

HEARD: 16/10/2015

DATE

DELIVERED: 19/10/2015

NOT

REPORTABLE

In

the matter between:

RAPHAEL

UGONCHUKWU ONWUAKPA

First Appellant

IBEGNUM

JOHNSON OBIEFOKA

Second Appellant

OBINNA

EDWIN ENYACHO

Third Appellant

and

THE

STATE

Respondent

JUDGMENT

PLASKET J

- [1] The appellants were arrested on charges of dealing in drugs. It is alleged by the State that they acted in the furtherance of a common purpose or conspiracy. They applied for bail in the East London Magistrate's Court. That application was refused and they now appeal against that refusal.
- [2] It is not in dispute that the offences with which the appellants have been charged are offences contemplated by Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA). That means that, in order to be released on bail, the appellants are required, in terms of s 60(11)(b) of the CPA, to discharge an onus on them to satisfy the court that their release is in the interests of justice. In terms of s 60(4), the interests of justice do not permit the release of an accused on bail if, inter alia, there is a likelihood that he or she will commit a Schedule 1 offence or attempt to evade his or her trial.
- [3] Section 65(4) of the CPA provides that a judge hearing a bail appeal 'shall not set aside the decision against which the appeal is brought', unless he or she 'is satisfied that the decision was wrong'.
- [4] The appellants are Nigerian nationals. Only the first appellant has a passport. The permit that allows him to remain in South Africa has expired and he has applied for its renewal. The second and third appellants are in South Africa on the basis of asylum seekers permits. Both claim not to have passports.
- [5] The first appellant is married, has three children and lives with his wife and children. The second and third appellants work for the first appellant in a tyre and panel beating business. They do not own fixed property in South Africa. The second appellant has four children who live in Nigeria and a girlfriend in South Africa. The third appellant has a girlfriend in South Africa and a wife in Nigeria.
- [6] The first appellant has lived in South Africa for 10 years. The second appellant has lived here for three years and the third appellant has only been here for four months. Both the second and third appellants appear to be economic migrants rather than people who require asylum in South Africa to escape persecution in their home country.
- [7] The three appellants were arrested after the police had conducted an undercover operation in which they bought drugs in the form of tik and cocaine from the appellants on three occasions. All three were actively involved in the transactions. In addition, the first appellant had been arrested on a drugs charge but for a reason that was inexplicable to the investigating officer, the charge had been provisionally withdrawn on his first appearance pending laboratory results being obtained. In addition, when he was asked about the drugs he sold to the police being readily available to him, he explained that before concluding the

first drug deal with the police, he had already made ‘some phone calls to arrange drugs from somebody’. His motivation for turning to the sale of drugs was that his business had taken a turn for the worse. The second appellant has a recent previous conviction for a drug offence.

- [8] The crux of the magistrate’s ruling refusing bail was that, based on the testimony of the investigating officer, there was a likelihood that the appellants would, if released on bail, commit further Schedule 1 offences; that the offences with which they are charged are serious, that they would probably, if convicted, be sentenced to ‘a very long term of imprisonment’ and that this would serve as a strong temptation for them to evade their trial. He concluded that in all the circumstances, they had come ‘nowhere close to meeting the requirements of Section 60(1)(a) of the Act that the interests of justice permits their release on bail’.
- [9] It appears to me that the case against the appellants is a strong one. It was the evidence of the investigating officer that much of the transactions were captured on video and audio recordings. He expressed the view that the undercover policemen, from his viewing of the video evidence acted within the authority that had been granted to them to set the trap.
- [10] The charges the appellants face are undoubtedly serious and the magistrate is correct that, if convicted, they are likely to be sentenced to lengthy terms of imprisonment. There is little that could keep the second and third appellants in East London to face their trial. They have no fixed property or family there. They were able to come to South Africa without a passport and can just as easily leave. The second appellant, who perhaps has a closer connection to East London in the sense that he has lived there for three years, has a previous conviction for a drug offence. That, together with the three drug offences with which he is charged in this matter, points to a likelihood of him committing a Schedule 1 offence again if released.
- [11] Although the first appellant has a family and two businesses in East London, the seriousness of the charges he faces – and he appeared to have been the leader of the second and third appellants – as well as the fact that another charge is likely to be re-instated against him, points to a likelihood that he will avoid his trial and that he will commit a Schedule 1 offence if released on bail.
- [12] Having considered the evidence, I am of the view that it cannot be said that the magistrate was wrong. The appeal is accordingly dismissed.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the appellants: DV Pitt, instructed by Mqanto & Associates

For the respondent: H Obermeyer of the office of the Director of Public Prosecutions,
Grahamstown

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