

SOUTH AFRICA / JUDGMENT

Palan v S (10571/2013) [2013] ZAKZDHC 60 (28 October 2013)

[2013] ZAKZDHC 60

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Gorven

CASE / FILE NUMBER

10571/2013

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NOT REPORTABLE

IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 10571/2013

In the matter between:

VEERAN PALAN

.....Appellant

and

THE STATE

.....Respondent

JUDGMENT

GORVEN J

This is a bail appeal from the Magistrate's Court, Port Shepstone. The judgment in the application was handed down on 12 August 2013. The appellant is charged with two counts of human trafficking and alternative charges involving two different persons, Candice Benjamin and Samantha Newman. He has also been charged with keeping a brothel, procuring Candice Benjamin to have unlawful carnal intercourse and procuring Samantha Newman (the complainants) to have unlawful carnal intercourse. The state claims that the alleged crimes or took place between 19 and 21 July 2013 in the vicinity of Port Shepstone. He appeared along with one other

person accused of the same offences. Both of them were refused bail.

It is common cause that the bail application fell to be considered under the provisions of section 60(11)(a) of the Criminal Procedure Act 51 of 1977 (the Act). This section places an onus on an applicant to show, on a balance of probabilities, that exceptional circumstances exist which, in the interests of justice, permit his or her release on bail.

The appellant sought to discharge this onus by way of producing evidence on affidavit. The state, in response, did likewise.

The appellant claimed to reside at Lot 87, Roslin Avenue, Port Shepstone, a property which belongs to a trust "of which I am a member". He stated that he was married but separated from his wife "for personal reasons" and living with the second applicant. He has fathered two children who are dependent on him. He stated that, at the time of his arrest, he

was doing odd jobs in the employ of his brother which earned him R10 000 per month. He gave no particularity as to the duration

of this employment or its permanence or otherwise. He stated that the monies were used to support his girlfriend (the second

applicant), his wife, his children and him. He indicated that he was previously employed as a driver until November 2012 when he resigned due to ill-health. He suffers from a heart and kidney problems and is being treated by a doctor and has constant medical checkups. He has had an operation to his heart. He then stated that he presently resides at 56 Seawood Lane, Oslo Beach, with his girlfriend and co-accused. He rents the premises and his co-accused rents them from him.

He stated that he was arrested at the police station at Port Shepstone where he went to make enquiries about the two complainants. He did so because he was informed that friends of his co-accused had been arrested. He had not known the complainants and saw them for the first time when he fetched them from the bus station at the request of his co-accused. They had apparently been

arrested at a lighthouse in Margate. He denies all the charges against him. He stated that he will stand his trial and, since the

two complainants have been placed in protective custody, he cannot interfere with them but also has no intention to do so. He has no travel documents and does not intend to apply for any. He has one previous conviction for theft committed in 2003.

The opposing affidavit was deposed to by the investigating officer who is a detective warrant officer in the South African Police Services attached to the Organised Crime Investigation Unit, Port Shepstone. Both complainants were living in Cape Town and during June 2013 offered employment at a hotel in Margate by the second applicant. Both were sent bus tickets and travelled to Port Shepstone, arriving on 19 July 2013. They were taken to a house at five Oslo Beach and introduced to a Chinese female and a person referred to as "the Boss" and also known as "Vees". This is the appellant. They were forced to change into clothing and lingerie which had

been bought for them and, on 20 July 2013, were made to stand in a line so that clients could choose them in order to engage in paid sexual intercourse. Ms Newman was chosen but Ms Benjamin was not. Later that evening they were taken to a place called the Country Lodge to a stag party where males chose women to engage in sexual intercourse. Both of the complainants were chosen by clients but did not engage in sexual intercourse as they indicated to the clients that they wanted to return home. On 21 July 2013, Ms Benjamin was chosen by a client who paid R350 to the Chinese female. When she told this person her predicament, no sexual intercourse took place. In the early hours of the following morning the two complainants

were asleep but were awoken on the basis that more clients had arrived and the appellant screamed at them to get dressed as they

refused to do so. Ms Benjamin was selected by a 17-year-old male who had paid R400 to have sexual intercourse with her. She informed him that she did not want to engage in this but he insisted that he had already paid for her services. She then informed the appellant that she could not do this work any longer. At the same time, Ms Newman, who was sick and crying continuously, told the appellant that she refused to see any further clients. The appellant shouted at her and said that she owed him money and that his son had booked her. Ms Newman contacted Ms Benjamin's uncle, one Mr Peterson, in Mpumalanga and asked him to contact the Port Shepstone police and to come and fetch them at the Lighthouse pub in Margate. This is where they were collected by the South African Police Services and taken to Port Shepstone police station where they were interviewed. The appellant arrived at the station looking for the complainants and was identified by both of them as the person referred to as "Vees" and said to have been the person who had brought them from Cape Town. He was then arrested. His co-accused later arrived at the police station and the women again identified her as the person involved in the matter.

The deponent to the affidavit was concerned about the appellant's flight risk since he had only lived at the given address for the past 3 to 4 months in a rented house. He has no legitimate employment in Port Shepstone. He has no fixed assets and owns nothing else significant material value. His wife is a Chinese national and cannot be found and the investigating officer had been

informed that she had fled the country. He was also concerned that the appellant was aware of the main state witnesses. He claimed that the appellant had already threatened the two complainants whilst under his custody and that they had expressed fear of the appellant and reprisals if the appellant was released on bail. He took the view that bail conditions prohibiting any communication would not be effective since they had already intimidated and threatened the two complainants. He stated that the appellant had not declared any legitimate source of employment or income and that, if he remained in prison awaiting trial it was unlikely that he would suffer any legitimate financial impediment. The investigation would be completed within a period of three months.

Section 60(4) of the Act provides, in its relevant parts, as follows:

‘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 circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security’

Since this is an appeal, it is governed by s 65(4) of the Act which reads 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.’

In *S v Barber*¹ Hefer J said 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 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.’

As indicated, the appellant bore an onus to prove, on a balance of probabilities, that exceptional circumstances existed which in the interests of justice permitted his release.² This section has been held to be constitutional, even though it places such an onus on an applicant for bail.³ Of more difficulty, however, is the assessment of what is meant by “exceptional circumstances”. I agree with the formulation of Labe J in *S v H4* to the following effect:

‘[E]xceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly...to an accused person’s specific application. What a court is called upon to do is to examine all the relevant considerations...as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under s 60(11)(a)’.

In considering the application, the learned magistrate noted that only personal circumstances were placed before the court. The appellant did not give any indication as to the strength of his case, satisfying himself with a bare denial. He balanced those

personal circumstances which, he indicated, “may show that in all probability they will stand trial”, with factors against the appellant. He did not enumerate these factors. They are, however, significant. It appears that the case against the appellant is a strong one. The two complainants are available to give evidence and have provided statements. One of them called the uncle of the other who intervened and telephoned the police which gave rise to the sequence of events leading to the appellant’s arrest. The appellant gave conflicting evidence as to his place of residence. The appellant’s claim to be employed has no content to it, particularly when its basis is that he has been employed by his brother to do odd jobs after he had left his employment as a driver in November 2012. As indicated above, he gave no details concerning the kind of work he did, the duration of his employment and the likely continuation thereof. In addition, there are state witnesses who are not under protective custody such as the uncle of Ms Benjamin and the clients who either procured or attempted to procure the services of the two complainants. These clients are likely to be known to the appellant if the version of the complainants is correct and he may attempt to influence them.

Whilst he has, on a previous occasion, stood trial, he gave no indication as to whether on that occasion he had been released prior to trial or was in custody awaiting trial. This is therefore a neutral factor as to whether or not he is likely to attend trial. There is no indication of delay and the investigation is said to be likely to be completed within three months. A further

factor which tends to count against the appellant is that his girlfriend, who is sought by the police, is at large. Since the

appellant was employed in Cape Town as recently as November 2012, he may well be a flight risk.

This is not a situation where the circumstance of the appellant are out of the ordinary or where the appellant proved exceptional circumstances warranting his release in the interests of justice. In all the circumstances, I cannot conclude that the learned magistrate was wrong in refusing the application. I am therefore not entitled to interfere on appeal and, even if I were so entitled, would not do so in the circumstances.

In the premises the appeal is dismissed.

DATE OF HEARING: 28 October 2013

DATE OF JUDGMENT: 28 October 2013

FOR THE APPLICANT: WD Lombard instructed by NONJABULO

MOLEELE ATTORNEYS.

FOR THE RESPONDENT: V Alamchand instructed by THE DIRECTOR OF PUBLIC PROSECUTIONS.

1 1979

(4) SA 218 (D) 220E-H

2S v Rudolph 2010 (1) SACR 262 (SCA) at para 9.

3S v Dlamini; S v Dladla& others; S v Joubert; S v Schietekat

[1999] ZACC 8; 1999 (2) SACR 51 (CC).

4 1999

(1) SACR 72 (W) at 77e-f.

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