

SOUTH AFRICA / JUDGMENT

Patel v S (CC209/2015) [2023] ZALMPPHC 44 (4 July 2023)

[2023] ZALMPPHC 44**COURT**

Limpopo High Court, Polokwane

BEFORE

Raulinga

CASE / FILE NUMBER

CC209/2015

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Source record**HIGH****COURT OF SOUTH AFRICA****(LIMPOPO****DIVISION, POLOKWANE)****CASE****NO: CC209/2015****1.****REPORTABLE: YES / NO****2.****OF INTEREST TO OTHER JUDGES: YES / NO****3.****REVISED.****DATE:**

04/07/2023

In

the matter between:

RAMEEZ

PATEL Applicant

and

THE

STATE Respondent

JUDGMENT

RAULINGA, J

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

Introduction

- [1] These are two consolidated applications wherein the applicant Mr Rameez Patel, seeks the amendment of his bail conditions imposed by the Magistrate Court Polokwane on 2 June 2015. In addition to this, the applicant also seeks leave of this court to recall a state witness to adduce further evidence.

Background

- [2] On 16 April 2015, Mr Patel was arrested and charged with the murder of his late wife, allegedly committed in the region of Polokwane. On 2 June 2015, Bail was granted in the amount of R250 000 subject to the conditions that:
- (a) The accused reports to the Westenburg Police Station three times a day, and
 - (b) The accused is restricted to the Magisterial district of Polokwane and may not leave the Magisterial district without prior written approval of the investigating officer.
- [3] A few months later in 2015, the applicant's bail conditions were amended without an application being made to the Court with the consent of the state advocate, for the purposes of enabling the applicant to attend to his other court matters. The amended bail conditions are as follows:
- (a) The accused reports to the Westenburg Police Station on Mondays;
 - (b) The accused may not leave the Magisterial district without prior written approval of the investigating officer.
- [4] The criminal proceedings were transferred to the High Court for hearing and consistent with the practice in this division the matter was allocated to a pre-trial judge whose task is to case manage the matter until it is certified trial ready. The matter was certified trial ready and the criminal trial began on 30 June 2016.

- [5] During the trial, a state witness Mr Razeen Patel who happens to be the applicant's brother testified before the Court and in his evidence he did not implicate his brother in the alleged crime of murder. In 2019, the state recalled Mr Razeen. The witness changed his initial statement and testified that his brother, the applicant is guilty of murder as he is the one that committed the offence. The defence (the applicant) then informed the Court that it will not adduce further evidence or call any witness.
- [6] On 16 May 2023, the applicant launched an application to amend his bail conditions, recall the state witness, and adduce further evidence before this Court. Arguments were heard on the day and also the following day, as the state had not filed their Heads of Argument. The State was requested to file Heads of Argument later in the afternoon, and the State complied with the Court's requests. The state opposes the application in its entirety.

Issues

for determination

- [7] The issue before this Court is whether a case has been made out for the amendment of the bail conditions imposed by the Regional Magistrate Court Polokwane. Furthermore, whether it is fair and reasonable to recall a witness and adduce further evidence.

Submissions

before this Court Applicant's Submissions Jurisdiction

- [8] The applicant submits that he brings this application to amend his bail conditions in terms of section 63(1) of the Criminal Procedure Act (CPA).[1] The applicant submits he is not appealing the bail conditions in terms of section 65(1) of the CPA, but this is an application to amend his bail conditions.

Merits

- [9] The applicant submits that section 12(1)(a) of the Constitution, provides that everyone has the right "not to be deprived of freedom arbitrarily or without just cause." Additionally, every accused person has a right to be presumed innocent until proven guilty. The applicant relies on section 35(1)(f) of the Constitution, that he has the right "to be released from detention if the interests of justice permit, subject to reasonable conditions."
- [10] The applicant argues that the purpose of granting bail is to enable the accused to exercise his right to freedom of movement and not prejudice him. The applicant submits he seeks to amend the bail condition, which requires him to apply to this Court for permission to exit its jurisdiction.

- [11] The applicant submits on several occasions he had to apply to this Court, to obtain permission to leave the Court's jurisdiction. The applicant submits he obtained the order to travel outside the Court's jurisdiction. The applicant submits, however, in certain instances he suffered prejudice as he was unable to get hold of the prosecutor and the investigating officer.
- [12] The applicant contends that he was unable to travel for business purposes, on certain weekends because he was unable to obtain consent from the Court, as he could not get hold of the prosecutor. After all, it was on weekends. By way of example, the applicant submits on one occasion he had to travel with his wife on 6 December 2021, to a medical specialist in Johannesburg. His legal representative informed the Provincial Head of detectives, who advised through a letter dated 5 December 2021, that he should proceed to obtain a court order as usual. However, the prosecutor was not cooperative.
- [13] The applicant argues that it is expensive to always approach the Court when seeking an order to leave the jurisdiction of the Court. The applicant submits that he suffers financial prejudice and that he is not a flight risk. The applicant submits that he has complied with all his bail conditions and therefore, it is fair that this bail condition should be amended as it infringes on his constitutional right to freedom.
- [14] During the oral argument counsel for the applicant proposed the amendment of the bail conditions of 2 June 2015, to be as follows:
- (a) The applicant can leave the Court's jurisdiction and he may report to the police station in the area he is going.
- [15] The applicant submits that he brings this application to recall a witness in terms of section 167 or 186 of the CPA. The applicant argues that in the interest of justice, this Court ought to exercise its discretion and allow the defence to recall the state witness and adduce further evidence. Additionally, the applicant contends that he wrote to the prosecutor requesting the state witness to be recalled but this proposal was rejected even though the state was furnished with new evidence.
- [16] The applicant submits that in May 2021, Mr Razeen circulated a video among his family members in which the state witness alleged that he falsely implicated the applicant in the murder of his wife and that the applicant is innocent. Additionally, he was influenced by certain police officials and family members to falsely implicate the applicant.
- [17] The applicant submits that after the video circulated, the legal representative (attorney) of the state witness informed him that a senior member of the Patel family instructed him, and the senior member also conducted investigations with regard to what was communicated in the video.

[18] The applicant submits that a clinical psychologist has assessed the state witness's psychological well-being and investigated his conduct in relation to this criminal trial. Furthermore, the applicant submits that the legal representative of the state witness has provided the applicant with the psychological report from the clinical psychologist. The applicant submits he wishes to call the clinical psychologist to present his findings.

Respondent's

submissions

[19] The respondent submits that there is a valid reason why the bail conditions of the applicant are that he should not leave the Court's jurisdiction without the consent of the investigating officer was set. The respondent submits that the investigating

team is monitoring his movement. Therefore, it is not in the interest of justice to amend the condition.

[20] The respondent rebutted the applicant's proposal that the applicant can simply report to the police station in the area he is going to. The respondent explained how it works and that they will not be able to monitor the applicant's movements if the conditions are amended in that regard because they cannot open registers everywhere.

[21] The respondent submitted that the letter the applicant relies on dated 5 December 2021, was fraudulently obtained as General Manala's affidavit stated that he never signed such a letter and it is unknown to him even though it comes from his office and the matter is being investigated. Additionally, the respondent argues that the applicant has connections in the South African Police Services, and as a result, he has captured police and they will not be able to monitor his movements.

[22] The respondent argues that the applicant does not have absolute rights and therefore, his right to freedom can be limited. The respondent

contends that there has never been a time wherein the prosecutor, was unreachable during weekends or public holidays when the applicant

needed consent. The respondent argues that it is false and misleading for the applicant to submit that the prosecutor was unavailable to assist the applicant in certain instances.

[23] The respondent submits that the condition that the applicant complains of is relaxed as he can simply send an sms to the prosecutor. The respondent contends that this bail condition has been effective for eight years and the applicant cannot come now and complain about it.

[24] The respondent submits that regarding the financial prejudice the applicant claims he suffers; the respondent submits that this contention must be rejected because the trial is coming to an end. Additionally, the application must be dismissed.

- [25] The respondent argues that the applicant has submitted a contradictory statement with regard to how he obtained the video. The respondent argues that during the trial the applicant submitted that he received the video from an unknown source, second, he alleged it is from social media and currently he claims it is from the state witness's legal representative.
- [26] The respondent submits the applicant (defence) is not allowed to consult with the same state witness that testified in the same trial. Additionally, the respondent submits that a criminal trial is a factual enquiry, and further evidence that the applicant wishes to adduce from the clinical psychologist is not relevant to the facts before this court.
- [27] The respondent submits that the purpose of recalling a witness is to clarify issues and therefore a witness cannot be recalled with an expectation to contradict the evidence he provided.

Jurisdiction

- [28] Section 63(1) of the CPA, grants an accused the right to approach a court on application, before which a charge is pending, to amend or supplement any of the bail conditions imposed under section 60 or section 62 of the CPA. This Court's jurisdiction is engaged by virtue of the provisions of section 63(1) of the CPA.

Amendment of bail conditions

- [29] Section 60(12) of the CPA empowers a bail court to attach conditions, that in the court's opinion are in the interest of justice, to release an accused on bail. Section 62 of the CPA, which addresses bail conditions, is connected to section 60(12). These requirements ensure that any concerns the state may have regarding the release of an accused individual are addressed.[2]
- [30] It is common knowledge that bail conditions must be subject to oversight by the relevant authorities, as well as being practical and in the interest of justice. In *Rex v Fourie*,[3] the court held as follows:

the proposal put forward on behalf of the accused in respect of bail did not "seem practical... it is difficult to see how the police can exercise sufficiently close supervision over the accused to ensure the fulfilment of these conditions. The suggestion does not offer a solution of the difficulties attendant on the accused being admitted to bail."

The court in *Rex* found that the bail condition must be such that police must be able to sufficiently closely supervise the accused.[4]

- [31] The critical concern of the applicant is that the applicant seeks an amendment of his bail conditions to the extent that he can travel outside the province of Limpopo on business, without permission of the OPP and/or Investigating Officer and/or Branch Commander. It appears to me that the key question that must be answered when a court is requested to amend bail conditions, is whether it is in the interest of justice to do so. This is clear solely

from reading section 60(12) of the CPA, which mandates that courts must impose justifiable bail conditions. This was bolstered by the Supreme Court of Appeal in *Savoi v S*, in which the Court held:

"The task of the trial judge was primarily to consider the interests of justice in the case before her. If she was satisfied that the rights of the appellant were being frustrated by the manner in which the designated officials were carrying out their duties, as she was, the terms of the order could have been adapted to meet the perceived difficulties with due regard to the maintenance of adequate State oversight. That, no doubt, is why the appellant, in its notice of appeal, suggested a revised formulation. In so far as an inconsistency might have arisen with orders made in other courts, unless the conflict was irreconcilable (which it was not) that was a matter that could be left to the parties to sort out." [5]

[32] In order to decide what would be in the interest of justice, this Court must exercise judicial discretion in the form of a value judgment, balancing the rights of the accused with those of the public. [6] In exercising the Court's discretion, the Court is permitted to use the list of pertinent factors contained in sections 60(4)-(5) to (9).

[33] In *Shefer v. Director of Public Prosecutions*, [7] the court held that the party seeking the amendment has the burden of proof on a balance of probabilities. The method in *Shefer* is persuasive because, in an application in terms of section 63(1), the applicant must advance evidence that indicates on the probabilities

that an amendment of the bail conditions will:

- (a) give confidence to, and
- (b) be the best expression of the interest of justice.

[34] The applicant submitted in his affidavit and argument that he had abided by his bail conditions and sought permission to travel as required, and a consent order was granted, in terms of which it was ordered that the applicant was permitted to travel. However, on one occasion the prosecutor was uncooperative or unreachable to obtain permission to travel. This is one occasion is disputed and denied by the respondent.

[35] The applicant's submission that he suffers financial prejudice is rejected and is not justifiable. The criminal trial is nearing an end and these conditions have been effective for eight years. The applicant has not shown any changed circumstances, that warrant the amendment of the bail conditions.

[36] The respondent raises serious allegations of fraud and submits they are still monitoring the applicant. The respondent argued that if the bail conditions are amended it will not be in the interest of just as they will not be able to monitor the applicant.

[37] The cumulative impact of some of the issues discussed in the paragraphs above infused with my discretion and decision that the applicant has failed to convince this Court that the probabilities compel a conclusion that the amendment of the bail conditions will be in the interest of justice.

Adducing further evidence and recalling a witness

[38] The defence closed its case on the last day allocated for trial. The applicant seeks to recall a witness in terms of section 167 of the CPA and adduce further evidence in terms of section 186 of the CPA. One of the concerns relates to the implications of the state witness's testimony.

[39] The state witness testified that the applicant is guilty of the murder of his wife, despite initially, he did not implicate the applicant until he was recalled. The applicant seeks to adduce further evidence, to support his case that the state witness falsely implicated him. The state witness is currently living with the applicant. The applicant submitted contradictory statements with regard to how he obtained the video he seeks to adduce to support his case.

[40] The respondent opposes the application to recall the witness and adduce further evidence. The respondent argues the state witness cannot give evidence for the state and then later for the defence.

[41] It is amusing that the state witness's legal representative provided a confirmatory affidavit that he was instructed by a senior member of the Patel family instead of his client to do what, it is unknown. Furthermore, he gave the applicant the psychological report of the state witness. It is worrisome as to how the applicant obtained the video and he currently resides with the state witness which leaves a bad taste in the mouth.

[42] In *S v Karolia*,^[8] the court provided meaning to section 186 of the CPA and held as follows:

"The section makes it plain that the court a quo was entitled to at any stage of the proceedings which would include a stage even after both the state and the defence had completed their arguments, to cause witnesses to be subpoenaed. (*S v Gerbers* 1997

(2) SACR 601 (SCA)). There is no requirement that the court give any notice to the parties before deciding to so act. The court has a wide discretion in the matter (see for example *Rex Hepworth* 1928 AD 265 at 277 and *R v Gani* 1958

(1) SA 102 (AD))."

[43] Section 186 of the CPA provides:

"The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."

[44] The commentary in Hiemstra's Criminal Procedure on this section states:

"This section and its associate section 167 {which relates to the recalling of witnesses by the court and the calling of persons who are present) give a criminal court a more inquisitorial role than that enjoyed by a civil court. The judicial officer has to see to it that justice is done. It is not the function of the judicial officer simply to decide on what the parties place before the court. The famous remark by Curlewis JA in R v Hepworth 1_ 928 AD 265 at 277 is all the more important in view of the exhortation to fairness in C 35(3):

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".

"The judge's remarks not only apply in the consideration of this section but are particularly apposite to it. How the dual role of a person who decides, and at the same time administers justice, is fulfilled calls for sound judicial discernment. On the one hand, the court searches for the facts but, on the other hand, a perceptibly even- handed trial is the goal. How far a court will go to repair the carelessness of a party is a matter of sound common sense in each case."

[45] A Court must therefore adopt absolute impartiality when considering whether to receive further evidence or not. And if further evidence is directed then the court must ensure that strict neutrality is maintained in the way questions are asked. I am of the view that a witness cannot be a witness for the state and then later change to be a witness of the defence. There is a possibility

that the state witness was coerced into attending the psychological assessment and to have made that video.

[46] Having considered the Applicant's consolidated Applications in their entirety, the following order is made:

1. The applications are dismissed.

J RAULINGA

Judge of the High Court

Date of Hearing: 16 and 17 May 2023

Judgment

delivered: 4 July 2023

APPEARANCES:

For the Applicants: Adv MS Khan SC

Adv M Thipe

Attorney for the Applicants: Chaya Attorneys

For the Respondent: Adv LL Mashiane

Instructed by: National Prosecuting Authority

[1] 51 Of 1977.

[2] D.J.V.V and Others v S [2011] ZAGPPHC 226; 2012

(2) SACR 492 (GNP) at para 55.

[3] 1947

(2) SA 547 (O) at page 577.

[4] Id.

[5] [2011] ZASCA 235; 2012

(1) SACR 438 (SCA) at para 47.

[6] S v Dlamini, S v 0/ad/a and Others; S v Jaubert; S v Schietekat [1999] ZACC 8; 1999

(4) SA 623[1999] ZACC 8; ; 1999

(7) BCLR 771 at para 46.

[7] 2004

(2) SACR 92 (TPD) at para 30.

[8] [2004] ZASCA 49; [2004] 3 All SA 298 (SCA); 2006 (2) SACR 75 (SCA) at para 9.

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