

SOUTH AFRICA / JUDGMENT

Pienaar v S (A132/2020) [2020] ZAFSHC 257 (19 October 2020)

[2020] ZAFSHC 257

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders

CASE / FILE NUMBER

A132/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A132/2020

In the appeal between:

ANDRIES BENJAMIN PIENAAR

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J

HEARD ON: 15 OCTOBER 2020

DELIVERED ON: 19 OCTOBER 2020

- [1] This matter came before me as an urgent appeal against the refusal of bail by the magistrate.
- [2] The record reveals that appellant has not pleaded yet and obviously no evidence under oath had been led yet. As such the Director of Public Prosecutions may put or add such charges as it prefers. When the matter served before the magistrate the charges consisted of public violence, attempted murder and violation of sec 17 of the Riotous Act 17 of 1956. It was common cause that such charges were charges in terms of Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA).

- [3] The appellant did not testify under oath before the magistrate. He relied upon a sworn affidavit. He is 51 years of age and resides in Senekal. He is married and has two daughters. His wife is a teacher and he generates an income of 30 000 monthly. He does not have a valid passport since his had expired. He grew up in Senekal. He has no previous convictions indicating that he has a disposition towards violence. The affidavit states that he has no knowledge of the identity of potential witnesses nor the nature of evidence to be tendered against him. He states that he will not interfere with any state witnesses. He does not have access to the police docket at this stage and he would not conceal, tamper or destroy any evidential matter should he be released on bail. He is concerned that future incarceration will not only inflict harm to his business but will financially devastate him. He is on medication as he had been diagnosed with bipolar disorder. His medication needs to be adapted constantly.
- [4] The state opposed the application. It led the evidence of Brigadier Poshodi. The Brigadier explained that he was leading an investigation team because of events that are perceived to be directly emanating from a murder case at Paul Roux. The Brigadier in his evidence dealt to a certain extent with the facts and history relating to the charges against appellant. It would appear that the South African Police Service arrested two individuals in connection with a murder and when they were to appear in court, a group of people gathered outside the court premises. The appellant addressed the group and shortly thereafter appellant and an estimated 120 other individuals entered the court premises searching for the individuals arrested in connection with the murder. A female police officer who attempted to prevent the group from entering was assaulted in the sense that she was pushed out of the way and "throttled". Gunshots were fired inside the court building and the holding cells at the court premises damaged. A police vehicle was also set alight. During testimony three video clips were referred to. Those video clips were also shown in this court during hearing of the appeal.
- [5] The magistrate in a comprehensive judgment came to the conclusion that appellant failed to show that it would be in the interest of justice to be released on bail. He concluded that it would jeopardize the administration of justice, undermine public peace and security, will cause public outcry, cause shock and undermine public confidence in the criminal system in the event appellant is released on bail.
- [6] Being a bail application falling under Schedule 5 meant that the onus was on appellant to prove that the interests of justice permits that he be released on bail.
- [7] Sec 60(4) of the CPA reads as follows:
- "(4) The interests of justice do not permit the release from detention of an accused where one of 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 other particular person or will commit a Schedule 1 offence;
 - (b) where there is a 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 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;... "
- [8] In considering whether the ground in subsection 4(d) has been established, the court may, apart from the prescribed factors, take into account "any other factor which in the opinion of the court should be taken into account" (subsection (8)(d)).
- [9] Section 60(8A) prescribes that in considering whether the ground in subsection 60(4)(e) has been established the court may save for the prescribed factors, also take into account whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed; whether the shock or outrage of the community might lead to public disorder if the accused is released; whether the safety of the accused might be jeopardized by his/her release; whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused and whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.
- [10] It was common cause that there is no likelihood that appellant would abscond. The question was posed to Brigadier Pashodi and to the best of his knowledge he had no indication or reason that appellant would abscond. In this respect the record reflects the following in cross-examination:

MR POTGIETER: "... You would agree with me that there is no risk that he might abscond.

MR POSHODI: "I would agree your worship."

- [10] On a question to Brigadier Poshodi whether appellant jeopardized or will jeopardize the functioning of the criminal justice system he testified:

"... the possibility of influencing the witnesses is there and that might affect the administration of justice."

In addition thereto the witness confirmed not having any evidence that appellant attempted to influence any witnesses. The record also reflects the witness testifying to the effect that "... the appellant(sic) might be involved again in incidents of these nature."

[11] Evidence was also tendered that information was received that certain political organizations might take the law into their own hands in the event the appellant be released from custody.

[12] The use of the word "likelihood" in sec 60(4) is of imperative importance. This connotes that a mere possibility or suspicion is not enough, and there must be a probability. The Constitutional Court in *S v Dlamini, Sv Dladla and Others; Sv Joubert: Sv Schietekat* 1999(2) SACR 623 (also cited elsewhere) directed as follows at para [53]:

"The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventative detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds."

[11] At the same time it is evident that sec 60(4)(e), as mentioned, requires the same standard of proof as it determines that the interest of justice do not permit the release from detention of accused "where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security,"

In this respect the Constitutional Court remarked as follows in para [57]m of *Schietekat* supra:

"It is important to note that sub-s (4)(e) expressly postulates that it is to come into play "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-s 4(e) also expressly stipulates that a finding of such exceptional circumstances has to be 'established on a preponderance of probabilities (likelihood). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-s

(9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for sub-ss (4)(e) and (BA) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all. Incorrect application of the criteria listed in sub- s (4) by elevating one of them unduly, is a matter for the criminal justice system to remedy. It must do so by applying s 60(4)-(9) in the balanced manner prescribed and in accord with "the spirit, purport and objects of the Bill of Rights." The limitation of the right is therefore as narrowly tailored as possible to achieve the compelling

interests in maintaining public peace, and meets the requirement of proportionality between this purpose and the nature of the right."

- [12] My reading of the record reflects no concern that appellant will not appear in court or abscond. My reading of the evidence does not lead to any conclusion that the likelihood of any of the provisions of sec 60(4) had been proven requiring appellant's continuous detention. At best evidence by the state itself amounts to no more than concerns and raised possibilities.
- [13] I agree with Semenya, J that an important consideration in an application for admission to bail is whether the appellant would defeat the ends of justice by evading his trail. *S v Ndhuli* 2020 (1) SACR 1998 (LP) at 99 par [4].
- [14] In my view therefore the appellant succeeded in showing not only that he is not a flight risk, but that the interest of justice does not demand his continued detention.
- [15] The parties were ad idem in the event of the appeal succeeding, that bail should be set in the amount of R 15 000-00. It was not suggested that any specific bail conditions should be set, save that appellant is not to interfere with any state witnesses.
- [16] The conclusion that I reach is that the appeal should succeed.
- [17] In the result the following order is issued:
1. The appeal is upheld.
 2. The order of the trial court that the appellant is to remain in custody is set aside and replaced with the following:

"In terms of Section 60 of Act 51 of 1977 it is ordered:

1. That the accused be granted bail in the amount of R 15 000-00 cash.

2. Upon payment of the said sum of money, the accused shall be released from custody on condition that:

2.1 He appears personally at each and every court date at times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charges to which the offences in this case relates, or where sentence is not imposed forthwith after verdict and the court extends bail, until sentence is imposed.

2.2 That the accused does not communicate with witnesses for the prosecution, either directly or indirectly.

2.3 That the accused does not communicate with witnesses for the prosecution, either directly or indirectly.

2.4 The accused is informed that, in terms of section 67(1) Act 51 of 1977, if, after his release on bail, he fails to appear at the place and on the date and at the time appointed for his trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings, or fails to comply with the above conditions, the Court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for his arrest. The accused is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition."

C. REINDERS, J

On behalf of the appellant: Adv J. Potgieter

Instructed by:

Adriaan Janse van Rensburg Inc

BLOEMFONTEIN

On behalf of the respondent: Adv. J.Roothman

Director: Public Prosecutions

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