

SOUTH AFRICA / JUDGMENT

Pillay v S (A221/2020) [2020] ZAGPPHC 768 (17 November 2020)

[2020] ZAGPPHC 768**COURT**

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

A221/2020

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Source record**IN THE REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION, PRETORIA)****CASE NO: A221/2020****REPORTABLE:**

NO/YES

OF

INTEREST TO OTHER JUDGES: NO/YES

REVISED

DATE:

17/11/2020

ROLSTON

PILLAY

APPELLANT

and

THE

STATE

RESPONDENT

This matter was enrolled for hearing on 09 November 2020, and dealt with or determined on the basis of the papers or record and written argument filed on behalf of the parties, without appearance and oral argument.

JUDGMENT**KHUMALO J****INTRODUCTION**

[1] This is an Appeal in terms of s 65

(1) (a) of the Criminal Procedure Act 51 of 1977 ("the Act") against the refusal by the Regional Court, Benoni, to extend the Appellant's bail following his conviction on a charge of murder and sentence to fifteen (15) years imprisonment. The court a quo granted the Appellant leave to appeal and to adduce new evidence.

[2] The Appellant was convicted for a murder of a 17-year-old boy he shot with a firearm on 19 May 2017 at Benoni. On being sentenced on 13 August 2020, his bail was withdrawn and his subsequent application to be admitted to bail on the same day was refused. He was duly represented.

[3] The offence of which the Appellant is convicted falls under Schedule 5 and therefore the bail application is subject to s 60 (11)

(b) of the Act. In terms thereof the Appellant is required to adduce evidence that satisfies the court on a balance of probabilities that it is in the interest of justice that he be released on bail. The criteria involve the weighing up of the interest of the accused, in liberty against those factors which suggest that bail be refused in the interest of society, taking both trial related and extraneous factors into consideration; see *S v Dlamini*; *S v Dladla & Others*; *S v Joubert and Sv Schietekat* [1999] ZACC 8; 1999

(2) SACR 51 (CC). The focus not being to decide if the interest of justice permits the release of the Applicant pending trial but described as protecting the investigation and prosecution of the case against hindrance.

[4] The interests of justice would, in terms of s 60 (4) of the Act, not permit the release of the accused if one or more of following grounds are shown to exist:

(a) Where there is a 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 a 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 a likelihood that the accused, if he or she is 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.'

[5] Section 60(6) lists several factors which a court may take into account, amongst other relevant things, in order to consider whether the ground stated in ss (4) (a) and (b), namely the likelihood that if he was released on bail will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, and the likelihood of him evading his trial, has been established.

[5.1] The factors in ss 4 (a) include: the degree of violence towards others implicit in the charge against him; any threat of violence which he may have made to any person; any resentment he is alleged to harbour against any person; any disposition to violence on his part, as is evident from his past conduct; any disposition to commit offences referred to in Schedule 1 as is evident from his or her past conduct; the prevalence of a particular type of offence; any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; any other factor which in the opinion of the court should be taken into account.

[5.2] The factors in (b) are: his emotional, family, community and occupational ties to the place of prosecution; his assets and where they are situated; his means of travel and available travel documents; whether he can afford to forfeit the amount of money paid in relation to bail; prospects of extradition; the nature and gravity of the offences charged with; the strength of the case against him and the Incentive that in consequence he may attempt to evade his trial; whether his extradition could be readily be effected should he flee across the borders of South Africa; the nature and gravity of the likely punishment in the event of the accused being convicted; the binding effect of possible bail conditions and the ease with which they could be breached, and any other factor which in the opinion of the court should be taken into account.

[6] The learned magistrate in the court a quo in refusing the Appellant bail found that the Appellant had not discharged the onus that it is in the interest of justice that he be released on bail. Although he had taking into account the Appellant's personal circumstances he nevertheless found that the appellant is not a flight risk but due to the fact that the appellant had interfered with a state witness, it is not in the interest of justice for him to be granted bail.

[7] Appellant contends that the learned magistrate erred on the following grounds of fact and law:

[7.1] He proceeded from a wrong premise which made him concentrate primarily on the seriousness of the offence without taking cognizance of the fact that the appellant has reasonable prospects of success on appeal and that he has appeared in court religiously.

[7.2] He found without proper justification that the Appellant will intimidate and/or influence the state witness.

[7.3] He failed to find that the personal circumstances of the Appellant, his previous history of appearing in court, the fact that he has reasonable prospects of success on appeal, the fact that he has a fixed address and no previous convictions as well as the current Corona epidemic, these cumulative factors, renders the release of the Appellant on bail to be in the interest of justice.

[8] In his heads of argument the Appellant furthermore argued that the court a quo failed to take cognizance that he was not a flight risk, with strong family and emotional ties in the jurisdiction area of the trial court, where he was employed as a traffic officer for many years; did not threaten or intimidate any of the state witnesses throughout the trial. It is emphasised that the bail application falls within the ambit of schedule 5 and not schedule 6 as in the *S v Brunettis* (676/2002)

[2003] ZASCA 4 (25 February 2003).

[9] He as a result alleges that the learned magistrate had wrongly exercised his discretion not to remit the Appellant on bail when he ought to have found that it is indeed in the interest of justice for the Appellant to be remitted on bail.

[10] In terms of s 65 (4) (b) of the Act, the Appellant has to persuade the appeal court that the decision of the magistrate, to refuse him bail was wrong. The section reads:

‘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 opinion the lower court should have given.’

[11] It is imperative for the court hearing an appeal to take cognizance that the powers and functions of a court hearing an appeal under s 65 are similar to those in an appeal against conviction and sentence; see the remarks of Hefer J in *5 v Barber* 1979 (4) SA 218 (D) 220E-H that:

"It is well known that the powers of this court are largely limited where the matter comes before it on appeal not as a substantive application. 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 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 ...Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is a wrong one."

[12] In *S v Porthen & Others* 2004 (2) SACR 242 © Binns-Ward AJ at [7] indicated that he had no quarrel with Hefer AJ's observation in *Barber* as a general proposition. He however considered it necessary to point out that a court hearing a bail application (ie, the court a quo) exercises a wide as opposed to a narrow (or strict) discretion. He at [16] said the following with reference to *S v Botha en n ander* 2002 (1) SACR 222 (SCA):

'In so far as the quoted dictum in *S v Barber* (supra) might be amendable to be construed to suggest that the appellate court's power to intervene in terms of s 65

(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s 60

(11) (a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case supra. See paras [21]-

[27] of the

judgment.

It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the Appellants have not discharged the onus on them in terms of s 60

(11) (a) of the CPA. (The fact that the appeal in Botha's case was an appeal from the decision of a bail application by the High Court as the court of first instance does not affect the principle in issue.)'

[13] In the court a quo, the Appellant submitted viva voce evidence in support of his Application, led by his legal representative Mr Van Wyngaardt: He indicated his personal circumstances to be as constituted in Exhibit H and F which was not attached to the record which he confirmed to be that he has no other previous convictions but a pending matter in Kempton Park for theft. He is out on a bail of R5000 in that matter. He has never absented himself for any appearance in that court, except when he was in custody with the present matter. He resides in Benoni with his wife and daughter in a property he has been renting for the past one and a half years from a person called Boetie. He does not know Boetie's actual name. It is a verbal lease agreement. He owns TVs and cars. Although there was a CCMA order that he be reinstated at work, he still has not been reinstated.

[14] In this matter, he was summoned to appear by way of a J175. Since then he appeared in court on each and every sitting until he was convicted and sentenced. He denied that after his conviction he approached the boy witness who testified in his trial and asked the witness to go and meet with the prosecutor to make a statement that he was asked by the investigating officer to lie during the trial. He indicated that the four firearms he possessed were confiscated by the police from his house. He is prepared to hand over his South African passport. He offered a bail amount of R2 500, and pointed out that if a higher amount is

required his father who works for the Defence Department will assist.

- [15] The state led the evidence of the investigating officer Mr Naicker who testified in opposition of the granting of bail. He alleged that on 10 June 2020 a statement was obtained by Warrant Officer Pretorius from Mphilo Khubeko (Khubeko), a state witness who testified during the trial that resulted in the Appellant's conviction, in which the witness alleged that the Appellant approached him when he was at a robot and told him that he is needed at court he must go and see the white lady, the control prosecutor. He was picked up by a coloured guy from the robot who took him to Actonville police station instead where a statement was written for him and never read back to him. It is the same police station where the two statements that were attached to the leave to appeal were obtained by a Sergeant Boer who works for the tracing team in the Ekurhuleni District. The statement were however commissioned in Benoni. According to Khubeka's statement, Boer picked him up from the robot. He (Naicker) only brought Khubeka to court as an investigating officer. He confirmed that a case of assault was opened by another state witness Kulani Mabunda (Mabunda) against a black policeman who is said to have been in his company. This witness did not come to testify during the trial. Naicker denied approaching or influencing Mabunda besides collecting Khubeka for court. He confirmed that a docket was opened on a Thursday at Actonville where Mabunda's statement was made and commissioned. The docket was then transferred to Benoni and on the next day, Friday the case or complaint was withdrawn or no/le prosecute. The document was then requested by a Mr Mabengula on the same day it was no/lien. There was nevertheless a decline to prosecute.
- [16] On cross examination Naicker's testimony was that he never spoke to Boer even if he is the Investigating Officer to avoid allegations of interference. A statement allegedly made by Khubeka on 16 May 2020 obtained by Boer in which Khubeka alleges that he was influenced by Naicker and a traffic cop lady was put to him. He reiterated that he only picked Khubeka up and took him to the control prosecutor's office after he was told that Khubeka was required at court. He was asked to confirm that the witness has indeed now changed his evidence regarding the murder. It was put to him that there is a possibility that Khubeka was influenced and false statements made.
- [17] Mr Wyngaardt had during the Application argued to indicate that Appellant not a flight risk, that the Appellant has been on bail during the whole trial and co-operated with the police and court by attending his trial religiously until he was convicted. Further, he denied that there was any attempt to influence a witness and argued that if the Appellant did, he was trying to assist by telling a witness to go and see the prosecutor. The Appellant also has good prospects of success on his appeal due to the new evidence of the witness he has been given permission to lead. That is if the new evidence is found to be correct there is a great probability that he can be acquitted at the end of the day. Therefore, to keep him in jail during COVID 19 pandemic when its unknown how soon the appeal is going to be heard under such circumstances would not seem to be in the interest of justice.

- [18] On appeal, the argument on behalf of the Appellant is persisted with, that the magistrate ought to have found that it is indeed in the interest of justice for the appellant to be remitted on bail for it is common cause that he is not a flight risk, he did not intimidate or threaten any of the witnesses and he has an arguable case on appeal. Also emphasizing that this bail application falls within the ambit of schedule 5 and not 6.
- [19] The state on the other hand argued that there is evidence under oath that the Appellant attempted to influence a state witness who according to the defence had already made two previous statements, on one alleging to have been intimidated, under questionable circumstances which makes it clear that someone was working with the tracing unit in Actonville where the statements were made. So there is an issue of interference with a witness. The state witness the Appellant apparently impelled to go and make a statement had already testified. Appellant had told the witness to go to the prosecutor to make another statement when the matter has already been concluded and after his conviction. The court was implored to be mindful of the type of witness they were dealing with that he lives under a bridge. In other words, he is vulnerable and exposed, as a result easily to be threatened and Influenced.
- [20] The state also pointed out that the issue of prospects of success must be viewed from the context of the learned magistrate stance, that he granted the Appellant leave even though it was his opinion that no other court will come to a different conclusion or change the ruling. It therefore means that he may have been granted leave to appeal but that is not proof of prospects of success in his appeal. Therefore, on the basis of a likelihood of further interference especially with such a vulnerable witness that has already testified and after conviction, hoping to get the witness to change his testimony the court must refuse the extension of his bail. His allegation that he was trying to assist the state be rejected. Particularly since the other witness could not be traced.
- [21] The court a quo had indeed on consideration of the Appellant's personal circumstances and conduct agreed that he was not a flight risk. However, the issue of the Appellant's approach of a state witness after he testified in his trial, influencing or trying to influence the state witness, is what persuaded the court that his release on bail will not be in the interest of justice. Since it has been confirmed that the Appellant has attached the statements that were obtained from the witness to his leave to appeal, pinning the success of his appeal on such statements, and in view of the fact that the state witness is clearly exposed and susceptible to influence and or intimidation as a vulnerable homeless person who lives under a bridge and found at robots, it was not wrong for the court a quo to be concerned about the Appellant's likelihood of future interference with the witness, taking into consideration Appellant's disposition to influencing the witnesses. A fact of another state witness who could not be found was considered. The release of the Appellant on bail therefore cannot be justified to be in the interest of justice if the investigation and prosecution of the case might be hindered.

[22] The Appellant has also been convicted of murder which is a serious and a violent crime that is prevalent in our communities. He has been sentenced to a long term jail sentence with a possibility of spending quite a number of years in prison. Notwithstanding him being granted leave to appeal, his release under these circumstances cannot be justified to be in the interest of justice. Indeed, the granting of leave may be an indication of prospects of success. Actually in terms of s 17 (1) of the Superior Court Act 10 of 2013, leave to appeal, is to be granted if the court believes that the appeal would have reasonable prospects of success meaning another court would arrive at a different conclusion due to prospects of success existing. However, in this matter the learned magistrate indicated that he does not believe that another court will arrive at a different conclusion. Seemingly leave

granted due to the fact that Appellant has applied to lead further evidence, his prospects of success therefore not fated, as it is depended on the probity of the alleged new evidence, as confirmed by his Counsel. The mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of his sentence, nor does it entitle him to bail as of right. See *S v Bruintjies* (676/2002) (2003) ZASCA 4 (25 February 2003) and *S v Mthembu* 1961(3) SA 468(N). The court is still required to consider all relevant factors and determine whether individually or cumulatively they warrant a finding that it is in the interest of justice that the Appellant be admitted to bail justifying his release.

[23] Considering the judicious counterbalance the court a quo was required to do between the different circumstances established in order to ensure that none of the circumstances is unduly accentuated at the expense of and to the exclusion of the others, I am satisfied that the weight of what Appellant raised in terms of his personal situation, that is his family and occupational ties to the area of jurisdiction of the court; tendering of his passport; having no previous convictions, and the circumstances of his leave to appeal, is diminished by the circumstances that have been established by the state, the seriousness and the prevalence of the offence he is convicted of; a strong case against him having been proven by his conviction; having another pending case and mostly, his influence and or likelihood to further influence the state witnesses making him a potential threat to the witnesses

[24] I am therefore satisfied of the magistrate's conclusion that it will not be in the interest of justice to admit the Appellant to bail.

It is therefore ordered that:

1. The Appeal against the refusal by the Regional Court, Benoni to admit the Appellant to bail is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

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