

SOUTH AFRICA / JUDGMENT

Rauf and Another v S (CC29/2015) [2016] ZAGPPHC 1093 (25 November 2016)

[2016] ZAGPPHC 1093**COURT**

North Gauteng High Court, Pretoria

BEFORE

S.A.M. Baqwa

CASE / FILE NUMBER

CC29/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****25/11/2016****CASE****NO: CC29/2015****Reportable:**

Yes

Of

interest to other judges: Yes

Revised.

In

the matter between:

ABDUL

RANA

RAUF First

Applicant

MUHAMMAD

SHABBIR Second

Applicant

and

THE

STATE Respondent

JUDGMENT

Bagwa J

Bail pending appeal - The requisite approach - Granting leave to appeal not entitling applicant serving long sentence for a serious offence entitlement to release on bail - All relevant factors to be weighed.

Summary

The appellants had been granted leave to appeal after being convicted on charges of kidnapping, murder, unlawful possession of a firearm and unlawful possession of ammunition. They were sentenced as follows:

On count 1 of kidnapping two (2) years imprisonment.

On count 2 of murder, life imprisonment.

On count 3 of unlawful possession of a firearm five (5) years imprisonment.

On count 4 of unlawful possession of ammunition one (1) year imprisonment.

It was further ordered that the sentences on counts 1, 3 and 4 would run concurrently with the sentence on count 2 and they were declared unfit to possess a firearm in terms of the Firearms Control Act 60 of

2000. The applicants are currently serving their sentences at Kgosi Mampuru II Correctional Centre, Pretoria.

The applicants emigrated from Pakistan to South Africa in 2003 and 2007 respectively. The first applicant had obtained a visitor's permit which he had failed to renew until it expired on 6 May 2015. The second applicant, a businessman who operated four businesses in Pretoria had been given a permanent residence status by the Department of Home Affairs but evidence was led that his permanent

residence had been withdrawn on 21 May 2015 after Home Affairs discovered that he had failed to disclose a previous conviction for corruption in terms of section 4 (1) (a) (iii) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 when he applied for permanent residence. Both the applicants proffered the fact that the court had stated the possibility that another court might come to a different conclusion and that therefore there were prospects of success as a special circumstance entitling them to be released on bail.

The applicants had been granted bail after their arrest by the Regional Court, Pretoria. Bail was subsequently withdrawn in terms of section 68 of the Criminal Procedure Act 51 of 1977 by the High Court, Pretoria for intimidating witnesses. That decision had subsequently been confirmed on appeal by the Full Court of the Gauteng Division of the High Court.

Held, that the finding by the Court that another court might come to a different conclusion did not ipso facto entitle them to bail.

Held, further that the trial court had found that the State had proved its case beyond a reasonable doubt and that the said decision was not watered down by the granting of leave to appeal. All the relevant facts had to be weighed anew.

Held, that in the light of their declaration as illegal immigrants by the Department of Home Affairs that factor had heightened the flight risk.

Held, that their application for release on bail pending appeal be dismissed.

Annotations:

Reported cases

R v Blom 1939 AD 188 at 202 - 203

S v Shabalala 1966 (2) SA 297 (A) at 299 C

S v Rawat 1999 (2) SACR 398 at 401 g to h

S v Branco 2002 (1) SACR 531 (VV)

Statutes

Criminal Procedure Act 51 of 1977

Criminal Law Amendment Act 105 of 1997

Firearms Control Act 60 of 2000

Prevention and Combating of Corrupt Activities Act 12 of 2004

Immigration Act 13 of 2002

[1] The applicants herein are applying for bail pending appeal after they were arraigned, tried and convicted by this court on charges of kidnapping, murder read with the provisions of section 51 (1) of Act 105 of 1997 and unlawful possession for a firearm and ammunition.

[2] They were sentenced as follows:

On count 1 of kidnapping two (2) years imprisonment

On count 2 of murder, life imprisonment each.

On count 3 of unlawful possession of a firearm five (5) years imprisonment each.

On count 4 of unlawful possession of ammunition one (1) year imprisonment each.

It was further ordered that the sentences imposed in counts 1, 3 and 4 would run concurrently with the sentence imposed in count 2 and the accused were declared unfit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

[3] The applicants are currently serving their sentences since their day of sentencing at Kgosi Mampuru II Correctional Centre,

Pretoria.

[4] They were granted leave to appeal against conviction and sentence to the full court of the Gauteng Division of the High Court of South Africa.

[5] The applicants have filed affidavits in support of their application wherein the first applicant states that he is a 34 year old male who prior to incarceration had been granted bail by the Regional Court, Pretoria North. Bail was later withdrawn by the High Court in terms of section 68 of the Criminal Procedure Act 51 of 1977 (the Act) in terms of which the State alleged that he and his co-accused had intimidated State witnesses.

Personal Circumstances

[6] The first applicant was born on 13 April 1982 in Pakistan and grew up in the province of Lahore. The applicant attended the equivalent of the South African standard 10 in terms of education. He emigrated to South Africa during 2007 and prior to incarceration he resided at house number 1253 Cobham Road, Queenswood, Pretoria in rented accommodation. He is not married and has no dependants of his own.

Employment

[7] Since his arrival in South Africa, his co-accused Muhammed Shabbir took him into his employment at his various business as a manager where he earned R5 000.00 per month. He was also managing Crazy Store Supermarket in Montana, Pretoria where he was arrested. The applicant states that he used to transmit money to his family in Pakistan who are now destitute as he is no longer able to do so. The applicant states that until his conviction on 28 July 2016 he had no previous convictions.

[8] The applicant refers to the fact that his conviction was based on circumstantial evidence and that this court opined during the application for leave to appeal that another court might come to a different conclusion. He states that he is prepared to subject

himself to any additional bail conditions which might be imposed if his application is successful and that he could post an amount of R50 000.00 to R100 000.00 as bail deposit if released.

[9] The second applicant makes similar submissions to the first applicant and further states regarding his personal circumstances that he was born on 1 January 1980 in Pakistan where he also grew up in the same province as the first applicant. Educationally he also attained a standard 10. He emigrated to South Africa in 2003. He is the owner of house number 1253 Cobham Road, Queenswood, Pretoria having purchased the property during 2014. Prior to

incarceration he was renting townhouse number 67 Roodeberg, Equestria at 151 Curro Avenue, Pretoria. If released he intends relocating to his Queenswood house where he intends residing with the first applicant.

- [10] The first applicant married his first wife on 17 July 2003 and they lived together at Eersterust, Pretoria. One child was born of that relationship before they divorced in October 2011. The second applicant married his second wife Hina through Pakistani customary rites in 2012 and they have a son who was two months old when he was arrested in May 2015.
- [11] Employment wise, the second applicant worked as a merchant selling cellular phones in 2003 but he later expanded into clothing and food businesses. From the income earned he maintains himself and family and also transmits money to his Pakistani family.
- [12] The first and second applicant have known each other since childhood and they have continued their association when the second applicant took the first applicant into employment after his arrival in South Africa.
- [13] The second applicant has one previous conviction in terms of section 4 (1) (a) (iii) of The Prevention and Combating of Corrupt Activities Act 12 of 2004 where he was sentenced to direct imprisonment suspended for five (5) years as well as a fine to the tune of R50 000.00.

Ad Exceptional Circumstances

- [14] Similarly to the first applicant, the second applicant makes reference to the fact that the conviction was based on circumstantial

evidence and that another court might come to a different conclusion. He proffers this submission as constituting special circumstances for him to be granted bail pending appeal. He further states the need for him to be released to cater for the needs of his wife, his son and his businesses.

- [15] The State has strenuously opposed this bail application and in doing so has called the evidence of Warrant Officer Van der Berg who is the Investigating Officer in this case. He testified regarding an investigation he is currently involved in, in which both the applicants are suspects. This concerns the murder of Mr Shah who was accused number three in this case before he was murdered. He stated that the witnesses in the Shah case are afraid of both the applicants and that he has already obtained a sworn statement implicating the second applicant from one of the witnesses.
- [16] This testimony of the Investigating Officer is particularly relevant when one considers the background to this case. As confirmed by the applicants themselves they were granted bail after their arrest but that bail was subsequently withdrawn in terms of section 68 of the Act. The basis of the withdrawal was that the applicants had intimidated State witnesses. The witnesses in the investigation

currently being investigated by Warrant Officer Van der Berg also expressed fears for their lives and in my view they are no different

from the witnesses in the main trial and their fears are not a figment of their imagination. It is also pertinent to note that the applicants appealed against the withdrawal of bail decision by this court. Their appeal was dismissed by the Full Court of the Gauteng Division.

[17] The Investigating Officer also handed in affidavits in terms of section 212 of the Act by a Mr Kruger and a Mr Ndou who are

immigration officers at the home Affairs Department. The affidavit of Mr Kenneth Ndou explained that the first applicant is an illegal immigrant in that his visitor permit expired on 6 May 2015 and that it was not renewed.

[18] The affidavit of Mr Nicolas Dirk Kruger further explains that the second applicant is also an illegal immigrant despite the fact that he had been granted permanent residence. Permanent residence was subsequently revoked on 21 May 2015 when it was discovered that he had failed to disclose a previous conviction for corruption in 2005 and 2007 when he lodged the application for permanent residence. On 10 November 2014 he was given notice to furnish reasons why his permanent residence should not be revoked within 30 days of that notice. He, however failed to do so despite his acknowledgement of receipt of the notice hence the revocation of permanent residence by the Department of Home Affairs.

[19] According to the Investigating Officer the applicants are liable to be deported if released on bail and when that happens he would be unable to locate them.

[20] Sections 60 (4) and (5) of the Act provide as follows:

"(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

[Words preceding para (a) substituted by s 9(b) of Act 62 of 2000.]

(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

[Para.

(a) substituted by s. 4 (c) of Act 85 of 1997.]

(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

- (c) 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;

- (d) 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; or [sic]

[Para.

- (e) added by s. 4 (d) of Act 85 of 1997.]

[Sub-s.

- (4) amended by s. 9 (b) of 62 of 2000.]

- (4) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account."

[21] That the applicants are persons who are prone to interfere with witnesses if released is a matter which was decided not only by this court but also a Full Court of the Gauteng Division. This is a hurdle which in my view the applicants have failed to surmount.

[22] The factors mentioned in subsections 4 and 5 (a), (b), (d), (e) and

- (g) of section 60 quoted above are also relevant in this case. The applicants had not only been violent towards the deceased, they had murdered him. Past conduct of the applicants therefore demonstrates that they are persons who have a propensity for violence and the court has to take this into account when determining the outcome of this application.

- [23] Counsel for the applicants has sought to persuade me to consider the emotional, family and business ties of the applicants to South Africa. I have considered these submissions but I have also had to consider the gravity of the charges of which the applicants have been convicted and the lengthy sentences they are currently serving which might be a good incentive for them to evade justice.
- [24] The applicants have also pleaded as a special circumstance the fact that this court in granting them leave to appeal suggested that another court could come to a different conclusion regarding their conviction. To suggest that there might be prospects of success is not a stand-alone factor when a court deals with serious charges for which a lengthy sentence has been imposed. It is but just one of the factors that is to be considered. Moreover prospects of success do not negate the fact that this court found that the circumstantial evidence presented had such a high level of credibility and cogency that the court found that the State had proved its case beyond a reasonable doubt.
- See *S v Shabalala* 1966 (2) SA 297 (A) at 299 C and *R v Blom* 1939 AD 188 at 202 - 203. Prospects of success do not retrospectively dilute that finding. The prospects relate to a future possibility which may or may not arise.
- [25] The applicants testified in response to the evidence tendered by the State. They deny that they are illegal immigrants but tender no real evidence to rebut the evidence by the Home Affairs Department in terms of section 212 of the Act.
- [26] Counsel for the applicants has quoted the case of *S v Branco* 2002
- (1) SACR 531 (W) in support of this application. That case was similar to the present application in that the applicant, Branco, was also a peregrinus. He applied for bail pending appeal. Bail having been denied in the lower court Branco appealed to the Witwatersrand Local Division. The court found that the magistrate had misdirected himself by not having regard to the appellant's family and business ties to South Africa, his wife and children being resident in the country.
- [27] In my view that case can be distinguished from the present case because the applicants have been declared illegal immigrants by the Home Affairs Department who are subject to be dealt with in terms of section 29 (1) (b) and section 28 (a) of the Immigration Act (Act 13 of 2002). That makes them liable to deportation if they were to be released on bail which would defeat the whole purpose of the sentence they are presently serving.
- [28] Regarding the test that has to be applied in considering matters much as the present application it was succinctly stated by Van Oosten J in *S v Rawat* 1999 (2) SACR 398 at 401 g to h when he said the following:

"Having considered the authorities referred to above I am of the view that where it has not been shown that a reasonable possibility exists that the Court of Appeal will interfere with the appellant's sentence to the extent that the appellant may not go to prison, then bail should not be granted."

[29] As matters presently stand and having considered all the above facts and the law, I have come to the conclusion that the applicants have failed to make out a case for bail to be granted pending appeal. In the result the following order is made:

ORDER:

The application for bail pending appeal by the two applicants is dismissed.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

24 - 25 November 2016

Judgment

delivered on:

25 November 2016

For the State:

Advocate D. Ngobeni

Advocate G. Mosethla

Instructed by:

The State Attorney

For the First and Second Accused: Advocate S. Sithole SC

Instructed by:

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