

SOUTH AFRICA / JUDGMENT

Rotyi v S (CA&R11/17) [2017] ZAECHHC 19 (18 September 2017) [2017] ZAECHHC 19

COURT

Eastern Cape High Court, Bhisho

BEFORE

Rugunanan

CASE / FILE NUMBER

CA&R11/17

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL

DIVISION, BHISHO

CASE

NO:CA&R11/17

Date heard: 15 September
2017

Date

Delivered: 18 September
2017

In

the matter between:

BANDILE
ROTYI
Appellant
and
THE
STATE
Respondent

JUDGMENT

RUGUNANAN, AJ:

- [1] This is an appeal by the appellant, aged 31 having no previous convictions or pending cases, against the decision of a magistrate taken at Mdantsane on 25 January 2017, in which the appellant's application for release on bail pending his trial on various charges for contravening the Firearms Control Act No. 60 of 2000, was refused. The charges against the appellant include possession of a prohibited firearm, more specifically a fully automatic firearm: possession of a firearm to wit a pistol; and possession of 74 rounds of ammunition. The offences are alleged to have been committed on 11 January 2017 on which date the appellant was arrested and has since been in custody. The charge sheet incorporates reference to the provisions of section 250 of the Criminal Procedure Act No. 51 of 1977, as amended, ('the Act').
- [2] The appellant was legally represented by counsel during the bail proceedings in the court a quo. When proceedings commenced, the magistrate informed the appellant that the charges were implicated by Schedule 5 of the Criminal Procedure Act. Absent explicit reference to Schedule 5 in the charge sheet, the magistrate did so presumably because one of the charges against the appellant involved an "automatic firearm". Although this classification correctly accords with the relevant schedule, I find it necessary to comment that in Schedule 5 bail applications it is prudent for the State to proffer a full and proper description of the alleged offence/sin the charge sheet, or to resort to a certificate from the 'attorney-general' (now Director of Public Prosecutions (DPP)) in terms of section 60(11A) of the Act (cf. *S v Josephs* 2001 (1) SACR 659 (CJ at 661 f-h). An accused seeking bail attracts an onus under the provisions of section 60(11)(b) of the Act to adduce evidence which satisfies the court that the interests of justice permit his release only once the State has established that the charge falls within Schedule 5, either through a proper description of the charge or by procuring the aforementioned certificate. Without intending criticism, proof of the nature of the charges against the appellant ought to have occurred preferably with some formality. However in this instance, I do not believe that the magistrate's approach, nor that of the parties in acquiescing thereto, was inherently prejudicial to the appellant and it is considered unnecessary to dwell any further on this aspect.
- [3] The appeal to this court is in terms of section 65(4) of the Act. The provisions of the section preclude me from setting aside the magistrate's decision unless I am satisfied that it is wrong in which event the issue of bail may be considered afresh (see *S v Faye* 2009 (2) SACR 210 (TkHC) at 212e-f; *S v Barber* 1979 (4) SA 218 (D) at 220 E-G). A finding that the magistrate's decision is wrong will ensue once it is shown that she misdirected herself in some material way in relation to fact or law (see *S v Ali* 2011 (1) SACR 34 (E) at para 14: cf. also *S v M* 2007 (2) SACR 133 (E)). Absent a finding that the magistrate misdirected herself, the appeal must fail

(S v Porthen and Others 2004 (2) SACR 242 (C) at para [11]). Tritely, the powers of an appellate court are limited where a matter comes before it on appeal and not as a substantive application for bail. For that reason, when considering whether the decision by a court of first instance is wrong, an appellate court will give due deference and attach appropriate weight to the fact that the court of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the court of first instance was wrong (see S v Porthen & Others 2004 (2) SACR 242 (CPD) at paragraphs [4] and [11] also S v Ali supra at paragraph [141]).

- [4] The provisions of section 60(11)(b) of the Act which stipulate that when an accused person is charged with an offence referred to in Schedule 5 he or she shall be detained in custody unless he or she adduces evidence which "satisfies" the court that the "interests of justice" permit his or her release. The onus requirement as conveyed by the word "satisfies" presumes that the accused person will discharge it on a balance of probabilities (see S v Siwela 1999 (2) SACR 685 (W) at 704i). Where the "interests of justice" is concerned, this is tritely regarded as a decidedly relevant consideration. In the exercise of its discretion a court will accord recognition to the constitutional right to freedom which includes the right not to be detained without trial and will lean in favour of the liberty of a suspect and grant bail where possible, provided the interests of justice will not be prejudiced thereby (see S v Petersen 2008 (2) SACR 355 (C) at paragraph [60] and S v Smith & Another 1969 (4) SA 175 (N) at 177 E-F).
- [5] With these principles in mind, I turn to evaluating the reasons underlying the magistrate's decision in the context of the evidence adduced on record. The magistrate's judgment indicates that her refusal of bail is grounded in the likelihood that the appellant may evade his trial in the light of the strength of the State's case against him.
- [6] The appellant was arrested consequent to being tracked by the police after a firearm was confiscated in Peddie from a suspect named 'B'. Upon being arrested and charged, 'B' disclosed that he and the appellant had come from Cape Town and that the appellant was in the Mdantsane area with a girlfriend employed by 'SASSA' (i.e. the South African Social Security Agency). With the information given by 'B' and with assistance from a police technical team the appellant was tracked to Mdantsane through a contact number presumably, of a mobile phone. It is patently clear from the transcript that firearms and ammunition were concealed in a blue bag the appellant was seen carrying in public moments before his arrest and which he instantaneously, upon seeing the police, dropped before taking flight. The circumstances in which the appellant came into possession of the bag with its contents are not known since the appellant refused to answer questions thereover, presumably on constitutional grounds. More particularly he denied having any knowledge of the contents of the bag, and in a somewhat indirect manner sought to convey that he was arrested for no good reason. Although the appellant stated that he has three minor children over whose support he was concerned, there is no indication of the extent of their involvement in his life nor of his in theirs. Evidence of where the children are living is

not entirely clear from the record. Indications are that one of the children, a youngster, lives in Cape Town with his mother. What is known is that the children are from different mothers, one of whom is a traditional healer, and that the appellant is no longer in a relationship with any of the mothers of his children. The evidence indicates that the appellant lived in Cape Town for more than half of his lifetime and that he visits the Eastern Cape twice a year to see his mother in Cofimvaba (although according to the investigating officer, Detective Sergeant Lunga Mtebele, the appellant's mother had last seen him during 2016). The appellant made no mention about visiting his other children (assuming they are residing somewhere in the Eastern Cape).

- [7] Against the backdrop of the above evidence, a perusal of the magistrate's judgment indicates that careful consideration was given to the evidence of the appellant and to that of Detective Sergeant Mtebele, a member of the organised crime unit in East London. The latter testified in support of the State's case in opposition to bail. He testified that he opposed bail on the grounds that the appellant was a flight risk and would probably evade trial since the appellant had no fixed residential address, it being the case that he proffered three addresses in Cape Town and two others here in the Eastern Cape. Although Sergeant Mtebele verified all five of the addresses, he established that the appellant had been living with relatives in Cape Town until obtaining premises which he rented, also in Cape Town. Sergeant Mtebele undertook a specific trip to the Western Cape to investigate the matter and upon inspection of the rented premises, he noticed that its contents were distinctly meagre, comprising as they were, of a bed, a television set, a DVD player and items of clothing lying about. This suggested to him that indications of fixed residence, and by implication a settled existence, were absent and it fortified his view that the appellant was a flight risk. Based on the status of his investigations undertaken at the time the bail hearing was conducted, Sergeant Mtebele testified that there was a strong case against the appellant. He was tracked with the assistance of an arrested suspect 'B' (who, if I might add, is also linked to a confiscated firearm) and was seen carrying the blue bag in which the stockpile of firearms and ammunition were found (which in the words of Mr Willemse who appeared on behalf of the respondent, was "enough to start a war").
- [8] In her evaluation of the evidence the magistrate took cognisance of the fact that the appellant has five different addresses and that at some stage while still in Cape Town he was employed as a taxi driver but on his own evidence he almost straightaway handed over his taxi to someone else before arriving in the Eastern Cape. and further that he has no assets or property and as such was not bound to any specific geographical location. In point. the appellant's own evidence demonstrated a propensity to have vacillated from Cape Town to Mdantsane between various girlfriends. More tellingly, the evidence revealed that prior to his arrest the police spotted the appellant carrying the blue bag, that he had dropped the bag, took flight and was pursued by the police and found hiding in a bush whereupon he was arrested. In her cumulative assessment of the evidence the magistrate concluded that there was a likelihood that the appellant, despite his plea that bail conditions be imposed and that he could afford R1 000 bail, would attempt to evade his trial and hence the interests of

justice did not permit his release on bail.

- [9] Contending for the release of the appellant on bail, Mr Macingwane the attorney who argued the appeal on behalf of the appellant, submitted that the magistrate misdirected herself in so far as the applicable law is concerned, in particular as regards the provisions of section 60(11)(b) read with section 60(4)(a)-(e) of the Act. When pressed to demonstrate the alleged misdirection on fact and/ or law, Mr Macingwane conceded that he was unable to do so and contended that this court should exercise its discretion and admit the appellant to bail on conditions. It is considered unnecessary to traverse the full spectrum of the provisions of section 60(4)(a)-(e), save to mention that they incorporate specific grounds (one of them being the likelihood that the accused if granted bail, will attempt to evade trial) which, if established, will not sanction a ruling that the interests of justice permit the release of an accused person from detention. The evidence indicates that the additional factors, (such as the meagre assets held by the appellant, his slender family ties in relation to his children, the strength of the State's case in the light of the seriousness of the charges and the gravity of the punishment likely to be imposed) as contained in section 60(6) of the Act, also informed the magistrate's reasoning. On the latter aspects Mr Macingwane conceded that he could not move away from the facts on record, save that this court should take a different view. In this regard he drew heavily on the appellant's testimony that the appellant intended to stay in the Mdantsane area so that he could start up a business with his girlfriend in selling 'Avon' products.
- [10] However liberal one may be with an inclination to accord recognition to the appellant's intentions to remain in Mdantsane and to start up a business, I am of the view that this fact on its own does not read persuasively. It is widely known that offences involving illicit firearms are detrimental to the safety and security of society, sometimes causing serious injury or death to innocent persons. It is certainly not in the interests of justice and society that the appellant, who has displayed a disregard for the law by carrying the illegal stockpile and taking flight, be granted bail and let free on society.
- [11] I am not persuaded on any of the arguments advanced on behalf of the appellant that it has been shown that the conclusion arrived at by the magistrate is wrong. In the circumstances I am of the view that the magistrate's decision cannot be faulted. The appeal is dismissed.

S RUGUNANAN

Acting Judge of the High Court

Appearances: For Appellant : Mr Macingwane, Macingwane Attorneys, EastLondon For
Respondent: Adv D A Willemse. OPP, Bhisho

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