

SOUTH AFRICA / JUDGMENT

S v Lenting and Others (CC08/2018) [2024] ZAWCHC 220; 2024 (2) SACR 525 (WCC) (22 August 2024)

[2024] ZAWCHC 220

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

CC08/2018

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FLYNOTES:

CRIMINAL – Evidence – Record
of bail proceedings
– State
seeks to utilize testimony of two accused at bail hearing against
them in trial – Accused contending bail court
failed to warn
accused before they could testify that such evidence could become
admissible in any subsequent proceedings
– Interpretation of
provision – Right against self-incrimination at trial –
Accused not adequately informed
at bail application –
Criminal Procedure Act 51 of 1977, s 60(11B)(c).
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
CASE
NO: CC08/2018
In

the matter between: THE
 STATE
 And
 ELTON LENTING AND 19
 OTHERS
 ACCUSED

JUDGMENT

– 22 August 2024

LEKHULENI J

Introduction

- [1] This judgment centres around the interpretation of section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 ('the CPA'). At the hearing of the trial against the accused, the State applied to introduce bail proceedings records from Bellville District court in respect of accused 3 and 14 in this matter. The State seeks to utilise the testimony of the two accused at the bail hearing against them in this trial. The legal representatives appearing on behalf of accused 3 and 14, respectively, objected to the State's application. The crux of their objection was that when the bail proceedings were heard before the bail court, the bail court failed to warn the accused before they could testify that anything they said as evidence in the bail proceedings might be used against them at their trial and that such evidence would become admissible in any subsequent proceedings. Pursuant to the said objection, I directed that a trial within a trial be held as the admissibility of the bail proceedings was contested.
- [2] Notwithstanding, the State and the defence closed their cases without leading viva voce evidence. However, the State and the defence Counsels presented arguments after closing their cases. At the Court's request, the State and the defence Counsels prepared Heads of Argument supplementing their oral submissions. I am deeply indebted to them.

Summary of facts

- [3] The accused are facing various counts. However, the relevant charges in this matter are counts 75 to 78. Counts 75 and 76 involve charges of Murder and Attempted Murder, respectively, and counts 77 and 78 involve possession of an unlicensed firearm and unlawful possession of ammunition. On 08 July 2015, accused 3 and 14 appeared together before the Bellville Magistrates Court and applied for bail in respect of these counts. At the bail hearing, they were assisted by an attorney from Legal Aid South Africa. For the record, I should mention that when the bail proceedings were heard, accused 14 was still a minor and was 16 years old. His mother assisted him in those proceedings. The proceedings were also held in camera.

- [4] Without explaining the rights of the accused as envisaged in section 60(11B)(c) of the CPA, both accused were called to testify in support of their application to be released on bail. Accused 3 testified and denied the charges levelled against him. He explained to the court where he resided and stated that he had no pending cases. He also denied the charges levelled against him. During cross-examination, he admitted that he was a gang member of the Firm Boys and that he was no longer a gang member. He asserted that he has repented and is now attending church. Accused 3 admitted that he has tattoos of the Firm Boys gang on his shoulder.
- [5] Accused 14 also testified at the bail proceedings. He explained that he was applying to be granted bail so that he could return to school. Accused 14 admitted that he was a Terrible Josters gang member but that he no longer belongs to that gang. He also admitted that he has one tattoo of the Terrible Josters. Accused 14 denied the charges levelled against him and stated that when the alleged murder was committed, he was in hospital. He also denied that he was involved in the commission of the alleged offences levelled against them. The two accused were eventually denied bail.
- [6] As stated above, the State advocate applied to have these bail proceedings handed in as exhibits in these proceedings. The respective legal representatives of accused 3 and 14 opposed the application on the grounds that it would infringe the accused's

rights to a fair trial, particularly in that they were not warned that anything they say may be used against them at their trial and that such evidence becomes admissible in any subsequent trial.

Submissions

by the Parties

- [7] Before addressing the admissibility of these bail proceedings, it is essential to provide a summary of the arguments put forward by the State and the two Counsels representing accused 3 and 14, respectively. Mr Damon, who appeared for the State, conceded that neither accused 3 nor accused 14 were warned in terms of section 60(11B)(c) during their bail application. However, Mr Damon submitted that the question whether the failure to warn them of their right not to self-incriminate would affect the fairness of the trial is to be determined by the presiding officer of the trial. Counsel submitted that it was admitted by accused 3's legal representative at the trial of this matter that he was a member of the Terrible Josters as exhibited in Exhibit M of these proceedings.

Mr Damon further asserted that admitting the bail record in this trial would not compromise the fairness of accused 3's trial, given that his gang membership has already been established in the trial. Moreover, Counsel contended that accused 3 denied any involvement in the allegations levelled against him regarding the offences specified in paragraph 3 above.

[8] Concerning accused 14, Mr Damon submitted that the photographs of accused 14's body containing the letter "TJ", which

indicates the abbreviation for Terrible Joster, in both exhibit M and exhibit CCC, has never been disputed. To this end, Mr Damon argued that the admission by accused 14 that he was a Terrible Joster, but no longer was at the time of the bail application, would not affect the fairness of his trial. In summary, Mr Damon submitted that the fact that both accused are part of the Terrible Josters gang has been a common cause fact since April 2021 and that an admission of the bail record would not render their trial unfair. The State implored the Court to accept the bail proceedings into the record as evidence against the two accused.

[9] Mr De Villiers, Counsel for accused 3, on the other hand, submitted that the former investigating officer of this matter, Sergeant

Bonthuys, testified during the bail application that he was busy with a specific project relating to the alleged Terrible Josters gang and the Terrible Firm Boys gang. The investigating officer also told the court that the accused had a Boss and that he (accused 3) was part of a criminal gang operating in Delft South. It was Mr De Villier's further submission that the magistrate and the legal representatives for accused 3 must have reasonably foreseen that accused 3 was part of a criminal gang and could be prosecuted in the future in terms of the Prevention of Organised Crime Act 121 of 1998 ('POCA').

[10] From the record of proceedings, so the argument went, accused 3's constitutional right to remain silent and not to be compelled to make any confession or admission that could be used as evidence against him was not explained to him. Counsel further submitted that section 60(11)(B)(c) of the CPA places an obligation on a court to inform an accused of his constitutional rights. In terms of the indictment, the State alleges that accused 3 formed part of the Terrible Josters gang under the leadership of accused 1. During the bail application, accused 3 gave evidence regarding his membership of a gang and testified about his tattoos. Mr De Villiers stated that accused 3 would suffer irreparable harm if the record of bail proceedings is admitted as evidence against him. He prayed the Court not to allow the bail proceedings as evidence against accused 3.

[11] Meanwhile, Mr Klopper, Counsel for accused 14, argued that the wording of section 60(11B)(c) is clear and unambiguous. It clearly

requires the Court to inform the accused of the consequences in a situation where an accused person chooses to testify. Mr Klopper

further submitted that it is evident that the State is not limited in how it can use the evidence from the bail proceedings against the accused if the bail record is admitted. Because of this situation, it was submitted that there are no merits in the argument that there can be no prejudice to the accused. According to Counsel, the precise way such prejudice may unfold depends, as always, on how the trial unfolds and the choices of both the State and the defence in this regard.

- [12] Furthermore, Mr Klopper reminded the Court that accused 14 was 16 years of age at the time of the bail application held eight years ago. Counsel pointed out that the principles of the Child Justice Act 75 of 2008 ('the CJA') applied to him. Mr Klopper further argued that the CJA placed an added obligation and duty on the presiding officer to ensure that accused 14 understood his rights when testifying at the bail application and that the process was fair. There was an obligation throughout to act in the best interests of the child. To this end, Counsel implored this Court to exclude any testimony given by accused 14 at the relevant bail proceedings as this would impact his fair trial rights.

The applicable Legal principles and Discussion

- [13] It is trite law that an accused person enjoys the right against self-incrimination at trial. The rule against self-incrimination is not simply a rule of evidence. It is a right that has been given constitutional force. It is entrenched in section 35(3)(j) of the Constitution, which provides that '[e]very accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence. The right of the accused person against self-incrimination is intrinsic and fundamental in our criminal justice system.
- [14] The Constitutional Court placed a high premium on this right. In *Ferreira v Levin* NO; *Vryenhoek v Powell* NO 1996 (1) SA 984 (CC) at para 159, the Court adopted the view that the right against self-incrimination applies only to accused persons. Writing for the majority, Chaskalson P, as he then was, observed that the rule against self-incrimination is not a mere rule of evidence but a constitutional right which is inextricably linked to the right of an accused person to a fair trial, and it existed to protect the right to a fair trial. In my view, abrogating this right in a criminal trial must only be countenanced if it will not render the trial unfair.
- [15] As mentioned earlier, this case revolves around the interpretation of section 60(11B)(c) of the CPA. For the sake of completeness, section 60(11B)(c) of the CPA provides as follows:
- 'The record of the bail proceedings, excluding information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.' (emphasis added)
- [16] Section 60(11B)(c) makes it abundantly clear that viva voce evidence tendered by an accused person at the bail application proceedings serves a dual purpose. It is not limited to use exclusively by the bail court to determine the question of bail. Section 60(11B)(c) of the CPA authorises the use of such evidence by the trial court to determine the guilt of the accused. An accused person is bound to uphold any defence presented during bail proceedings. In other words, the record of bail proceedings, excluding the information disclosed in terms of section 60(11B)(a) (previous convictions and pending cases), may form part of the record of the subsequent trial.

[17] However, section 60(11B)(c) provides an accused person with a safeguard. It entrusts the bail court with a mandatory injunction

that if the accused elects to testify during bail proceedings, the court must warn him that anything he says may be used against him at his trial and that such evidence becomes admissible in any such proceedings. From the reading of the section, it is evident that before section 60(11B)(c) can be invoked at a subsequent trial to prove the oral testimony given by an accused in the bail application, it must be clear that the accused was adequately informed at the bail application of his constitutional right to remain silent and of the privilege against self-incrimination.

[18] In *S v Sejaphale* 2000 (1) SACR 603 (T), Jordaan J held that the failure to advise an accused person at bail proceedings in terms of section 60(11B)(c) that anything he said might be used against him at his or her trial, rendered the record of the bail proceedings inadmissible. In several cases, the courts have found that though it is accepted that bail proceedings may form part of subsequent trial proceedings, the applicant at bail proceedings should be warned. If not warned, the record is not admissible at subsequent trials. (*S v Aglioti* 2012 (1) SACR 59 (GSJ); *S v Snyman and Another* 1992 (2) SACR 169 (C)).

[19] In the present matter, it is common cause that the magistrate who heard the bail proceedings did not explain or warn the two accused when they elected to testify that the evidence may be used against them at their subsequent trial and that such evidence would become admissible in such proceedings. At the hearing of this matter, Mr Damon strongly contended that the two accused had received legal representation and that their legal aid attorney must have thoroughly explained their rights in accordance with section 60(11B)(c) of the CPA. To support his argument, he pointed out that the same legal aid attorney had previously confirmed to the bail court, in a separate case, that he had indeed informed another accused person about his rights in terms section 60(11B)(c) of the CPA. Mr Damon exhibited those proceedings to this court to support his argument.

[20] This argument with respect is mistaken. It is worth noting that a similar argument was rejected by this court in *S v Nzima* 2001

(2) SACR 354 (C), where the court held that the duty to advise the accused in terms of this provision existed irrespective of whether the accused was represented by an experienced or an inexperienced legal representative. I am of the view that the duty to warn an accused person in terms of section 60(11B)(c) rests with the court and nobody else. This is a judicial function that cannot be outsourced or delegated to the legal representative. The reason being that the warning in terms of section 60(11B)(c) is an important constitutional safeguard that strikes at the heart of an accused person's right to a fair hearing.

[21] In my view, section 60(11B)(c) entrusts a court with a constitutional obligation to ensure that justice and fairness prevail in bail proceedings and in the principal case. A bail court cannot be inert and lackadaisical in the conduct of court proceedings. Instead, it must adopt a proactive approach and jealously guard the entrenched constitutional rights of an accused person. In *S v Dlamini*, *S v Dladla and Others* [1999] ZACC 8; 1999 (4) SA 623, para 99, the

Constitutional Court emphasised that it is not only the trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. The Court noted that the command that the presiding judicial officer ensures that justice is done applies with equal force to a bail hearing. The Court also emphasised that the presiding officer in bail proceedings is duty-bound to ensure that the accused who elects to testify does so knowing and understanding that any evidence he or she gives may be admissible at trial.

- [22] As stated earlier, the accused were not warned during the bail proceedings that their evidence would be used against them at the subsequent trial if they testified. Mr De Villiers and Mr Klopper have contended that the bail record should be excluded as the two accused were not warned. Notwithstanding the provisions of section 60(11B)(c), it is important to note that the failure to inform an accused person of his rights prior to testifying does not automatically necessitate the rejection of the bail proceedings. The inquiry on the admissibility of such bail proceedings records, does not end there. The trial court must determine whether the admission of such evidence would render the trial unfair. In other words, the admissibility at trial of evidence given by an accused person in an earlier bail application involves the exercise of discretion by the trial court, with fairness being the guiding principle.
- [23] In my view, even in instances where the bail court timeously warned an accused person that his evidence could be used against him at a subsequent trial, such evidence is not automatically admissible against the accused during the subsequent trial proceedings. A trial court may exclude otherwise admissible evidence on the basis that it may render the trial unfair in order to protect an accused person's right to a fair trial. (*S v Basson* (1) SACR 611 (CC) at para 112). A trial court must also ensure that the trial of an accused person is fair in substance and must give content to this concept.
- [24] The critical question is whether the intended evidence that the State intends to adduce against an accused person passes the constitutional test in section 35(5) of the Constitution. Namely, that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise would be detrimental to the administration of justice. A court has the power, indeed a duty, to exclude evidence if the admission of the evidence would otherwise be detrimental to the administration of justice. In other words, an inflexible rule of admissibility or a rigid exclusionary rule, has no place in our constitutional jurisprudence.
- [25] Where an accused gives evidence in a bail application he retains the privilege against self-incrimination. (*S v Botha and Others* 1995 (2) SACR 605 (W)). This means that even where the accused elects to testify he can decline to answer incriminating questions. However, if the accused chooses not to testify or refuses to answer incriminating questions, he runs the risk of bail being refused. (Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 4 ed (2015) at 150).

- [26] Reverting to the present matter, it is common cause that the accused are facing POCA charges and various predicate offences. It is also common cause that during cross-examination at the bail proceedings, both accused were confronted on their association with certain gangs. The two accused were also confronted on their alleged gang membership. In response, accused 3 admitted that he was a member of the Firm Boys gang. According to the evidence already tendered in this Court, the Firms Boys gang evolved into the Terrible Josters. Significantly, it was admitted by accused 3's legal representative that accused 3 was a Terrible Joster, as reflected in exhibit M in these proceedings. Accused 3 also has tattoos, as detailed in exhibit CCC, which showcases this evidence.
- [27] Mindful of the balance that must be struck between the question of fairness and the interest of the administration of justice, in my view, the admission of the bail record will not affect the fairness of accused 3's trial as his gang membership in this trial has already been confirmed or admitted. It would have been a different case if accused 3 had disputed that he was a member of the Terrible Joster gang. As correctly pointed out by Mr Damon, the admission or exclusion of the bail application record will, therefore, not impact any finding the court makes that accused 3 is a Terrible Joster and was a Terrible Joster member even in the period that the Terrible Joster of Delft-South were known as the Firm Boys.
- [28] Regarding accused 14, it is important to emphasise that his situation is distinct. It is essential to underscore that he was a minor at the time the bail proceedings were conducted. He was 16 years of age. The bail proceedings had to be conducted in line with the provisions of the CJA. Accused 14 was young and vulnerable. Unquestionably, the CJA placed an added obligation and duty on the presiding officer to ensure that accused 14 understood his rights. The bail court had to ensure that the accused understood the process that would unfold before the proceedings could commence. Consistent with the guiding principles set out in section 3 of the CJA, there was an obligation upon the bail court throughout the bail proceedings to act in the best interests of accused 14.
- [29] It must be emphasised that it is not business as usual when it comes to child offenders in criminal matters. Prior to 1 April 2010, children who committed crimes were dealt with in terms of the CPA. The Child Justice Act established a child justice system for children in conflict with the law parallel to the justice system for adults. This means that children under the age of 18 who are suspected of committing a crime are not dealt with according to the normal criminal procedure used for adults but in a child-centric manner provided in the CJA and the Constitution. This is consistent with the obligations envisaged in the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.
- [30] Section 1 of the CJA provides that a Child Justice Court is any court provided for in the Criminal Procedure Act dealing with the bail application, plea, trial or sentencing of a child. Any court that applies the provisions of the CJA when dealing with a child in conflict with the law is a de facto child justice court. (Corrie L, Van Niekerk J and Louw E, A Practical Approach to the Child Justice Act (2016) at 172). On the other hand, section 63(4) enjoins a

Child Justice Court during court proceedings to ensure that the child's best interests are upheld. Section 63 of the CJA deals with trials in the Child Justice Court. However, the principles stated therein in my view, equally apply to bail

applications. Thus, the CJA ensures that the child's rights are protected and that children appearing in the child justice court are aware of their rights and why they are in court. It is the duty of the presiding officer in the child justice court, including in bail proceedings, to inform the child of the allegations against him and to explain the procedures that would unfold. This duty cannot be delegated to a legal representative of the child.

[31] Evidently, in this case, the bail court did not protect the rights of accused 14 as envisaged in section 28(2) of the Constitution, read with the relevant provisions of the CJA. The Court did not adequately explain to the child offender the process that would unfold before it could proceed with the bail proceedings. The Court did not explain to the child offender the provisions of section 60(11B)(c) of the CPA. As discussed above, the fact that the child offender was legally represented did not absolve the bail court of its judicial injunction to explain to the child offender his right not to self-incriminate.

[32] Furthermore, I am not satisfied with how the bail court admonished the child offender (accused 14). From the record, it is dubious whether the child offender was properly admonished as envisaged in section 162 read with section 164 of the CPA. At the hearing of this matter, the State advocate argued in the context of this matter that the rules in bail proceedings are relaxed and that sections 162 to 164 do not find application as the proceedings were not intended to prove the guilt of the child offender. Counsel further argued that the Court a quo was satisfied that the child offender understood the difference between the truth and falsehood and correctly admonished the child.

Mr Klopper, on the other hand, submitted that the Court a quo did not properly comply with the competency test nor correctly admonished the child; instead, it confused a criminal capacity test and the competency test.

[33] Gleaning from the record, I am in doubt whether the bail court properly admonished the child as envisaged in section 164 of the CPA. Whilst I appreciate that bail proceedings are less formal than a trial, I am of the firm view that sections 162 to 164 apply with equal force in bail proceedings. Where a child witness in bail proceedings elects to give viva voce evidence and does not understand the nature and import of the oath, and the court is satisfied that the witness understands the difference between telling the truth and falsehood, the child witness must be admonished properly in terms of section 164 of the CPA.

[34] In conclusion, I am of the opinion that the bail court did not accord accused 14 with the fundamental protection envisaged in the Constitution and CJA. The admission of the purported evidence he tendered during the bail proceedings, in my view, would render his trial unfair.

Order

[35] For these reasons, the State's application for the admission of accused 3's record and contents of bail proceedings conducted on 08 July 2015 is hereby granted.

[36] The State's application for the admission of accused 14's bail proceedings record is hereby dismissed.

LEKHULENI JD

JUDGE OF THE HIGH COURT

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