

SOUTH AFRICA / JUDGMENT

S v Packham (CC50/2018) [2018] ZAWCHC 183 (20 December 2018) [2018] ZAWCHC 183

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman

CASE / FILE NUMBER

CC50/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: CC50/2018

In

the matter between:

The
State
Applicant
And
Robin
Leslie William Packham
Respondent

JUDGMENT

DELIVERED ON 20 DECEMBER 2018

BAARTMAN,J

- [1] This is an application in terms of section 66 of the Criminal Procedure Act, 51 of 1977 (the CPA). On 28 September 2018 this court, per Erasmus J, amended the respondent's bail conditions after finding that he had breached the conditions that had been imposed on him on 9 March 2018, following his arrest on charges of murder and defeating the ends of justice. In these proceedings, the state has alleged that the respondent has breached the amended conditions and requested that his bail be revoked. I deal with the relevant bail conditions below.
- [2] Sergeant Sonnenberg (Sonnenberg), the investigating officer, attested to an affidavit in which he alleged that he had received numerous telephonic complaints from the respondent's neighbours reporting that the respondent was moving freely about when he was meant to be under house arrest. The complaints did not always have merit, although, there were occasions when they did.
- [3] In addition, he annexed an affidavit from which it appeared that the respondent had contacted Ms F, a mutual friend of a state witness – L (L) – and the respondent. In sending the message, the respondent breached his bail conditions by having an electronic device capable of sending or receiving electronic communications. The state further alleged that the respondent contacted L in direct violation of his bail conditions. Therefore, on 11 December 2018, Erasmus J authorised a warrant for the respondent's arrest. He appeared in these proceedings pursuant to that warrant and denied the allegations.
- [4] Sonnenberg testified as indicated above. On 5 December 2018, L complained to the state as follows:

'Please find attached a letter received today via post to my work address from the alleged Richard J Hopkins (RJH-W). The post mark appears to be December 2018, although the letter is typed in November 2018. This is therefore a direct contact from him.'

- [5] The following appears from the letter:

'Hullo L

I write this to remedy the mistruths created following my prior emails. I wrote them nobody else did. I so regret the damage caused.

I know this must have been so hard on you. It has been a very difficult period for him too, on multiple levels. He is hurting.

I was with him in the car that day. I cautioned him but he was determined. I tried to pretend it was me to protect him. Honestly no harm was meant. Any talk of a threat or intimidation is utter nonsense. It was just him reaching out.

He wears his heart on his sleeve for you. I honestly don't know whether to go punch him or to admire his naïve honesty. ...

He dared show his vulnerability, stupid maybe, but at a real personal cost both to his girls and himself. ...

He says he often finds himself suddenly thinking about you when he least expects it. He misses you.

As mentioned, he 100% understood the need to step back but not the subsequent tone and character change, i.e. the sudden hardness, apparent anger and hurtful bitterness. He says his heart knows a very different you. He said something about you and a small piece of his heart. I didn't follow this, maybe you will know the meaning. It seemed significant for him.

He says he cannot wait to clear his name and claim his life and honour back.

Do keep an open mind. Don't judge. I do not for a second doubt him. Have you stopped to consider that he is an innocent target of cynical police work? Or have you bought into the spin, the press' presumption of guilt via unfounded speculation? He deserves better. You know this. He is the same genuine and kind person he always was.

Take care, best wishes

RJH-W'

[6] The respondent went on oath and denied the allegations against him. He said that he had 'not been moving freely around the area other than in the manner prescribed by [his] bail conditions.'

[7] He stated that he had complied with his bail conditions.

'My movements around the area consist of my daily reporting to Diep River police station between 08h00 and 09h00. I am allowed to do shopping once a week for no longer than three (3) hours. I am further allowed to consult with my counsellor in Rondebosch area. On Sundays, I am allowed to attend a church service, which I do. ...

I further wish to bring it to the Court's attention, ...that I constantly receive threatening mail from whom I can only assume is either a person, a group of people or a lobby group which has concluded that I am guilty of the offence...

Post that is sent to me or purportedly on my behalf in acts of malice, I cannot prevent. I have no control of malicious acts such as these.'

[8] In respect of the complaint that he had contacted F, the respondent said:

‘...F is not a witness on the witness list and any contact with her other than through electronic devices after 25 July 2018 is not a breach of any bail condition.

I do not deem it necessary to admit or deny whether I sent the letter referred to in paragraph 4 as it was not a contravention of any bail condition to contact F or to WhatsApp her at that stage. The bail condition that I was not allowed to make any contact with [L] was only added as a condition on 25 July 2018...’

[9] The respondent further denied that he sent email correspondence to F. He said that he did not have an email address for her and the police had seized all electronic devices he could have used for that purpose. On 18 October 2018, the police arrived at his home, shortly after F deposed to her affidavit, and searched the house but found no electronic devices from which he could have sent mail to F.

[10] Instead, the respondent alleged that he had also received unwanted mail – ‘threatening mail’ – and that the mail to F and L was part of a campaign against him. The respondent has received a photograph depicting him with triple 6 superimposed on his forehead. He further received a newspaper article about his court appearance with a typed message:

‘Dearest Richard

Your last free Xmas and New Year for 25 years. Hon. Judge ...who nailed Jason Rhode is going NAIL you too...Lucy Allan, [...] Road, Constantia’

[11] A third letter warns as follows:

‘...I hear Ben Mathewson won’t take your case, as he doesn’t like losing and wants to keep his unbeaten record in tact.

Adv Pieter Botha is the most expensive guy in town and if you don’t believe me ask Henri van Breda as he represented him, for callously killing his parents and brother. Something like was the case with dear Gill....

But, as I was taught at school actions have consequences.

Enjoy this Christmas and New Year Rob as this is your last one for a considerable length of time !!! Savour every moment while it lasts.

...Next year is going to be a lousy one, but then that’s what you wanted and meticulously planned?...Byron Williams, [...], Stellenbosch, 7600.’

Discussion

[12] The bail conditions relevant to these proceedings are as follows:

(28 September 2018)

‘2. The accused shall remain under house arrest and may not leave his home ...under any circumstances other than the following, ...

3. Prior to the accused departing from his home (and again upon his return), ...the accused shall contact the Investigating Officer...from his Telkom landline on [Sonnenberg's] mobile phone and inform him of his departure and return. If [Sonnenberg's] mobile phone is switched off, the accused shall leave a voice mail regarding his departure or return...
 4. The accused shall forthwith hand over all electronic communication data (electronic devices) to his attorney ...
 5. Until the final determination of his criminal trial, the accused may not be in possession and/or make use of any electronic devices. ...
 7. The accused may not make contact or communicate in any way, directly or indirectly, with any private State witness, ...'
- [13] The state has to prove on a balance of probabilities that the respondent has breached his bail conditions. It has to show *dolus* or *culpa* on the respondent's part. The communication to L on 5 December would be a breach of his bail conditions if the respondent had sent the mail.
- [14] When Erasmus J amended the respondent's bail conditions, he had an affidavit from L in which she alleged that she had received a parcel at her work place containing a 'plant with a card reading "love makes all things beautiful"'. The camera footage depicted the respondent delivering the parcel. L said that she had received correspondence on 3 and 4 September from Richard Hopkins. Regarding the 4 September correspondence, she said that it was: 'a long email from this same person, Richard J Hopkins, ...with details pertaining to the relationship between [respondent] and I that I truly believe [respondent] would not share with anybody.'
- [15] The court found that the respondent was Richard J Hopkins. The letter received on 5 December was signed by RJH-W. The respondent denies that he is the author. A comparison of the correspondence belies the denial. There are insignificant differences. The latest mail was sent by snail mail. The reason is obvious. The respondent has been caught out with email and self-deliveries. The 5 December correspondence is self-serving and seeks to exonerate the respondent. The theme is personal and intimate, and clearly directed at gaining favour with his former lover, L.
- [16] The letter is in stark contrast to the 'threatening mail' referred to above. The 'threatening mail' was vindictive. Unlike the letters to L, the 'threatening mail' is a call for justice. The letters to L are personal and a cry for attention. In the circumstances of this matter, the submission that the letters to L originate from members of the public is completely unfounded.

[17] L further said that she had received a ‘message from a number [...]47, which I verily believe was from [the respondent]. He, however denied same, and as the number was not RICA-registered, I could not prove that it was him.’ The style and sentiment of this correspondence is similar to the other correspondence addressed to L. I am persuaded that they originate from the same author.

[18] As indicated above, the respondent said he did not deem it necessary to admit or deny that he had contacted F in April

2018. F said the following about the correspondence:

‘In April 2018 I became aware that L had blocked [respondent] from all her social media accounts...[The respondent] then began contacting me on ‘WhatsApp’ requesting me to forward messages and correspondence to L...which I did.

[19] F said the following about further correspondence:

‘In July I received a letter from [respondent], which was delivered to the security desk at my complex, and requested to forward it to L. I did not pass on the letter to L as I was aware she did not want any contact with [the respondent] and instead forwarded it to L’s Attorney.

[20] That letter gives a very graphic account of the respondent’s mood and frustration at being unable to see L. The letter also relates details of the respondent’s therapy sessions with his counsellor. It is not clear when in July F received the letter. The respondent deals specifically with the April correspondence but not the July correspondence. I am persuaded that in July, the respondent was still trying to make contact with L through F. However, it is not clear whether it was after she had been added to the list of witnesses.

[21] On 14 October 2018, F received 2 emails, allegedly from the respondent. He expressed a desire to have sexual intercourse with F to ease his frustrations. The author expressed his desire as follows:

‘Don’t shut me down and block me like all my so called friends, please. ...I am deprived. I crave intimacy, raw, primal sex.

...Keen? ...Relax, this is not about LK.

I am in a dark hole, you know this...R’

[22] In the second October mail, the author says:

‘Hi C

Can we just see each other – no agenda, no pressure....I just want to connect. I won’t pester you for info re L, I understand that is a “no go zone”.’

[23] If the respondent sent the October mail, he breached the bail conditions that prohibit him from possessing electronic devices

capable of sending or receiving electronic communication. Mr Mathewson, the respondent's counsel, submitted that the

police searched the respondent's home shortly after F made her statement but found no 'prohibited device'. Therefore, so the submission went, the respondent was not the author of the messages.

[24] The respondent alleges that these messages were sent by members of L and F's social group. There is no basis for that allegation. Conversely, the indications are that the respondent was the author of the October messages. F received the messages on 14 October but only made her statement, which caused the police to search the respondent's house, on 18 October 2018. In the circumstances of this matter, the content points to respondent having been the author of the October correspondence. It follows that he had an electronic device from which he sent the mail. That was a contravention of his bail conditions.

[25] As indicated above, Sonnenberg testified that he had received complaints from neighbours indicating that the respondent was

venturing about in contravention of his bail conditions. He said some of the complaints had merit. However, without a record indicating

when the respondent had contravened the evidence is of no assistance in this enquiry. Although, the state's burden of proof is on a balance of probabilities, it still has to present evidence of the facts alleged. A generalisation will not suffice.

[26] In the result, I am persuaded that on a balance of probabilities the state has shown that the respondent was the author of the December correspondence to L. He did so in contravention of his bail conditions. He is also the author of the correspondence to F, in particular the October correspondence which was sent via electronic mail. It was in contravention of his bail conditions. These were deliberate calculated actions[1].

Does the finding warrant withdrawal of the respondent's bail?

[27] L is a state witness who finds the respondent's continued contact harassing. Her attorney has requested the respondent to desist but not even a court order could persuade him. The respondent's bail has been increased from R50 000 to R75 000 in an attempt to impress on him the need to comply with his bail conditions. He was placed under house arrest with stringent conditions. Despite the measures put in place, the respondent is in flagrant disregard for the orders of this court.

[28] I have considered the effect his actions may have on L and other witnesses. It is not in the interest of the justice to allow an accused to abuse his bail conditions with no consequences. I will heed the call not to declare the bail money forfeit as it was paid by a third party.

ORDER:

[29] I, for the reasons stated above make the following order:

- (a) The respondent has breached his bail conditions;
 - (b) The bail, R75 000, is revoked and to be returned to the depositor.
 - (c) The respondent is held in custody pending finalisation of the trial unless a competent court orders otherwise.
 - (d) The matter is postponed to 11 March 2019.
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BAARTMAN J

- [1] Jack v Vermeulen NO and Another 1979 (1) SA 659 at 662 D-E: ‘...It is clear that, ...the legislator intended that all that the magistrate was required to be satisfied of before exercising his discretion was that the bail condition had been breached and that such breach was due to the fault of the accused.’

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