

SOUTH AFRICA / JUDGMENT

Shaibu v State (A 04/2018) [2018] ZAGPPHC 782 (14 September 2018) [2018] ZAGPPHC 782

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff

CASE / FILE NUMBER

A 04/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A 04/2018

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

ALI

SHAIBU

Appellant

and

The

State

Respondent

Heard:

3 September 2018

Delivered:

14 September 2018

JUDGMENT

Coram; VAN DER SCHYFF, AJ

Introduction

- [1] This is an appeal against the refusal of the magistrate Mr Moos for the district of Wonderboom sitting in Pretoria North to grant bail to the appellant on 24 June 2014.
- [2] The appellant stands trial on a charge of contravening the provisions of s 5(b) read with sections 1, 13, 17 to 25 and 64 of the Drug Trafficking Act 140 of 1992 (read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997), alternatively on a charge contravening s 4(b) read with sections 1, 13, 17 to 25 and 64 of the Drug Trafficking Act 140 of 1992. He allegedly dealt in drugs, being 11 kg of heroin valued at approximately R15 million. It was alternatively alleged that the appellant was in possession of the said drugs.
- [3] The appellant was charged with two co-accused, and he is accused number one.
- [4] The learned Magistrate refused appellant's application to be admitted to bail.

Legal principles applicable to bail appeals

- [5] It is trite that a court hearing a bail appeal may only interfere with the court's decision to refuse to grant bail if the court is satisfied that the magistrate, when exercising his discretion in coming to a specific finding, erred either on a point of fact or a point of law and that the decision of the magistrate is wrong.[1]
- [6] This principle is explained in *S Barber* 1979 (4) SA 218 (D) 220E-G where Heher J stated:

"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. 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 exercise of his discretion. I think it should be stressed that, no matter what the 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'.

- [7] The principle is not unique to bail appeals and it is settled law that if there is any doubt as to whether the lower court erred, a court of appeal will not interfere.[2]

Parties' contentions

- [8] Counsel for the appellant attacked the constitutionality of the magistrate's decision to refuse bail. He contends that:

[8.1] The state created the impression that the appellant was the suspect although no drugs were found in his possession. The drugs were allegedly found in the vehicle of one of the appellant's co-accused. From these facts it appears as if the respondent does not have a strong case against the appellant. It is in addition stated in the heads of argument that the appellant "in the present case discharged the onus by showing that the state case is doubtful or non-existent";

[8.2] The magistrate relied on the "ipse dixit" of the state. As a result none of the grounds listed in s 60(4) were established and therefore the detention of the appellant is not in the interest of justice;

[8.3] The provisions of s 60(9) and the due consideration of the appellant's constitutional rights to be released on bail as envisaged

in s 35(1)(f) of the Constitution were not considered;

[8.4] The magistrate erred in finding that the appellant is a flight risk without supporting evidence to that effect;

[8.5] The magistrate misdirected himself in disregarding the favourable personal circumstances of the appellant;

[8.6] The magistrate failed to weigh up the interests of justice against the right of the appellant to his personal freedom and the prejudice that he is likely to suffer if he was detained in custody;

[9] Respondent's counsel contended that:

[9.1] The appellant bore the onus in terms of s 60(11)(b) of the CPA to satisfy the court hearing the bail application that the interests of justice permit his release because the appellant is faced with charges falling within the ambit of Schedule 5 of the CPA;

[9.2] The ground in s 60(4)(b) has not been established, and on this ground alone bail ought to be refused because the interests of justice do not permit the admittance of the appellant to bail where one of the factors mentioned in s 60(4)(a)-(d) is established;

[9.3] Evidence shows that the appellant has no assets in South Africa which compel him to remain in the country and to attend the trial to finality;

[9.4] It is apparent that the appellant can afford to forego the amount paid as bail to evade trial;

[9.5] It was never denied during the bail application that the appellant was the main person negotiating the deal who introduced his co-accused to the police agent. Neither was it denied that the appellant instructed accused 2 in the court to fetch the drugs from the hiding place. Subsequently, a strong prima facie case has been established against the appellant;

[9.6] The magistrate paid proper attention to the totality of the facts before coming to a conclusion.

Considering the magistrate's judgment

- [10] In order to determine whether the learned magistrate erred the magistrates judgement, and the evidence that was placed before him, must be considered.
- [11] The appellant deposed to an affidavit in support of his bail application. On 24 June 2014 the appellant's attorney read this affidavit into the record.
- [12] The information contained in the appellant's affidavit, that he confirmed as correct after the affidavit was read into the record by his attorney, was that:
- [12.1] He is a 29 year old Ghanaian citizen;
- [12.2] He is in possession of travelling documents;
- [12.3] He recently came from Ghana when he was arrested;
- [12.4] He stayed at B 847 Zambesi Country Estate, Montana Pretoria;
- [12.5] His address in Ghana is house number 22, Godcha street, Accra; [12.6] He is married and is the father to one 2 year old child;
- [12.7] He can pay R10 000.00 bail;
- [12.8] He has no previous convictions;
- [12.9] He does not pose a threat to the safety of the public or any specific person;
- [12.10] He will not attempt to evade trial and is not a flight risk;
- [12.11] He will not interfere with any police investigations;
- [12.12] His release on bail will not undermine or jeopardise the objective or proper functioning of the justice system;
- [12.13] He has not supplied any false information ;
- [12.14] There are no exceptional circumstances which indicate that his release on bail will disturb the public order or
- undermine public peace or security.
- [13] The prosecutor in turn submitted an affidavit deposed to by the investigating officer. In this affidavit the following was statet:
- [13.1] The appellant is a flight risk. He is in South Africa on a holiday permit/ visitor's visa that will expire on 11 July 2014;
- [13.2] He did not provide a residential address to confirm on his behalf;
- [13.3] He does not have any fixed property in the country, neither does he have any family or relatives;

[13.4] He is not employed in the country and it will be difficult to trace him since there is no confirmed address for him;

[13.5] The police obtained a section 52A certificate for entrapment and the appellant was the one who made contact with the agent regarding the selling of 11 kg of heroin, and introduce accused 2 to the police agent. The state will obtain cell phone records, surveillance footage and audio recordings regarding these transactions. The state has a very strong case against the appellant;

[13.6] The appellant was present with his co-accused on the day of the arrest;

[13.7] The appellant has no previous convictions or pending warrants of arrest outstanding;

[13.8] All three the accused are part of a syndicate dealing in drugs;

[13.9] If released on bail the possibility exists that the appellant may interfere with the investigation, and seek to evade trial in light of the fact that a sentence of 25 years imprisonment may be imposed.

[14] It is evident from the record, that the learned magistrate applied his mind before coming to a finding pertaining to the bail application. Numerous questions were posed to the attorney representing the appellant and the prosecutor.

[15] In his judgment the learned magistrate considered the following:

[15.1] The offence of which the appellant is charged is a schedule 5 offence and as a consequence the duty and onus is on the appellant to adduce evidence proving that it is in the interest of justice that he be released on bail.[3]

[15.2] The appellant's personal circumstances (as set out above); [4]

[15.3] A big part of the affidavit amounts to nothing more than quoting section 60(4)(a) -(e);[5]

[15.4] The information contained in the investigating officer's affidavit (as set out above).[6]

[16] The learned magistrate held that as far as s 60(4)(a),(c) and (d) are concerned the appellant discharged the onus resting on him.[7]

[17] The main question that remained to be considered was whether the appellant posed any flight risk.[8]

[18] The magistrate referred to the judgment in *S v Branco* 2002

(1) SACR 531, where the High Court held that the mere fact that a person is a foreigner does not mean that he is not entitled to be released on bail. There must however be factors present for a court to make that decision.

[19] Given that the appellant is not a citizen of the country and that he was only in the country for a few days before he was arrested; that he is in the country on a visitor's visa; that the appellant's travel visa has already expired; that the charge against the appellant is of a very serious nature and will attract a heavy sentence if the appellant is found guilty; that the

appellant does not have any assets in the country; that the state has a strong case against the appellant; [9] and that there is nothing keeping the appellant in the country,[10] the learned magistrate found that the appellant did not discharge the onus to prove that he does not constitute a flight risk and that it is in the interest of justice to release him on bail.[11]

[20] I am of the view that the learned magistrate carefully considered all the facts before he came to the decision to refuse the applicant's bail application. He questioned both the attorney representing the appellant and the prosecutor. He carefully weighed the interests of the appellant and the interests of society. He exercised his discretion judicially and I cannot fault the decision that he came to after considering the evidence that was placed before. The appellant did not provide substantial evidence to prove that he is not a flight risk.

[21] The appellant did not discharge the onus that was on him.

ORDER

In the circumstances the appeal against the decision of the court a quo to refuse an application for admittance to bail is dismissed.

E VAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

3 September 2018

For the Plaintiff/Applicant: ADV NKOANA

Instructed by:

MALATJI ATTORNEYS

For the Defendant/Respondent: ADV KOALEPE

Instructed by:

STATE ATTORNEY

Date of Judgment: 14 September 2018

[1] S 65(4) Criminal Procedure Act, No 51 of 1977, hereafter the "CPA".

[2] R v Dhlumayo 1948 (2) SA 677 (A).

[3] Page 8 of the record.

[4] Page 9-10 of the record.

[5] Page 10 of the record

- [6] Page 13-14 of the record
- [7] Page 17 of the record
- [8] Ibid.
- [9] Page 18-21 of the record.
- [10] Page 22 of the record.
- [11] Page 22-23 of the record.
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