

SOUTH AFRICA / JUDGMENT

Solomons v S (A163/2024) [2024] ZAWCHC 305 (10 October 2024)

[2024] ZAWCHC 305

COURT

Western Cape High Court, Cape Town

BEFORE

Andrews

CASE / FILE NUMBER

A163/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE NO: A163/2024

LOWER COURT CASE NO: BDSH3/44/2022

In the matter between:

IMTIYAAZ SOLOMONS

Appellant

and

THE STATE

Respondent

Date of argument: 08 October 2024

Date of judgment: 10 October 2024

Judgment

Andrews, AJ

Introduction

[1]

This is an appeal in terms of Section 65(4) of the Criminal Procedure Act [1](hereinafter referred to as the CPA), against the decision of the Presiding Magistrate Mr Siyabonga Mazibuko on 20 November 2023 in the Regional Court in Blue Downs to refuse the Appellant's release on bail.

[2] The Appellant is arraigned on one count of attempted murder and one count of possession of a firearm, calibre unknown to the state, without having a valid licence to possess the firearm, in contravention of the Firearms Control Act[2]. It is not disputed that the Appellant has been charged with offences that fall under Schedule 5 of the CPA. The Appellant brought an application to be released on bail on 7 November 2023, which was opposed. The court a quo refused the Appellant's application for bail on 20 November 2023.

[3] The Appellant appeals the decision of the court a quo on the grounds that the Appellant had not established on a balance of probabilities that it would be in the interest of justice to permit his release on bail. The Respondent opposed the application.

Legislative framework

[4] Section 65(4) of the Act provides for the test of a Superior Court to interfere with a decision of the Lower Court to refuse bail.

'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court/judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given'

[5] Section 60(11)(b) of the Act sets forth how bail applications that fall within the prescripts of Schedule 5, should be dealt with in this regard, the Act states:

'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) ...

(b) In Schedule 5, but not in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interest of justice permit his or her release...'

[6] The seminal Constitutional Court judgment of *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*[3] are apposite in respect of section 60(11)(b) of the CPA as it crystallises the Court's approach to interest of justice considerations:

‘This view is strengthened by a consideration of s 60(11)(b). That subsection stipulates that an accused must satisfy a magistrate that the “interests of justice” permit his or her release. It clearly places an onus upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in sub-ss 60(4) - (9) or required by s 35(1)(f). It is clear that an accused on a sch 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant.’

The evidence

- [7] The Appellant adduced evidence by way of affidavit and a further affidavit of Gail Arendse. The Respondent adduced evidence by way of affidavits from the Investigating Officer, Detective Sergeant Karel Jooste (“D/S Jooste”), and the affidavits of the complainant, Mr Philip Bailey (“the complainant”), an eye witness, Ms Caitlin Bailey (“Ms Bailey”) and Constable Krige who attended at the scene of the crime.

The allegations on the merits

- [8] D/S Jooste summarised the salient allegations against the Appellant in his affidavit in opposition to the Appellant’s release on bail. In this regard it is alleged that on Wednesday 6 October 2021 at about 23h00, the complainant and family members were watching television at their house in Wesbank. The complainant was about to

lock the door of the house. As he approached the door he heard a knock at the door. The complainant opened the door and saw an unknown male, whom he remembers as having walked around with the Appellant, who wanted to sell a cell-phone to the victim. The victim observed the shadow of another person standing next to the front door. The victim heard a gunshot and felt bullets penetrating his body.

- [9] The sister of the complainant who was in the bedroom at the time heard the voices of people talking in front of the house. When she looked through the window, she saw the Appellant taking out something from in front of his waist. The Appellant pointed it to the house and fired one shot. She saw something like flames coming out of the gun.

- [10] She took shelter and then heard more gunshots. After the gunshots stopped she heard the victim shout to his mother that he was shot. Thereafter the complainant was taken to Tygerberg Hospital for medical treatment.

- [11] The affidavit of the complainant, Mr Bailey, explained that when he asked his mother about the cellphone, she said she did not want stolen property. He could see the shadow of a person next to the house. As he was about to close the door he heard gunshots and felt the bullets going through his body. He sustained a gunshot wound through the neck.

The Appellant’s case

[12] The affidavit of the Appellant was read into the record which set out his personal circumstances and previous convictions. He disclosed the basis of his defence which in brief, amounted to a bare denial. He stated that at the time of the alleged incident, he was far away and not involved in any way in the commission of the offence. A further affidavit of Gail Arendse was produced to confirm an alternative address where the Appellant would be able to reside should the court have been minded to release the Appellant on bail.

The grounds of appeal

[13] The Appellant's grounds of appeal as per the Notice of Appeal are encapsulated as follows:

- (a) The Magistrate erred and misdirected himself by not carefully evaluating the totality of the evidence submitted but only chose to select the evidence submitted against the Appellant;
- (b) The Magistrate's approach in failure to properly assess and evaluate the totality of the evidence submitted falls short of the approach required by section 60(9) of the CPA;
- (c) Had the Magistrate properly evaluated the totality of the evidence submitted both for and against the Appellant, he would have noticed that:
 - (i) The Appellant correctly disclosed all his previous convictions;
 - (ii) The Appellant attended all his Court appearances in previous cases and thereby demonstrated that he was unlikely to evade his trial;
 - (iii) The Appellant abided by the judgment of the court in matters where he previously convicted;
 - (iv) The suspended portion of sentences imposed in respect of his previous convictions had lapsed;
 - (v) The Magistrate referred to 4 previous convictions; but according to the affidavit of the D/S Jooste, he has 5 previous convictions;
 - (vi) The Magistrate should have noticed that the Appellant's previous convictions does not include murder;
 - (vii) The D/S Jooste alleged that the Appellant has a previous conviction for a double murder which was not accurate;
 - (viii) That the Appellant does not have a conviction for the supply of false information on oath as alleged by the D/S Jooste and
 - (ix) In respect of the alleged robbery referred to by the D/S Jooste, the Appellant was not found guilty of any wrongdoing.
- (d) The Magistrate erred in finding that the interest of justice does not permit his release on bail;

- (e) The Magistrate erred in not considering the Appellants release on bail subject to strict bail conditions;
- (f) The Magistrate erred and misdirected himself in arriving at the conclusion that if the Appellant were released on bail the Appellant is likely to commit a schedule 1 offence based on his previous convictions;
- (g) The case against the Appellant is not strong and;
- (h) There was an unreasonable delay in finalising the trial which infringes his constitutional right to a fair trial.

Grounds of opposition

- [14] The Respondent opposes the Appeal on the basis that the court a quo correctly refused bail for the appellant as the interest of justice would not permit his release.

Interest of Justice Considerations

- [15] Section 60(4) of the CPA sets out the interest of justice considerations:

‘The interest of justice do not permit the release from detention of an accused where one or more of the following grounds have been established.

- (a) Where there is a 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
- (b) Where there is a likelihood that the accused, if he or she were released on bail will attempt to evade his trial; or
- (c) Where there is a 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
- (d) Where there is a likelihood that the accused, if he or she would be released on bail will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) Where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security’

Legal Principles

- [16] It is trite that the functions and powers of the court or judge hearing the appeal under Section 65 are similar to those in an appeal against conviction and sentence. In *S v Barber*[4], Hefer J remarked as follows:

‘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 this 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.'[5]

Considerations by the Court a quo

Personal circumstances

[17] The court a quo took the Appellant's personal circumstances as outlined in his affidavit into consideration which included that his was 25 years old and left school in grade 8 and that he has 2 minor children. At the time of the Appellant's arrest, he was employed at a construction company earning approximately R2000 every fortnight; that such employment was still available should he be released on bail.

Likelihood of committing Schedule 1 offences

[18] It was submitted that the court a quo failed to take into account that the Appellant's previous offences were committed about 5 – 7 years ago.

[19] The court a quo considered the Appellant's previous convictions and the concomitant risk factor of the likelihood that if the Appellant was to be released on bail he will commit a schedule 1 offence. In this regard, the past conduct of the Appellant was a factor that was taken into account. The court a quo was alive to the fact that the previous convictions were "old for almost five years". The court a quo found that if the Appellant were to be released on bail there is a likelihood that he will commit a schedule 1 offence.

[20] It is therefore evident that the Appellant's contention in this regard is therefore inaccurate.

Flight Risk

[21] The affidavit of the D/S Jooste in terms of which mention was made that the Appellant had changed his names when he was arrested on another matter. The court a quo further considered that the Appellant was born and raised in South Africa and that he has no family outside of the Republic. The court a quo found that there is a likelihood that the accused would evade his trial as the offence occurred on 6 October 2021. He was identified by the sister of the complainant, and arrested on 29 October 2021, 23 days after the date of the incident. The court a quo had regard to the content of the D/S Jooste's affidavit wherein he indicated that it was difficult for him to trace the Appellant as he was running from the police and not sleeping at home.

[22] The Appellant contended that the empirical evidence shows that the Appellant attended all his previous court appearances until his matters were finalised in matters where he was cleared of and that he had abided by the judgment imposed on him. In addition, it was submitted that the conclusion reached by the court a quo that the Appellant would evade his trial is not grounded on any factual material basis as it was invented or manufactured by the D/S Jooste.

- [23] The D/S Jooste indicated that he had trouble tracing the Appellant. The incident occurred on 6 October 2021. The Appellant was arrested on 29 October 2021, after a period of 23 days had lapsed. It was argued that no reason was proffered by the Appellant for this time lapse. During argument Mr Ngonzo, the Appellant's legal representative, submitted that the Appellant was not aware that the police were looking for him and that he was arrested whilst walking from his girlfriend's place. This information was not placed before the court a quo when the bail application was heard.
- [24] The Respondent contended that the Appellant did not dispute the evidence that he used a false name when he was arrested for under Delft CAS 425/08/2021. It was argued that the Appellant was never charged for "falsification of name". It was submitted that in light of the fact that there was no rebuttal to the allegation, the finding by the court a quo that the Appellant will evade his trial is not wrong.
- [25] Section 60(6) of the CPA sets out the considerations which are to be taken into account when considering whether an accused will abscond which states as follows:
- '(6) In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors namely –
- (a) The emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
 - (b) The assets held by the accused and where such assets are situated;
 - (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
 - (d) The extent, if any to which the accused can afford to forfeit the amount of bail which may be set;
 - (e) The question whether the extradition of the accused could readily be effected should be or she flee across the borders of the Republic in an attempt to evade his or her trial;
 - (f) The nature and the gravity of the charge on which the accused is to be tried;
 - (g) The strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
 - (h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
 - (i) The binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or any other factor which in the opinion of the court should be taken into account.'

- [26] Section 60(6)(j)[6] allows the court to consider any other factor. There is therefore no numerous clausus of factors which a court should consider in assessing the likelihood that a bail applicant would attempt to evade trial.

Interfere with witnesses

- [27] The Appellant provided a further affidavit confirming he had an alternative address, however the court a quo was not persuaded that this would deter the Appellant from interfering with witnesses as he provided no evidence in this regard. Neither did he deal with the aspects of the likelihood that he would evade trial and that he will commit Schedule 1 offence if released on bail.

Strength of the State's case

- [28] It was argued that the complainant does not identify the Appellant as his assailant. In this regard, he informed the police officer who attended the scene of the crime that he does not know who shot him and therefore the state does not have a strong case against him. During argument, Mr Ngongo, emphasised that the complainant clearly indicated that he saw a male person who was unknown to the Appellant, who was "walking up and down with Kadwasie and Charra". It was pointed out that the complainant said he could see "a shade of another person", thus implying that if it was the Appellant who shot him, the complainant would have recognised him as they know each other. Mr Ngongo, further emphasised that the complainant who was possibly fearing that he was dying after being shot, would surely have informed the police officer who attended the scene that it was the Appellant who shot him but instead; Constable Krige's statement reflected that the complainant reported that

"the unknown one to him then pulled out the firearm as he closed the door". Constable Krige's statement goes further and recorded that "three shots went off shooting him twice then Intiyaas (sic) Solomons "Kadawsie, Charra and the third one unknown ran direction ..." [7]

- [29] Advocate Smit on behalf of the Respondent submitted that the complainant gave an honest account of his recollection of the events and contended that the court is to have regard to the fact that the complainant was shot whilst he was in the process of closing the door. Therefore, he could not have seen his assailant. Advocate Smit further contended that there is a compelling case against the Appellant as there is an eye witness, the sister of the Appellant, who saw who had fired the shots.

- [30] On the complainant's version, he only saw the shadow of a person and not the assailant. The account appears to not be consistent with the version of Constable Krige. Of significance is the fact that the Appellant is placed on the scene. Whether he was the one who ultimately shot the complainant, or possibly acted in common purpose with the one who may have actually shot the complainant, will be for the trial court to decide. The test at the stage of a bail application is whether there is a prima facie case against the Appellant. In my view, the presence of the Appellant together with the eye witness account was sufficient to meet the minimum threshold for the purposes of the bail application. Although it was placed on

record that the eye-witness is about to be cross-examined on this aspect, nothing turns on this for the purposes of this bail appeal as the Appellant is confined to the four corners of his application.

- [31] This is not a bail hearing on new facts. Even if these facts were to be taken into account, the ultimate consideration for the purposes of this bail appeal is whether the court a quo, in exercising its discretion to refuse bail did so wrongly.

Discussion

- [32] The Appellant contended that the Magistrate erred on the facts by electing to take into consideration the facts which were invented or manufactured with no factual material basis, and ignored facts which have factual material basis that should have been taken into consideration as set out in Section 60(11)(B)(a). In this regard, it was submitted that the error of fact emanated when the Appellant tabulated his previous convictions as confirmed by the SAP 69's. In terms of the previous convictions, the Appellant was never convicted of any double murder but the court a quo took into consideration the assertion of the double murder as proffered by the D/S Jooste and ignored the SAP 69's.

- [33] D/S Jooste indicated as follows:

‘...the accused was wanted on Mfuleni CAS 553/07/2021, double murder and he was arrested on Delft CAS 425/08/2021 where (sic) he gave a false name as Ricardo Van Wyk.’

- [34] The court a quo did not state that the Appellant was convicted of a double murder. It was stated that “the Appellant was also wanted on CAS 553/7/2021 for double murder and he was arrested on CAS 425/8/2021 where he gave a false name of Ricardo van Wyk.” The court a quo noted that the Appellant did not dispute these allegations.

- [35] Section 65(4) of the CPA is drafted in peremptory terms. The decision of the Magistrate cannot be set aside unless it was wrong. The Appellant has placed an inaccurate account of the court a quo's findings before this court. It was argued that it is not in the interest of justice to be denied bail on the basis of charges that he was cleared on. Those matters are no longer pending. Mr Ngongo furthermore submitted that the Appellant was never charged and

convicted with any falsification of his name and there are no pending cases against him.

- [36] Advocate Smit emphasised during argument that a clear likelihood that the Appellant, if released on bail will commit other offence was established. In augmentation, it was submitted that the Appellant was convicted on 29 June 2021 on a charged of robbery which offence was committed on 4 August 2019. The offence in casu is said to have been committed on 6 October 2021. This, it was argued, is sufficient to demonstrate the conduct of the Appellant in support of the assertion that there is a high probability that the Appellant will commit another schedule 1 offence if he were to be released on bail. Mr Ngongo argued that the threshold to establish propensity has not been met if regard is had to the matter of R

v Rudolph[8] . I interpose to mention that reliance on Rudolph, by the Appellant is misplaced as the facts in casu are not only distinguishable, the matter dealt with a different schedule. If anything, Rudolph supports the findings of the court a quo pertaining to unanswered allegations.

- [37] In relation to the aspect of unreasonable delay, it was submitted that this question has never been raised before, despite the matter serving before numerous Presiding Officers. It is apparent that there was a Section 49G application as well. The Respondent contended that there was no unreasonable delay as regard is to be had to the cogent reasons for the adjournments some of which were at the instance of the Appellant who had changed legal representatives.
- [38] In argument, Mr Ngonzo placed on record that there has been a further delay in that the witness(es) were not in attendance on at least 2 occasions and on one of those occasions, the presiding officer and the witnesses(es) were not at court. Advocate Smit speculated that the witnesses could have been stopped because the Magistrate was not available, however, Mr Ngonzo on behalf of the Appellant argued that the Court threatened to close the state's case if the witness(es) were not at court on the following occasion.
- [39] It was further contended that the delays in finalising the trial, infringes on his Section 35 Constitutional rights and that the court is to have regard to the fact that the eye witness's evidence is not reliable based on the time she had to observe what happened. In my view, these are all aspects that will be ventilated during the trial. As earlier indicated, it is sufficient, for the purposes of a bail hearing that a prima facie case is established. In my view, the subsequent commencement of the trial, renders this ground moot for the purposes of this bail appeal. It might become a ground for a bail application on new facts.
- [40] Furthermore, it is my view that nothing turns on whether the investigating officer was not accurate on the Appellant's previous convictions. The court recognised the disparity and stated as follows according to the record:
- 'According to the accused affidavit he has four previous convictions however according to the affidavit of the investigating officer it is five previous convictions'
- [41] The correct facts are reflected on the SAP 69. The test is not whether the Investigating Officer was wrong, but whether the decision of the court a quo was wrong. This error on the part of the Investigating Officer is not material if regard is had to the reasons upon which the court a quo denied the Appellant's release on bail. It is evident that the court a quo's refusal of bail is not predicated on this factor in isolation.
- [42] Mr Ngonzo pleaded with the court to have mercy on the Appellant as his son is growing up without his father as the Appellant has been in custody since 2019.

Conclusion

- [43] There is an overabundance of authorities that reaffirms the limitations and powers of a Court of Appeal. The ultimate consideration is whether the Magistrate, who had the discretion to grant bail, exercised such discretion wrongly. Only one of the considerations set out in Section 60(4) of the CPA need be present to refuse bail. In my view, the court a quo, cemented its decision to refuse bail on more than one of the factors listed in Section 60(4). It is evident that the court a quo's refusal to grant bail is based on the relevant provisions of Section 60(11)(B) and the interest of justice considerations encapsulated in Section 60(4) of the CPA.
- [44] In addition, the court a quo considered the Appellant's constitutional right to freedom and the presumption of innocence. However, the court a quo concluded that those rights are limited if the interest of justice demands so. It went on to say that interest of justice considerations included those of the victims.
- [45] It is trite that the court a quo is imbued with a wide discretion when deciding on an accused's release on bail. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the accused to adduce evidence and persuade the court that his or her release would be in the interest of justice.
- [46] In considering the factors taken into account by the court a quo regarding why it believed the Appellant, will commit a schedule 1 offence if released on bail and the likelihood that he will not stand trial in light of the fact that he purportedly evaded being arrested and used a false name in another matter which was not rebutted. I can find no misdirection in the finding of the court a quo in this regard. The observations and reasoning of Jones J in *S v Mpulampula*[9] is apt, and although distinguishable to the facts of the current case, I echo certain sentiments expressed therein:
- ‘...The conclusion is difficult to avoid that he had been deliberately avoiding the police for a considerable time, ...This in my view, reduces considerably one's confidence that he will ultimately stand trial...’
- [47] I do not agree with Ms Ngonzo's submissions that speculative issues become none issues. The Appellant is reminded that for the purposes of bail, the onus rests on the Appellant to show that it would be in the interest of justice to permit his release on bail. His contention that the that the Appellant will be deprived of his freedom for a non-issue, is in my view misplaced and a misinterpretation of what the threshold test was for the Appellant at the bail hearing.

[48] I am satisfied that the court a quo properly assessed and evaluated the totality of the evidence; considered the objective facts and applicable legal principles and correctly found that the interest of justice does not permit the Appellant's release on bail. Therefore, I agree with the findings of the court a quo that it would not be in the interest of justice for the Appellant to be released on bail.

[49] Consequently, I am satisfied that the court a quo correctly denied the Appellant's application to be released on bail.

Order:

[50] In the result the Appellant's appeal against the order by the court a quo refusing his application for bail is dismissed.

P ANDREWS

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant:

Mr BK Ngonzo

Instructed by:

BK Ngonzo Attorneys

Counsel for the Respondent:

Advocate C Smit

Instructed by:

Office of the Director of Public Prosecutions

[1] Act 51 of 1977.

[2] Act 60 of 2000.

[3] (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999), para 65.

[4] 1979 (4) SA 218 (D) at 220E – H.

[5] See also Killian v S [2021] ZAWCHC 100 (24 May 2021) at para 7.

[6] '60(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors – (j) any other factor opinion of the court should be taken into account.'

- [6] '60(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors –
- (j) any other factor opinion of the court should be taken into account.'
- [7] Appeal Record Bundle, Constable Krige statement, page 83.
- [8] [2010] 2 All SA 178 (SCA) (30 September 2009).
- [9] 2007 (2) SACR 133 (E) at 136f-i.
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