THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A727/2014

17/10/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:

EXCELLENT BLUES SHABANGU **APPLICANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOSEAMO AJ:

[1] This is an appeal against the decision of the magistrate at White River, delivered on 23rd April 2014, refusing an application by the appellants for bail pending a trial. The appellants were charged with the following counts: (1) Theft read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997; (2) Carrying out a restricted activity involving threatened or protected species without a permit by hunting and killing a rhino; (3) Contravention of s27 read with b and c of Act 10 of 1998; (4) Possession of a

firearm; (5) Possession of ammunition. On the 23rd of August 2014 the appellants brought an application for bail on new facts, which was abandoned.

[2] At the hearing of the bail application it was common cause that the appellants were facing charges that fall under Schedule 5 of the Criminal Procedure Act 51 of 1977 and therefore had to prove on a balance of probabilities that the interests of justice permit their release. The appellants did not testify but submitted affidavits in court.

[3] The first appellant's affidavit states that he denies the charges leveled against him. He stated that Rossouw and Don English called him on the 06th April 2014 and he was released after being questioned. He was called again on the 7th April 2014 and was later arrested. At the time of his arrest he was employed by Sanparks and earned an amount of R5 000. He has a passport and can hand it to the investigating officer if the court so orders. He has no intention to abscond and will attend trial until excused by the court. He has no previous convictions.

[4] The second appellant's affidavit states that he is employed at the Kruger National Park and earns an amount of R4 300. He does not have a passport and does not intend to travel outside the Republic. He will not interfere with any witnesses. He is a breadwinner and will lose his job if he is not released on bail. He intends to plead not guilty to the charges leveled against him.

[5] The state tendered *viva voce* evidence of Frederick Willem Rossouw who is employed by Sanparks as an investigator in environmental crime investigation services in the Kruger National Park. A summary of his evidence is that he was involved in the investigation of the incident of the killing of a rhino at the Kruger National Park. He confirmed that the appellants were employees of the Kruger National Park and stayed in official housing. He could not confirm the addresses provided by the appellants. He did not believe they were a flight risk but further stated that because they were facing charges of a serious nature they were likely to abscond. He further stated that

the case against both appellants was strong as the first appellant made a confession while the second appellant made certain admissions.

[6] He testified further that there was evidence that the first appellant booked out an official vehicle. The electronic tracking system of the vehicle places the vehicle at the scene of the crime at the time the shot was heard. The police's forensic laboratory telephonically confirmed that full profiles of rhino DNA were found in the vehicle. First appellant made a pointing out where he pointed out a firearm that they used to kill the rhino. The police recovered the firearm and found it to be the same caliber as the bullet and cartridge found at the scene of the crime. The first appellant told Rossouw that he travelled to Protea Hotel on the night of the incident to fetch a firearm and later to deliver the horn that was taken from the rhino after it was shot.

[7] The second appellant admitted that the shoe that was found near the crime scene belonged to him. He indicated that the other shoe was thrown in the Sabie river together with his clothes.

[8] In response to the question by the court why bail should or should not be granted, Rossouw said that the seriousness of the crime, the outcry of the community, possibility to commit similar crime in order to supplement their income due to the hardship that may arise as a result of being unemployed, possibility of evading trial were the reasons why the appellants should not be granted bail.

[9] The court a quo refused to grant the appellants bail on the grounds that the State has a strong case against the appellants and that the possibility of a long-term imprisonment would provide an incentive to the appellants to abscond. The court considered the personal circumstances of the appellants and also considered the evidence of Rossouw including the public outcry and decided it would not be in the interest of justice that the appellants be granted bail. In considering the outcry of the community the court a quo was cautious enough to ensure that it does not place undue emphasis on it. The learned magistrate stated as follows: ' Honourable Judge Louw criticized the

magistrate for accepting the report in the Beeld for an outcry of rhino poachers being released on bail, but at the same time he also indicated that the magistrate is not an ivory tower so he needs to take note of the public's views in these instances.'

[10] At the hearing of this appeal it was argued on behalf of the appellants that Section 35(1)(f) of the Constitution provides for the release of an accused person subject to reasonable conditions, provided that the interests of justice permit. It was further contended on behalf of the appellants that the presumption of innocence operates in favour of the appellant over where there is a strong *prima facie* case.

[11] Counsel for the respondent contends that the State has a strong *prima facie* case against the appellants. The appellants could face 15 years, 10 years and 2 years imprisonment in respect of count 1, 2 and 3 respectively. It is further the contention of the State that there is a desperate outcry from the community.

[12] Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 (CPA) provides that 'where an accused is charged with an offence referred to 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 satisfied the court that the interest of justice permit his release.'

[13] Section 60(11) places the onus on the appellants to satisfy the court that it is in the interest of justice that they be released on bail. Therefore the appellants bear the onus to prove on a balance of probabilities that the interest of justice permits their release on bail. And in deciding whether it is in the interest of justice that the appellants be released on bail the court will be guided by Section 60(4) to 60(9) of the CPA.

[14] In ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 CC para 6*** Kriegler J stated that 'Section 35(1)(f) in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by s12. The second is that notwithstanding lawful arrest, the person concerned has a right, but circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permits it.'

[15] The court summarized the application of Section 35(1)(f) of the Constitution and Section 60 of the CPA at paragraph 101 as follows
'4. Section 35(1)(f) of the Constitution acknowledges that persons may be arrested and detained for allegedly having committed offences but such arrestees are entitled to be released on reasonable condition if the interests of justice permit such release.
5. Deciding whether the interests of justice permit such release, and determining appropriate conditions, is an exercise to be performed judicially in accordance with the procedure laid down in s60 of the CPA.'

[16] Therefore it is clear from the above that the right to liberty is not absolute and the court will be guided by the provisions of s60 of the CPA in deciding whether the interests of justice permits it.

[17] In support of the allegation that the State has a strong *prima facie* case against the appellants, the State is relying on the evidence led by Rossouw to the effect that: (a) the police are in possession of a confession by first appellant; (b) he admitted that he went to Protea Hotel to collect the firearm and went back to deliver the rhino horn; (c) he made a pointing out which resulted in the recovery of the firearm that was used in the killing of the rhino; (d) the second appellant admitted that the crock shoe that was recovered at the scene of the crime belongs to him; (e) he stated that the other shoe had

been thrown in the Sabie river. The appellants did not present any evidence to contradict the above evidence.

[18] In ***S v Kock 2003 (2) SACR 5 (SCA) para 11*** Heher AJA stated that the strength or weakness of the State's case must be given consideration in determining where the interests of justice lie for the purpose of section 60(11)(b). The court held that when the state has either failed to make a case or has relied on one which is so lacking in detail and persuasion that a court hearing a bail application cannot express even a *prima facie* view as to its strength or weakness the accused must be given the benefit of the doubt. Failure by the magistrate to pay attention to this important factor in the evaluation of the application was held to constitute misdirection on her part.

[19] In ***S v Van Wyk 2005 (1) SACR 41 (SCA) para 6*** it was stated that the function of the court in a bail application is to prima facie determine the relative strength of the State's case and not to make a provisional finding of guilt or innocence.

[20] From the above it is clear that the court will consider the strength or weakness of the State's case against the appellants. The issue of guilt or innocence of the appellants will be dealt with by the trial court. Therefore the reliance by the appellants on the appellants' right to be presumed innocent until proven guilty does not have a bearing on the bail application proceedings.

[21] Bail proceedings are *sui generis*. The State is not obliged to produce evidence in the true sense. See ***Siwela v S [2000] 1 ALL SA 389 (W)***. The admissibility of the confession and DNA results that the appellants' counsel sought to challenge under cross-examination are matters to be determined by the trial court.

[22] The court a quo correctly accepted the evidence of Rossouw that the State has a strong case against the Appellants. The appellants did not lead

any evidence but rather chose to hand in affidavits. The evidence of the state regarding the case against the appellants remains unchallenged.

[23] In ***S v Viljoen 2002 (2) SACR 550 SCA at 552 para 19*** the court held that 'the onus which had rested on the appellant had required that he show on a balance of probabilities that his confession, plea of guilty, plea explanation and evidence at the bail proceedings before the magistrate would be shown at his trial to be devoid of all effect due to the involuntary and forced nature thereof. On the facts the court a quo correctly found that he had not discharged the onus.' The court further cautioned against turning every bail applications in to drawn-out trial before the criminal trial.

[24] It is not clear what the appellants' defence against the charges leveled against them is. The appellant should have led evidence placing in dispute the evidence of Rossouw regarding the allegations leveled against them.

[25] In ***S v Jonas 1998(2) SACR 677 (SCA)*** the court held that to be successful the appellant had to show by adducing acceptable evidence that the State's case against him is non-existent or subject to serious doubt.

[26] The appellants contend that they were required to adduce acceptable evidence and their affidavits constitute that evidence. In my view the evidence adduced by the appellants was not sufficient to discharge the onus.

[27] In ***S v Boeck 2000 (2) SACR 185 at 186 para h*** it was stated that if the State elects to use unsatisfactory procedure to adduce evidence in a bail application other than *viva voce* evidence, they do so at their own peril because the value attached to a written statement is clearly less than evidence under oath that can be tested by cross examination.

[28] In my view the same applies to the appellants in this matter. The appellants decided not to testify but chose to hand in affidavits. They did so at their own peril. The evidence of the State regarding the confession, the DNA results, the pointing out and the recovery of the firearm as a result of the

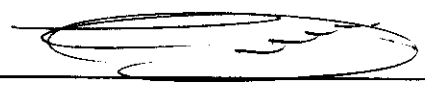
pointing out remained uncontested. In my view the strength of the State's case and the possibility of a long prison term if found guilty is enough to prompt the appellants to evade trial.

[29] Section 65(4) of the CPA provides that a court of appeal may not set aside the decision of a lower court, unless it is satisfied that the lower court was wrong, in which event that court shall give a decision which in its opinion the lower court should have given.

[30] In the result I find that the court a quo was not wrong in coming to a conclusion that it will not be in the interest of justice for the appellants to be released on bail.

ORDER

The appeal is dismissed.



P. D. Moseamo

Acting Judge of the Gauteng Division, Pretoria