REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A 278/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

22 October 2021
DATE

SIGNATURE

In the matter between:

MADLOZI BOY SHABANGU — Appellant

and

THE STATE — Respondent

JUDGMENT

VAN VEENENDAAL, AJ

[1] This is an appeal against refusal of bail in the Nigel Magistrate's Court.

[2] The Appellant was arrested on 27 August 2021, appeared in court the first time on 30 August 2021 and bail was refused on 6 September 2021.

[3] The Appellant's case is the following:

a. He is a South African citizen, 32 years old, without a passport, or family ties outside of South Africa. He has been residing in Devon for the past three years. He is married and has three minor dependants, with fixed assets, employed as a storeman and earning R5 000 per month.

b. He has previous convictions and no pending matters. The previous convictions are for robbery in 2007, with a 3-year suspended sentence; possession of dagga in 2014 with a fine of R200 and malicious injury to property in 2019, with a fine in alternative to imprisonment. (The last conviction was due to being involved in delivery protests.)

c. He intends to plead not guilty to the offence.

d. He submits that it is in the interests of justice that he be admitted to bail as he is the sole breadwinner and his employment is in jeopardy due to his incarceration; he undertakes to comply with section 60(4) (a) to (e), and he has R 1000 available for bail.

[4] The State's case is the following:

a. The investigating officer submitted an affidavit in which he states that at about 1:30 in the morning the complainant and his crew attended to a domestic violence dispute at the home of the Appellant.

b. They found the appellant dragging his girlfriend by the hair and tried to intervene, but the Appellant started to assault his girlfriend by slapping her on the head.

c. They were separated and taken to the Devon Police Station. The allegation is that the girlfriend out of fear did not want to lay charges, that this is not the first time the complainant had attended to complaints of domestic violence between the two while no charges were laid.

d. At the police station, the complainant states that the appellant did the following: he swore at the police while still locked in the police van, he assaulted the complainant with a closed fist when they opened the police van; he tried to disarm the complainant; he made death threats to the complainant before being forcefully locked in the police cells; he resisted arrest and even refused to sign the notice of rights in terms of the Constitution.

e. The Appellant knows the identity of the complainant and he assaulted the arresting officer where he stays. His conduct made it difficult for the girlfriend to lay charges and she denied being assaulted by the Appellant. The Appellant also assisted her to be employed at the same company as himself.

f. The Investigating officer states that bail condition will not be feasible for the Appellant, the state has a strong case against the Appellant, The Appellant can influence or intimidate witnesses or he may be arrested for similar offences.

[5] From the scenario as stated by the investigating officer, two charges were distilled. The defence denies that the appellant obtained work for the girlfriend and she denies that she was assaulted, not that she called the police. She is not the victim she is being made out to be. She is also somewhat friends with the girlfriend of the complainant. She did not witness the assault of the complainant.

[6] On appeal, Mr Alberts on behalf of the Appellant submitted that the trial may possibly happen soon, it will not be a long trial and may not even lead to incarceration or incarceration of short duration, if it were to be imposed. The state concedes on this point, but still strenuously opposes the bail application.

[7] It is important to keep in mind in this matter, that the complainant is the police officer, not the girlfriend of the Appellant.

[8] The bail application was brought under Schedule 5 of the Criminal Procedure Act, in terms of section 60(11)(b) of the Act, placing the onus on the Appellant to prove that the interests of justice permit his release. Until the Appellant discharges that onus, he has to remain in custody.

[9] The basis of reliance on schedule 5 is not made clear, but seems to be based on the previous conviction in 2007 of assault. No allegation is made that the Appellant inflicted a serious wound on the complainant.

[10] The factors determining interests of justice are contained in section 60(4) and then further described in subsections 5 to 9. The magistrate found that the Appellant poses no risk in terms of this section, but for section 60(4)(a).

[11] Section 60(4) determines that: (4) "The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the 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 the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the 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 the likelihood that the accused, if he or she were 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 the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or [sic]".

[12] At a first glance, this is an open and shut case and the Appellant should be granted bail. However, the matter is complicated by the fact that the complainant responded to a complaint of domestic violence, found the Appellant dragging his girlfriend around by the hair, then proceeded to assault the police officers responding to the complaint while the girlfriend of the Appellant refuses to lay charges against the Appellant. The complainant alleges that they have responded to similar complaints on numerous occasions. Furthermore, it is alleged that the complainant's girlfriend and the Appellant's girlfriend are known to each other.

[13] The magistrate was alive to the complication posed by the fact that the girlfriend refused to lay charges and this caused the court to make remarks unkind to the High Court judiciary while expressing frustration at the inability to make an indentation on the prevalence of gender-based violence. That said, the Courts still are duty bound to apply the principles of law and not become vigilantes. The Magistrate was of the inclination that the Appellant's girlfriend had to be protected against possible violence by the Appellant and therefore bail was denied.

[14] On appeal, a court must reconsider the application and make an appropriate order. The court must consider inter alia the strength of the State's case of assault on the police man as complainant. Furthermore, the court always must remember that the purpose of bail is not punitive, but merely to ensure that the accused person will attend his trial and broadly put, will not interfere with the state's case, either by influencing the witnesses or disappearing or interfering with the proper administration of justice.

[15] The Magistrate refused bail on the single factor that the Appellant will endanger the safety of the public or any particular person and therefore that it is not in the interests of justice that he be released on bail..

[16] On appeal, the possible risk to the girlfriend, who is refusing to lay charges against the Appellant, and still supports him, must be assessed, together with the strength of the state's case. The charges are distilled from one continuum of occurrences at the time of the offloading of the Appellant from the police van and booking him into the cells. The prior assault of the girlfriend was not transformed in charges, which the complainant stated that he witnessed. The State, being dominus litis, rather formulated two charges from one single event. It is doubtful, with what has been revealed at bail application stage, that both charges will stand, as it may be struck with duplication of charges.

[17] As to the possibility of risk, the court stated in S v Diale and Another 2013 (2) SACR 85 (GNP) at [14] that: "A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released." The state has to indicate on the record that the possibility is translated into a probability.

[18] The magistrate also referred to the fact that the complainant is after all a policeman and therefore should be a more robust person. It is indeed so, as also pointed out by Mr Alberts, that police officers are indeed robust persons, capable of arrest. The State submitted that a dangerous situation existed when the Appellant tried to disarm the complainant. However, the situation occurred at the police station, with surrounding officers, and the presence of the crew of the complainant should be acknowledged, as he would surely have assisted the complainant. Indeed, they are both trained and expect resistance at arrest and should not be in need of court protection after arrest.

[19] Regarding the protection of the girlfriend of the Appellant. She is adamant that she does not need assistance, the Appellant's attorney offered from the Bar in argument. She did not want to lay charges. The complainant referred to previous incidents, but the State produced no evidence to the Court a quo to

indicate previous incidents. One would expect previous investigations of some sort, like a copy of the occurrence book, or a protection order application or viva voce evidence to be put before court, if the severity of the attack warranted the protection of the girlfriend.

[20] On the face of it, this trial should not take long before starting and, once started, should progress to its conclusion very quickly. The possible sentence, the state admits, may not be one of incarceration, or very short incarceration, if imposed. This is not a matter where an accused would avoid his trial because of a long incarceration will be waiting at the end of a conviction. The purpose of protecting the girlfriend will thus be very shortlived, before the trial is concluded and the Appellant back at home.

[21] It is not the court's duty to pre-emptively punish an accused by keeping him in custody and refusing bail, no matter how justified concern over the continued security of another person may be. It may be so that there is a violent relationship between the Appellant and the girlfriend, but there is no evidence before this court, with charges in that regard to decide on. The court cannot speculatively keep a person incarcerated and refuse bail. Bail is not to be used to punish an accused before he has been tried and convicted. The purpose of bail is merely to ensure that the accused attends his trial and keeps to the imposed conditions, because he is still regarded as innocent.

[22] The state also submitted that the Appellant's previous convictions show him to be a violent man, with criminal tendencies. His first conviction, of robbery, was in 2007, when he was 18 years old. Today, that offence lies 14 years in the Appellant's past. Since then he has indeed had two more convictions, one of which is dated in 2019, due to a service delivery protest, which Mr Alberts suggests is par for the course in South Africa and does not necessarily indicate that a person is violent in nature. These last two do not feature in Schedule 1 to justify the bail application to resort under Schedule 5. Van Dijkhorst J stated in S v Mqwathi 1985 (4) SA 22 (T) at p 25a that: " Daar moet teen gewaak word dat die boek van die sondes van die verlede tyd altyd geopen bly lê en (in die woorde van die psalmdigter) "die donker skuldverlede bly leef in ons heugenis"

ongeag die vervloë tyd." The court also has to be careful and heed this warning in the present case, as the appellant is, in this regard, not shown to be a person who commits offences and spends most of his time fighting charges in court. Currently he has shown only 3 matters over a period of 14 years.

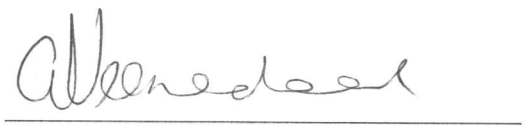
[23] Based on the above, I am not convinced that the state has managed to load the scales in its favour and the Appellant has established the case in his favour. It is my considered opinion that the Appellant can be released on bail, subject to conditions. If the Appellant transgress any of the conditions, the Appellant can be arrested and the state can apply to have his bail withdrawn.

[24] Based on the above, the appeal succeeds and the following order is made regarding bail conditions to be imposed:

1. The Appellant is granted bail in the amount of R1000;

2. The Appellant is to report daily between 6am and 6 pm to the Devon police station and;

3. The Appellant is instructed to refrain from interfering with the investigation, the state witnesses and the proper administration of justice.



C VAN VEENENDAAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the Appellant: Mr Alberts (Legal-Aid)

For the State:	Mr Lalane
Heard on:	21 October 2021
Delivered on:	22 October 2021