REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: CC149/2016

(1)
(2)
(3)

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.

27/10/2021

SIGNATURE

DATE

In the matter of:

Vusi Reginald Mathibela **Applicant**

and

State **Respondent**

JUDGMENT

Munzhelele J

Introduction

[1] The applicant brought an application for bail in terms of section 60(11) (a) read with schedule 6 of the Criminal Procedure Act 51 of 1977. The applicant has

been indicted in the High court of Pretoria for murder, read with section 51(1) and part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997. Secondly, he is also charged with attempted murder and two counts of possession of unlicensed firearms. The accused appeared before Judge Mosopa, and the matter has already advanced to the defense's case. Application for discharge of the accused in terms of section 174 of the Criminal Procedure Act 51 of 1977 has been denied by the Judge because there is *prima facie* evidence enough to convict the applicant on the charges he is facing.

[2] It is common cause that the applicant was released on bail at the Pretoria Magistrate Court on 11 January 2017 in the amount of fifty thousand rands (R50 000.00) where the court ordered some conditions to it. The conditions were:

a. that the accused must appear in the High Court on the 26 – 30 June 2017 and after that on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge to which the offence in this case relates, or where the sentence is not imposed forthwith after the verdict and the court extends bail until the sentence is imposed;

b. accused must refrain from interfering or communicating directly or indirectly with the victim and state witness;

c. accused did not furnish false information at the bail proceedings;

d. accused is not arrested on any other offence committed after his release on bail;

e. accused reports in person to the person in charge of the charge office at Midrand Police Station between 06h00 and 18h00 on 13 January 2017 and every Friday after that;

f. that the accused's address is 460 Caswald North Estate, Tambotie Street, Midrand, Gauteng, and if he should change such address, he will notify the

investigating officer of this case and the clerk of the Court Atteridgeville of such change of address within 24 hours thereof, in writing;

g. Accused must hand over his passport to the investigating officer within 48 hours;

h. Accused is not to leave the jurisdiction of Gauteng without the permission of the investigating officer;

i. The title deed to the property to be held as security in possession of the investigating officer.

[3] It is also common cause that Judge Bam cancelled the applicant's bail upon formal inquiry into violation of his bail condition and then handed down a judgment to that effect. The applicant brought an application to appeal the said judgment at the Supreme Court of Appeal, and such leave was denied. The implications of such refusal to appeal the said judgment means that there was no misdirection on the Judge's part, and as such, the judgment stands unshaken. This means that the applicant remains a person who has violated the bail conditions, which the district magistrate ordered.

[4] Presently, the applicant is bringing a fresh application for bail on the basis that it will be in the interest of justice that he be released on bail subject to additional bail conditions to be determined by the court as it deems just. Further, he should be given bail in the amount of fifty thousand rands to two hundred thousand rands (R50 000.00-R200 000.00), or the amount to be determined by the court.

[5] The applicant, in his affidavit alleged the following:

1. That he is 35 years of age and resides in the Gauteng province.

2. That even though Judge Bam cancelled his bail because of failure to comply with the conditions, there has now been a passage of time and that now the

applicant is in a position to can be released on bail, and such will be in the interest of justice.

3. That at the district court, the magistrate found that he met the requirements to be released on bail. That presently, the issue should be whether there is an inherent risk in the applicant failing to comply with the conditions that triggered his cancellation of bail in the high court.

4. That the applicant is a good candidate for house arrest with stringent limitations of visitors.

[6] The application for bail by the applicant is opposed by the state on the basis that there is evidence that connects the applicant with the offence. Secondly, that the applicant did not adhere to the bail conditions which the court ordered on his first bail given at the district court. Thirdly, that he will interfere with the state witnesses if he is released. Fourth, the applicant is considered a flight risk. Fifth, that he will commit other offences. Therefore, it will not be in the interest of justice that the applicant is released on bail.

Submissions by the counsels

[7] Advocate Thipe submits on behalf of the applicant that the Constitution protects the applicant's freedom. As such, it will not be in the interest of justice to continue with the detention of the accused as a form of anticipatory punishment. He further submits that the provisions of section 60(4) (a-e) having been considered carefully, the court will find that they do not find any application to this bail application at hand. He further submits that the applicant is not a violent man and that the evidence that he was involved in the commission of this crime is not conclusive. Further that the applicant had never threatened any person. The charge of threats brought against him was withdrawn. Further, that the applicant is a peaceful man, a businessman, a family man, and an ordinary member of society.

[8] The applicant denies that he has committed the offence accused of. Advocate Thipe submits that the applicant is not a flight risk because he is a family man and has occupational ties here in the republic of South Africa. He has immovable assets in the country. He further submits that the court can fix an amount from two hundred thousand rands (R200 000.00) such that the applicant cannot afford to forfeit such an exorbitant amount of money.

[9] It was submitted that the applicant has pleaded not guilty to the charges, and there is a weak case against the applicant. Advocate Thipe further submits that the fact that the applicant will interfere with the witnesses is irrelevant because witnesses have already testified.

[10] It was argued that this continued detention would prejudice the applicant in the following ways;

a. Financial loss

b. Impediment to the preparation of his defense case

c. Applicant state of health

To this, the applicant referred the court to the case of *S v Acheson* 19991(2) SA 805 (NM) at para a-b. The applicant referred to the report prepared by Mr. Rantie that he is legible for the house arrest. The applicant also relied on the clinical psychologist, Claire Hearne's report, which provides that the applicant suffers from depression disorder, post-traumatic stress, and personality disorder. The applicant's medical health cannot be treated while in prison. With the above submissions, the advocate, Mr. Thipe, requests the court to grant the applicant bail with conditions that he should be on house arrest and also limit the contacts with people as well as fixing bail in the amount of two hundred thousand rands (R200 000.00).

[11] The state, on the other, represented by Advocate Cronje, opposed the bail application and submitted that the accused, whilst on bail, failed to adhere to the bail conditions. Therefore, should he be granted bail with conditions, the likely hood is

that he will not observe such conditions just as he had done before? She further submits that the finding of the magistrate is irrelevant in this bail application. She further stated that the state had proved a *prima facie* case against the applicant; as such, it will not be in the interest of justice that he be released. She further stated that the release of the accused would disturb the public order and undermine public peace and security because people were so happy that the reign of terror had now ended when the applicant was removed from the area.

[12] Advocate Cronje denies that the applicant is suffering financial loss because of his incarceration. She maintained that the applicant is still able to finance a senior counsel and a junior counsel. This shows that he is financially well. Regarding the health issues, the state contends that the applicant has been receiving attention from private medical facilities. She submits that the report filed by the correctional services personnel does not apply to this application of bail but to a person who is seeking house arrest as a sentence. The psychological report that the accused needs medical care for his condition is not a new thing; he had been taken to private medical facilities for his medical care all the time as and when required.

Discussion

[13] The issue to be determined is whether the applicant has discharged the burden placed on him by section 60(11) (a) of the Criminal Procedure Act 51 of 1977 to be admitted to bail. Section 60(11) (a) provides that:

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

(a) 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 exceptional circumstances exist which in the interests of justice permit his or her release."

[14] In *S v Dlamini* [1999] ZA CC 8 ; ; *S v Dladla and Others* 1999 (2) SACR 51(CC); S *v Joubert* 1999 (4) SA 623 (CC); *S v Schietekat* 1999 (7) BCLR 771 (CC) at para 79 the Constitutional Court made the following instructive pronouncements:

"It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates - and sanctions - the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1) (f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that unless the equilibrium is displaced, an arrestee is not to be released."

[15] The Act requires the applicant to adduce evidence that satisfies the court that exceptional circumstances exist that permit his release from custody in the interests of justice. This is clearly shown through the above case laws that bail on schedule 6 offences is not there to take, but there should be circumstances that warrant the courts to consider for the applicant's release. It is not business as usual anymore. If the applicant fails to show exceptional circumstances, therefore, he should remain in custody until his case is finalised. The Supreme Court of Appeal has clarified what is meant by exceptional circumstances in *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577f where Shongwe AJA had the following to say:

"what is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence".

The court further remarked as follows at 577I:

"If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which,

consistent with the interests of justice, warrant his release, the appellant must be granted bail." See also *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266g- h.

[16] The applicant adduced the following circumstances to show the court that exceptional circumstances exist that warrant his release from custody and that such will be consistent with the interest of justice. The applicant said in his affidavit that he had financial loss due to incarceration. He is encountering impediments to the preparation of his defense case. He further stated that his health condition requires private medical doctors. It was submitted that the clinical psychologist recommends his release so that he can continue with the psychotherapy. This therapy will assist him to cope with the management of his condition. It was further said that the applicant is 35 years of age and resides in the Gauteng province. The fact that the applicant was considered for bail at the district court should work in his favour when the court considers releasing him on bail. Further that, even though his bail was cancelled because of failure to comply with bail conditions, there has now been a passage of time such that he is now legible to be released on bail. The applicant is a good candidate for house arrest with stringent limitations of visitors as recommended by the correctional services personnel.

[17] In *S v Scott-Crossley* 2007 (2) SACR 470 SCA at para 12, the court held the following:

'Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11)(a);.'

[18] Generally speaking, what may constitute exceptional circumstances in any given case depends on the presiding officer's discretion and the facts peculiar to a particular matter. It requires the court to exercise a value judgment in accordance with all the relevant facts and circumstances. In *S v Yanta* 2000 (1) SACR 237 (Tk) at 249c-e, the court was of the view that a proper construction of section 60(11) of the Act involved balancing the interests of society and the proper and effective administration of criminal justice as opposed to the personal interests of an accused.

[19] The applicant's circumstances should be balanced with the following circumstances; The applicant failed to observe the bail condition, which was imposed when he was given bail at the magistrate court on this same case. Secondly, the public is at peace now that he is in custody; as stated in one of the media. The applicant has been terrorising the public. The offence he is facing is murder, and there is a *prima facie* case against him. The sentence which could be imposed if convicted is a minimum sentence. In *S v Hudson* [1980] 1 All SA 130 (D) at 131, the court held the following:

'. . . The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country...

[20] The circumstances mentioned above on para 16 are all common and cannot be regarded as exceptional circumstances that warrants the court to release the applicant on bail. The applicant has all along been attending private medical hospitals by private doctors for his health condition. Therefore, there is nothing new or exceptional about what was proposed by the psychologist. I agree with the state in this regard. His health issues are taken care of. His business has not been closed but running even in his absence, and that money is not an issue because he can even afford two counsels to proceed with his bail application.

[21] The accused's application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 was rejected by Judge Mosopa who is busy dealing with the applicant's main case. The case is a part-heard matter wherein the accused is to proceed and give evidence. The state case is already closed. There is a strong case against him as stated by the respondent. Therefore, the fact that he has pleaded not guilty from the start of the case will no longer be an exceptional circumstance for his release on bail.

[22] It has been held that proof by an accused that he would probably be acquitted can constitute exceptional circumstances for the purpose of this section 60(11) (a). However, in this case the applicant cannot be able to say that he will be acquitted. He has to show more than that. Nothing was said except the fact that the applicant is innocent until proven guilty. In this bail proceedings the applicant should show by

facts that he will indeed be acquitted. So far he had failed to adduce such kind of evidence. In *S v van Wyk* 2005 (1) SACR 41 (SCA), the Supreme Court of Appeal found that the absence of a *prima facie* case against an accused was relevant to the aspect of exceptional circumstances. See also S *v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) para 21. The court pronounced that there is a *prima facie* case; therefore, the applicant cannot rely on his innocence when there has already been a finding that he is not innocent in this case.

[23] Of importance is that the applicant was given bail before with conditions to be observed. However, he failed to observe the same, and therefore, what guarantee would I have as a presiding Judge that the applicant could be trusted to come back and attend his court when the state has a *prima facie* case against him. Further that the interest of justice would not permit his release when there is such a flagrant disregard of the law that the applicant had demonstrated at the time when the district court gave him bail.

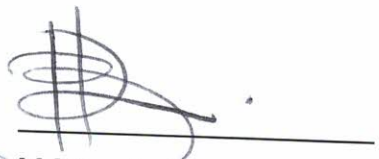
[24] Considering the seriousness of the case and the sentence that the applicant might face if convicted, there is a likelihood that the applicant might evade the trial resulting in the interest of justice being put into disrepute.

[25] Having considered the applicant's circumstances, I find that the applicant failed to show any circumstances which are out of the ordinary for the court to be satisfied that, indeed, the interest of justice will permit his release on bail. Instead, what I have found is that the interest of justice will be best served by leaving the applicant in custody while the trial proceeds to its finality.

Order.

[26] Therefore the following order is made;

1. The application for bail is dismissed.



M Munzhelele

Judge of the High Court Pretoria

Virtually Heard: 12 October 2021

Electronically Delivered: 27 October 2021

For the Applicants: Adv M. Mphaga SC

Adv M. Thipe

Instructed by: Mkhabela Attorneys

For the Respondent: Adv Cronje

Instructed by: National Director of Public Prosecution