IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO HIGH COURT)

POLOKWANE

CASE NO: BA23/18

DATE: 10/01/2019

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED

10.1.2019
DATE

SIGNATURE

PRINCE GIFT MDHLULI — Applicant

and

THE STATE — Respondent

BEFORE THE HONOURABLE MADAM JUSTICE SEMENYA

JUDGMENT

SEMENYA (J): This is an appeal against the decision of the Praktiseer magistrate to refuse to admit the appellant on bail. The appellant is charged with five counts, two of which are of robbery with aggravating circumstances as envisaged in Section 1 of the Criminal Procedure Act 51 of 1977, one of possession of a firearm without a license and one of unlawful possession of ammunition, the last being one of attempted murder.

The test to be applied at this stage has been enunciated as follows in *S v Barber* 1979 (4) SA 218.

> "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."

In the initial application the court was called upon to determine whether the appellant has discharged his onus of establishing on a balance of probabilities that exceptional circumstances exist that justifies his release on bail as envisaged in Section 60(11)(a) of the Criminal Procedure Act.

It is trite that the main consideration in an application for the admission to bail is whether the appellant would not defeat the ends of justice by evading his trial.

The personal circumstances of the appellant placed before the court is the following:

The appellant was 28 years old, unmarried with two children. He was running businesses of three taverns, a shop and a plumbing and tiling business. He was living with his girlfriend. He further owned cars and fixed property in South Africa.

This evidence was to a larger extent confirmed by the investigating officer. The appellant further testified that he has a previous conviction of statutory rape. He was on parole as at the date of his arrest. He was on a Level C, which according to him, meant that parol conditions were no longer stringent.

The appellant admitted that he used to travel between Mozambique and South Africa and had alleged that he was out of the country as at the date on which the offences were allegedly committed. He stated that he will stand his trial in order to proof his innocence and that the state has a week case against him.

The respondent's evidence, as placed before the court during the bail application by the investigating officer, was that the appellant is untrustworthy in that according to the affidavits deposed to by the Home Affairs official the appellant left the country on the 8th of March and it appears to them that he is supposed to have still been in

Mozambique as at the date of the incident according to the records.

The investigating officer further testified that the house that the appellant referred the police to was not his own property but that of his girlfriend who informed the police that she is indeed staying with the appellant.

The investigating officer confirmed that the appellant was once arrested on two separate cases and that he attended court regularly until the cases were withdrawn. The police officer testified that the appellant is linked to the commission of the offences in this matter by means of fingerprints which were lifted on the getaway vehicle which was said to be a Volkswagen Amarok.

He testified to the effect that this Amarok was robbed from its owner on the 14th of March. The investigating officer further testified that the appellant breached his parole conditions in that he travelled outside the country when he was not allowed to do so in terms of the parole conditions.

He testified that he was in possession of the affidavits deposed to by the officials from the Department of Home Affairs with regard to the records of the appellant's movement in and out of the country, as well as an affidavit deposed to by an official from the Correctional Services with regards to the condition of parole.

It is of note that the affidavits by the two officials from the Home Affairs and the Correctional Services Department were not handed in as evidence during the bail application. The magistrate on her own accord called the officials of the two departments to come and testify.

In her judgment she justifies this decision on the provisions of Section 60 and on the decided case of *David and Others v S* (288/15) ZAKZDHC. The official from the Home Affairs Department testified that their records show that the stamps on the appellant's passport are fraudulent in that they do not conform to those prescribed by the department.

It is these stamps that, according to the official, showed that the appellant travelled between South Africa and Mozambique between March and May 2018.

She stated that the only valid stamp on the appellant's passport is the stamp that was dated the 8th of March 2018 which indicated that the accused exited South Africa and travelled to Mozambique. She testified that the fonts on the stamps that appear on the appellant's passport on the dates after the 8th of March 2018 are different from the fonts of the stamps prescribed by the Department of Home Affairs in South Africa.

It is evident from the magistrate's judgment that she placed more emphasize on the evidence of the Home Affairs

official in her reasons for refusing to admit the appellant on bail. It was argued on behalf of the appellant that the evidence of the witnesses called by the court should be ignored as it was improperly placed before the court.

It was argued that according to their interpretation Section 60(3) enjoins the magistrate to order either the state or the prosecutor or the defence to place further information on record and not for the court to do so *mero motu*. It was submitted that the Criminal Procedure Act gives a judicial officer discretion to call witnesses only during trial and not during bail application.

The appellant's argument that the magistrate overstepped her powers in calling the two witnesses is base on the provisions of section 60 of the CPA. Section 60(2)(b) and (c) provides as follows:

> "(2) In bail proceedings the court-
>
> *(b)* may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
>
> *(c)* may, in respect of matters that are in dispute between the accused and the prosecutor, require of the

prosecutor or the accused, as the 'case may be, that evidence be adduced;"

Section 60(3) which should be read together with Section 60(2)(b) and (c) provides as follows:

"(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court."

I tend to agree with the appellant's interpretation of the two sections. In these sections the duty of the judicial officer is clearly to order the prosecutor or the accused to place sufficient information before it so that it can be in a position to make a just decision.

The judicial officer is not empowered, on his or her own accord, to call witnesses so as to place the necessary information or evidence before it. A comparison between the above sections and section 186 of the CPA will make this point more evident. Section 186 empowers a court to subpoena a witness during the course of trial for the

purposes of clarifying certain aspect of the evidence that is already n record. Same cannot be said with regard to section 60(2) and (3). These sections expressly provide that such information must be placed on record by the State or the accused.

The respondent's argument that the magistrate's decision cannot be faulted is rejected. It is clear that the witnesses were not merely called to clarify issues but were called to add more flesh to the skeleton that constitute the evidence of the state or that of the investigating officer.

I agree that such evidence should be ignored. I further agree that the evidence deposed to by the two officials of the Home Affairs Department and the Correctional Services Department should be ignored. It was not properly placed before the court as the magistrate acted outside her powers as envisaged in Section 60(2) and (3) of the CPA.

I will therefore disregard their evidence, in particular, the evidence of the official of the Home Affairs Department with regard to the stamps that appears on the passport of the appellant.

The magistrate's further reason to refuse bail was based on the strength of the state case against the appellant.

The magistrate found that the state has managed to proof that the fingerprints, which were lifted from the getaway vehicle, the Volkswagen Amarok, match those of the

appellant. This finding is found to be without merits. The concession made by counsel for the respondent is that, as at the date of the application for bail, certain fingerprints were lifted from the Amarok vehicle but that comparison of those fingerprints with those of the appellant was not yet done.

That she is however in possession of the results of the comparison and that some of the fingerprints lifted from the car were found to match those of the appellant in this matter. I cannot consider such evidence coming from the bar.

Nothing precluded the respondent from bringing an application for the leading of further evidence during appeal. It is evident that the so-called evidence of fingerprints is the only evidence that the state is relying on or relied on during bail application.

I find that this, on its own, proves that as at the date of the applicant for bail the state did not have a strong case against the appellant in this matter in that, although the fingerprints were lifted from the vehicle, they had not yet being compared with those of the appellant in this matter and the court's finding that they matched is misguided.

There is no evidence on record that proved that the appellant is a flight risk. The common cause evidence is that, despite his ability to travel between South Africa and Mozambique, be that legally or illegally, the appellant

continued to attend court until his two previous cases were withdrawn.

I have no evidence to the effect that he will fail to do the same in this instant matter. The magistrate did not make any determination with regard to the factors relevant in terms of Section 60(4) (a), (c), (d) and (e). I am not called upon to do so at this stage. In any event there is no evidence to guide me in that regard. The evidence of the parole officer did not take the matter further. He conceded that he is not the officer who was allocated the duties of monitoring the movements of the appellant while he was on parole.

Of importance is his concession that the appellant was never arrested for breach of any of the parole conditions until he was arrested in respect of this matter. With regard to the fairness of the proceedings in the Magistrate's Court the court will have to refer to the sentiments raised by Nugent J A, as he then was, in the case of *S v Mabena and Others* 2007 (1) SACR 428 (SCA) in which he stated the following:

> "And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her a protagonist. A bail enquiry, in other

words, is an ordinary judicial process, adapted as far as needs be to take account of its peculiarities, that is to be conducted impartially 'and judicially and in accordance with the relevant statutory prescripts."

I fail to find any impartiality in the manner in which bail application proceeded in the Magistrate's Court, more in particular in the manner in which the judicial officer in that application interpreted the provisions of Section 60(3) and used that interpretation to call the two witnesses, that is the officials of the Department of Home Affairs and Correctional Services.

I am of the view that the argument raised by the appellant in this matter that the magistrate in so doing prejudiced the appellant in this matter holds water. The evidence of the official of Home Affairs Department misguided the magistrate in arriving at a conclusion that the appellant is a person who cannot be trusted.

I am of the view that she, although not categorically stated, found that the evidence proves that the alibi the applicant is able to move between the two countries illegally. Although this is not expressly stated by the magistrate, an inference in that regard may be drawn from the findings made by the magistrate in the bail application.

I agree with appellant's submission that, at this stage of the bail application, the court cannot enquire into the validity of the defence that the accused intends to rely on in ensuing trial. Whether the intended defence of alibi, which the appellant in the evidence in chief stated that he will rely on during the trial will succeed or not, should be left to the decision of the trial court.

I find that the magistrate misdirected herself in relying on the evidence of the officials of the Department of Home Affairs and the evidence of the official of the Department of Correctional Services in her finding that the appellant in this matter should not be admitted to bail.

I further find that there is no evidence to justify the Magistrate's Court finding that the appellant in this matter is a flight risk. On the contrary the evidence which appears to be common cause proves that he is a person who attends court on each and every date and time as he shall be ordered to do so by a court of law.

I find that this is a case where the exercise of the discretion by the magistrate can be interfered with as stated in *S v Barber* cited in above. I further find that I can replace the order of the magistrate, which is the refusal to grant the appellant bail, with an order that the accused should be admitted to bail.

ORDER

I therefore order that the appellant in this matter is ADMITTED TO BAIL IN THE AMOUNT OF R2 000.00 (TWO THOUSAND RAND).

SEMENYA (J): Is there a problem with the recording machine?

STENOGRAPHER: [indistinct].

SEMENYA (J): It is ordered, I am told that what I said with regard to the order is not audible.

It is ordered that the appellant is ADMITTED TO BAIL IN THE AMOUNT OF R2 000.00 (TWO THOUSAND RAND) subject to the ordinary condition that he shall attend court on each date on which he shall be required to appear until the matter is finalized.

MV SEMENYA
JUDGE OF THE HIGH COURT,
POLOKWANE, LIMPOPO DIVISION

ON BEHALF OF THE APPELLANT: ADV. A CAMBELL

ON BEHALF OF THE STATE: ADV. MC MOLEPO