IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: CC50/2018

In the matter between:

Robin Leslie William Packham **Applicant**

And

The State **Respondent**

JUDGMENT DELIVERED ON 27 FEBRUARY 2019

BAARTMAN, J

[1] On 20 December 2018, the appellant's bail was revoked and returned to the depositor. This is an application for leave to appeal

against that decision. The parties are in agreement that the decision to revoke the applicant's bail is appealable[1]. I agree.

[2] On 1 March 2018, the applicant was arrested on charges of murder and defeating or obstructing the administration of justice. On 9 March 2018, he was released on bail. On 28 September 2018, Erasmus J found that the applicant had breached his bail conditions. He increased the bail amount from R50 000 to R75 000 and placed the applicant under house arrest with stringent conditions. I found that the applicant nevertheless breached those conditions.

[3] It is convenient to deal with the fifth of the applicant's grounds of appeal first. Mr Mathewson, the appellant's counsel, submitted:

'37. …the learned Judge misdirected herself in holding that any perceived breach to be deserving of the onerous sanction of cancellation of bail.

38. Without conceding that the [applicant] was the author of the alleged communications, it is submitted that the tone and content of such communications appeared overwhelmingly affectionate and loving in nature; were not threatening, intimidating or attempting to influence L or manifesting any such intention to appear to try or do so.'

[4] It is correct that the communications to L, a potential state witness, have different undertones to the hate mail the applicant had received from members of the public. I found as much in paragraphs 15 and 16 of the December judgment. It bears repeating:

'[15]… The 5 December correspondence is self-serving and seeks to exonerate the [applicant]. The theme is personal and intimate, and clearly directed at gaining favour with his former lover, L.

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[1] Section 16(1) of the Superior Courts Act, 10 of 2013; *S v Kheswa and Another* 2008 (2) SACR 123 (N) at para 27 and S v *Porrit* 2018 (2) SACR 274 .

[16] The letter is in stark contrast to the "threatening mail" referred to above. The "threatening mail" was vindictive. Unlike the letters to L, the "threatening mail" is a call for justice. The letters to L are personal and a cry for attention. In the circumstances of this matter, the submission that the letters to L originate from members of the public is completely unfounded.'

[5] The applicant seeks to reduce this contravention of his bail conditions to insignificance, without admitting it. If one bears in mind that the contravention was committed after a court had found that the applicant had breached the original bail conditions, increased the bail amount and imposed house arrest with stringent conditions, the seriousness of the breach is obvious. In those circumstances, the applicant's attitude towards the court orders defies logic and is an indication of his attitude towards it. It is not in the interest of justice to allow the applicant to persistently contravene his bail conditions because his intentions are honourable. There is no merit in this ground of appeal.

[6] The applicant further denies that he was the author of the communications ascribed to him, the first ground of appeal. As indicated above, the distinct difference between the hate mail and the 'love letters' belies the denial. The applicant's attitude to date has been an indication of his inability to respect the court order. There is no merit in this ground of appeal.

[7] The applicant further claimed, the second ground, that the court misdirected itself in finding 'that a breach of the conditions had been proven by the state' (the applicant then). Mr Mathewson submitted:

'…30. Without conceding that the [applicant] had authored such communications, the relevant bail condition prohibited the [applicant] from "making contact or communicating in any way, directly or indirectly, with [L]", accordingly could not be an arbitrary or gratuitous

impediment to the freedom of an accused but had to be interpreted purposively so as to reflect the requirement that a particular condition needs to be both reasonable and necessary to counter or minimise a bail risk.

It is submitted that the State did not prove on a balance of probabilities that L was in any manner intimidated or influenced by such correspondence, this is supported by an email sent by L to State Advocate Susan Galloway on 5 December 2018. In which she states that she received a letter via post from Richard J Hopkins and that "I do not find the letter intimidating, however this constant contact whether "allegedly indirect" or direct is still harassing in nature" (own emphasis added).'

[8] Mr Mathewson chooses to ignore the fact that the witness complains about being harassed; therefore, as she complained to the state advocate, seeking to be protected from what she experienced as harassment. It follows that she was influenced. I do not understand how it can be in the interest of justice to allow an accused to harass a potential witness in his upcoming trial. It is the court's duty to protect the rights of both the accused and the witness to ensure the integrity of the process. There is no merit in this ground of appeal.

[9] The applicant further complained that the court erred in (the third ground):

'32...failing to find that in proceedings under Section 66 of the CPA, the State had misconstrued its remedy, and ought to have proceeded in terms of Section 68 of the CPA. Further, in holding, expressly or impliedly, that the communications delivered to Ms F, but not actually conveyed to L, constituted a breach of the bail conditions.

33. …Although Section 60(4)(c) of the CPA …seems to contemplate actual and attempted contact or communication with State witnesses, and to distinguish between act and attempt, in terms of his bail

conditions, the Applicant was prohibited in the actual "making "of any contact or communication with State witnesses therefore not a mere attempt.'

[10] In paragraphs 18–23 of the December judgment, I dealt with the mail sent to F and concluded:

'[20] …I am persuaded that in July, the [applicant] was still trying to make contact with L through F. However, it is not clear whether it was after she had been added to the list of witnesses….

[23] If the respondent sent the October mail, he breached the bail condition that prohibited him from possessing electronic devices capable of sending or receiving electronic communication….'

It follows that there is no merit in this ground of appeal.

[11] Fourthly, the appellant alleged that the court erred in:

'34. …cancelling the Applicant's bail, in negation of the constitutional right to liberty, on the appearance that such order was by wish to punish rather than apply the requirements of Chapter 9 of the CPD and the considerations of the interest of justice.

35. It is trite that the denial of bail should never be used as a method of punishment of an accused that is awaiting-trial…'

[12] Paragraphs 27 and 28 of the December judgment bear repeating:

'[27] L is a state witness who finds the respondent's continued contact harassing. Her attorney has requested the respondent to desist but not even a court order could persuade him. The respondent's bail has been increased from R50 000 to R75 000 in an attempt to impress on him the need to comply with his bail conditions. He was placed under house arrest with stringent conditions. Despite the measures put in place, the respondent is in flagrant disregard for the orders of this court.

[28]I have considered the effect his actions may have on L and other witnesses. It is not in the interest of the justice to allow an accused to abuse his bail conditions with no consequences. I will heed the call not to declare the bail money forfeit as it was paid by a third party. '

There is no merit in this ground of appeal.

[13] I am persuaded that there is no sound or rational basis to conclude that there are prospects of success on appeal.

(a) The application is refused.

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BAARTMAN J