

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**Case no. 158/2018
Date heard: 11/7/18
Date delivered: 13/7/18
Not reportable**

In the matter between:

KINGSLEY OBI UDEOBI

Appellant

and

THE STATE

Respondent

JUDGMENT

Plasket J

[1] The appellant was arrested on a charge of unlawfully dealing in drugs. He applied unsuccessfully for bail soon after his arrest. He brought a second bail application some time later, alleging new facts. That bail application was also refused and he now appeals against that refusal.

[2] It is necessary at the outset to stress that this appeal does not concern the first bail application at all. That decision was not appealed against and must be accepted as correct.

[3] The magistrate, in the first bail application, refused bail principally because of the strength of the State case and the seriousness of the offence with which the

appellant was charged. In addition, she took into account the appellant's questionable status as an asylum seeker, his links with a person accused of drug dealing who had fled despite having been released on bail, and his 'lack of assets in East London'. These factors all combined, in her view, to impel a conclusion that there was a likelihood of the appellant evading justice and not standing trial. She also concluded that the evidence established a likelihood that the appellant would continue with the manufacture and distribution of drugs.

[4] When the first bail application was heard, the investigating officer, captain Raymond Buys, testified in support of the State's opposition to the granting of bail. He was cross-examined extensively by the appellant's attorney. The appellant did not testify orally. Instead, he filed an affidavit in what I would describe as the usual terms in matters of this nature.

[5] When the second bail application was brought, the appellant had access to the docket. Certain of the contents of the docket is relied upon as constituting new facts. The magistrate who heard the second bail application concluded, in essence, that the new facts relied on made no difference to the outcome. I may only interfere with that finding if I am satisfied that it is wrong.

[6] Captain Buys testified that by coincidence, personnel of Red Alert Security stumbled upon a drug factory in Vincent Heights, East London. As a result, they contacted the estate agent who had let the premises, who, in turn, contacted the lessee. She arrived together with the appellant. That the appellant was one of the occupiers of the premises was established by the estate agent. She had a passport photograph of him attached to the lease as a means of identifying him as an occupier. In addition, a photograph of him was found inside the premises and other people stated that he was seen there regularly and that he arrived and left in a silver Amarok vehicle.

[7] When the lessee and the appellant arrived, the appellant told those present that the large quantity of the substance that aroused suspicions was in fact used for cleaning cars. He said that it was not necessary to call the police as he would clean the premises. When he was told that the police were on their way, he and the lessee

left. When captain Buys was at the premises, he received a telephone call from an attorney who said that he had the appellant with him, if captain Buys was interested. Captain Buys said that he was not about to make an arrest because he was still investigating. Captain Buys also noticed a number of lids for pots of the Bastille brand in the premises. The pots themselves were not in the premises.

[8] On the strength of the information linking the appellant to the drug factory, on the one hand, and the silver Amarok vehicle, on the other, the police raided his home a few days later. There they found the keys for the Amarok. They asked the appellant to take them to the vehicle and when he did so, they found in excess of 100 kilograms of drugs in and around the Amarok in the garage that housed it. They also found a number of Bastille pots. The appellant was arrested. Captain Buys made it clear in his evidence that the appellant may still be charged in connection with the drug factory in Vincent Heights. He is awaiting DNA and fingerprint results.

[9] The new facts that are relied upon by the appellant are that no search warrants were obtained for the search of the drug factory, the garage and the Amarok. On this basis, it was argued by Mr Price, who appeared for the appellant, that the State case was exceptionally weak: all of the evidence incriminating the appellant was unlawfully obtained and would be inadmissible.

[10] It does not follow that unlawfully obtained evidence is inadmissible. A trial court has a discretion to admit it. How that discretion is exercised will depend on a conspectus of all the facts that are established in a trial-within-a-trial. It is not possible in bail proceedings to second-guess how that discretion will be exercised in due course. I am in agreement with the magistrate in the second bail application who stated in his judgment that he was not in a position to make any findings concerning whether the evidence was unconstitutionally obtained and the consequences thereof, and that the trial court will be best suited to deal with that issue. On this basis, it cannot be said that the finding of the magistrate in the first bail application that the State's case appeared to be strong had been altered by the new facts.

[11] In any event, other factors remain in force. Captain Buys testified that there was a likelihood, given the size of the drug factory in Vincent Heights, the appellant's

involvement with a drug dealer by the name of James, and the size of his operation, and the amount of drugs found in and around the Amarak, that the appellant would continue to manufacture and distribute drugs.

[12] In the result, the appeal is dismissed.

C Plasket

Judge of the High Court

APPEARANCES

For the appellant

T Price SC

Instructed by

Van Breda Attorneys, East London

For the respondent:

A Ackermann

Director of Public Prosecutions, East London