

VIC & DUP/JHB/LKS


IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: A535/98

DATE: 5 AUGUST 1998

The Magistrate

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES <input checked="" type="radio"/> NO	
(2) OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO	
(3) REVISED <input checked="" type="checkbox"/>	
DATE <u>23/10/98</u>	SIGNATURE 

In the matter between:

ROY ERNEST SELLERS

Appellant

and

THE STATE

Respondent

J U D G M E N T

WILLIS AJ: This is an appeal against the refusal of bail to the accused in terms of section 65 of the Criminal Procedure Act, No. 51 of 1977, as amended, to which I shall hereinafter refer as "the Act".

The accused has been charged with the murder of his wife. It is common cause that he shot her and killed her, making use of a firearm. This much appears clearly from the record that is before me.

The/..

The offence with which the accused has been charged is one that falls under Schedule 5 of the Criminal Procedure Act. There was evidence led by the state that it had a concern that the accused might commit suicide. Certainly it appeared that very soon after the incident, in which the accused's wife was shot and killed, he uttered words to the effect that he might have taken his own life. The accused was in the bail application, in my opinion, evasive and unsatisfactory, if not downright untruthful when he was asked questions concerning whether he had made this particular utterance.

In terms of section 60(4) of the Act refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

- (a) Where there is the likelihood of 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;
- (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;
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate the witnesses or to conceal or destroy evidence;
- (d) where there is a 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."

Section/..

Section 60(4) or section 60(6) and section 60(7) and section 60(8) set out various grounds that must be considered in deciding whether or not the grounds in subsection 4(a), (b), (c) or (d) have been established. Nevertheless, it is important to note that section 60(11) provides that notwithstanding any provision of this Act, where an accused is charged with an offence referred to in sub-section (a) in schedule 5:

"The court shall order that the accused be detained in custody until he or she shall be dealt with in accordance with the law and if the accused, having been given reasonable opportunity to do so, satisfies the court that the interests of justice do not require his or her detention in custody."

Mr Strydom very correctly drew my attention to the provisions of subsection (9) of section 60 of the Act which essentially requires some kind of balancing exercise to be undertaken by a court considering a bail application. It reads as follows:

"In considering the question in sub-section (4) the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely -

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c)/..

- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the Court should be taken into account."

There seems to be no dispute that the accused does indeed suffer from diabetes. There was no challenge to the contention by counsel for the state that he would be able to receive medical treatment for this condition while in custody.

It is also important to bear in mind that the court or judge hearing the appeal, such as I am doing at present, shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given. See section 65(4).

It is, in my view, correct as Mr Strydom argued, that the learned magistrate perhaps overstated the probability that the accused would commit suicide. On the other hand, that probability cannot be entirely discounted. In other words, although I find that the learned magistrate over-

stated/..

stated the probability of suicide being committed, I do not believe it is a factor that can be entirely excluded from consideration.

As against this there is the fact that as the evidence stands at present there is a strong prima facie case against the accused. In fact, one might refer to it as summa prima facie case against the accused. It seems to me highly probable, on the evidence before me at the moment, that the accused will indeed be so convicted and also probable that the accused would receive a custodial sentence. I accept that this is not necessarily the case. Then the onus, by reason of this provision of section 60(11), would have been on the accused to have put before the court evidence indicating such probability.

In doing the balancing exercise, while I accept that there is a denial of freedom to the accused in being held in custody, the prejudice that is likely to ensue is, in my view, on the evidence before me non-existent. Accordingly I find that the accused has failed to satisfy me that the interests of justice do not require his detention in custody : and I cannot come to the conclusion that the decision of the learned magistrate was wrong.

In the result my judgment is as follows: The appeal against the refusal of bail to the accused by the learned magistrate is dismissed.

ON BEHALF OF APPLICANT : ADV STRYDOM
Instructed by : Galloways
ON BEHALF OF RESPONDENT : ADV A VAN DER COLFF
DATE OF JUDGMENT : 5 AUGUST 1998