In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A195/2024

In the matter between:

ASHLEY BERGSTEDT Appellant

and

THE STATE Respondent

Matter Heard: 19 November 2024
Judgment Delivered: 21 November 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release to SAFLII. The date and time for hand-down is deemed to be 11h00 or soon thereafter on 21 November 2024.

JUDGMENT

MANTAME, J

[1] The appellant lodged this bail appeal after the Magistrate in Cape Town refused bail on 19 August 2024. The appellant was arrested on 27 June 2024 and charged with various counts including dealing in drugs, possession of firearms and possession of ammunition. Subsequent to his arrest he commenced with a bail application. The bail application fell within the confines on Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The bail application was opposed by the respondent on the basis that there is a strong *prima facie* case against the appellant; that if released on bail there is a likelihood that the appellant would endanger the safety of the public or commit a Schedule 1 offence; that if released on bail, there is a likelihood that the appellant will attempt to evade his trial; and that if released on bail there is a likelihood that the appellant will attempt to influence or intimidate witnesses.

[3] The appellant states that he was arrested after he took a car for a test drive as he is in the business of buying and selling vehicles. No proof was furnished by the appellant insofar as this business is concerned. According to the appellant, when he was arrested, he was in Cape Town to fetch someone. He was requested by the family of a certain Mr. Mishack Adams (Mishack) to buy this VW Polo Sedan 2010 model or find a buyer for an amount of R120 000.00. As stated by the appellant, while driving in Darling Street, Cape Town and next to KFC, he was pointed at with firearms by two gentlemen and was boxed in by an unmarked BMW 1 series vehicle. One gentleman went into the passenger seat in front and another went into the back seat both pointing firearms at him. At that time, he was under the impression that he was being hijacked. However, he learnt later on that these were policemen and he was asked to drive to the Parade. The police commenced with searching the vehicle. He did not know that there was anything illegal found in the vehicle.

[4] However, he learnt later on that after the police conducted a search of the vehicle, they advised him that they found firearms and drugs in a secret compartment. He advised the police that the vehicle did not belong to him, it was in his possession as he was merely test driving it to ascertain if it was roadworthy and find a buyer for it. The appellant denied having knowledge or control of illegal substances or firearms that were found in the vehicle.

[5] Warrant Officer Witbooi the investigating officer in the matter confirmed that the arresting officer found drugs (street value R250 000.00), firearms and cash (R205 540.00) in possession of the appellant. In his testimony, he stated that there is a suspicion that the cash that was found in the vehicle is the proceeds of dealing in drugs. Further, the appellant is the leader of the Ghetto Gang in Hanover Park. Due to the position he held, he was responsible for the safeguard of the proceeds of crime. Similarly, when Warrant Officer Witbooi pulled out the appellant's profile, he found that the appellant at the age of 17 years old, whilst driving a BMW vehicle, was stopped by the Metro Police Dog Unit officials and they found a hidden compartment in that vehicle with drugs. However, that matter was withdrawn on 24 May 2016 since there was no complainant in that case. Although the appellant advised him that he is a salesman, he could not ascertain nor confirm that information.

[6] On 19 August 2024, the magistrate dismissed the appellant's application for bail on the basis that the state had made out a strong *prima facie* case against the appellant. There is a likelihood that if the appellant is released on bail, he would endanger the safety of the public or commit a Schedule 1 offence. There is a likelihood that the appellant, if released on bail will attempt to evade trial; there is a likelihood that if the appellant is released on bail he will attempt to influence or intimidate witnesses.

[7] In bringing this appeal, the appellant contended that the magistrate misdirected itself in making factual findings based on unsubstantiated conjecture rather than evidence; it misdirected itself in finding that the appellant is a flight risk in circumstances where the state conceded he was not; it erroneously found that the appellant would interfere with witnesses when evidence did not demonstrate so; it ignored the appellant's presumption of innocence and thereby constructively convicting him of the charges and did not appreciate that the state's case was weak and it misdirected itself in elevating the onus against the appellant to be in the confines of Schedule 6 rather than Schedule 5.

[8] This appeal serves before this Court in terms of s65 (4) of the Criminal Procedure Act 51 of 1977 and it reads as follows:

‘**65 Appeal to superior court with regard to bail**

. . .

(4) The court or judge hearing the appeal 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’.

[9] In addition thereto, it is therefore settled law that a court hearing a bail appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of s60(11) (a) of the CPA. This therefore means that the appellant has an onus to prove facts establishing exceptional circumstances that he should be released on bail.

[10] The appellant did not address *viva voce* evidence during the bail application before the magistrate. His evidence was contained in an affidavit. In his evidence, the appellant explained that the vehicle belonged to a certain Mishack Adams. Mishack requested him to sell the vehicle on his behalf. In turn the said Mishack filed an affidavit stating that at the arrest of the appellant, he was incarcerated. During his incarceration various friends used the vehicle and advised that they will sell the vehicle on his behalf. He wanted to use the proceeds from the vehicle sale to pay legal fees and a possible appeal to this Court. On 27 June 2024 the appellant took the vehicle for purposes of sale.

[11] It is not clear from Mishack as to how he knew that the car was in possession of the appellant on that date as he was in prison. In the same affidavit he stated that the vehicle was driven by various friends who promised to sell it. Further, it is not stated by both the appellant and Mishack how the drugs, firearms and money ended up in the vehicle that was driven by the appellant. Most importantly, no evidence was led on behalf of the appellant from any of Mishack’s family that presumably handed the vehicle to him on how it was handed over, in what state it was handed over and what was inside the vehicle when the appellant took possession of it.

[12] In my view, the appellant did not take the court below in his confidence. He did not put a compelling case for his release on bail. The fact that the appellant did not see it proper to bring relevant evidence before the bail court points to the fact that he is not playing open cards with the court.

[13] It might be so that the appellant has a clean criminal record. However, that does not mean that this Court should turn a blind eye to the fact that he was once arrested on similar charges to the present matter and the charges were withdrawn in 2016 due to the fact that there was no complainant before Court. With the evidence that was put by the respondent before Court, mere denial of his involvement in this crime is not enough for this Court to find in his favour. I am of the strong view that to simply release him on bail would be reckless as investigations are still being conducted.

[14] In fact, I am convinced that the respondent has a strong case against the appellant. The fact that he omitted to bring evidence of Mishack's family who released the car to him points to the fact that he is capable of influencing their evidence or that of the state witnesses should he be released on bail.

[15] Section 60 (11) (b) of the CPA is clear that 'in Schedule 5, but not 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 the interests of justice permits his or her release'. The interests of justice do not permit the accused's release on bail if the grounds referred to in s60 (4) (a) to (e) of the CPA are present.

[16] In circumstances where the appellant has failed to discharge the onus that he is entitled to be released on bail, it is not for this Court to exercise its discretion carelessly. In *Killian v S*[1] , this Court stated that:

[1] [2021] ZAWCHC 100 (24 May 2021) para 8 and 13

'… [8] certainly in respect of bail applications governed by s 60(11) in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the Court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved.

…

[13] But in cases where s 60 (11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail…the discharge of the onus is a central consideration in s 60 (11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improper.'

[17] In evaluating the evidence that was adduced before the magistrate, it appears that the threshold with regard to onus of proof is higher than what the appellant has argued before this Court. It is not enough for him to simply deny his involvement in a crime without proffering a *prima facie* version that will prove that he will be acquitted at the end of the trial. The appellant's evidence, that served before the magistrate was adduced on affidavit. In my view, it is detrimentally short of the true *onus*. In light thereof, the respondent has adduced a strong case before the magistrate that convinced her not to grant bail.

[18] As this Court held in *Conradie v S*[2] - '… a mere denial by an applicant for bail affected by s60 (11) (a) of the probability of any of the considerations in s60 (4) (a) to (e) pertaining would be insufficient to show exceptional circumstances. More is required; the applicant is required to adduce convincing factual evidence to support any contention by him or her that the considerations do not apply in the circumstances.'

[19] In this matter, the charges faced by the appellant are serious. The offences that he is charged with are prevalent in this division. In my view, the interests of

[2] (A248/2020) [2020] ZAWCHC 177 at para 18

society which ought to be protected from these crimes far outweighs the liberty of the appellant. Despite the fact that the appellant is not a flight risk, the magistrate correctly refused bail as the investigations are ongoing. Since he did not call relevant witnesses who according to him released the vehicle to him, he is therefore capable of influencing and or intimidating such witnesses. Moreover, it was said that he was previously charged of a similar crime, if released on bail there is no guarantee that he will not commit a similar offence or a Schedule 1 offence for that matter.

[20] For these reasons, I make the following order:

20.1 The appellant's bail appeal is dismissed.

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MANTAME J

WESTERN CAPE HIGH COURT

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