17/10/2017.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A508/2017
Reportable
Not of interest to other Judges/Revised

In the matter between:

JACOBUS STEPHANUS JOBS NEL	**APPELLANT 1**
DICKY JUNIOR VAN ROOYEN	**APPELLANT 2**
JOSHUA LIAM SCHULTZ	**APPELLANT 3**
and	
THE STATE	**RESPONDENT**

JUDGMENT

PETERSEN AJ:

[1] This is an appeal by the appellants' against the refusal of bail by the magistrate Tshwane North. The appellants' who appear in the district court as accused 1, 2 and 5 with two co-accused (accused 3 and 4) are charged with, attempted murder (count 1); pointing of a firearm (count 2) and assault with intent to do grievous bodily harm (count 3). Accused 3 abandoned his application for bail in the district court and accused 4 was released on bail in an earlier separate bail application.

[2] An appeal against the refusal of bail is governed by section 65(4) of the Criminal Procedure Act 51 of 1977("the Criminal Procedure Act") which provides that:

"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 shall have given".

[3] The approach of a court hearing a bail appeal is trite. In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H it was said:

"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 it would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly . . ."

The appellants' assail the decision of the district magistrate both in law and fact.

[4] At the commencement of the bail application on 10 August 2017, the State contended that the application resorted within the ambit of Schedule 5 of the Criminal Procedure Act and by implication that the provisions of section 60(11)(b) of the Criminal Procedure Act were applicable. The appellants' legal representatives raised an objection to this contention and addressed the court at length with reference to authorities. The magistrate called on the State, in response, to reply to the objection. When an offence referred to in Schedule 5 is placed in issue, a prosecutor, is required either to produce written confirmation in terms of section 60(11A) of the Criminal Procedure Act, or prove to the court in some other way, ordinarily by way of an affidavit by the investigating officer, that it is such an offence. The State failed to produce either a certificate or evidence proving the schedule. Instead the State submitted from the Bar that the injuries sustained by the complainant, which resulted in bleeding from his ear

and mouth, constituted a dangerous wound within the ambit of attempted murder involving the infliction of grievous bodily harm in Schedule 5.

[5] The dispute on the bail schedule required of the magistrate to give a ruling, a duty she was acutely aware of, when she noted that she was not in a position to do so before applying her mind to the matter. The focus briefly turned to the provisions of section 60(11B) of the Criminal Procedure Act which itself could have had an impact on the schedule of the bail application. The appellants' disclosed no previous convictions or pending cases on which they were released on bail. The State when asked to indicate if the application for bail was opposed or not confirmed that bail was opposed.

[6] A sequence of unfortunate events followed. The magistrate perturbed by the absence of authorities being made available to her in print, declined an offer by one of the legal representatives to have same printed at his office which was in close proximity to the courthouse. At this stage the magistrate mooted the postponement of the application to secure the authorities herself so as to apply her mind to the issue of the applicable schedule. The legal representatives were engaged at length on this aspect. A counter proposal was raised that the application proceeds, with the court ruling on the schedule and the bail proceedings as a whole, at the end of the matter. The magistrate raised concerns about the proposal, correctly so, in my view, for reasons which I deal later in this judgment. With the focus squarely on the postponement of the matter submissions turned to the accused right to liberty and constitutional imperatives related thereto at great length. In giving reasons why the matter should be postponed, the magistrate raised the possibility of the opposition to the schedule being withdrawn, as an alternative to a postponement. She qualified this proposal by stating that the appellants' were not forced to do so. After a lunch adjournment and obtaining instructions from the appellants', the legal representatives still held their view that the offence of attempted murder was not a schedule 5 offence, but "abandoned" the point on instruction of the appellants'. The magistrate accordingly ruled that the application proceed on the basis of schedule 5.

[7] Counsel submits that this approach by the magistrate, which is described as having forced the legal representatives into a corner, constitutes a material irregularity. In the ordinary course of an application for bail, a timeous ruling should be made on the applicable schedule or section, whether placed in dispute or not. This determines how the bail application will be conducted and more importantly determines the issue of onus. The magistrate, who described herself as the driver of the vehicle had been heading in the right direction by indicating that she had to apply her mind to the issue of the schedule. However, the magistrate took a sudden detour by raising the possibility of a withdrawal of the opposition as an alternative to a postponement of the matter which the legal representatives of the appellants', albeit reluctantly, acquiesced in.

[8] The right of an applicant to apply for bail and the urgency thereof is important but equally important are the rights of the public and the complainant. The sentiments in the decision of *S v Jaipal* 2005 (1) SACR 215 (CC) at para 29 are apposite:

"The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime." A court should never allow the interests of justice which has fairness at its core to be trumped by issues of convenience or expediency.

[9] The decision by the appellants' legal representatives to withdraw their opposition to the schedule as an alternative to a postponement of the application was not in the interest of the administration of justice or the appellants'. Similarly, the magistrate's proposal of a withdrawal of the objection, despite the protestations in her judgment that the appellants' had not been forced to do so was not in the interests of justice.

[10] It remains a salutary practice to give a timeous ruling on the applicable schedule, particularly in the case of schedule 5 and 6 offences. The procedure at a bail application should be carefully adhered to in a step by step process dictated by the bail chapter and related schedules in the Criminal Procedure Act. In *Nwabunwanne v S* 2017 (2) SACR 124 (NCK), Erasmus AJ agreed with a suggestion by Binns-Ward AJ in *S v Josephs*

2001 (1) SACR 659 (C) at 661*f–h* "that, given the drastic consequences for an accused if section 60(11) of the CPA applies, it is desirable that the procedural provisions of s 60(11A) of the CPA should be closely adhered to and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible." I agree.

[11] I am accordingly satisfied that the proposal by the magistrate leading to the acquiescence therein by the legal representatives of the appellants constitutes a material misdirection. This does not imply, however, that the appellants' are summarily entitled to be released on bail. In *R v Hepworth* 1928 AD 265 on 277, it was said that:
"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[12] In *Nwabunwanne*, Erasmus AJ having found that the magistrate had materially misdirected herself held at paragraph 19:
"This matter before me is not one where I, on the facts before me, should order whether or not the appellant should be released. It cannot merely be accepted that the appellant or the respondent would have approached the bail application on the same basis, had there been clarity whether section 60(11)(b) of the CPA applied or not. On this basis alone the appeal should succeed and the matter remitted to the Court *a quo.*"

[13] The circumstances of the present appeal are distinguishable from those in *Nwabunwanne*. This court has the benefit of the evidence and submissions relevant to the attempted murder charge, both prior to the issue of the ruling and at the conclusion of the evidence. This court is therefore in a position to determine the issues in this appeal and to give the decision which the lower court should have given. There is further no indication that the bail application would have been conducted otherwise when one considers the misplaced ruling of the magistrate that the charge of attempted

murder constituted a schedule 5 offence, when opposition to the schedule was withdrawn.

[14] This matter demonstrates that the disputed facts of the State's case provide no clear or easy answers on whether the charge should be attempted murder or assault with intent to grievous bodily harm. I do not have the benefit of how the magistrate would have approached this question and that is a question now best left for the trial court. At the very least the evidence is that the complainant on the attempted murder charge was viciously attacked to a point where he bled from his mouth and ear causing a burst eardrum following a blow to the head with a firearm, being hit with fists and kicked repeatedly. The intention of the accused on the State's version in inflicting grievous bodily harm is irrelevant. In *R v Jacob* 1961 (1) SA 475 (A) at 478A the following was said pertaining to the infliction of grievous bodily harm, in the context of the offence of robbery with aggravating circumstances:

'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.'

[15] This view has been confirmed in the context of a charge of Rape involving the infliction of grievous bodily harm contemplated in Part 1(c) of Schedule 2 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 in *The Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* (959/15) [2017] ZASCA 85 (2 June 2017), where Molemela AJA said at para 15:

"In my view, the high court's reliance on cases where the accused was charged with the offence of assault with intent to do grievous bodily harm was clearly wrong. By importing the intention of the respondent into the enquiry, the high court disregarded the principles laid down in *Jacobs*. It committed an error of law as 'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part I*(c)* of the CLAA. Rather, the question to be answered is whether, as a matter of fact, the victim of such a rape sustained grievous bodily harm...".

[16] For purposes of this appeal the remainder of the grounds of appeal and heads of argument clearly move from the premise that the appellants' had adduced evidence on a balance of probabilities in satisfying the onus brought about by section 60(11)(b) of the Criminal Procedure Act which provides:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) ...

(b) in Schedule 5, but not 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 permit his or her release".

[17] I propose to approach the appeal on the basis of these grounds of appeal. The magistrate in effect refused bail by finding a likelihood of the grounds set out in section 60(4)(a),(b), (c) and (e) read with the factors in sections 60(5), 6, 7 and 8A of the Criminal Procedure Act.

[18] Before proceeding to deal with the grounds of appeal, it is clear that the personal circumstances of the appellants' were not placed seriously in issue at the bail application and not disputed by the investigating officer. I therefore do not propose to repeat the personal circumstances in this judgment.

[19] Section 60(4)(a) provides that:

"The interests of justice do not permit the release from detention of an accused...

(a) Where there is the likelihood that 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;

The magistrate in summarising the evidence of the investigating Officer, Constable Tladi and his commanding officer, Warrant Officer Naidoo, noted that the complainants as well as witnesses at the KFC at the Collanade Mall did not feel safe. This was based on video footage which had been taken of the complainant's motor vehicle indicating the

registration number. This led to a fear that they might be intimated by the appellants who lived in the same vicinity as they did. The magistrate based on this evidence found that the respondent had successfully rebutted the evidence of the appellants' by showing that there was a reasonable likelihood that the appellants would intimidate witnesses if released on bail. The finding lost sight of the evidence of Constable Tladi and Warrant Officer Naidoo under cross examination that the fear expressed by the complainants and witnesses was premised on what *might* happen if the appellants' were released on bail. The appellants' in their affidavits indicated that they would not interfere with or intimidate state witnesses. What is required is a likelihood of the offending behavior manifesting itself and not a mere possibility. The gravity and seriousness of the offences cannot be overlooked, which was at face value was brutal, but that in itself cannot lead to a conclusion that witnesses would be intimidated. The imposition of suitable bail conditions was overlooked by the magistrate as a way of mitigating such a likelihood.

[20] Section 60(4)(b) provides that:

"The interests of justice do not permit the release from detention of an accused...

(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".

The magistrate found that the first appellant had surrendered himself merely on the basis that accused 4 had been released on bail anticipating that he too would be released on bail. This led to a finding that the first appellant was a flight risk. There were no objective facts before the magistrate to draw this inference. The third appellant the magistrate found posed a flight risk based on the strength of the State's case and the likely sentence which would be imposed in the event of a conviction. The finding lost sight of Constable Tladi's evidence during cross examination that the third appellant would not flee. In *S v Acheson* 1991 (2) SA 805 (N), Mohamed J said:

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been

established in court. The court will therefore ordinarily grant bail to an accused unless this is likely to prejudice the ends of justice."

[21] Section 60(4)(c) provides that:

"The interests of justice do not permit the release from detention of an accused...

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

It is not in dispute that counsel (or the legal representative) for the first appellant had visited the Montana Hospital where the complainants received medical attention and was privy to information regarding their treatment. The magistrate premised on this found that counsel had contravened the provisions of section 60(4)(d) of the Criminal Procedure Act and made a blanket finding that all three appellants' would accordingly interfere in the State's case if released on bail. Whilst the behavior of counsel (or the legal representative) should be deprecated in the strongest terms, it could not be attributed to any of the appellants'. The submission that section 60(14) of the Criminal Procedure Act alludes to information which is contained in or forms part of the docket which an accused may not have access to for purposes of bail, does not avail counsel (or the legal representative) in what simply should not have happened. Save for the behavior of counsel (or the legal representative) there were no other objective facts showing that the appellants' would interfere in the investigation of the State's case.

[22] Section 60(8)(e) provides that:

"The interests of justice do not permit the release from detention of an accused...

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;"

and

(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is

released;

(c) whether the safety of the accused might be jeopardized by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused.

(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.

The approach to this ground has been settled in *S v Dlamini* 1999 (2) SACR 51 (CC) where Kriegler J held as follows at paragraph [57]:

"It is important to note that sub-section 4(e) expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-section 4(e) also expressly stipulates that a finding of such circumstances has to be established on a preponderance of probabilities ("likelihood"). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-section (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for subsections 4(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interest of all."

[23] The incident, notwithstanding submissions to the contrary, manifested racial connotations or undertones during the course of the incident, often described as so called "white on black" violence. The understandable public outcry in incidents of this nature is understandable. The call for bail to be refused is likewise understandable. However, the magistrate should not have lost sight of the very high watermark of section 60(4)(e) read with section 60(8A) and the salutary warning expressed in S *v Schietekat* 1999 (1) SACR 100 (CC) at paragraph 104 where the court said:

"... no more than expression, in statutory form, of what amounts to lynch law. It is true to say that it is the duty of courts of law to ensure the maintenance of law, order and justice and so prevent that greatest of all evils, a criminal justice system so weak and vacillating that people feel the need to avoid the courts and take the law into their own hands. Despite this courts have a greater obligation to society at large. They must jealously guard the rule of law. That is the lesson of this century..."

[24] No objective facts of the likelihood and not possibility of the eventualities envisaged section 60(8A) were presented to the court from which the magistrate drew her inferences. The magistrate appears clearly to have been influenced by the events which manifested itself in the social media, comments emanating from the Minister of Police on Twitter and protestors who had gathered opposing the release of the accused on bail. On what public outcry constitutes the magistrate indicated that she did not need a dictionary to tell her what public outcry was but had merely to have regard to section 60(8A). It is apparent that the magistrate paid lip service to the statutory provision.

[25] A submission was made that the court considers the fact that accused 4 had been released on bail and that there had been no public outcry. However, the court must be alive to the fact that even upon a reading of the record there is no indication as to what happened on the 04 August 2017 in the magistrate's court leading to the release of accused 4 on bail. Therefore it would be mere speculation on the part of the court to surmise that there would not have been a similar stance taken by the protestors who were at court on 10 August 2017. Notwithstanding this, the question still remains, whether or not on the high watermark, the State had shown or rebutted the evidence that there would be no public outcry.

[26] Upon a consideration of the totality of the factors set out in section 60(8A) it is clear that they are not to be read individually but jointly, the one following upon the other. Whilst the court notes that there were protests for bail to be refused, that there has been an outcry on social media, the question remains, even though the magistrate had found the likelihood that the release of the appellants would disturb the public order or undermine public peace and security, whether a consideration of section 60(9) could have mitigated this aspect. The magistrate failed to consider the provisions of section 60(9), which on its own is a material misdirection when regard is had to the decision of *Dlamini.*

[27] On the factors the magistrate had considered, I am of the view that she had misdirected herself in respect of each of these grounds and that this court is at liberty to give the decision which the magistrate should have given in the first instance.

[28] In the result the following order is made:

1. The appeal against the refusal of bail is upheld;
2. The decision of the learned magistrate Rapulana in the court *a quo* is set aside.
3. The order is replaced with an order as set out at Annexure "X".

AH PETERSEN
ACTING JUDGE
OF THE HIGH COURT OF
SOUTH AFRICA

APPEARANCES:

For the First and Second Appellants: Advocate Kriel
Instructed by: Steenkamp Van Niekerk Attorneys (First Appellant)
Booysen Dreyer and Nolte Incorporated (Second Appellant)
For the Third Appellant: Advocate Erasmus
Instructed by: Van Jaarsveldt Attorneys
For the Respondent: Advocate Broughton
Instructed by: The Director of Public Prosecutions, PRETORIA

DATE HEARD: 16 October 2017
DATE OF JUDGMENT: 17 October 2017

"X"

17/10/2017

ANNEXURE "X"

APPEAL NUMBER: A508/2017

THE STATE versus 1. Joshua Liam Schultz, Jacobus
2. Stephanus Jacobs Nel
3. Dicky Junior Van Rooyen

(Hereinafter referred to as the accused)

In terms of Section 60 of Act 51 of 1977 it is ordered:-

That each of the accused be granted bail in the sum of R5000-00 cash;
AND
1. That upon payment of the said sum of money, the accused shall be released from custody on condition that:-
He appears personally at the Tshwane North Magistrates Court at 08h30am (time) on the 18th day of October 2017 and thereafter on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge to which the offence in this case relates, or where sentence is not imposed forthwith after verdict and the court extends bail, until sentence is imposed;
2. That the accused does not communicate with witnesses for the prosecution, either directly or indirectly.
3. That the accused are prohibited from entering or going to the Colonnade Shopping Complex for the duration of this matter.

The accused is informed that, in terms of section 67(1) Act 51 of 1977, if, after his release on bail, he fails to appear at the place and on the date and at the time appointed for his trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings, or fails to comply with the above conditions, the Court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for his arrest. The accused is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition.
(A copy of this order is to be brought to the attention of the accused by their legal representatives upon their release from custody)

By order of the Court

THE REGISTRAR