

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A50/2022

**DELETE WHICHEVER IS NOT
APPLICABLE**

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED.

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In the matter between:

MARVIS, IRVIN

Appellant

and

THE STATE

Respondent

Heard: 15 JUNE 2022

Delivered: 22 JUNE 2022

JUDGMENT

KARAM, AJ:

[1] The appeal in this matter was argued on 15 June 2022. Mr Schorn appeared for the Appellant and Mr Futshana represented the State.

[2] The Court proceeds to hands down its judgment in this matter.

- [3] The Appellant applied for bail, which was refused on 18 October 2021.
- [4] The Appellant subsequently launched an application for bail on new facts and same was refused on 2 December 2021.
- [5] The Appellant subsequently launched a further application for bail on new facts and same was refused on 6 January 2022.
- [6] The Court will refer to these as the first, second and third applications.
- [7] This is an appeal against the refusal of bail in respect of the 3 applications. The Appellant is charged with:

- count 1 – contravening section 5(b) read with Schedule 2 of the Drugs and Drugs Trafficking Act 140 of 1992 (dealing in drugs).

Alternatively to count 1, contravening Section 4(b) read with Schedule 2 of the aforesaid Act (possession of drugs); and

- count 2 – contravening section 22A(16)(b) read with Schedule 5 of the Medicines and Related Substances Act 101 of 1965 (possession of Schedule 5 medicine);

- [8] It is common cause that this is a Schedule 5 matter, the Appellant being required to satisfy the Court that the interest of justice permit his release on bail.
- [9] Section 60(11)(b) of the Criminal Procedure Act 51 of 1977, provides that where an accused is charged with an offence referred to in Schedule 5, the Court shall order that the accused be detained in custody until he is dealt with in accordance with law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that the interest of justice permit his release.
- [10] An appeal against the refusal of bail is governed by Section 65(4) of 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”.

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

“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... ”.

[12] This Court is aware that there is no onus on a bail applicant to disclose his defence or to prove his innocence;

[13] Further, that the Court hearing the application or this Court of appeal is not required to determine in such application or appeal, the guilt or innocence of the applicant – that is the task of the trial court.

[14] However, one of the factors that can be looked at is the strength of the State's case. It is apparent to this court that the State, indeed, has an overwhelming case against the Appellant by virtue of the following factors:

- It is common cause that the Appellant was the registered owner of the property whereon the drug factory/laboratory was discovered;
- In none of the applications has it been disputed that the Appellant was not resident at or in control of such premises at the time of the discovery of the drug factory;

On page 92 or page 413 of the Bundle, the learned Magistrate stated in his judgment in the third application at lines 13 – 17:

“The applicant was not found at the scene. Previously it was claimed that the applicant had rented out his house and that he had nothing to do with the activities of his tenant, which he seemed to blame for the existence of the drug factory”.

Counsel for both the Appellant and the State concurred with this Court, that what is quoted aforesaid is incorrect, and that there is no basis for the learned Magistrate to have stated this, as in none of the 3 applications was this averred by the Appellant.

- Then there is the DNA evidence, objective evidence, which links the Appellant to a glove found in the drug factory, which affidavit states that

the most common occurrence for the DNA result from the glove is 1 in 999 trillion people.

[15] The omissions by the police to obtain the identity and statement from the woman who had tipped off the police about the presence of the drug factory and who drove away from the premises, or the neighbours who had allegedly seen a person run from those premises into their premises and vanish, certainly does not impact in any material manner upon the strengths of the State case.

[16] Aside from the aforesaid factors are what may be termed suspicious factors:

- The fact that the Appellant, who is portrayed as a successful business man, does not have a personal bank account and utilises the company account;
- The multiple cash deposits as reflected in those bank statements that were furnished;
- The disappearance of the docket that resulted in the Appellant only being arrested some 9 years subsequent to the discovery of the drug factory;
- The names of the investigation team forwarded from the Appellant's cellular telephone to the traditional healer/witch doctor;

It was stated by Colonel Ludick, the investigating officer, that the Appellant could not have known the names of all the members of the investigation team had this information not been leaked from within the South African Police.

[17] In the first application, the Appellant had stated as a fact in his affidavit that he was the founder and director of Amalangeni Trading, which manufactures furniture and which had 6 employees, and the other company, Vikela Security Company, which provided private security, the latter company having 18 employees.

In the affidavit opposing bail, Col Ludick stated that the Appellant had informed the police that he owns Emalangeni Trading, a furniture business from which he derives his income, but that he had lost the company due to bad debt.

The learned Magistrate requested various additional information, and in a further affidavit, the Appellant stated that due to the pandemic, his businesses had not been doing well, particularly the furniture business, and that same had to be closed.

These two averments are material in that same were made on 8 October 2021 and 18 October 2021, it is 10 days apart. They are glaringly contradictory and impact adversely upon the credibility of the Appellant, falsely leading the Court to believe that this company was fully operational when in fact it had closed down.

This further impacts upon the veracity of other allegations contained in the Appellant's affidavits.

- [18] A further factor relates to what the Appellant stated regarding his wife having notified him that the police were looking for him, that he was willing to hand himself over and that he advised his then legal representative that he would be arriving in Johannesburg on 7 October 2021.

This is material as it relates to the Appellant's willingness to submit himself to the authorities, and demonstrates that he would not be a flight risk if bail is granted.

Significantly, there is no affidavit from his legal representative confirming same. Further, there is no reference to same in any address to the Court by any of his legal representatives in any of the three applications.

- [19] Counsel for the Appellant, wisely in the Court's view, conceded in argument that there was no real substance to the second application.

- [20] The crux of the third application relates to the lawfulness or otherwise of the search and seizure conducted by the police at the Appellant's premises subsequent to the tip-off.

Counsel for the Appellant argued that in the event of it being found by the trial court that the search and seizure was indeed unlawful and infringed upon the Appellant's fundamental rights, then the State would have no evidence to adduce against the Appellant.

Whilst this may be correct, the difficulties facing the Appellant, and as acknowledged by the Appellant's legal representative at the hearing of the third application, are the fact that:

- Notwithstanding that Section 11(1)(a) and (g) of Act 140 of 1992 were declared unconstitutional by the apex Court in *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC), this decision was made prospective to 27 July 2016 and not retrospective.

In the current matter the search and seizure occurred in March 2012;

- The fact that real evidence (as is the case in this matter), is generally admitted even if obtained unlawfully;
- The fact that the Appellant will have to convince the trial court that the police did not act lawfully in terms of Section 22 of the Criminal Procedure Act.

[21] This Court can find no misdirection with the reasoning and prima facie finding of the learned Magistrate that the police acted lawfully and in accordance with this Section, having regard to the events that transpired that evening.

[22] Regarding the video of the live slaughtering of the black chicken and its blood being poured onto eggs on which were written in red the names of the investigation team:

These images were received on the Appellant's cellular telephone from the same person to whom the names were initially dispatched;

The video was received on the Appellant's phone after same had been confiscated by the police;

Whilst counsel for the Appellant is correct in his submissions that the images were not sent to the cellular telephones of the investigative team members and that there is no evidence that any of them suffered any harm as a result, the fact remains that this is indeed disturbing and it is understandable that the team members were deeply disturbed thereby and fear for their lives. It is highly arguable that this constitutes indirect interference with and intimidation of State witnesses.

- [23] The learned Magistrate was further correct in stating in the first application, that on count 1, the Appellant, if convicted, faces a minimum sentence of 15 years imprisonment, the drugs seized having an approximate value of R 1 million.
- [24] Given the sentence he faces, the strength of the State's case, the Appellant's financial means, and the unsatisfactory aspect referred to herein above relating to his alleged intention to hand himself in, there are indeed reasonable prospects that he will attempt to abscond.
- [25] This is not a matter where the Appellant will languish interminably in custody whilst investigations are being concluded. Both counsel have advised the Court that the matter is trial ready and that the matter is set to commence on 15 July 2022, that is in 3 weeks time.
- [26] Counsel for the Appellant, Mr Schorn, is to be commended for his preparation and tenacious efforts on behalf of his client.
- [27] However, and having regard to all of the foregoing, this Court finds that the learned Magistrate was fully justified in refusing bail in all three applications.
- [28] Accordingly, the appeal against the refusal of bail is dismissed.

Order:

1. The appeal against the refusal of bail is dismissed.

William Karam
Acting Judge of the High Court
Gauteng Local Division

Appearances:

For the State: Adv. Futshana (State Advocate)

For the Appellant: Adv Schorn

