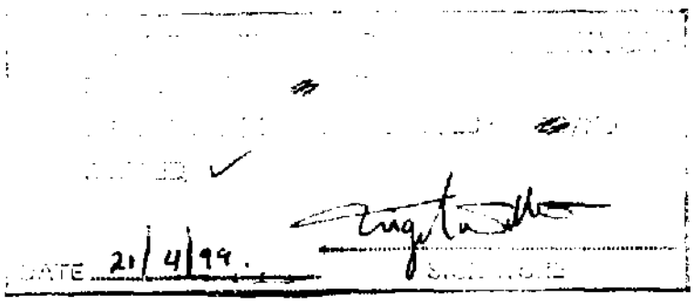
VIC & DUP/JEB/LKS

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO.: A182/99 JOHANNESBURG

1 April 1999



10

In the matter between:

BENNETT, KEITH NEIL Appellant

and

THE STATE Respondent

20

J U D G M E N T

WILLIS, J: This is an appeal in terms of section 65 of the Criminal Procedure Act, No. 51 of 1977, against the refusal of bail by the learned magistrate, Mr Wagenaar, of the Johannesburg Magistrate's Court.

It would appear that on 9 May 1997 the accused's former wife, Anne Noreen Bennett, sought and obtained an interdict against the accused in terms of section 2 of the Prevention of Family Violence Act, 133 of 1993. The interdict ordered the accused:

30

1. Not to assault or threaten Anne Noreen Bennett;

2. Not to enter 2 Almond Court, Stilte Road, Vredenpark.

It appears that 2 Almond Court, Stilte Road, Vredenpark is the residence of the accused's former wife.

At the time that the interdict was obtained the magistrate issuing that interdict authorised a warrant for the arrest of the accused. The interdict was served on the respondent, i.e. the accused, on 12 May 1997.

On 17 September 1997 the accused's former wife filed further allegations against him and alleged that the accused was in breach thereof. Once again on 10 November 1998 the accused's former wife did the same. On that day another magistrate attempted to resolve the matter. According to Mr Wagenaar, the magistrate who refused the accused's bail, the manner in which that magistrate dealt with the matter was inappropriate. I do not have the record of what transpired on 10 November 1998 and cannot express an opinion on that issue.

On 10 February 1999 further allegations were made by the accused's former wife alleging, it would seem, gross violations of the conditions of the interdict. Consequent thereupon the learned magistrate, Mr Wagenaar, issued a new warrant of arrest and the accused was brought before him on 3 March 1999.

Mr Hodes, counsel for the accused, disputed that a valid interdict was currently in force. The record is not clear on this issue. I shall, however, assume in favour of the state that a currently valid interdict is still in force. On that day the accused made an application for bail. Bail was refused and the accused was remanded in custody.

The/..

The enquiry in terms of section 3(4) of the Prevention of Family Violence Act is due to commence on 7 April 1999.

It appears from the evidence led in the bail application that the accused and his former wife have been married to each other and divorced from each other three times. The accused has custody of one of the children born of their former marriage, a boy aged 15 years. The accused's former wife has custody of the younger son, aged 5 years. The accused has rights of access to him.

The uncontroverted evidence of the accused is that his former wife has on numerous occasions falsely laid charges of rape and assault and perhaps other charges as well against him. In every instance these charges have been withdrawn or the accused has been acquitted. These facts were confirmed by Mr Hoyland, his attorney, who has been acting for the accused in such matters since 1987. Mr Hoyland also confirmed that the accused's ex-wife remarried him after laying charges of rape against him. Mr Hoyland is an officer of the court. He is a partner of the well-known and well established firm Fluxman Rabinowitz-Raphaely Weiner. It is inconceivable that he would have misled the court on this issue. It goes beyond mere puffery or presenting his client's case in the best possible light.

The accused is a breadwinner. He supports the child in his custody as well as that in the custody of his former wife. He works for a company called Fridgemaster as a service technician or contractor. It appears that he is not an employee in the legally strict sense of that term but rather an independent contractor. He has bought a house with a large bond and he works according to him very hard.

His statement that he is a committed christian and that he is involved in church work has the ring of truth. He did for instance undergo marriage counselling through his church. The accused believes his former wife is insanely jealous. It certainly is clear that they have a stormy and tempestuous relationship.

Section 12(1)(c) of our Constitution confers on everyone the right to freedom which includes the right not to be detained without trial. That is the fundamental premise in a case such as this. It has long been the fundamental premise of our common law. See Minister van Wet en Orde en Andere v Dipper 1993 (2) SACR 221 (A) and 1993 (3) SA 591 (A) at 224g and S v Du Plessis and Another 1997 (2) SACR 379 (T) at 386b; see also S v Petersen 1992 (2) SACR 52 (C) and S v Acheson 1991 (2) SA 805 (Namibia). The constitutional rights to freedom have, of course, to be limited in terms of section 36 thereof but only to the extent that it is reasonable and justifiable in an open and democratic society. The presumption of innocence operates in favour of an applicant even where there is a strong prima facie case against him. See S v Essack 1965 (2) SA 161 (D) at 162C and S v Thornhill (2) 1988 (1) SACR 177C at 181D-H. The presumption of innocence, according to Du Toit and others in The Commentary on the Criminal Procedure Act at 9-2 remains a cornerstone of bail and this explains why the courts should in principle lean in favour of the liberty of the bail applicant. Sections 2 and 3 of the Prevention of Family Violence Act provide for drastic and unusual measures infringing upon a person's liberty. They must accordingly be applied with due caution.

In his reasons for judgment the magistrate criticises the accused for not mentioning in his evidence in chief why his ex-wife wrongfully and unlawfully accused him of serious misconduct. Apart from observing that it does not appear clear to anyone, least of all the accused, why she should do so, I wish to add that the learned magistrate seems to have overlooked that the very purpose of his questioning was surely to throw light upon the issues on which there was insufficient clarity. The learned magistrate appears to have overlooked the fact that in practice rights of access to a child almost invariably entail a visit to the home of the custodian parent to collect or return the child in question. Access also entails the right to be informed and to give and seek advice with regard to the welfare of the child.

In his original judgment the learned magistrate seems to have adopted a "no smoke without fire" approach and says that there must be a reason why the accused's former wife would make these allegations against him. The approach of the learned magistrate throughout the proceedings was to adopt the attitude that this woman could not conceivably falsely have implicated the accused. He seems to ignore the history of false allegations. He seems to ignore the fact that it is unlikely that a person has been seriously threatened or whose life has been endangered by another remarries such person. He seems to find it impossible to believe that the accused's former wife is capable of such evil as making false allegations against him. His experience of life is very different from my own. In great works such as the Bible or Shakespeare it is made plain that

evil is not an exclusively male phenomenon but malice and wrongdoing fall within the province of women as well as they do with men. Gender equality is indeed a two-way street.

In refusing bail the learned magistrate seems to have relied on section 60(4)(e) of the Criminal Procedure Act, No. 51 of 1977. This provides that it will be in the interests of justice to refuse to grant bail 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."

Nothing on the record shows such a likelihood. On the contrary, there is nothing to suggest that the accused would attempt to evade his trial, influence of intimidate witnesses or attempt to conceal or destroy evidence or in any way undermine or jeopardise the objectives or the proper functioning of the criminal justice system.

I am satisfied that the decision of the learned magistrate to refuse bail was wrong. I am also satisfied that the learned magistrate exercised his discretion wrongly. Accordingly my order is as follows:

1. The decision of the learned magistrate to refuse bail to the accused on 3 March 1999 is set aside.
2. The accused is to be released on bail immediately.
3. The amount of bail is R100,00.

ON BEHALF OF APPLICANT	:	ADV L M HODES
Instructed by	:	Fluxman Rabinowitz-Raphaely Weiner
ON BEHALF OF THE STATE:		ADV J G WASSERMAN
DATE OF JUDGMENT	:	1 APRIL 1999