IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A796/05

In the matter between:

VINCENT VERWEY First Appellant

WAYNE SMITH Second Appellant

ESRA BEZUIDENHOUT Third Appellant

and

THE STATE Respondent

J U D G M E N T

MOSHIDI, J:

[1] This is an appeal in terms of the provisions of section 65 of the Criminal Procedure Act, Act 51 of 1977 (the Act) against the decision of the Regional Magistrate at Randburg on 31 August 2005, refusing to release the three

appellants on bail pending their trial.

[2] The trial in the Regional Court was postponed to 29 November 2005 subsequent to the above refusal. In this appeal, the first appellant was represented by Adv Smit whilst the second and third appellants were represented by Adv Hattingh. The State was represented by Adv Du Toit.

[3] The charge-sheet in the Regional Court currently contains no details of the allegations against the appellants. However, from the record of the proceedings and as it was alleged that the appellants were manufacturing drugs and selling them, the Regional Magistrate accepted that the appellants will be charged ultimately with dealing in narcotics or drugs having a narcotic effect in contravention of section 5(b) of Act 140 of 1992, the Drugs and Drug Trafficking Act. Therefore the charge will relate to an offence as envisaged in section 5 of the Criminal Procedure Act 51 of 1977 (the Act).

[4] As a result of the provisions of section 60(11)(b) of the Act are applicable to any bail application. Section 60(11) provides as follows:

> "*Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*
>
> *a) (not applicable)*
> b) *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 permit his or her release.* "

In the Regional Court , the applicants' application for their release on bail was based solely on sworn affidavits as well as the arguments advanced by their respective legal representatives. I shall deal more fully with the nature of these affidavits later. The State called one witness, the investigating officer, Ms D Meyer (Meyer). Her evidence briefly, related to the arrest of the appellants on 26 August 2005. At about 04h000 on this day and after she had received information that the first appellant drove a red BMW and resided at Charter Avenue in Killand, the witness and her colleagues went to this address. The information they had received included that the first appellant manufactured drugs. Whilst patrolling and waiting at the given address they observed four black males approaching them and driving in a black Volkswagen Golf 4. On seeing the witness and her colleagues, the occupants of the Volkswagen Golf made a U-turn and sped away. It was later established that this motor vehicle carried false registration numbers. Thereafter, within five minutes the second and the third appellants emerged from the yard of the given address and enquired from the State witnesses what was going on. When given the description of the occupants and the Volkswagen Golf, the second appellant said that he thought the occupants were Tanzanians that had come to deliver drugs. The second and the third appellants then returned to this house. The witness and her colleagues continued to patrol the area in search of the first appellant and his red BMW motor vehicle. At approximately 11h00 on the same day, and after receiving further information that the first appellant was living at No. 15 Charter Avenue

(the same address mentioned earlier), the witness and her colleagues returned to this address where they encountered the domestic helper, Martha. The latter confirmed to them that the first appellant and the second appellants were staying there but she had not seen them since she had come on duty that day in the morning at 08h00. With the permission of Martha, the house inside and outside rooms were searched (in the absence of the appellants). The following items were found: Bubble wrapped box full of equipment; bottles and glasses pipes used for manufacturing drugs; a bottle of tuline; caffeine powder; ephedrine powder; a box of scheduled steroids. In the first appellant's room a zip log bag with powder and clean unmixed CAT were found. The forensic unit was called in and they took over the scene. The appellants were phoned. They came and they were arrested.

[5] All the three appellants' addresses were verified by the police as well as their respective occupations. All three appellants were South African citizens and had no known connections overseas. The appellants offered no co-operation to the police and exercised their constitutional rights to remain silent. Meyer expressed fear that the appellants, if released on bail, may continue to manufacture drugs for which they had an established clientele base. Meyer also indicated that more suspects could be arrested as she had information that the first appellant also ran another drug manufacturing laboratory somewhere in Nylstroom. Meyer suggested that if the appellants were granted bail a high amount of bail should be fixed and that the

appellants be further burdened with the conditions of reporting twice a week to the South African Police and not to leave the Republic of South Africa during their trial without authority or consent.

[6] Meyer was cross-examined fairly extensively. Her cross-examination, in short revealed that in essence she was not opposed to the granting of bail to the appellants, the value of the equipment seized by the police amounted to R250 000,00, the first appellant's passport had already been surrendered to the police, the suggested bail according to Meyer was the sum of between R30 000,00 and R40 000,00 for each of the appellants, she had no reason at all to suggest that the appellants will not stand their trial, although no drugs were found on appellants nos. 2 and 3. However, appellant no. 3 knew about the manufacturing of the drugs and that there were several issues to be still investigated by the police e.g. the forensics, the Home Affairs records, the property ownership of the Assets Forfeiture Unit, the Nylstroom factory etc.

[7] The Regional Magistrate had also put several questions to Meyer. Her answers revealed that all the three appellants were in fact friends; she thought it possible that the appellants were flight risks; she was also awaiting the laboratory test results on the chemicals seized; the appellants' SAP 69's, the cellphone information; there was a possibility that other suspects would still be arrested if the Nylstroom factory was located; appellant no. 2 did not possess a passport whilst appellant no. 3's passport was somewhere with his

mother; she was also of the view that there was a possibility that the appellants if released on bail could interfere with Martha that is the domestic helper and the first appellant's girlfriend as possible State witnesses; the appellants were a danger to society as they manufactured CAT drugs and sold these drugs to children and to the nightclubs.

[8] The Regional Magistrate then evaluated the evidence dismissing the applicants' bail application and offered brief reasons therefor. The Magistrate found that the State had a watertight case or *prima facie* case against the appellants, that the appellants will endanger public safety, that there was a great incentive for the appellants to flee their trial and that it was contrary to the interests of justice to release them on bail.

[9] In applications of this nature the *onus* was on the applicants to satisfy the court that, on a balance of probabilities, that the interests of justice demanded their release on bail. The applicants' bail applications in the Regional Court were more than deficient in a number of respects. I need not elaborate in view of my conclusions later hereinafter. The result was that it was left to the State to lead evidence in opposing the bail applications of the appellants which evidence provided a broader picture of the issues to be determined. In addition, such deficiency had largely contributed to the rejection of the appellants' bail application, in my view. However, in this Court the fate of the applicants was not entirely doomed. The *onus* once more was on the

appellants to demonstrate to me, on a balance of probabilities, that the decision of the Regional Magistrate in refusing them bail was wrongly decided and that the discretion of the court *a quo* was exercised improperly. In this connection, I am confined to the four corners of the record of the proceedings in the Regional Court as supported by the grounds of appeal and the heads of argument as well as the submissions made on their behalf before me. Pursuant to the Notice of Appeal the Regional Magistrate provided additional reasons for his judgment. Regrettably, such additional reasons were, with respect, not much helpful to me.

In terms of section 60(4) of the Act, I am entitled to refuse to release the appellants on bail from custody in the interests of justice if one or more of the following grounds are established:

a) Where there is the likelihood that the appellants, if they were released on bail, will endanger the safety of the public or any other particular person or will commit a schedule 1 offence; or

b) Where there is the likelihood that the appellants if they were released on bail will attempt to evade their trial; or

c) Where there is the likelihood that the appellants if released on bail will attempt to influence or intimidate witnesses or to

conceal or destroy evidence; or

d) Where there is a likelihood that the appellants if released on bail, will undermine or jeopardise the objectives of the proper functioning of the criminal justice system; including the bail system; or

e) Where in exceptional circumstances, there is a likelihood that the release of the appellants will disturb the public order or undermine the public peace or security.

[10] In dealing with the above factors in *S v Branco* 2002 (1) SACR 531 (WLD) at page 533, Cachalia AJ (as he then was) said the following:

> "*The factors which the court may take into account in determining whether any of the grounds described in section 60(4) Have been established, are set out in section 60(5), section 60(6), section 60(7) and section 60(8) of the Act. These factors are merely guidelines in assisting the court in arriving at a just decision, they are not 'numerus clausus' of the factors that a court may consider. (See S v Stanfield 1997 (1) SACR 221 (C) at 226c-d.) Nor are any of the factors individually decisive. Some of them may be weightier than others, depending on the circumstances of the particular case. The court must judicially exercise a proper discretion taking into account the totality of the circumstances.*"

[11] Counsel for the State in opposing the granting of bail in this Court contended that the opinion of Meyer as the investigating officer in this case

was not decisive in matters of this nature. With respect, I agree with him wholeheartedly. However, it will equally be unreasonable to simply ignore wholly her opinions as reflected in her evidence in this particular case. After all she was intimately involved in this matter from inception. She arrested the appellants. At her instance, the alleged drugs and drugs manufacturing equipment were confiscated for forensic scrutiny. She investigated and continues to investigate the allegations against the appellants. Finally, she was indeed the only witness to testify at the bail hearing of the applicants in the court *a quo*.

[12] In my view, the Regional Magistrate has with respect, on several aspects completely misevaluated and drawn incorrect conclusions on the evidence of Meyer. For the purposes of this judgment, I need not deal with each and every such incorrect approaches to her evidence. It will suffice to note, and indeed find, Meyer never expressed explicitly her opposition to the granting of bail to the applicants. She said that in essence she was not opposed to the release of the appellants on bail. She did however, suggest that a high amount of bail, between R30 000,00 and R40 000,00 should be determined, coupled with stringent bail conditions as indicated earlier when I dealt with her evidence. In addition, she could advance no reasons why the appellants would not stand their trial or interfere with evidence as all the said drug manufacturing equipment and drugs were confiscated already. I am however reluctant to completely ignore Meyer's reservations expressed that the appellants if released on bail, will interfere with possible State witnesses i.e. appellant no. 1's girlfriend and the domestic helper, Martha – and that the appellants will endanger safety by continuing to manufacture drugs. The rest of Meyer's reservations such as the possibility of the existence of a second drug manufacturing factory in Nylstroom, were based on speculation. In addition, her evidence has clearly demonstrated that there were indeed numerous aspects of this case which still have to be investigated. I need not expatiate in this regard. It is all on record. What is worthy of mention, however, is that some of the investigations will require several months, if not longer, to complete.

[13] Meyer's reservations that the appellants will likely interfere with witnesses are genuine and well-founded. However, I was informed by

counsel for the appellants that the witness, Martha, was no longer in the employ of the first appellant. Meyer has also already obtained a statement from this witness. In any event, such concerns as was suggested by both counsel for the appellants and Meyer could be remedied by appropriate bail conditions. Meyer's concerns that the appellants were likely to continue manufacturing drugs, remain a possibility, even though remote. Meyer, herself has dispelled this possibility when she testified that it was unlikely for the appellant's to do so as she had confiscated all the equipment for the manufacture of drugs. In any event, if granted bail and the appellants engage in such activity, they will be doing so at their own peril.

[14] On the whole and viewed in its totality, the evidence of Meyer did not establish unequivocally that the State had a watertight case against all the appellants as found by the Regional Magistrate. The alleged drugs and manufacturing equipment thereof were found at appellants' nos. 1 and 2's residence. However, this was in the absence of all the appellants. In any event, the appellants have thus far exercised their constitutional rights and steered clear of the allegations against them – as indeed they were entitled to do. In this regard too the Regional Magistrate had misdirected himself by concluding that the State had a strong case against the appellants.

[15] The fact that several aspects of the case were still to be investigated should not compromise the appellants' rights as guaranteed by section 35 of

the Constitution of the Republic of South Africa. The continued detention of an accused in order to complete police investigations should be discouraged and frowned upon. In *S v Acheson* 1991 (2) SA 805, Mohamed J (as he then was) said the following at page 822A-B:

> "*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 person unless this is likely to prejudice the ends of justice.* "

[16] Having concluded that the decision of the Regional Magistrate was incorrectly arrived at and having considered all the facts and circumstances of this case, balancing the interests of justice as against those of the appellants, I have exercised my discretion in favour of the appellants and decided that they ought to be released from custody on bail. The only issues to be resolved were the quantum of the bail amount and the conditions to be attached thereto. Both counsel for the appellants had no objection to any condition to the granting of bail and I have found no reason not to do so. However, the amount of bail of between R5 000,00 and R10 000,00 suggested by counsel, in my view, will be bordering on the lower end of the scale in the circumstances. The allegations levelled against the appellants, even in incomplete form currently, are indeed of a serious nature. I am also painfully aware of the fact that I should not fix such a high amount of bail that could be interpreted as amounting to the refusal of bail to the appellants.

[17] In the end, I make the following order:

17.1 The appeal succeeds.

17.2 The Regional Magistrate's order refusing bail to the appellants is hereby set aside.

17.3 Bail is hereby fixed in an amount of R15 000,00 (fifteen thousand rand) for each of the appellants, subject to the following conditions:

a) The appellants shall not interfere or communicate with any State witnesses including the domestic helper, Martha;

b) The appellants shall each report three times , that is on Mondays, Wednesdays and Fridays weekly to the South African Police at the Sophiatown Police Station between the hours of –

(i) 07h00 and 19h00;

c) The appellants shall refrain from leaving the Republic of South Africa or their respective places of residence without the written consent of the

investigating officer or his/her duly authorised delegate or successor, save for the purposes of reporting to the South African Police Station in accordance with the conditions of bail;

d) The appellants shall, if not yet surrendered, surrender any passports or travel documents which they might have in their possession or under their control, to the investigating officer immediately;

e) Finally, the appellants shall refrain from engaging in acquiring any equipment for the purposes of manufacturing any drugs or involve themselves in the manufacturing of drugs contrary to any law.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT

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DATE OF HEARING	
DATE OF JUDGMENT	30 January 2006