IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: A344/08

DATE: 2008-08-14

In the matter between

ASHLEY, GEORGE AIDEN Applicant

and

THE STATE Respondent

J U D G M E N T

SHAKENOVSKY, AJ:

[1] INTRODUCTION

(a) The appellant is presently in custody facing the following charges:

1. Attempted murder.

2. Possession an unlicensed firearm.

3. Malicious injury to property.

(b) The appellant was arrested on 14 May 2008, since which date he has remained in custody.

(c) The appellant first appeared in the Protea Magistrate's Court, Gauteng, on 16 May when the matter was postponed to enable the appellant to bring an application to be released on bail. Such application was heard on 23 May and on further dates thereafter.

(d) Judgment on the bail application was delivered on 2 June 2008, when the learned magistrate ruled:

"Bail denied".

(e) The Notice of Appeal to the High Court (WLD) against the magistrate's refusal of bail was filed on 5 June 2008. The magistrate, in response to the Notice of Appeal stated:

"No reasons to add."

(f) The appeal was heard in this Court before me on 7 August 2008. Counsel, Mr Myburgh appearing for the appellant and Mr Mohamed then appearing for the State.

(g) It was common cause that the offence with which the appellant was charged is an offence set out in Schedule 5 of the Criminal Procedure Act 51 of 1977 (herein after referred to as the CPA).

[2] PROCEDURE FOLLOWED RESPECTIVELY BY THE APPELLANT AND THE RESPONDENT (THE STATE)

(a) Appellant was sworn in as a witness and thereafter Mr Myburgh handed in a sworn affidavit by the appellant

which Mr Myburgh then proceeded to read into the record.

(b) Appellant gave a further oral evidence when examined by Mr Myburgh.

(c) He was then cross-examined briefly by Ms Marriott, the prosecutrix in the matter.

(d) Thereafter appellant closed his case on the application.

[3] RESPONDENT'S PRESENTATION OF EVIDENCE

This was done by the handing in of duly sworn affidavits by the following witnesses for the State:

(i) Detective Constable Kelvin de Jaap, the investigating officer in this case, who also handed in various exhibits including *inter alia* various photographs relating to the scene of the alleged violent assault on the complainant on 4 May 2008 (this relating to the attempted murder charge and malicious injury to property), as also various photographs indicating the stab wounds of complainant's head, neck and back.

He also handed in as an exhibit a copy of a article that appeared in *Die Beeld* newspaper, setting out complainant's allegations of the assaults on her by the appellant and stating:

"Enige iemand met inligting oor George kan kaptein Shuler by 0795251515 bel."

He also handed in as an exhibit a publication in the

Internet stating *inter alia*:

"Should you have any information that can assist the authorities, please contact the volunteer (sic) listed below or the investigating officer. Please do not approach the subject."

It appears to be undisputed when the applicant stated:

"Several days later I learned through a publication by complainant's family on the Internet that I was being sought by the police. Immediately, through my legal representative and I arranged for myself handing myself over to the police, which handing over occurred at approximately 15:30 on 14 May 2008."

Appellant states that this handing over took place despite the police and the prosecuting authority refusing to give him an undertaking that he would be entitled to apply for bail immediately upon his arrest.

Detective Constable de Jaap opposed the granting of bail, as he was of the view that appellant could endanger the lives of the complainant and witnesses or otherwise intimidate them.

(ii) The complainant, Chantelle George, being the wife of the appellant. The contents of her sworn affidavit were also read into the record by the prosecutrix. Her affidavit deals at length in the main with the alleged violence and abuse and assaults upon her committed

by the appellant, as also his threats towards himself and also members of her family, that particularly dealing with the attack upon her on 4 May 2008 being the subject matter of the attempted murder charge against the appellant.

She also testified about his aggressive and unstable personality. I will deal with her evidence further insofar as needs be herein after.

(iii) Robyn George, she is the daughter of the complainant and the appellant and is 18 years old. She gave birth to a child recently. Her affidavit was similarly read into the record by the prosecutrix. Therein she also testified to the violent conduct of the appellant towards, and his abuse of, the complainant. She also expressed the fear that:

"If my father gets bail he would want to finish what he started and nothing would stop him from hurting us."

(iv) Anthea Steward, complainant's sister. Her sworn affidavit was similarly read into the record by the prosecutrix. She also testified *inter alia* about the threats, assaults on, and abuse of the complainant by the appellant.

(v) Mark Dennis Rosa, a man of 44 years old and complainant's uncle. His sworn affidavit was similarly read into the record by the prosecutrix. He also set out

various assaults, threats and abuse of the complainant by the appellant.

(vi) Paula Dreyer, 60 years of age and being complainant's mother. Her sworn affidavit was similarly read into the record. She also referred to the violent and abusive conduct of the appellant towards the complainant, as also his assaults upon her, the injuries complainant sustained and also the threats of the appellant.

That then concluded the State's case.

[4] APPELLANT'S AFFIDAVIT IN REBUTTAL

Mr Myburgh then applied to place further evidence in rebuttal of the various allegations made in the affidavits of the State witnesses.

This application was granted, the prosecution not opposing same.

A "voluminous affidavit" was then read into the record by Mr Myburgh as being the evidence tendered in rebuttal of the averments made by the State witnesses.

I will refer hereto as far as needs be herein after.

Mr Myburgh then concluded stating:

"That will then be the evidence that the appellant seeks to adduce in this application and for the second time closes his case."

The presentation of evidence in affidavit form is permissible in bail applications. See *S v Pienaar*, 1992 (1) SACR 178 (W) 180b-c where the Court stated:

"If an application can be brought by means of an *ex parte*

statement from the Bar I cannot see how an applicant can be worse off if he elects to support his application by means of affidavits. The fact is that it is the State that largely calls the tune in bail applications. If it is prepared to accept the *ex parte* statement from the Bar or, for that matter, the affidavit in support of the application, the need for *viva voce* evidence falls away."

[5] ESSENTIAL FEATURES OF THE CASE MADE BY THE APPELLANT IN SUPPORT OF HIS APPLICATION FOR BAIL

In his original affidavit (supplemented by some oral evidence under oath), as also his rebuttal affidavit, appellant stated that:

(i) He resides with his girlfriend, Andrea Moore, at 348 Willgrove Road, Henley on Klip, Gauteng, where he has been residing with her for some approximately ten months since he has been separated from the complainant. He states however that at times he got together with the complainant at the marital or joint home.

(ii) Divorce proceedings were at that stage of the hearing of this bail application already pending between him and the complainant.

I should mention that I was informed from the Bar by Mr Myburgh that the divorce has now been finalised. However as this is a new fact which did not exist at the stage when the application was heard by the magistrate, it cannot be taken into account in deciding

the matter in an appeal. In this regard see *S v Yanta*, 2000 (1) SACR 257 (Tk) where the Court at 249f stated:

"It is not competent for an appellant in appeal proceedings to place new evidence before the appeal Court by way of statements from the Bar. An appeal in terms of section 65 is analogous to an ordinary appeal. Like any other appeal, an appeal against the refusal of bail must be determined on the material on record. There is no provision for furnishing additional information to the Court hearing the appeal. In terms of section 65(2) an appeal shall not lie in respect of new facts, which arise or are discovered after the decision against which the appeal is brought, unless such new facts were first placed before the Court against whose decision the appeal is brought, and such Court has given a decision against the accused on such new facts."

However, it does not appear that what is stated above is seriously in dispute.

(iii) Appellant stated that he had been advised by his legal representative that he has the constitutional right to remain silent regarding the charges against him and that it was prudent to do so. In his rebuttal affidavit he reaffirmed that:

"It is not necessary for me in this bail forum to deal

further therewith."

(That is the attempted murder allegations relating to the events of 4 May 2008, as also the other charges.)

Appellant however denied the correctness of the versions of the State witnesses regarding these charges. An applicant for bail is entitled to so refrain from dealing with the merits of the charges against him in his bail application. In this regard I refer to *S v Dlamini and Others*, 1999 (2) SACR 51 (CC) where Kriegler J at 99c stated:

"Indeed, it could well happen that an arrestee adopts the attitude that, for the purposes of the bail application, guilt is conceded but a compelling case for release is still made out. It would also be proper for an arrestee when testifying in support of bail to refuse to answer any questions relating to the merits of the charge and the defence thereto. Not only the innocent are entitled to their release on bail pending trial. On the contrary, even those who have been convicted and sentenced to imprisonment can be and often are released on bail pending appeal."

(iv) Appellant further stated that as they were living apart and as they are:

"embroiled in a divorce action there would be no need for us to communicate directly or indirectly since we

could well do so through the respective legal representatives."

However, despite living apart for ten months and divorce proceedings then being pending, it appears from the evidence that the appellant did have access to and did make contact with the complainant and members of her family at her mother's home, at their former joint home and even at the hospital at the time that Robyn was giving birth to a child.

Whilst in a bail application a Court should not generally deal with the merits of the charges, especially in the face of the numerous conflicts that exist in this case on the facts, it appears to me that under present condition there does exist justifiable apprehension and fears that the appellant could endanger the complainant or the State witnesses.

One need only have regard to the serious injuries sustained by the complainant resulting from the events at her mother's house on 4 May 2008.

(v) Albeit that there are numerous disputes of fact and conflicts between the version of the State witnesses, and particularly the complainant on the one hand and the appellant on the other hand, the question has now arisen whether the appellant has discharged the onus of proof placed upon him by section (60)(11)(b) of the

CPA. See also *Dlamini's* case *supra*, page 63f-g; and also at page 83a-b to 84a at (b) and (c).

In the latter case the learned judge stated:

"An accused on a Schedule 5 charge while obliged to adduce evidence, need only satisfy the Court that..."

The interests of justice permit his or her release." And also earlier in the judgment at page 83a to page 84 the Court stated:

"Section 60(11)(b) provides that where an accused is charged with a Schedule 5 offence (as is the situation in the present appeal) the Court shall refuse bail unless the accused adduces evidence which satisfies the Court that the interests of justice permit his or her release."

When considering the issue of "interest of justice" must the Court consider what conditions can be attached to a grant of bail which can reasonably allay a complainant's fears? In the case of *S v Branco*, 2002 (1) SACR 531 (W) at 537a, the Court stated:

"Finally, a Court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion."

As appears from the totality of evidence presented by

the State in opposing the grant of bail, a great measure of concern exists that the appellant, if released on bail, could constitute a danger to the complainant and a danger of intimidation of State witnesses whose identity and whereabouts are known to the appellant.

Indeed, the learned magistrate did so find when stating in her judgment:

"The Court is convinced that there is overwhelming evidence on the part of the State which direct (sic) the safety of State witnesses."

I assume this wording of the magistrate is meant to read:

"which directly affects the safety of State witnesses."

It also appears from the judgment that the magistrate had due regard to the relevant provisions of the Criminal Procedure Act when she stated:

"I have heard argument on both sides."

And:

"weighing all factors provided by section 60(4)(a) up to (e) as well as section 65 ... read with section 35(1) of the Constitution Act of 1996."

Section 65(4) of the Criminal Procedure Act provides:

"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."

Mr Myburgh, in an able argument however, has strongly urged that the magistrate has committed a misdirection in not considering either adequately or at all the question as to whether the fears of the complainant could reasonably be allayed by attaching, in his words, "the most stringent" conditions to a grant of bail. He further submitted that the prosecutrix did not even cross-examine the appellant on his willingness or ability to comply with and on the efficacy of any such conditions.

Mr Mohamed, in an equally able argument, has submitted that the appellant constitutes a "life threat" to the complainant and no matter what conditions are attached to the grant of bail same would not be practicable as the police cannot keep the appellant under constant observation. He relied upon what was stated in the case of *R v Fourie*, 1947 (2) SA 574 at 577, where the Court, in dealing with a suggested condition relevant in that case stated:

"... the suggestion does not seem practicable, it is difficult to see how the police can exercise sufficiently close supervision over the accused to ensure fulfilment

of the conditions."

Mr Mohamed further submitted that the Court is "entitled to go into all the circumstances which indicate the type of man the accused person is..." See *Fourie's* case *supra* at 577.

This appeal has occasioned me considerable concern and anxiety to ensure that there is a proper balance achieved between the right of an unconvicted person not to be unnecessarily incarcerated pending the determination of his trial on the one hand, and the safety of the complainant and witnesses on the other.

After much concern and anxious consideration of all the evidence and arguments presented I have come to the conclusion that there has been a misdirection by the magistrate:

(a) In not examining or, and considering either adequately or at all the whole question of the imposition of effective conditions as an alternative to incarceration which has resulted in a failure to exercise a proper discretion. (See *Branco's* case *supra* at 537a.)

(b) In failing to attach weight or sufficient weight to the prosecutrix' failure to cross-examine the appellant on his undertaking to abide by bail conditions.

The question however still remains as to what order pursuant to section 65(4) of the CPA I should now make. But before proceeding with that I wish to state the following: by reason of what I have stated with regarded to the misdirection I conclude that in the result and in my judgment I "am satisfied" that the decision of the magistrate in denying bail to the

applicant was wrong entitling this Court to:

> "give the decision which in its opinion the lower Court should have given".

See section 65(4) of the CPA.

As stated by the appellant the nearest police station to where he now lives with his girlfriend at 348 Willgrove Road, Henley on Klip, Gauteng, is the Meyerton police station. Both counsel informed me that the aforesaid police station is approximately 5.5 kilometres from appellant's above address.

10 I also refer to appellant's evidence (see page 10 of the record) that he will not contact any State witnesses and will abide by any further conditions this Court may impose.

Mr Myburgh further submitted that the appellant is prepared:

(a) To submit to stringent conditions that he be not allowed to leave his home at Henley on Klip at any time. He conceded that this would in effect amount to a form of "house arrest".

(b) To pay a sum larger than R5 000 in respect of bail, for example R10 000, which larger amount he would endeavour to raise or could be raised with the assistance of friends and family.

20 In view of all the aforegoing I now grant the following order:

1. The appeal is allowed and the magistrate's order refusing bail is set aside.

2. Bail is fixed in an amount of R10 000 subject to the following conditions:

   (a) The appellant shall report thrice (three times) daily to

the Meyerton police station between the hours of:

(i) 07:00 and 09:00;

(ii) 12:00 and 14:00;

(iii) 17:00 and 19:00.

(b) Save when leaving to report to the Meyerton police station set out in (a) above, appellant shall refrain from leaving his place of residence at 348 Willgrove Road, Henley on Klip, Gauteng, at any other time without the written consent of the investigating officer or his duly authorised delegate.

(c) Appellant shall refrain from communicating in any manner whatsoever with:

(i) The complainant, his children, or any of the witnesses (save the investigating officer) who testified in this bail application.

(ii) Any further witness or person that the State may nominate and whose name shall be conveyed in writing to the appellant by the investigating officer.

(d) The appellant shall in no manner and in at any place have access to or approach or contact any of the witnesses or person referred to in paragraph (c) above.

That then is the Court's order.