



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 877/12
Not reportable

In the matter between:

RAJIV SEWNARAIN

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sewnarain v S* (877/12) [2013] ZASCA 27 (25 March 2013)

Coram: Malan and Theron JJA and Van der Merwe AJA

Heard: 25 March 2013

Delivered: 25 March 2013

Summary: Appeal against refusal of bail — no exceptional circumstance shown as required by s 60(11)(a) of Criminal Procedure Act 51 of 1977 — appeal dismissed.

ORDER

On appeal from: Kwazulu-Natal High Court, Pietermaritzburg (Swain and Henriques JJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

VAN DER MERWE AJA (MALAN AND THERON JJA CONCURRING)

[1] This is an appeal against the refusal of bail by the Kwazulu-Natal High Court, Pietermaritzburg (Swain and Henriques JJ).

[2] On 10 December 2010 the appellant's wife was shot and killed. On 20 December 2010 the appellant confessed to a magistrate that he had arranged for his wife to be killed by a hit man. On 22 December 2010 the appellant pleaded guilty to the murder of his wife before another magistrate. On the same date he was sentenced to life imprisonment.

[3] Approximately a year later, the appellant launched an application to have the conviction and sentence reviewed and set aside. In the review application he said that he was assaulted, threatened and unduly influenced by the investigation officer, as a result of which neither the confession nor the plea of guilty was made freely and voluntarily. He also said that the combined effect of the intake of medication, exhaustion and bereavement because of the loss of his wife, was that he was not in his sound and sober senses at the relevant time. He therefore admitted to something that he had not done. The appellant filed reports by expert witnesses in support of his case. In opposition the respondent relied on the observations at the time of the two magistrates and the appellant's erstwhile attorney.

[4] On 18 September 2012 the court a quo referred the review application for the hearing of oral evidence. The basis for this order was a finding 'that a real, genuine and bona fide dispute of fact arises on the papers, as to whether the applicant was in his sound and sober senses, when he confessed and pleaded guilty to the crime for which he was charged'. The court a quo directed that the matter must be afforded preference

[5] The appellant subsequently applied to the court a quo for his release on bail pending the outcome of the review application. This application was dismissed on 23 October 2012, hence the present appeal.

[6] The appellant accepts that s 60(11)(a) of the Criminal Procedure Act 51 of 1977 is applicable. The appellant therefore had to satisfy the court a quo that exceptional circumstances exist which in the interests of justice permit his release on bail.

[7] The court a quo found that a reasonable prospect of success in the review application is an 'indispensable criterion', that the appellant failed to show that criterion and that in any event the appellant did not show exceptional circumstances as contemplated in s 60(11)(a).

[8] It was never the appellant's case that exceptional circumstances consist of good prospects of success on review. I am prepared to assume, however, that the appellant has a reasonable prospect of success with the review application. This assumption seems to me to follow necessarily from the referral of the review application for the hearing of oral evidence. For obvious reasons it is undesirable for this court to say more on the subject of the merits of the review. It also follows that it is unnecessary to express an opinion on the question whether reasonable prospects of success on appeal must in these circumstances necessarily always be shown by an applicant for bail. It is trite that a reasonable prospect of success on appeal or review in itself does not entitle an applicant to bail.

[9] The question therefore is whether the court a quo erred in finding that the appellant did not prove exceptional circumstances. In this regard the only circumstance relied upon by the appellant that could possibly be regarded as exceptional, is the allegation that because his financial resources have been exhausted he will only be able to retain his present legal team and expert witnesses in order to conduct the review application properly, if he is allowed to recommence his bus building and repair business in order to generate income and that he would be able to do so almost immediately after his release.

[10] However, the allegation lacks a factual foundation. First, even in the best of circumstances it will probably take several months to re-establish the business as a profitable concern. The business was closed down in December 2010. It will have to be re-established at different premises with newly recruited employees. In order to do so at least a totally enclosed spraybooth large enough to accommodate a bus will have to be constructed and fitted with suitable extraction systems, at an estimated cost of in excess of R70 000.00. Only after completion hereof could permission to operate the business be considered by the local municipality. On the evidence the indication is that the process of consideration of an application for a trade permit for this type of business will take at least two months. Second, on his own showing the appellant is possessed of sufficient assets to enable him to fund the litigation. He says that an amount of approximately R500 000.00 is owed to him by debtors of the business and that if released on bail he would be able to recover that amount. Clearly this amount could be recovered by his attorney whilst the appellant is incarcerated. And the appellant says that equipment and stock of the business presently stored are worth R150 000.00 and R700 000.00 respectively.

[11] In the result the appeal is dismissed.

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:

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Instructed by:

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For Respondent:

A Truter

Instructed by:

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