IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE NO.: CA&R06/2011

DATE: 12 APRIL 2011

In the matter between:

MAZIZAYANDA SINUKA

versus

THE STATE

EX TEMPORE JUDGMENT

Y EBRAHIM J:

This is an appeal against the refusal of the Magistrate in the court *a quo* to grant the appellant bail. In the court *a quo* the appellant and three other accused were charged with two offences, namely: firstly, a contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956, referred to as statutory conspiracy, in that the accused conspired with any other person to aid or procure the commission of

or to commit any offence, whether at common law or against a statute, etc. The second charge against the accused is one of attempted murder.

Accused no. 1 and accused no. 2 together with the appellant, who was accused no. 3 in the court *a quo*, applied for bail. Accused no. 3 did not launch a similar application. The evidence tendered in respect of the bail application was basically that of accused no. 1 and accused no. 2 and the appellant. I do not intend dealing with the evidence of accused no. 1 and accused no. 2 since that is not relevant in the present bail appeal.

Insofar as the appellant is concerned, he testified and in essence denied the charges against him and presented evidence of his personal circumstances. He indicated clearly that he was pleading not guilty to both the charge of conspiracy and that of attempted murder.

In answer to the appellant's evidence the State tendered the evidence of an Inspector Sonwabile Nkosiyani who holds the rank of a colonel in the South African Police Services and is stationed at the Organised Crime Unit in East London. I refer to him as an inspector because until recently that was the designation used but the South African Police Services has now adopted previous rank descriptions and therefore he is now referred to as a Colonel. He has been in the

South African Police Services for the past 30 years. I do not intend recounting the evidence of the appellant or that of Colonel Nkosiyani but shall refer to some aspects of it during the course of this judgment.

The offences of which the appellant has been charged are Schedule 5 offences and there is no dispute insofar as this is concerned. In view of this it places an *onus* on the appellant to show why it was in the interests of justice that he should be admitted to bail.

Both charges relate to an incident which involved the complainant being shot. The complainant is the spouse of the appellant. From the evidence it emerged that they are presently engaged in divorce proceedings and that the appellant no longer resides at the common home. It also emerged from the evidence that there is a great deal of friction between the complainant and the appellant, so much so that at various stages each obtained a protection order against the other. These orders, of course, were obtained in the Magistrate's Court. The record reveals there was some difficulty in tracing these orders because it appears that the records had been destroyed or could not be found. But, at the stage when the prosecutor was addressing the court on the merits of the application he sought leave to introduce an order that the complainant had obtained against the appellant. It does not appear that the appellant's legal representative raised any serious objection to this and the Magistrate

therefore allowed it to be admitted. I have some difficulty with the admission of the protection order. It is apparent from the opposition that the State has against the appellant being granted bail that it centred very largely on the fact that such a protection order existed.

Mr Maseti represented the appellant today and Mr Gounden appeared for the respondent, namely the State. I indicated that I have some difficulty with the admission of this order since Mr Gounden has placed great emphasis on the fact that such an order was granted and that this played a central role in the State's opposition to the appellant being granted bail.

At the bail hearing the prosecutor informed the court that there were four grounds upon which the State was opposing bail. The first was there was the likelihood that the accused, if released, might commit further offences. Insofar as the State was concerned this applied to accused no. 1 and accused no. 2 as well as the appellant because it did not seek to differentiate between the three. The second ground was that there was a likelihood the accused would evade court proceedings and not return if released on bail. Here again no differentiation was made between accused no. 1, accused no. 2 and the appellant. The third ground was there was the likelihood, or a possibility, that the accused would influence the State witnesses and the investigation in the present case. This similarly, as far as the State was concerned, applied to all three of the accused who applied

for bail. The fourth ground, which was restricted to the appellant, was there was a likelihood he would undermine the objectives or the proper functioning of the criminal justice system if released on bail.

In the appeal before me, Mr Gounden, in his heads of argument, identified that the only issue which this court had to decide was whether or not the magistrate in the court *a quo* exercised his discretion correctly in refusing the appellant bail. Mr Maseti, on behalf of the appellant, has relied on other grounds, but conceded that he did not dispute that the submission made by the State was correct. I agree with Mr Gounden that this is the issue which this court is confronted with.

Mr Gounden has gone to great lengths to deal with a number of other issues in an attempt to paint the picture of the appellant that, to my mind, is not apparent from the evidence placed before the court *a quo.* I have no argument with Mr Gounden that this court is not required at this stage to determine the guilt or innocence of the appellant, but merely whether it is in the interests of justice that he be released on bail. In this regard, as I have indicated, the *onus* is on the appellant.

In looking at the judgment given by the magistrate it is evident that he recognised that the four grounds of opposition to grant him bail were issues that he had to address. Indeed he did so, but very

perfunctorily and in very cryptic terms on pages 178 and 179 of his judgment. I find it necessary to repeat these grounds and what the magistrate said and these are the following:

> "It was the State's submission as the respondent in this matter, that there is a likelihood on the part of the applicant no. 3 to, if he is released on bail, to go out and make some other means of committing further offences against this person, they have been in quarrel for, for a long time. That was the suggestion of the State. And also the court on the other side feels that the State has made a correct submission.
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> Then the second one, the standing of trial, that one was not in issue. Everybody was adamant that there were will be no problem for him to run away from the trial. Then the third issue, the one of witnesses also now there was a submission by the State and the basis of that submission is that he should not be granted bail. And the basis for that is that the victim in this matter is the applicant's wife.
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> Then there is also another witness who is staying with the wife of the applicant will also be a witness in this matter. That was the submission as well that there is a likelihood that the applicant no. 3 will influence or try to intimidate

the victim who is this wife in the matter as well as the witness. And it is the conclusion of the court that that submission which is made by the State is the correct one. And that factor has been proven by the State.

Then there is a last one the one of undermining the criminal justice system. I have said in my judgment that we have got more questions than answers. In the manner in which the applicant being the sophisticated somebody, intelligent, hardworking, in the manner he has arranged this matter getting to no. 3 so that he may do things which are illegal which are not in the process of the law in trying to get rich or to cause his wife to disappear. And he did not even worry about asking in the manner in which this was supposed to be done, no time frames.

And he decided to drop this without even informing this person even after he hear the shocking news that his wife has been attacked and shot at he continued with business to go to PE."

The magistrate has made some other comments in relation to this latter aspect and later comments as follows:

"Now, are we supposed in court now to allow people to

> undermine the criminal justice system by doing illegal things in trying to solve their problems. Are we allowed to do that? I feel as well that this one if the applicant no. 3 in this matter can be granted bail the criminal justice system be undermined and in conclusion the applicant no. 3 as well is refused bail."

In dealing individually with the conclusions the magistrate has reached, it was conceded, rather reluctantly at first, by Mr Gounden that the magistrate had in fact not provided reasons in respect of any of the conclusions he had reached. Mr Gounden nevertheless submitted it was apparent that the magistrate must have had regard to the evidence that had been tendered in order to reach these conclusions. That may very well be so, but in our criminal justice system a judicial officer is required to furnish reasons to indicate why he or she has reached a particular conclusion. It is not sufficient merely by inference to refer to the fact that there was evidence and to say therefore I agree with the conclusion that the State has reached. If it was that easy I would not have to give reasons for my judgment today and I could simply just indicate what my conclusion is and dispense with the matter. I wish that it was that easy but obviously it is not so.

Now in reaching the conclusion that there was a likelihood on the part of the appellant, if he was released on bail, to commit further

offences, the magistrate, as I have stressed, did not indicate on what facts he arrived at this conclusion. To be honest, I can understand his difficulty because no such facts were placed before the court *a quo.* There was nothing to indicate that if the appellant is released on bail that he would go out and commit further offences, whatever those may be. In this respect Mr Gounden sought to refer to the protection order and said this was an indication, because the complainant had been shot, that the appellant was likely to commit further offences. I regret to say the logic escapes me. If it is so that a person is charged with a particular offence and appears in court and seeks bail, it cannot be that the State can simply say that because he has committed the offence there is the likelihood he will commit further offences of that nature or any other nature. If this was the approach that we are required to adopt then not a single accused would ever receive bail. The fact is that in the absence of any facts to substantiate that there is a likelihood that the appellant will go out and commit further offences, a court is obliged to accept that this ground has not been proved, or been shown as probable.

The second ground, namely that the accused would not stand trial, was rightly conceded by the magistrate as not being an issue, and by that I understand that he was indicating that the State was not relying on this as a ground of opposing the appellant being released on bail. There is in fact no question of any evidence suggesting that he would not stand trial.

The third ground is that there was a likelihood that the appellant would influence or try to intimidate the complainant as well as the witness referred to by the magistrate. Who this other witness is, is certainly not apparent from the record. There is an oblique reference that it might have been one of the children, but as was correctly pointed out by the legal representative for the appellant, and re-emphasised by Mr Maseti today, there is no indication that the appellant was on the scene when the complainant was shot. There can be no likelihood therefore of someone identifying him as having been present at the scene of the crime. Here again the magistrate, apart from stating the obvious, has not provided any reasons to indicate why there is such an apprehension that the appellant would interfere with any witness.

What has clouded the whole issue in this matter is the fact of the protection order that the complainant obtained against the appellant. In this regard the court had to point out to Mr Gounden that the appellant himself had obtained a protection order in the Magistrate's Court against the complainant. It is apparent to me that the complainant and the appellant are at extreme loggerheads and that there is obviously a great deal of animosity between the two of them. Of this there can be no doubt. It is so, that on the face of it the appellant appears to be an intelligent individual if one goes according to his education – though education is not necessarily a

sign of intelligence. But, be that as it may, I will accept that as he is a school principal and an individual who is now studying for a Master's degree, that one would expect him to show a greater deal of understanding in relationships with other individuals. But, in my long experience in the law, common sense and education do not often meet. Far too often people who have great levels of education are by no means necessarily the most intelligent individuals, nor are they exceptional in personal relationships. In fact the opposite might very well be true in respect of some individuals who have great intellect. One need merely look at history to see that there were people of great intellect who had very little skill in dealing with other human beings and acted in a most rash manner. I do not see that because the appellant is considered to be a highly educated person necessarily translates into the fact that he has not acted very rationally when one would have expected him to do so. The facts of each circumstance must be judged on its own merits. There is no evidence of any nature to suggest that there is a likelihood that the appellant would interfere with any other witness. In any event, if there is such likelihood a court, in granting bail, could set a condition which would hopefully prevent the appellant from coming close to his wife, who is the complainant, and in that manner prevent any kind of interference with her.

The last ground, namely that of undermining the criminal justice system, is one that I found difficult to understand. I am not sure

what the State has really meant by this and I am engaging in guesswork to understand what is meant. From what I can see it appears that the State is referring to the fact that the appellant had approached a Sangoma to produce some muti to have his wife disappear from the house and that as far as the State was concerned he could do this again and that might be undermining the criminal justice system. You must forgive me but I cannot follow this line of reasoning at all. The appellant is an individual who obviously believes in Sangomas. He conceded that he did approach one to ask for muti to have his wife disappear from the house and was even prepared to allow the Sangoma to injure his wife, if necessary, to get to her to move from the house. He was at pains, when questioned by the prosecutor in the court *a quo*, to deny that this entailed his wife being shot at and killed or an attempt to kill her. He said that he had never given the Sangoma that kind of mandate. This is an issue for the State to prove at the trial. I am not required to determine whether that is in fact so, or not, but merely to look at the probabilities at this stage. There is nothing to indicate that the appellant's version is not probable other than speculation that he had told this Sangoma to make her disappear permanently, and by that I mean causing her death. In any event the evidence presented by the State in this respect is, to put it mildly, like looking at murky water. It is difficult to see what is in the water but you have a general idea that the water is not clean. The 1st and 2nd accused, if I am not mistaken, testified that they had been approached by the 3rd accused

to do away with the complainant. Neither of them, in my reading of the record, was able to say who the person was apart from the fact that it was accused no. 3 who had given such an instruction. Accused no. 3 obviously did not testify at the bail hearing because he did not apply for bail. He, therefore, could not implicate the appellant. This oblique reference by accused no. 2, I think it is, to the fact that there was a person who wanted his wife removed does not in my mind amount to a sufficient probability that one can reach the conclusion that the appellant was involved with that. It may be at the trial that further evidence is presented that paints a different picture, but I am not required to determine that today.

In my view, the Magistrate did not exercise his discretion properly or judicially in respect of any of the grounds upon which the State was opposing bail. Indeed he failed to apply his mind judicially to the facts and failed to analyse those facts in order to reach a conclusion whether it was in the interests of justice or not that the appellant should be released on bail.

In my view, the appellant has shown that it is in the interests of justice that he be released on bail. The investigating officer conceded that he was a principal at a school, that his presence there was needed, that it might cause some disruption to the education of the children at the Primary School if he was not present. But apart from all that, it is not sufficient for the State merely to come to court

to say that it is opposing bail and for the court slavishly to follow that submission. The court must apply its mind to the facts, analyse those, and reach a decision judicially in terms of what those facts present. In my view, the Magistrate failed to do this and his refusal of bail was improper and not substantiated by the facts before him. I am satisfied, therefore, that it is in the interests of justice that the appellant be granted bail.

In the circumstances, the order I am issuing is the following:

The appellant is granted bail in the sum of R5 000-00, subject to the following conditions:

1. That the appellant shall not have any contact with his wife, who is the complainant, or any other State witness.

2. That the appellant shall not be within a distance of one (1) km of the house where the complainant resides, namely 2[...] H[...] Crescent, Bhisho.

3. That the appellant shall attend court on every date of the criminal proceedings relating to the charges preferred against him until the conclusion thereof.

Y EBRAHIM

JUDGE OF THE HIGH COURT