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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal Case Number: A55/2022

Case number: RCB 1/13/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

28/10/2022

In the matter between:

KIEVE BLAYDE VAN STADEN

APPELLANT

AND

STATE

RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an appeal against the refusal of bail, by the Acting Regional Magistrate, Ms Beharie, sitting in the Johannesburg Regional Court.

[2] Mr Kieave Blyde van Staden (“the appellant”), who according to the charge sheet is arraigned before the Regional Court, sitting at Johannesburg, on a charge of

murder read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1995 (“CLAA”) and Schedule 5 of the Criminal Procedure Act, 51 of 1977 (“CPA”), in that it is alleged he murdered Ms J [....] V [....] S [....], his wife.

[3] Mr Madumelo appeared on behalf of the appellant during the bail proceedings in the Regional Court, Johannesburg. The bail application commenced on 11 March 2022.

Evidence presented in the court a quo

[4] During the bail application, Mr Madumelo presented an affidavit deposed by the appellant, in support of the application to be admitted on bail. The appellant outlined his personal circumstances as follows:

1. He was born on 20 March 1989 in Pietermaritzburg, Kwa Zulu Natal.
2. In 2006 he matriculated at Haythorne Secondary School in Pietermaritzburg.
3. After he obtained his matric, he relocated to Johannesburg. Prior to his arrest he resided at Unit [....], F [....] G [....], [....] R [....] Street, Forest Hill, Johannesburg.
4. If released on bail he will remain at an alternative address, Unit [....] M [....] P [....], H [....] Street, Rosettenville, Johannesburg. The said address is that of his mother and is approximately a distance of 5 km from his residence.
5. He was married to the deceased, during their marriage three children were born. The children are 10, 8 and 3 years old.
6. Prior to his arrest, he was employed as an international consultant for Standard Bank. However, following his arrest he resigned from his employment.

7. He earned a gross income of R 24 000 per month.
8. He owns movable property to the value of R 700 000.
9. He is a South African citizen and does not have any travel documents nor does he have family links outside South Africa.
10. He has an amount of R 2000 available for bail.
11. He does not have any previous convictions or any pending cases against him.
12. He was arrested on 9 January 2022 for murder, he will tender a plea of not guilty during the trial on the basis that he acted in self-defence.
13. He is not a danger to the community and he will not undermine the public order and peace if released on bail.
14. He will attend his trial; he will not flee or evade justice.

[5] Mr Van Staden testified under oath. He stated that he was arrested previously for assault to do grievous bodily harm, but he was unable to state in which year. He conceded that he paid R300, admission of guilt on the charge of assault. He testified that he never appeared in a court prior to paying the admission of guilt. He was unaware of the fact that in paying an admission of guilt, that such would be noted as a previous conviction. Therefore, the information provided to the court, with regard to the fact that he had no previous convictions was not done in an attempt to mislead the court.

[6] He further testified as to what transpired on the fateful night when the deceased was killed. On the night of the incident he, the deceased and the children visited his mother-in-law. On their arrival, back home, he attended to household chores, he got the washing from the washing line and defrosted meat in order to

prepare supper. The children were watching TV in the lounge. He then proceeded to the bedroom. The deceased was seated on the bed behind him, while he was undressing. Suddenly the deceased, armed with a knife, grabbed him from behind around his neck. A struggle ensued. During the struggle the deceased injured him on his neck. He succeeded in pulling away from the deceased, and he grabbed his belt lying on the floor. He struck the deceased with the belt. The deceased again attacked him, during the scuffle for possession of the knife, he noticed the deceased was injured. He called their 10-year-old son and instructed him to get help. The young boy ran to the neighbours. The police were summoned to the scene. While waiting for the police to arrive, the appellant testified that he cut his wrists. He was then transported to the hospital where he received medical treatment for the injuries to his wrists.

[7] The appellant testified that since the incident the minor children reside with his mother-in-law, the maternal grandmother. He further stated that he will not interfere with the state witnesses, his children. He will remain at his mother's place in Rosettenville until the trial is finalized.

[8] During cross examination by the State the applicant stated that he was unable to remember the identity of the complainant in the assault cases previously opened against him.

[9] The State presented an affidavit deposed to by the investigating officer, in opposing the granting of bail to the appellant. In short, the affidavit outlines the circumstances under which the murder was committed and the nature of the evidence the state will adduce during trial. It is evident, the 10-year-old son of the deceased, will be called because he witnessed what transpired on the night his mother was killed. According to the evidence presented by the investigating officer the children of the deceased witnessed the brutal killing of their mother.

[10] It was also stated that according to the profile history record of the appellant, prior to the incident, four cases of assault were opened against Mr Van Staden. However, three of the cases were withdrawn and the appellant paid an admission of

guilt on one of the charges. The investigating officer asserts that this is an indication that the appellant will interfere with the state witnesses, as he has done in the past.

[11] Although there was no direct evidence on the appellant's interference with state witnesses in the past, the context and direct evidence in this case is highly suggestive of him interfering with state witnesses. The appellant's vagueness about his previous convictions is also unsatisfactory. It is implausible that he cannot remember the name of the person in respect of whom he paid an admission of guilt.

[12] Further, the investigating officer stated that the appellant is a threat to not only members of the community but also to his children, who will be called to testify during the trial. He further stated that the appellant is a danger to himself and there is an assumption that he will not stand his trial, because shortly before the arrival of the police at the crime scene, he cut his wrists in an attempt to commit suicide.

[13] The state called Ms Lillian Beckland, a community representative and Hall Committee Member to testify under oath. The witness testified that she knew the deceased and the appellant as they were members of the community where she resides. According to her the relationship between the deceased and the appellant was of a violent nature. She stated that at times she would note bruises on the deceased's body and the deceased told her, that the appellant caused the injuries. Ms Beckland even went as far as advising the deceased to go for counselling.

[14] Ms Beckland stated that the community is assisting and dealing with the children of the deceased. The children are traumatised and are receiving counselling. She further stated that if the appellant is released on bail, he would inevitably have contact with the children. It is clear to me that in the event that he does contact the children this of itself may result in a form of secondary trauma for them. The alternative address provided in Rosettenville is in close proximity to where the children are currently residing.

Legal Framework

[15] Section 65 (1) of the CPA, provides that;

“(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

[16] When deciding on the matter before me, I am alive to the provision in terms of Section 65(4) of the CPA which states the following;

“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.”

[17] The provision above was considered and interpreted by Hefer J in *S v Barber*¹, where he held,

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of his discretion. I think it should be stressed that, no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

¹ 1979 (4) SA 218 (D) at 220 E-F.

[18] In *S v Porthen and Others*², Bins-Ward AJ (as he then was) focuses on the appeal court's right to interfere with the discretion of the court of first instance in refusing bail when he held:

“When a discretion... is exercised by the court *a quo*, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong.”

[19] From a careful reading of the section 65(4) of the CPA and the case law referred to, it is clearly discernible that this court will only interfere with the decision of the bail court if the Acting Regional Magistrate has misdirected herself materially. In applying the provisions of section 65(4) the court hearing the bail appeal must approach it on the assumption that the decision of the court *a quo* is correct and not interfere with the decision, unless it is satisfied that it is wrong.³

[20] The Acting Regional Magistrate in her judgment stated, quite correctly, that this is a Schedule 5 offence, and that the *onus* was on the appellant to prove that that it is in the interest of justice that he be released on bail. Section 60(11) (b) of the CPA, as amended provides:

“Notwithstanding any provision of this Act, where an accused is charged with an offence –

(a)

(b) referred to 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

² 2004 (2) SACR 242 (C).

³ *S v Mbele & Another* 1996 (1) SACR 212 (W) at 221H-I, The appeal court will interfere if the magistrate overlooked some important aspects of the case or unnecessarily overemphasized others, in considering and dealing with the matter - See *S v Mpulampula* 2007 (2) SACR 133 (E); *State v Essop* 2018 (1) SACR 99 (GP) at paragraph [23].

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”.

[21] Section 60(4) provides that:

“The interests of justice do not permit the release from detention of an accused...

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;

(b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;

(c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;

(d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

[22] Section 60(5) to section 60(9) details the factors to be considered when having regard to subsections 60(4)(a) to (e) discussed above. This court must consider whether on the facts and the evidence presented in the court *a quo*, the Acting Regional Magistrate misdirected herself or erred when she found that the appellant has failed to satisfy the court on a balance of probabilities that the interests of justice permitted his release on bail.

Evaluation of the court a quo's finding and conclusion

[23] It is not in dispute that the charge levelled against the appellant involves gender-based violence in a domestic relationship and is therefore of an extreme serious nature. In *S v Smith and Another*⁴, it was stated that 'the court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby'. The essence therefore of the principles and considerations underlying bail is that no one should remain locked up without good reason.

[24] The Acting Regional Magistrate also found⁵ and correctly so in my view, that the duty of the trial court in a bail application is to assess the *prima facie* strength of the state case against the bail applicant, as opposed to making a provisional finding on the guilt or otherwise of such an applicant. She was alive to the fact that bail proceedings are not to be viewed as a full-dress rehearsal of the trial, but that should be left for the trial court.

[25] As far as the strength or otherwise of the case against the appellant is concerned, the Acting Regional Magistrate acknowledged that the appellant was arrested on the night of the incident. Prior to his arrest, the appellant attempted to commit suicide. The deceased's 10-year-old son witnessed the incident, and he will be called to testify during the trial. Due to the family relationship between the appellant and the witness as well as the witness' tender age, a reasonable possibility exists that the appellant could interfere with the state witness. The Acting Regional Magistrate in her judgment, concluded that the appellant has a tendency to commit acts of violence and as such he is a danger to members of the community.

[26] She found that the community and the broad public look up to the courts to ensure that the administration of justice is not brought into disrepute. The community also requires the assurance of the proper functioning of our criminal justice system including our bail system. After considering all these factors, she came to the

⁴ 1969 (4) SA 175 (N) at 177.

⁵ See paragraph [17] of the judgment.

conclusion that it was not in the interests of justice for the appellant to be released on bail.

[27] The catastrophic effect of spousal gender-based violence remains a human rights issue, which requires careful analysis even at this stage of the appellant's arraignment when assessing bail. The evidence of Ms Beckland is an important consideration when weighing up this bail appeal. Her testimony that the deceased was subjected to physical abuse evidenced by bruises on her body, is a serious consideration in this context.

[28] I can find no fault with the in-depth evaluation and reasoning of the Acting Regional Magistrate in her judgment. In my considered view, the appellant failed to discharge the *onus* on him of proving that it was in the interest of justice that he be admitted to bail.

[29] Furthermore, it cannot be said that the state's case against the appellant is non-existent, or weak and that the appellant will be acquitted.

[30] In my view, there is a likelihood that when the appellant is released on bail, he might commit a schedule 1 offence. The finding by the Acting Regional Magistrate that the appellant has the propensity of committing serious offences cannot be faulted. He is facing a serious charge, and if found guilty he would be sentenced to long-term imprisonment.

[31] The interests of the minor children of the deceased were also taken into consideration, and it is evident that they need protection until the finalization of the trial, due to the fact that they were witnesses to the murder of their mother. There is a clear impression that the appellant's release would threaten the welfare of the witnesses.

[32] The release of the appellant on bail will undermine the sense of peace and jeopardise security among members of the public. The prevalence of violence against women in South Africa reveals that the country is plagued by the horror called GBV. Gender based violence is both a human rights and public health issue,

which not only affects the individual, but has an impact on families and communities both in the short and long term. It is extremely important to take into consideration the complexity of gender-based violence in an intimate relationship, as it mainly takes place behind closed doors. Even though, the community in this case was aware of the violence in the relationship of the deceased and the appellant, no action was taken, evidently because of the deceased's inability to comprehend her situation.

[33] If the appellant is granted bail, such would fume the perception of community members that there is no justice for victims of gender-based violence. Therefore, the release of the appellant on bail will undermine and jeopardise the public confidence in the criminal justice system.

[34] In my view, it cannot be said that the Acting Regional Magistrate was wrong in refusing to admit the appellant to bail. On the probabilities, this court does not find that the appellant has successfully discharged the *onus* as contemplated in section 60(11)(b) of the CPA. He has failed to show that there are factors which in the interests of justice permit his release on bail.

[35] There is no basis in law for this court to interfere with the discretion exercised by the Acting Regional Magistrate. It follows therefore that the appeal must fail.

[36] In the result, the following order is made:

1. The appeal is dismissed.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 28 October 2022.

DATE OF HEARING:

28 October 2022

DATE JUDGMENT DELIVERED:

28 October 2022

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