REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: DP 9/2016

Not reportable

Not of interest to other Judges

In the matter between:

A866/16
3/2/2017

THAPELO RAYMOND MOLOKOMME Appellant

and

THE STATE Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an appeal against the refusal of bail by the regional court, Pretoria. The appellant faces two counts of murder, read with section 51 of the Criminal Law Amendment Act 105 of 1997. He is charged with two others, Ms.Bonolo Lekalalala (accused 1) and Mr Kgaugelo Rapelego (accused 3). The appellant is

thus accused 2. The case has been transferred from the regional court to this court for trial from 24 April to 12 May 2017. The charges against the appellant and his co-accused arise from the death of Mr Mr Jacobus Beetge and his wife, Mrs Eva Beetge, on 26 December 2015. Mrs Beetge was the mother of accused 1, and Mr Beetge was her step-father. The deceased lived in Capital Park, Pretoria. Accused 1 did not live with her parents, but lived in Atteridgeville. It is alleged that accused 1 is the masterminded the death of her parents for financial gain, and that she solicited the assistance of the appellant and accused 3 to kill them and dispose of their body. The three were arrested in January 2016.

Schedule 6 offence and the onus

[2] As the appellant and his co-accused are charged with pre-mediated murder in terms of s 51 of the Criminal Law Amendment Act 105 of 1997, it was common cause that the offence fell within the purview of schedule 6 to the Criminal Procedure Act 51 of 1977 (the CPA). That is relevant to the degree of onus which lies on the appellant. In terms of s 60(11)(a) of the CPA, where an accused is charged with an offence referred to 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 reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional

circumstances exist which in the interests of justice permit his or her release. The onus is discharged on a balance of probabilities.[1]

Refusal of bail

[3] The state opposed the release of the trio on bail. It is not clear from the record of proceedings as to when the three first applied for bail, but on 15 March 2016 accused 1abandoned her bail application. The appellant and accused 3's bail applications were dismissed on 25 April 2016. On 10 August 2016 accused 1 was granted bail in the amount of R3000. I shall later revert to the circumstances under which bail was granted to her. Aggrieved with the decision refusing him bail, the appellant now appeals to this court in terms of s 65(1)(a) of the CPA against the decision of the regional court.

General observations

[4] The following general observations are apt before considering the appeal. The common law and the Constitution demand equilibrium between the importance of freedom and the broad interests of justice. The primary objective of the criminal process regarding the phase before the trial is to bring the accused before a court and there to confront him or her with the allegations of the prosecution. For that reason, the court gives its support, where necessary, to steps aimed at preventing flight, obstruction of the police investigation,

[1] *S v Yanta* 2000 (1) SACR 237 (Tk).

interference with state witnesses or concealment/destruction of real evidence. The courts have done this by means of bail conditions and criteria which have been thrashed out judicially over the years. See Kriegler *Hiemstra's Criminal Procedure*, Issue 1, 9 – 2.

Legislative framework and jurisprudence

[5] It is prudent also to consider the legislative framework before I consider the merits of the appeal. Section 60 of the CPA is of particular relevance, especially sub-sections (4) – (9), as they provide a broad framework within which a bail application should be considered. Section 60(4) provides that the interests of justice do not permit the release from detention of an accused where, if so released, there is a likelihood of any of the following:

(a) The accused will endanger the safety of the public or any particular person, or will commit a schedule 1 offence;

(b) the accused will attempt to evade his or her trial;

(c) the accused will attempt to influence or intimidate the witnesses or to conceal or destroy the evidence;

(d) the accused will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) the release of the accused will disturb the public order or undermine the public peace or security.

[6] Sections 60(5) - (9) provide practical guidelines which a court may consider whether any of the grounds set out in s 60(4)(a) – (e) has been established. In *S v Mabena and Another*[2] the court summarized the above legal framework as follows:

'Five grounds are listed upon which, if established, 'the interests of justice do not permit the release from detention of an accused'. Two of those grounds concern the impact that the granting of bail might have upon the conduct of the particular case. The remaining three concern the impact that the granting of bail might have upon the administration of justice generally and upon the safety of the public. Then follows an extensive and detailed list of what were described in *Dlamini* as 'the potential factors for and against the grant of bail (the various factors contained in ss 60(5) – (9)) to which a court must have regard' in considering where the interests of justice lie.[3]

Before a court may grant bail to a person charged with such an offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody…'

[7] In *Hiemstra's Criminal Procedure* Issue 2, 9 – 11, the learned authors make a useful summary of the principles on the concept of 'the interests of justice' as set out in s 60(4):

'Although this subsection contains a considerable number of specific stipulations, the essences of the principles and considerations underlying bail is simply that no-one should remain locked up without good reason. The interests of justice are still favour of protecting the freedom of the citizen rather than depriving him or her of that freedom (*S v Visser* 1975 (2) SA 342 (C); *S v Bennett* 1976 (3) SA 652 (C); *S v Smith* 1969 (4) SA 175 (N) at 177E-F). The court hearing the bail application must express a balanced valued-judgment taking into account the factors mentioned in subsection (4). The reasons for refusal of bail can usually be found in one of two considerations, or both: (1) will the accused abscond; and (2) will the granting of bail lead to interference with the investigation and/or prosecution? These considerations entail a projection of future conduct taking into account past conduct (*S v Thornhill* (2) 1998 (1) SACR 177 (C) at 182e-g). A court cannot find that the refusal of

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[2] *S v Mabena* [2007] 2 All SA 137 (SCA).
[3] Para 4.

bail is in the interests of justice merely because there is a risk or possibility that one or more of the consequences mentioned in subsection (4) will result. The court cannot grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interests of justice and the accused should be released (*S v Swanepoel supra* 313d-f).'

Proceedings in the regional court

[8] I turn now to the merits of the appeal. In support of his application to be released on bail, the appellant, who was 24 years old, tendered an affidavit, and did not testify. The state led the evidence of the investigating officer. In his affidavit, the appellant stated the following. He resided in Atteridgeville. He did not own any immovable property. He was unmarried, but has a child who was born in January 2016, whom he maintained. He operated a small business repairing computers and electric appliances, generating an average income of R3 000 per month. His incarceration would jeopardise his business and his ability to support his child.

[9] With regard to the merits of the case, he intended pleading not guilty to the charge of murder. According to him, he and accused 3 were called by accused 1 to her place on 26 December 2015 at approximately 21h00. Upon arrival at accused 1's place, they found the bodies of the deceased lying on the floor. Accused 1 informed them that she had poisoned them, but was not certain whether they were dead. She requested them to assist her to dispose of their bodies and promised to pay them an amount of R250 000 each for their

assistance. They agreed and placed the bodies in Mr Beetge's vehicle and drove to the Hennops River, into which they threw the bodies. The following day, accused 1reported the deceased as missing persons. He was arrested on 7 January 2016.

[10] In opposing bail, the state led the evidence of the investigating officer, Sergeant Johanna Putter, who testified that the bodies of the deceased were discovered in Hennops River on 27 December 2015. According to her, accused 1, when questioned about the circumstances of her parents' death, she confessed to the police that she killed them with the assistance of the appellant and accused 3. This led to the arrest of the appellant and accused 3. Accused 1 provided further details of how the murders were planned and carried out. Accused 1 informed the police that the appellant was her boyfriend. On Christmas day 2015 she had an argument with her mother. Later that day she informed the appellant of her plan to kill her parents. They went to accused 3's place where they planned the murder.

[11] On 26 December 2016 she and the appellant went to Atteridgeville in search of poison, but were unsuccessful. Accused 1 boarded a taxi to the city where she bought rats poison, after which she went to her parents' house where she spiked the rat poison in the drinks which she offered them. At approximately 20h00 the appellant called her and requested her to switch off the main

electricity supply to the house, and to put the dogs aside and meet him and accused 3 outside the house, which request she complied with. The three of them entered the house through the front door. Once inside the house, they strangled her to death. Mr Beetge was hit with a brick on the face while still asleep, and strangled with a laptop charger cable to also strangle him.

[12] The three of them loaded the bodies into the vehicle. The appellant and accused 3 drove off whilst she remained at the house. Upon their return, they took Mr Beetge's bank card and withdrew an amount of R500 from his account at an automated teller machine (ATM). Accused 1 further informed the police that she was the sole heiress to the estate of her parents. She promised each of the appellant and accused 3 an amount of R35 000 for their role in the murders, although this never materialised.

[13] Sergeant Putter further testified that the appellant and his co-accused had sold some of the deceased's property. They had also cleaned the house in order to destroy the evidence. Furthermore, the appellant had made some pointings out , not only of the place where the bodies were discovered, but also of the house of the deceased where the murders occurred. His finger prints had also been found at the house. The appellant had also made a confession, which is corroborated by the objective evidence. That concluded the evidence in the regional court.

[14] In its judgment the regional court considered the following three factors as militating against the release of the appellant on bail. First, that the appellant appeared to be a flight risk, from the fact that he did not own any immovable property, and therefore nothing prevented him from gathering his personal possessions and absconding. She further considered the fact that the tendered amount of R1 000 could easily be forfeited, when weighed against the likely punishment to be imposed upon conviction. Considering all these factors, the regional magistrate took a view that the appellant's chances of not standing trial were increased.

[15] Second, the regional court considered the strength of the state's case against the appellant, in light of his confession, the pointings-out, the finger-print evidence and all the corroborative evidence. As stated earlier, the *prima facie* strength of the state's case against an accused is a factor a court may consider, in determining whether there is the likelihood that that the accused, if released on bail, he or she will attempt to evade his or her trial, as stated in s 60(4)(b). Even before the enactment of s 60 of the CPA, our courts have over the years accepted that where there is a strong *prima facie* case against an accused, this is a factor which the court has to take into consideration in deciding whether it is in the interests of justice for an accused to be released on

bail.[4] However, this does not mean that the strength of the State's case is the all-pervasive factor. It simply means that it is a factor that has to be considered together with others. What the court is called upon to do is an examination of all the relevant factors, not individually, but as a whole, in determining whether an accused has established that the interests of justice permits his or her release on bail. In the evaluation of the relative strength of the state's case in the present case, the regional court cautioned itself against making a provisional finding of guilt, and properly heeded the injunction in *S v Viljoen*[5] that a bail hearing turning into a dress rehearsal for the trial.

[16] The court was also mindful of the appellant's indication that he intended to challenge the admissibility of the confession and pointings-out. The court correctly remarked that there is a dispute about admissibility, the appellant had not demonstrated how the confessions and the pointings-out were inadmissible or unreliable. In other words, no basis has been suggested why those were likely to be ruled inadmissible by the trial court. During argument, counsel for the appellant recognised this difficulty, but nevertheless pointed out that the basis would be that the appellant had been assaulted into making the confession and the pointings-out. For this, counsel relied on an entry in the charge sheet diary on 5 August 2016 which reads:

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[4] *S v Hartman; S v Jacobs* 1968 (1) SA 278 (T) at 281; *S v Mabaza en 'n ander* 1994 (5) BCLR 42 (W) at 56.
[5] *S v Viljoen* 2002 (2) SACR 550 (SCA) para 25.

'Accused 2 [appellant] says on 7 January 2016 he was assaulted by [a] police officer. He is living on painkillers – police who arrested him. J7 will indicate accused 2 needs medical attention.'

[17] There are two glaring difficulties with this proposition. The first is that allegation was never made to the court hearing the application. As indicated earlier, the appellant's application for bail was refused on 25 April 2016, and the allegation was made only in August 2016, long after bail was refused. Furthermore, there is no indication of a connection between the allegations of assault, the confession and the pointings-out. I therefore conclude that nothing really turns on this aspect.

[18] Third, the court considered the likelihood that the appellant, if released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. In this regard, the regional magistrate considered the state's evidence that after the deceased were murdered, their bodies were dumped in a river and the appellant and his co-accused cleaned the house and the vehicle to destroy the evidence. She considered these factors to be strong indicators that the appellant, if released on bail, was likely to conceal or destroy the evidence.

[19] On the basis of the above, the regional magistrate came to the conclusion that the appellant had not discharged the onus on him to satisfy the court that exceptional circumstances existed, permitting his release on bail.

Approach on appeal

[20] In considering this appeal, the lodestar is s 65(4) of the CPA, which provides that the court or Judge 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/her opinion the lower court should have given. In *S v Barber*[6] the context of deciding an appeal in terms of s 65(4) was explained:

'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]t should be stressed that, no matter what this court's 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.'

[21] In *S v Porthern and others,*[7] Binns-Ward AJ considered the above *dictum* in the context of s 60(11) and concluded, with reference to *S v Botha en 'n ander*, [8] that the appeal court's power to intervene in terms of s 65(4) of the CPA is not strictly confined as suggested in *Barber*, above, and that the appeal

[6] *S v Barber* 1979 (4) SA 218 (D) at 220E-H.
[7] *S v Porthern and others* 2004 (2) SACR 242 (C).
[8] *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) para 19.

court can undertake its own analysis of the evidence and come to its conclusion whether the appellant had discharged the onus in terms of s 60(11).

[22] On a consideration of all the factors, I find no fault in how the regional court considered the appellant's bail application. In particular, I am persuaded that the regional court's reasoning and conclusions are wrong. On the contrary, I am of the view that the learned regional magistrate carefully considered all the factors relevant to the appellant's bail application. It is the right of the appellant to adduce evidence by means of an affidavit to discharge the onus resting on him. However, as correctly pointed out by the regional court, oral evidence, which the state adduced and was tested under cross-examination, carries more weight than the evidence tendered by way of affidavit. There is nothing in the personal circumstances of the appellant placed before the court, or the facts of the case, constitutes, either individually and cumulatively, exceptional circumstances. The appeal should therefore fail.

[23] It remains to consider a final aspect. That relates to the granting of bail to accused 1. It appears that all three – accused 1, the appellant and accused 3 – brought formal bail applications shortly after their arrest in January 2016. It appears that the bail applications were jointly heard over a period of time. On 15 March 2016 accused 1 abandoned her bail application. The entry in the charge sheet diary reads:

'Accused 1 abandons bail application due to no address.'

[24] On 28 July 2016 the three accused appeared before court. Accused 1's legal representative requested a postponement of the matter to for accused 1's father to 'give an alternate address.' *Postea*, accused's father was present in court and it is noted that he gave the address to the prosecutor, and that accused 1 wished 'to bring a further bail application.' The matter was remanded to 5 August 2016. On 10 August 2016 accused 1 appeared before regional court magistrate, Mr Shikwambana. The state prosecutor was Mr Letsoalo. There was no legal representative on behalf of accused 1. She appeared in person. The following entry appears in the charge-sheet diary:

'PP [Public Prosecutor] informs – it's a formal bail application in respect of accused 1. For accused 2 and 3 [bail] formally denied. For accused 1 – bail fixed at R3000.

Conditions: 1.To appear before Court at .....

2. Not to interfere with witnesses.

Accused 2 and 3 in custody, no bail (formerly denied).'

[25] There is no indication that the investigating officer was present at the proceedings of 10 August 2016, nor was he aware of such proceedings. The nature of bail proceedings in terms of s 60(11) of the CPA requires that they

should be formal and transcribed, even where the state does not oppose bail. I accept that accused 1's personal circumstances might differ from those of the appellant and accused 3, which resulted in her being released on bail and the two being refused bail. But given the state's case that she is the mastermind behind the murders, and that the appellant and accused 3 assisted her, it becomes difficulty to see how she was released on bail by the same court which denied the appellant and accused 3 bail, hence a need for investigation of that aspect.

[26] During the hearing of this appeal, I requested state counsel to seek a transcribed record of those proceedings and place it before me. I did so because it brings to question judicial comity and consistency with regard to bail applications, something the Judge President expressed concern about recently in a statement widely reported in the media. As at the delivery of this judgment, I had not received the record or any written report on this aspect. As a result I shall make an order directing that a written report be furnished to the Judge President.

[27] In the result the following order is made:

1. The appeal is dismissed;

2. The Director of Public Prosecutions (Gauteng, Pretoria) is directed to investigate the full circumstances under which accused 1 (Ms Bonolo

Lekalakala) was granted bail on 10 August 2016, and report in writing to the Judge President of this Division on or before 3 March 2017.

TM Makgoka

Judge of the High Court

Judgment delivered: 3 February 2017

Appearances

For the Appellant: Mr B.G. Mogaswa (Attorney)

Firm: Rihlampfu Attorneys , Pretoria

For the Respondent: Adv. R. Molokoane

Instructed by: Director of Public Prosecutions, Gauteng