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**In the High Court of South Africa
(Western Cape Division, Cape Town)**

**Bail appeal case number: CC72/2019
District Court case number: 16/849/2018**

In the matter between:

THEMBAKAZI FISONTI

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 15 MAY 2023

VAN ZYL AJ:

Introduction

1. This matter came to this Court by way of an appeal against the refusal of bail to the appellant by the Cape Town District Court on 24 June 2019. The appellant, together with three co-accused, is charged with one count of murder, and one count of attempted robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”).

2. The trial was previously on the roll for hearing on 28 February 2022, 9 May 2022, and 17 October 2022. It is currently set down for – and will hopefully finally proceed on – 31 July 2023.

3. The State opposes the appeal upon considerations that will be dealt with in the course of the discussion below.

When may the magistrate's decision be overturned?

4. In terms of section 65(2) of the CPA, read with section 63(3), the Court is bound by the record, and there is no scope for placing additional facts before the Court for the purposes of the hearing on appeal (*S v Ho* 1979 (3) SA 734 (W) at 737G).

5. Section 65(4) of the CPA provides that 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.*”

6. A court may interfere on appeal when the lower court misdirected itself materially in respect of the relevant legal principles or the facts of the case (*S v Essop* 2018 (1) SACR 99 (GP) at paras [34]-[35]), or where the lower court overlooked important aspects in coming to its decision to refuse bail (*Ramasia v S* (A24/2012) [2012] ZAFSHC 88 (3 May 2012)). The power of the court on appeal are thus similar to those in an appeal against conviction and sentence (*S v Ho* 1979 (3) SA 734 (W) at 737H).

7. Nevertheless, in *S v Porthern and others* 2004 (2) SA SACR 242 (C) the Court observed at para [17] that it remains necessary “*to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's discretion to refuse bail was 'wrong'.*”

8. The mere fact that the reasons for refusing bail are brief, is not in itself a sufficient ground for the court of appeal to infer that insufficient consideration was given to the considerations set out in section 60 of the CPA (*S v Ali* 2011 (1) SACR 34 (ECP) at para [15]).

9. In the present matter, the appellant effectively contends that the lower court misdirected itself by overemphasizing the seriousness of the charge at the expense of the appellant, thereby disregarding her personal circumstances and the failing to consider the factors in section 60(4) as being exceptional in the context of the case. The appellant gave oral evidence at her bail application, and was cross-examined.

10. It is against this background that I consider the facts at my disposal, and the argument presented by the parties.

Has the appellant shown the existence of exceptional circumstances warranting the grant of bail?

11. The starting point in bail applications generally is section 60(1)(a), which provides that *“an accused who is in custody in respect of an offence shall ... be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.”*

12. Section 60(4) enjoins the Court, in determining a bail application, to have regard to the following factors in deciding whether to grant bail:

“The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(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; or

(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; or

(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; or

(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; or

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

13. Section 60(11) of the CPA constitutes an exception to the general entitlement to be released on bail as set out in section 60(1), read with section 60(4):

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) 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 a 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;

(b) 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 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.”

14. The offences with which the appellant is charged are Schedule 6 offences. In the premises, the appellant must show, by adducing evidence, that exceptional circumstances exist which, in the interests of justice, permits her release on bail. In *S v Petersen* 2008 (2) SACR 355 (C) at para [54] it was stated that “...it is clear that the onus is on the accused to adduce evidence, and hence to prove, the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of

justice".

15. In paragraphs [55] and [56] of the same case the concept of "exceptional circumstances" was explained as follows:

"Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, different degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

16. I agree with the appellant's counsel that a charge in respect of a Schedule 6 offence is not an absolute bar to the granting of bail, and that bail is not punitive in character (with reference to *S v Acheson* 1991 (2) SA 805 (Nm) at 822A-B; and section 35(1)(f) of the Constitution). That much is clear from a proper interpretation of the relevant provisions of the CPA.

17. Against this context, did the appellant demonstrate exceptional circumstances as contemplated in section 60(11) of the CPA? Was the magistrate wrong in refusing bail?

Consideration of the relevant facts

18. A summary of the facts as set out in the State's heads of argument is as follows. Mr Peter O'Rourke who was living with his wife and other family members at [...] P[...] Road, Cambridge Estate, Milnerton. He was 78 years old when he was murdered.

19. He liked to potter around the garage, and he would park his vehicle outside when he did so. The State alleges that the accused (including the appellant) planned to rob the deceased of his motor vehicle, and that they had some idea of his daily habits. On 15 December 2018 they took a taxi from Gugulethu to Century City and walked to the deceased's house. The accused confronted the deceased in his garage and set about assaulting him, causing multiple injuries. The deceased's wife became aware of the commotion in the garage and alerted their security company who, in turn, alerted the police.

20. Members of the South African Police Service arrived on the scene and were able to arrest all of the accused while they were still in the process of committing their crimes. The appellant was found the feet of the deceased who was lying on the floor of the garage; one of her co-accused was at his head. The police were unfortunately too late to save the deceased, who had died as a result of the assaults on him. The *post mortem* examination revealed that the deceased died because of blunt force injuries to the head and chest.

21. This was a carefully planned and premediated robbery. A toy gun looking like a real firearm was found on the scene. The elderly deceased was tied up and badly assaulted. He had Scotch tape over his mouth. One of the accused were wearing a police reflector jacket, and all of the accused had gloves on. The accused were all staying in Gugulethu and had no business to attend to in the area where the deceased was killed.

22. As mentioned, the appellant was arrested inside the garage where the deceased was lying, tied with cables, and beaten. The appellant was busy with his feet, apparently tying them together. One of her co-accused kept a lookout to see if anybody was coming. The third accused was inside the deceased's vehicle. His clothes ere bloodstained. The fourth accused was busy with the upper body of the deceased. The deceased died on the scene.

23. Bail was opposed for the following reasons:

- a. The seriousness of the offences, which carry heavy penalties. Murder

and attempted robbery with aggravating circumstances are all too prevalent offences within the jurisdiction of this Court in general. In the circumstances in which these crimes have been committed, a minimum sentence of life imprisonment would apply if the State proved common purpose. Even if the Court does not impose the prescribed minimum sentences, the appellant is still facing long-term imprisonment.

b. The brutal manner in which the crimes were committed. They were carefully planned and pre-meditated and were committed by a group of four persons acting on the execution of furtherance of a common purpose.

c. The appellant knows where the victims stay. There is thus a likelihood that she will endanger the safety of the State's witnesses. The deceased's wife still lives in the same house where her husband was murdered.

d. The State has strong case against the appellant. She was caught in the act in the garage.

24. The appellant was 30 years old at the time of the commission of the offences. Two of the other accused were 17 years old at the time, whilst the fourth accused was 25 years old. The State argues that the appellant was probably the instigator as she was the oldest of the four accused. She was staying in Samora Machel in an informal settlement.

25. Prior to her arrest the appellant had no permanent job. She was doing odd jobs selling cutlery, having passed grade 11 at school. She earned about R1 000,00 per month. The appellant wanted bail because she wanted to "go on" with her life. She also wanted to attend school. She testified that her father would assist her to go back to school. She is single and has no children.

26. The appellant has no previous convictions, pending cases or outstanding warrants.

27. The appellant told the District Court that she was arrested on 15 December

2018 when she was arrested on her way to a party in Joe Slovo. This was obviously a lie since she was arrested by the police inside the garage where the deceased had been murdered, as indicated earlier. It was put to the appellant that the four accused were together and they planned to go and rob the deceased, with appellant as the leader. The appellant was also seen by a witness about an hour before the murder occurred sitting on the corner of P[...] and P[...] Road, Milnerton, near the deceased's home, apparently watching the house. Despite this, the appellant had told the investigating officer that she had never been to the house. The appellant had no comment on any of these statements.

28. At the time of the bail application the appellant could not give any fixed address or any address of any family member where she could go and stay. It was clear from the evidence that she mover around regularly. At the hearing of the appeal, the appellant's counsel informed the Court that the appellant has, in the meantime, reconciled with her father, who is willing to support her should she be granted bail. She intends to reside with a relative at an address, which, she says, will be her fixed abode. This was the only new information given in relation to the appellant's personal circumstances.

29. It is so that bail is not about the guilt or innocence of the appellant. One must, however, not lose sight of the fact that she does have a formal onus upon her. She has to adduce evidence which satisfies the Court that the interests of justice permit her release.

30. On a consideration of the matter as a whole, I am not satisfied that the magistrate's court misdirected itself materially on the legal principles involved, or on the facts. The evidence on record, viewed as a whole, shows that the appellant failed, at the bail hearing, to discharge the onus of proving that exceptional circumstances exist that justify her release in bail in the interests of justice. The State has a strong case against her. The personal circumstances advanced by the appellant do not constitute exceptional circumstances as contemplated by section 60(11). In *S v Botha* [2002] 2 All SA 577 (A) the accused advanced similar circumstances, which the then Appellate Division (at para [17]) did not regard as exceptional in the face of a *prima facie* case.

31. The appellant has referred to the conditions in prison as an additional argument on appeal. The conditions are undoubtedly not ideal, but they do not constitute “exceptional circumstances” for the purposes of section 60(11) of the CPA. In *Solomons v S* [2019] 2 All SA 833 (WCC) at para [30] this Court held that: *“I do not believe much can be made of the conditions of detention in a case such as the present one. Whilst unsatisfactory, I believe that the State is correct in its argument that the conditions of detention is really a separate issue which needs addressed through the Office of the Inspecting Judge or some other process. Such conditions cannot in my view constitute exceptional circumstances justifying the release of the Applicant.”* (See also *Lin and another v S* 2021 (2) SACR 505 (WCC) at para [73]: *“...bail in general is not a remedy to the failures of prison authorities to detain inmates in conditions consistent with human dignity.”*)

32. A final consideration (although not an overarching one) is the view that the community takes of offences such as those with which the appellant is charged. Violent crimes committed within private homes are rife. Public confidence in the justice system might be undermined should the appellant be released on bail. There was evidence at the bail hearing that a few residents in the neighbourhood had subsequently put their houses up for sale, as they no longer feel safe there.

Order

33. In the circumstances, it is ordered as follows:

The appeal is dismissed.

P. S. VAN ZYL AJ

Appearances

For the appellant

N. Kunju

(Legal Aid South Africa)

For the respondent **M. Engelbrecht**
(Director of Public Prosecutions, Western Cape)