

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: CA&R 07/2016

In the matter between:

**NDIPHE SOGQOKOMASHE
MSINDISI BHEBHULA**

**First Appellant
Second Appellant**

And

THE STATE

Respondent

JUDGMENT – BAIL APPEAL

BESHE J:

[1] This is an appeal against the refusal of bail by the Magistrate, Motherwell, Port Elizabeth. The appellants together with three others stand accused of complicity in the murder of **Ms Nomatamsanqa Tsitsi** (deceased) on the 12 November 2015. The deceased was a police officer (South African Police Services member). At the time of her demise, she was married to accused number 5 in the matter, **Mlungisi Tsitsi**. The couple was experiencing marital problems at the time and were thus living separately. The state alleges that **Mlungisi Tsitsi** (deceased's husband) made a confession wherein he implicated his co-accused persons. It is further alleged that first appellant is also linked by telephone records which indicate that he had several telephone conversations with **Tsitsi**. This occurred on dates that preceded the murder, on the date of the murder and a few minutes after the murder in question. The allegation

against first appellant is that he is the one who procured the assassins, the motor vehicle used as well as the weapon used. To this end, it is alleged that he had several telephone contact with the killers / assassins.

[2] The evidence implicating second appellant is alleged to be the following:

He is implicated by one of his co-accused persons **Thembani Rorwana** in his confession. He also made a statement to the police and made certain admissions relating to the motor vehicle used in the commission of the offence. A report pertaining to the tracking device of the vehicle in question is still awaited. He is also implicated by cellular phone records. It was also alleged that the cellular phones of the accused persons in the matter had been sent to the Cyber Crime Unit for further analysis.

[3] From the foregoing, it is clear that the offence in respect of which the appellants and their co-accused are charged is a *Schedule 6* offence in that the murder in question was committed by a group of people who were acting in concert in execution of a common purpose. The deceased was a law enforcement officer who was waylaid on her way from work. For the purposes of bail application by an accused, the provisions of *Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977* (the Act) are applicable. The relevant part of *Section 60* of the Act provides that:

“(11) 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.”

[4] In applying for bail in the court *a quo* the appellants contended that there were exceptional circumstances which in the interest of justice

permitted their release. This was by means of affidavits placed before the court *a quo* on their behalf. First appellant's affidavit reads as follows:

"I, the undersigned Ndiphe Soqokomashe, here make oath and state as follows:

I am the applicant before the Honourable Court. I am accused no. 1 in the matter.

I am 46 years of age. I was born in the Port Elizabeth area of jurisdiction. I do not have a passport.

I reside in M. S., [...], Motherwell. I reside here for 19 years. No. [...] M. S. is a tavern. It is registered under my name. I am the owner of this tavern.

No. [...] M. S. is a house. I reside in this house with my wife and three children.

At no.210 is a shop in Mandela Street, I am also the owner of the shop. I sell electricity and groceries at the shop.

There is also a Standard Bank and an Absa Bank teller machine at my shop.

The tavern was a RDP house, I converted it into a tavern. No. [...] M. S. was also a RDP house which I extended. I currently live in it with my family. The shop situated at no.210 Mandela Street I built myself. I own the three properties. The tavern and the shop is on my name. The house I left on the name of the previous owner. I also own a tavern in Peddie. My brother runs the tavern, but it is on my name.

I generate about plus minus R24 000.00 per month with my businesses.

My wife assist in running the shop and tavern. My wife cannot run both the tavern and shop in Mandela Street by herself and while I am in custody the business is struggling.

In the tavern I employ three persons and in the shop I also employ three persons who are dependent on me.

I am married and I have been married since year 2002. I have three minor children with my wife. My children is 2 years, 13 years and 18 years old respectively.

The children are all dependent on me financially. I also have another child out of wedlock. The child is 18 years old. The child lives in Knysna and I maintain the child financially.

I wish to state that my tavern is also a club. It operates on Friday and Saturday from 10.00 in the morning up until 04.00 the next morning. On Sundays up until Thursday it runs from 10.00 in the morning up until 2h00 the next morning. My shop is open from 07h00 in the morning until 10.00 in the evening that is 22h00 every day of the week.

If I am granted bail I can abide by any bail conditions set by the Court, including 24-hours house arrest.

I am also willing to report every single day of the week at the Motherwell Police Station.

If I am granted bail I will not endanger the safety of the public or any particular person.

I will not commit any offences.

I will not attempt to evade my trial.

I will not attempt to influence or intimidate witnesses or conceal or destroy evidence relating to this or any other offence.

I will not undermine or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system.

I will not disturb the public order or undermine the public peace or security.

I have no pending cases against me.

I recall a previous conviction of robbery.

I am not sure of the exact date of the previous conviction. I can recall I received a short-term imprisonment. I can recall it was a year.

I am going to plead not guilty to the charge against me.

I do not wish to deal with the merits of my defence during my bail application.

I can afford R3 000.00 for bail and I submit there is exceptional circumstances, which in the interest of justice will permit my release on bail.”

[5] Second appellant’s affidavit appears at page 31 onwards of the record and reads as follows:

“I, Msindisi Bhebhula, an adult male 25 years old declare under oath as follows:

I am an accused in case 70/959/2015. I am aware of the charge against me. I understand it and intend pleading not guilty.

I reside at no. [...] M. S., [...], Motherwell, Port Elizabeth for the past 25 years. I reside with my father, sister and niece. My sister is unemployed and I help to support her.

I am not married, but I have two children. I have a boy and a girl both 2 years old from different mothers. I pay support of R1 000.00 per child out of my own. I also help support my niece.

I work at Transnet for the past plus minus 3 years and earn between R13 000.00 and R18 000.00 per month, depending on the amount of overtime that I work. my basic salary is R13 000.00 per month. I work as a specialised driver and work overtime on a regular basis. Proof of my salary is attached as Annexure A.

I just want to mention Your Worship it is an oldish one, it is one that the family could find at his place where they stay, Your Worship.

"I do not own fixed property, but have bought a vehicle for the amount of R178 500.00 during 2014. The above vehicle is financed by Absa and my instalments are R4 200.00 per month as per attached tax invoice marked Annexure B.

If I am not released on bail I would not be able to pay my instalments on my vehicle as I would not be able to work and it would be repossessed by the bank.

I will confirm that should I be released on bail I will comply with the following conditions and I have been informed by my attorney of the consequences of failing to comply therewith:

I will not endanger the safe of the public or any particular person.

I will not commit any offences.

I will not evade my trial.

I will not attempt to influence or intimidate witness or conceal or destroy evidence relating to this or any other offence.

I will not undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

My release will not disturb the public order or undermine the public peace or security.

I have no warrants out for my arrest and I have never escaped from lawful custody.

I do not have pending cases, nor any previous convictions and have been informed by my attorney of the consequences of failing to disclose any of the above.

If I am not released on bail I shall be prejudiced in that I would lose my job at Transnet resulting in me not being able to support my children. Lose my vehicle as stated above to a point and paid for the defence of this case.

I do not own a passport and has never travelled abroad.

If this Court grants me bail under strict bail conditions I will adhere to all such conditions.

I do not wish to disclose the basis of my defence at this stage and I will do so at trial.

I have been in custody since November 2015.

I will be able to raise the sum of R5 000.00 should bail be granted to me. I submit there is exceptional circumstances that permit my release on bail.

I wish to add that on the day of my arrest I was at a funeral and was called by the police to come home. I went home and was arrested for this case. I never tried to evade my arrest."

[6] It was submitted on behalf of the first appellant that he was not a flight risk and that his business is suffering because his wife is not coping with the running thereof without his assistance. That he had been in custody for four months at that stage. It was also argued that there was not a strong case against the first appellant. **Mr Van Rensburg** who represented the first appellant in the court *a quo*, assailed the investigating officer's evidence on the ground that he did not give any factual basis for saying there is a strong case or there is evidence implicating the appellant in the commission of the offence. He may have been implicated in a confession by one or more of his co-accused but such confession or confessions are not admissible against him. Further that the fact that he had spoken with his co-accused telephonically does not mean he was involved in the plan to and the actual murder of the deceased.

[7] **Mr Roelofse** who was acting for the second appellant argued that the fact that the appellant co-operated with the police and did not try and evade his arrest should be regarded as an exceptional circumstance. He submitted that there was no evidence that second appellant is a flight risk or that he will interfere with state witnesses. It was argued on second appellant's behalf that the case against him was of a circumstantial nature.

[8] In what appears to be a carefully considered and detailed judgment, the court *a quo* found that appellants' personal circumstances pertaining to their business interest and employment did not present any exceptional circumstances. The Magistrate also found that the strength of the case against the appellants is but one of factors to be taken into account. That, however the appellants have not succeeded in showing that the case against them is exceptionally weak and that they will most likely be acquitted. The learned Magistrate concluded that:

“Upon consideration of the totality of the evidence placed before this court and the accumulative effect of all the relevant facts and circumstances and upon weighing the interest of justice against the appellants personal circumstances and the possible prejudice that they might suffer the court finds that there is nothing unusual or exceptional about the appellants personal circumstances and that the appellants have failed to discharge the onus placed upon them to satisfy this court on a balance of probabilities that exceptional circumstances exist which in the interest of justice permit their release. Bail is accordingly DENIED.”

[9] The Magistrate’s decision is assailed on a number of grounds, *inter alia*:

That the court misdirected itself in finding that there is a likelihood that the appellants will interfere with the investigations and or conceal or destroy evidence and or interfere with witnesses should they be granted bail. In this regard, the learned Magistrate remarked as follows:

“The following aspect to be considered is Sect. 60(4) of the Criminal Procedure Act 51 of 77 read with Set. 60(7) of the Criminal Procedure Act where the court has to consider whether there is a likelihood that if the accused, if they were to be released on bail will attempt to interfere with or intimidate witnesses or to conceal or destroy evidence bearing in mind that the investigation is not complete. As the firearm is still missing, one suspect is still not arrested and the state is still awaiting certain reports and specific reference to the cellphone reports there is my view a likelihood that the appellants will interfere with the investigation and or conceal and or destroy evidence and or interfere with witnesses should they be released on bail.”

[10] I can find no fault with the Magistrate’s reasoning in this regard.

[11] It is further contended that the Magistrate in the court *a quo* misdirected herself in failing to find that the fact that the cellular telephone conversations between their other co-accused and alleged assassins, the possession by second appellant at some stage of the motor vehicle used in the commission of the crime, does not prove that the appellants were involved in the commission of the offence.

[12] It is trite that a court hearing an appeal against the refusal of bail will not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.¹

[13] Apart from attacking the strength of the case against the appellants in argument on the basis *inter alia* that a confession by one accused person is not admissible against another, and assailing the admissibility of the confessions or statements, the appellants did not show or produce any evidence on a balance of probabilities that there is real likelihood that they will be acquitted. See in this regard ***S v Mathebula 2010 (1) SACR 55 SCA at 59 paragraph 12*** where the following was stated:

“But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha en ‘n Ander* 2002 (1) SACR 222 (SCA) (222 (2) SA 680; [2002] 2 All SA 577) at 230h, 232c, *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, And Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a *prima facie* case of the prosecution failing there is no call on the State to rebut his evidence to that effect.”

[14] In argument before me **Mr Dauberman** for the appellants submitted that the state did show its hand its hand in advance in this matter. From

¹ Section 65 (4) of the Criminal Procedure Act 51 of 1977.

what the state disclosed it is apparent, so he argued, that the case against the appellants was a weak one.

[15] It was rightly pointed out by the Magistrate in her judgment that “it is not the duty of the court considering the bail application to make a provisional finding of guilt but to assess the prima facie strength of the state’s case against the applicant’s case”.

[16] In my view it cannot be said that the state’s case against the appellants, albeit being of a circumstantial nature, is of such a weak standard that it amounts to an exceptional circumstance which is the interest of justice permits the release of the appellants on bail. The appellants have not succeeded in showing on a balance of probabilities that it is so.

[17] I am unable to find that the Magistrate’s decision to deny the appellants’ bail was wrong. In the result the appeal must fail.

[18] The following order will issue:
The appeal is dismissed.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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