



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **A143/2023**

In the bail appeal between:

VUSIMUSE SEENG

Appellant

and

THE STATE

Respondent

CORAM: HEFER AJ

HEARD ON: 20 OCTOBER 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16:00 on 26 OCTOBER 2023.

[1] This is an appeal in terms of Section 65 of the Criminal Procedure Act, Act 51 of 1977.

- [2] The Appellant appeared in the Bethlehem Magistrates Court in an application to be released on bail. The Appellant was charged with the crime of murder in that on or about 30 March 2023 at or near Bethlehem, Free State Province the Accused did unlawfully and intentionally assault one Katleho Makgoa by stabbing him with a knife and did then and there inflict fatal wound(s) and/or injuries by inflicting such wound(s) and/or injuries unlawfully and intentionally causing the death of the deceased.
- [3] On a second charge, the Appellant was charged with assault with intent to do grievous bodily harm in that the Accused on the same date as above, and at the same place unlawfully and intentionally assaulted one Fufe Isaac Makgao by stabbing him with a knife twice with the intent of causing him grievous bodily harm.
- [4] During the bail application the Appellant, who was legally represented, placed the following information on record through his own testimony:
- [5] The Appellant is 21 years old and he has a child of 18 months. The child is currently staying with her biological mother who is still attending school. The Appellant's only means of employment and income is "*touting for taxis*" from which he earns an income of R200.00 per day. The Appellant testified that he does not have any pending cases against him.

- [6] The Appellant indicated that he was applying for bail in order to generate money to help his mother and to maintain the child referred to. He also has two calves which need to be fed.
- [7] The Appellant testified that he took himself to the police station and surrendered himself after the incident. He also indicated that he did not attempt to escape or flee.
- [8] Without going into the merits, the Appellant indicated that his defence to the incident will be that he acted in self-defence in regards to both the murder charge as well as the charge of assault. According to the Appellant, he was injured during the incident on his neck as well as his leg. According to him, the police has taken photographs of the injuries after the incident.
- [9] During cross-examination by the prosecutor, it was put to the Appellant that he has made a confession to a certain Captain Mokwena. According to this confession, the Appellant contradicted himself in that in such a confession it was indicated that the murder was premeditated. According to the statement with which the Appellant was confronted during cross-examination, it appeared that the Appellant first attacked the complainant on the assault charge and thereafter after the complainant had been taken to hospital, he attacked the deceased by stabbing him with the knife in his heart. According to the prosecution, the Appellant was before the incident a passenger in a taxi where an argument has taken place between him and the deceased because the Appellant was smoking in the vehicle. A braai was organised by the Taxi –Association. Upon their arrival

at the braai the Appellant was dissatisfied with the fact that the deceased and the complainant had moved to the front of the queue to cook their meat on the braai stand. The Appellant first verbally quarrelled and argued with the complainant on the second charge whereupon he stabbed the complainant with the knife. After the complainant had been removed to hospital, when the deceased made enquiries about the whereabouts of the complainant, the Appellant stabbed the deceased in his heart once as a result of which the deceased passed away. Of importance is the fact that according to the Appellant, the knife which he used to stab the complainant as well as the deceased, was a knife which he had found there at the scene which were used to cut the meat at the braai stand. As far as it may be relevant, this to me shows an absence of premeditation.

- [10] The prosecution called W/O Shannon to testify on behalf of the State. He testified that the appellant has made a confession statement to a Captain Mokwena. His evidence stemmed from this confession as well as personal knowledge of the matter. He confirmed that a braai was held by the taxi association of Qwa-Qwa and that this is where the incident had occurred. He confirmed that prior to the stabbing incidents, there was already an incident in the taxi as referred to above. He also confirmed the further events pertaining to the fight which first started between the Appellant and the complainant on the second charge and then later between the Appellant and the deceased. According to W/O Shannon, the Appellant made a confession to the effect that he has taken the knife from the braai stand. According to the W/O, after the incident the Appellant did not report

to the police station but he got into a taxi and went back to Qwa-Qwa. The police services through the intelligence network went to look for him and it was then discovered on the police system that there is also an assault case pending where the Appellant allegedly stabbed someone that is also being investigated in Qwa-Qwa. The W/O then sent a message to the house of the Appellant, the Appellant came by himself to the police station and said to the W/O in the other matter, namely W/O Gumede, that he knows that the police is looking for him and for that reason he was reporting at the police station. W/O Shannon then went to Qwa-Qwa to fetch the Appellant and upon their arrival he booked the Appellant and he was handed to W/O Shannon. As they were leaving the police station, the complainant and his uncle were there and they indicated to the police services that they were going to kill the Appellant. The police services prevented them from fighting, they put the Appellant in the car and left Qwa-Qwa.

[11] According to the statement, the Appellant never said that he was being attacked and that he was acting in self-defence. W/O Shannon confirmed that the Appellant showed him two scratch marks on the neck, on his knees as well as on his arm but it appeared that only one of the marks on the neck could be considered to be a fresh injury.

[12] According to the witness, the Appellant does not have previous convictions and the assault case in Qwa-Qwa was struck from the roll apparently because of a technicality.

[13] As far as bail is concerned, it was indicated on behalf of the State that bail is being opposed because of the seriousness of the offence and also because of the fact that it now appears to be premeditated murder. The evidence was also to the effect that because the Appellant lives very close to the family of the deceased, the Appellant may also come to harm in view of the previous threats referred to above. According to the State, the Appellant cannot be regarded as a flight risk but on the version of W/O Shannon, because the Appellant might face a long term of imprisonment, the Appellant might decide to evade his trial.

[14] On behalf of the Appellant it was argued that the offence is a Schedule 5 offence as it stands on the charge sheet and not Schedule 6 which will include premeditated murder. According to the defence, the question of premeditation only appeared during the time when the Appellant was being cross-examined by the prosecutor.

[15] The prosecution on the other hand, argued that the charge sheet stands to be amended to refer to Schedule 6 and in particular premeditated murder. The factor of premeditation was however not taken into consideration in refusing bail.

[16] With reference to Section 60(4) of the Criminal Procedure Act, and in particular the factors which the Court needs to take into account in granting bail, the safety of the Appellant also needs to be considered in view of the threats referred to above. This was canvassed during argument. The defence further argued that it should be taken into account that the Appellant informed W/O Gumede that he knew the

police were looking for him and that the Appellant himself went to the police station as a result of which the Appellant was then arrested. It was further argued that there was nothing to show that the Appellant has any intention to flee.

[17] During argument the prosecution persisted in opposing bail on the basis of the seriousness of the offence and the so-called premeditation of the murder. According to the prosecution, the altercation which had taken place in the taxi prior to the stabbing incident, are indicative of the Appellant planning to murder the deceased.

[18] In reply the defence argued that when he was contacted by the police, the Appellant had the opportunity to flee which he did not, but indeed went to the police station himself.

[19] In his judgment, the presiding magistrate said *inter alia* as follows:

"Does he have a propensity to commit an offence; and he does have a propensity, simply because we have testimony a formal charge is not prerequisite or a determination for a propensity. And we have heard evidence that he was charged, and the matter was only removed from the roll because they needed the J88 to decide what is the story. And at the time of his arrest, by that time the prosecutor already made a decision to enrol the matter. So, he has got a propensity to commit offences, particularly Schedule 1 offences. Whether acting in self-

defence, acting wilfully, or exceeding the bounds of self-defence, that is for the trial court. But he has got a propensity."

[20] The Court held that there was no likelihood that the Appellant will attempt to evade his trial. There is no evidence of this, save for the Appellant's actions after committing the offence whereas it is a serious offence, somebody is stabbed and somebody dies and the Appellant, according to the presiding magistrate, just went off to Qwa-Qwa and not to the police station.

[21] The Magistrate further held that the Accused is a man of straw, he is living with his mother. The Court did also take into account that Qwa-Qwa is very close to Lesotho and according to the Court, *"the Accused seems to be savvy, up and down. He knows how to move around and get from town to town particularly from Bethlehem to Qwa-Qwa as well. He is street savvy"*.

[22] The Court also took into account the safety of the Appellant. As far as the potential harm to the Appellant is concerned, the Court rejected the defence's argument to the effect that because nothing has happened within the 5-day period, before his arrest, the threats as expressed towards the Appellant were not real and will not materialize. The Court considered such presumption to be incorrect. The Court then said the following:

"What is clear this is the manner in which it happened. It clearly induces the sense of shock and outrage in a community. Then the next question

*is will it translate into public disorder or may his safety be jeopardized.
... But the Court simply cannot ignore when threats are made to the
investing officer. It does not mean nothing happened in those 4, 5 days
prior to his arrest or that something had to have happened."*

[23] The Court held that the factors in Section 60(4)(a) and (e) have been established.

[24] The Court came to the following conclusion: *"From the factors before me, suitable bail conditions will not assist in delaying any of the fears established in section 64(a), (b), (c)(sic). Furthermore the interest of justice outweigh his personal circumstances. And I am of the opinion that in the interest of justice do not permit his release. He has got a propensity such Schedule 1 offences. He is flight risk in the sense of the strength of the state's case and the factors against him is incentive enough for him to flee and thirdly the sense of outrage that would be caused if he is subsequently released. Bail is accordingly denied."*

[25] In terms of Section 60(1)(a), an accused who is in custody in respect of an offence shall, subject to the provisions of Section 50(6) 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 interest of justice so permits.

[26] In terms of Section 60(4), interest 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 a 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 a 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 a 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 a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the Criminal Justice System, including the bail system;
- (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.

[27] In terms of Section 60(5), in considering whether the ground in subsection 4(a) has been established, the Court may, where applicable, take into account amongst others:

- (i) Any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (ii) Any disposition of the accused to commit offences referred to in Schedule 1 as is evident from his or her past conduct; or

- (iii) Any other factor which in the opinion of the Court should be taken into account.

[28] In terms of Section 60 (6), in considering whether the ground in subsection 4(b) has been established, the Court may where applicable, take into account amongst others the following factors, namely:

- (i) The assets held by the accused and where some assets are situated;
- (ii) The means and travel documents held by the accused which may enable him or her to leave the country;
- (iii) The nature and the gravity of the charge on which the accused is to be tried;
- (iv) The strength of the case against the accused and the incentive that he or she may in consequence have to attend to evade his or her trial;
- (v) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her; or
- (vi) Any other factor which in the opinion of the Court should be taken into account.

[29] In terms of Section 8 (a), in considering whether the ground in subsection 4(e) has been established, the Court may where applicable take into account the following factors, amongst others namely:

- (i) Whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (ii) Whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (iii) Whether the safety of the accused might be jeopardized by his or her release;
- (iv) Whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (v) Whether the release of the accused will undermine or jeopardize the public confidence in a criminal justice system; or
- (vi) Any other factor which in the opinion of the Court should be taken into account.

[30] In *S v Barber*,¹ Hefer J, (as he then was) remarked as follows:

“... 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 a Magistrate who has the discretion to grant bail but exercise that discretion wrongly ... Without

¹ 1979 (4) SA 218 (D) at 22E - H

saying that the Magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one."

[31] In *S v Porthen and Other*², Binns-Ward AJ said that there can be no quarrel with the correctness of the observations of Hefer J as a general proposition but nevertheless considered it necessary to point out that a court hearing a bail application, i.e. the court *a quo*, exercises a wide as opposed to a narrow or strict discretion.

[32] The test as set out in *S v Barber (supra)* was also followed in *Attorney-General of Zimbabwe v Phiri*³.

[33] In *S v De Abreu*⁴, McEwan J also confirmed that in terms of Section 65(4) interference can only take place if the Court is satisfied that the Magistrate was indeed wrong.

[34] I am not satisfied that the Magistrate was wrong in concluding that the Appellant should not be released on bail with reference in particular to Section 60(4)(a), (b) and (e). My reasons for confirming that the interests of justice does not permit the appellant to be released on bail, however differs to a certain extent with that of the magistrate in that, although I agree that bail should be refused taking into

² 2004 (2) SACR 242 (C)

³ 1988 (2) SA 696 (ZAC) at 698C - D

⁴ 1980 (4) SA 94 (W) at 96H - 97A

account the factors as listed in Section 60(4)(a)(b) & (e), I am of the view that the following facts are of more importance:

[35] As far as Section (60) (4)(b) is concerned:

- (i) The nature and gravity of the charge with which the Appellant is charged,
- (ii) As well as the strength of the State case against the Appellant is also to be taken into account.

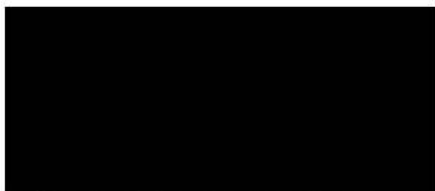
[36] Furthermore, as far as Section 60(4) is concerned the fact that the safety of the Appellant might be jeopardised if he is released on bail is also a further factor which plays a role in refusal of the Appellants' bail.

[37] Save for these differences I cannot, as a whole, say that the Magistrate exercised his discretion wrongly.

ORDER:

Therefore, I make the following order:

The appeal is dismissed.


J J F HEFER, AJ

On behalf of the Appellant:
Instructed by:

Adv P. Van der Merwe
Legal Aid South Africa
Bloemfontein

On behalf of the Respondent:
Instructed by:

Adv Tshefuda
Director of Public Prosecutions
Bloemfontein