

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

APPEAL NO. C.A&R 14/2018

Reportable	Yes / No
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In the matter between:

MNINAWA SIMPHIWE GABA WILI

Appellant

And

THE STATE

Respondent

APPEAL JUDGMENT

BESHE ADJP:

[1] This is an application in terms of section 65 of the Criminal Procedure Act No. 51/1977. This provision governs appeals to the local division of the Supreme Court with regard to bail. Sub-section 4 thereof 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 opinion the lower court should have given."*

[2] The appellant, who is facing a charge of murder where it is alleged that such murder was planned, was denied bail in the Regional Court, Zwelitsha. He is now appealing that the decision.

[3] The bail application fell within the purview of Schedule 6 of the Criminal Procedure Act and fell to be dealt with terms of section 60(11) of the Act which provides that *"An accused shall be detained in custody until he 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 interest of justice permit his or her release."*

[4] The Magistrate in the court *a quo* found that there were no such exceptional circumstances.

[5] As I understand it, the case against the appellant is that he conspired with his co-accused person to kill the latter's husband. That, to this end he secured an assassin from Engcobo who shot and killed the deceased. He was at some stage before the murder of the deceased seen in his company. There is also a suggestion

that certain payments were made to him between March – October 2017 (presumably by his co-accused) deceased died on the 24 February 2017.

[6] I prefaced the preceding paragraph by saying “*As I understand the case against the appellant*” because the fundamental difficulty is that the evidence of the investigating officer does not form part of the record (transcribed record). It is not clear why this evidence could not be transcribed as would appear from Ms Janse van Rensburg of Ikamva Veritas letter. No reference is made by those representing the appellant of this fact in the papers – save one of the documents filed on page 169 of the papers is a certificate from Ikamva Veritas showing that transcribed record is complete and correct.

[7] In argument before me Counsel for the appellant submitted that owing to the urgency of the matter concerning as it does the liberty of the appellant - I should deal with the appeal on what is before me. As far as the evidence of the investigating officer is concerned, the only part of his evidence that was transcribed is when he was under cross-examination. Cross-examination by the Mr Mayisane who appeared for the appellant was recorded in full whereas that of his co-accused was not. From the cross-examination it would appear that the investigating officer is opposing bail on the basis that there is a strong case against

the appellant who is implicated by a witness in the planning the execution of the murder amongst other things that there is evidence that appellant received a sum of R60.000,00 from March 2017 which was part of payment by Old Mutual Insurance and FNB following deceased's death in February. Bail was also opposed on the basis that appellant does not have a fixed address. He only visits the address he gave as NU 11, and there's mention of an address in Cape Town

[8] Besides submitting that there is no suggestion that appellant is a flight risk, it was also submitted that exceptional circumstances exist in that the case against the appellant is weak. It had also emerged from appellant's evidence that he used to smoke but stopped because he suffered from chest pains. And that being locked with up to 32 others in a cell some of whom smoke cigarettes, dagga, tablets and tic he gets to inhale the smoke and the prison authorities cannot do anything to stop the smoking. He does not get any treatment from prison for chest problems.

[9] The Magistrates decision is impugned on the following grounds, *inter alia*: She misdirected herself in the application of the law, when she made a finding that the presumption of innocence does not apply in bail proceedings; she misdirected herself in her evaluation of the facts and discarding with evidence of that appellant about the effect of smoke on his health condition. By finding that there was strong

case against the appellant, by ignoring the following facts; that there was no likelihood that appellant will threaten witnesses, breach bail conditions, commit Scheduled Offence and is not a flight risk.

[10] It is indeed so that when the Magistrate was setting out the legal principles that apply to bail applications, she quoted a dictum from *S v Mbeleki and Ano*. Where at para 14 the following was said

“I need, however, to also deal with this perception that the presumption of innocence had a role to play in the consideration of bail. In S v Dlamini¹ “our Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right, but a trial right. This has also been understood by the learned Magistrate”. It cannot therefore be said that the Magistrate misdirected herself by taking note of this dictum.

[11] It must be borne in mind as the Magistrate correctly pointed out – it is only once exceptional circumstances have been established by the applicant for bail that the enquiry will move to focus on the balance between the interest of the state / justice *vis-a-vis* the personal freedom of the applicant.

¹ 2013 (1) SACR 165 KZD

[12] As far as the strength or otherwise of the case against the appellant, the Magistrate acknowledged that evidence against him was of a circumstantial nature but that it connected the appellant to the killing of the deceased. I can find not fault with this evaluation. It cannot be found that the state's case against the appellant is non-existent, or weak and that the appellant in all likelihood will be acquitted after the trial. The appellant has not been able to show that he will in all likelihood be acquitted. That the case against him is now non-existent.

[13] Did the appellant succeed in showing on a balance of probabilities that his continued incarceration is negatively affecting his health due to smoke inhalation? According to the investigating officer when he met with the appellant and chatted to him, appellant was smoking. The sum total of appellant's evidence in chief in this regard was the following.

"Counsel: Do you smoke cigarette, dagga or anything?"

Appellant: No I stopped

Counsel: When did you stop?

Appellant: Your Worship, I was smoking but I had chest pains and then went to the doctor he said I had chest pain problem.

Counsel: Now in that cell where you are staying is there any where that the warders can regulate smoking in that cell?

Appellant: They are smoking your Worship, they smoke there.

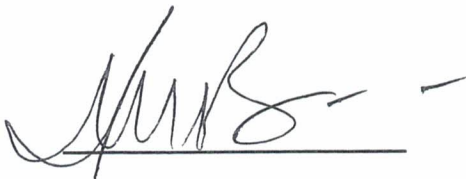
Counsel: Are you inhaling a smoke being asthmatic?

Appellant: Yes, Your Worship they smoke dagga, tablets as well as tic."

Nowhere does he say he drew the attention of prison authorities to his problem. Even the suggestion that the ailment was asthma came from his counsel. In this regard as well in my view the Magistrate was correct in finding that an appellant has not established that this was an exceptional circumstance.

[14] It must necessary follow that from what I have stated above that the appellant has not succeeded in showing that the Court below was wrong and that its decision should be set aside.

Accordingly the appeal is dismissed.



N G BESHE

ACTING DEPUTY JUDGE PRESIDENT

BHISHO

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Date Heard:

02 May 2018

Judgment Delivered:

01 June 2018