

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No. 1721/2017P

In the matter between:

Joseph Zamokwakhe Khanyile

First Appellant

Mandla Border Khumalo

Second Appellant

Doris Jabulile Dladla/Zaca

Third Appellant

and

The State

Respondent

Judgment

Lopes J:

[1] The three appellants, together with two others were arrested by members of the South African Police and are to be arraigned in the High Court in Pietermaritzburg on three counts of premeditated murder, one count of attempted murder, one or more counts of fraud and the theft of motor vehicles. The trial date has been set down for May and June 2017.

[2] On the 3rd November 2016 and upon various dates thereafter, the appellants, together with their co-accused, appeared in the Regional Court at Greytown before Mr C F Masikane and applied for bail pending their trial in the High Court.

[3] On the 14th December 2016 the learned magistrate handed down judgment in the application, refusing the grant of bail to any of the five accused. This matter comes before me by way of an appeal by Messrs Khanyile, Khumalo and Dladla/Zaca in terms of s 65(1)(a) of the Criminal Procedure Act ('the Act') against that decision to refuse them bail.

[4] Sub-s 60(3) of the Act provides for the circumstances where the interests of justice do not permit the release from detention of an accused. Sub-s 60(9) sets out the factors which a court must take into consideration in weighing the interests of justice against the right of the accused to his or her personal freedom, and the prejudice he or she is likely to suffer if he or she were to continue to be detained in custody.

[5] In this matter the state's case may be summarised as follows:

- (a) The facts are more easily understood if the accused are viewed in two groups, accused 1 and 2 (the first and second appellants before me) who would carry out murders, and accused 3, 4 and 5 (accused 4 is the third appellant before me) who would carry out what may be referred to as the administrative functions of the conspiracy by finding persons whose lives they would insure with one or more insurance companies. They would then give instructions for the murders to be carried out.
- (b) They would nominate themselves as beneficiaries of those insurance policies or persons over whom they had control or pursuant to which they could gain access to any funds paid out. Accused 3, 4 and 5 would then give instructions to accused 1 and 2 to murder the persons insured. This would (in three counts) involve drugging or incapacitating them, and then running them over with a motor vehicle.

- (c) The murders were allegedly carried out on the 27th August 2015, the 20th November 2015 and the 19th March 2016.
- (d) Two of the murder charges allege that the victims in them were deliberately run over by a motor vehicle, and in the other murder charge the victim was shot.
- (e) There is also a charge of attempted murder, allegedly committed on the 20th November 2015. The State alleges that after unsuccessfully trying to kill the deceased by running her over, the accused conspired to have the victim killed by way of a lethal injection whilst she lay injured in hospital.

[6] By virtue of the allegations that the murders were premeditated and that the accused all conspired in the execution of a common purpose or conspiracy to commit the crimes, the bail application fell to be dealt with in terms of the provisions of sub-s 60(11)(a) of the Act.

[7] Sub-s 60(11) provides:

‘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; ...’

[8] Before dealing with the merits of the appeal, it is pertinent to point out that sub-s 65(4) provides:

‘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.’

[9] Each of the appellants, as well as their co-accused testified at the bail hearing. Detective Warrant Officer Nelson Naicker gave evidence for the State by way of an affidavit in which he set out the investigations into the three counts of murder, the count of attempted murder and the methods used in executing the crimes of the accused. No application was thereafter made by counsel for the appellants to re-open the cases of the accused in order to deal with the allegations made in that affidavit.

[10] With regard to the concept of ‘exceptional circumstances’ as contemplated in sub-s 60(11)(a) and the requirements of sub-s 65(4), I refer to *S v Mathebula* 2010 (1) SACR 55 (SCA) at paragraph 12 where Heher J 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 ... 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; ... 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.’

It was made clear in *Mathebula* that an accused is required to show ‘exceptional circumstances’, meaning facts which are unusual or facts which singularly or

altogether warrant release of the appellant in the interests of justice. See also *S v Faye* 2009 (2) SACR 210 (Tkhc) and *S v Mazibuko & Another* 2010 (1) SACR 433 (KZP).

[11] The attack of the appellants upon the judgment on the learned magistrate may be summarised as follows:

- (a) The learned magistrate misdirected himself in finding that the personal circumstances of the appellants failed to persuade him that exceptional circumstances existed, and if they did, that they are not such that the interests of justice permit any of the appellants to be released on bail; and
- (b) The learned magistrate failed to take sufficient account of the fact that the appellants voluntarily handed themselves over to the police;
- (c) The learned magistrate erred in finding that the appellants are likely to endanger the safety of the republic.
- (d) The learned magistrate erred in finding that, given the sentences that the appellants are facing, they are unlikely to stand trial.
- (e) The learned magistrate erred in finding that the medical conditions of the three appellants could be dealt with in prison.
- (f) The learned magistrate erred in holding it against the appellants that they failed to answer questions put to them which may have been incriminating. This is exacerbated by the fact that the learned magistrate suggested to the appellants that they could decline to answer questions, and did not warn them that their failure to do so may count against them.
- (g) The learned magistrate failed to take into account the factors in sub-s 60(9) of the Act which are in favour of the appellants.

- (h) The learned magistrate erred in failing to find that the appellants had established on the probabilities that they will secure an acquittal in the main trial.

[12] I shall deal firstly with the evidence of the three appellants. The first appellant Zamakwakhe Joseph Khanyile, who was accused 1, testified that:

- (a) He was 37 years of age and lived at Matimatolo in his house where he had lived for 18 years.
- (b) He is not married but lived with his partner.
- (c) He has six children and provides for their education.
- (d) He provides for all six of his children who live with three different mothers, two of whom are unemployed.
- (e) Also residing with him are his mother and sister who suffer from epilepsy and diabetes respectively.
- (f) He is employed at MTE at Hermannsburg and has worked for the company for five years, and currently earns R5 300 per month.
- (g) He currently suffers from what he referred to as 'traditional' sexually transmitted disease.
- (h) He has been a pastor in the Serenity Church of the Zion Church for seven years'.

[13] Mr Khanyile confirmed he had been arrested at his place of employment. He then explained that he had gone to the hostel where he was staying and was called by a security officer who told him that the police were looking for him and were at the gate. He claimed that he went to the gate and surrendered himself to the police officers. Mr Khanyile also testified that he owned a taxi from which he derived an

income of about R4 000 per month. He was not receiving any income whilst in custody. Being in custody also affected the operation of his taxi business.

[14] In cross-examination Mr Khanyile was accused of deliberately misleading the police when they questioned him concerning his whereabouts on the day on which the deceased in count 3 died. Mr Khanyile refused to deal with this matter, saying that he would do so at his trial.

[15] Mr Khanyile was accused of misleading the court because he denied that his rights had been read to him. He admitted that he had signed a document referred to as an SAP14A which is a Notice of Rights in terms of the Constitution, and the prosecutor put it to Mr Khanyile that his rights were explained to him by the police.

[16] The prosecutor also put to Mr Khanyile that not only had he lied to the police as to his whereabouts on the day Mr Mdlalose (the deceased in count 3) died, but that there was video footage which showed him with the deceased in count 3 on the night when he was killed. Mr Khanyile refused to deal with these aspects as well.

[17] In cross-examination Mr Khanyile stated that he knew the second accused, Mr Khumalo and the third accused, Ms Mildred Fisani Khoza. He denied knowing the accused persons numbered 4 and 5, Ms Dladla/Zaca and Ms Zuma. Mr Khanyile confirmed his cellphone number and it was put to him that the state was in a position to prove that many calls had been made from that cellphone to accused 2, 3 and 4, and in the case of accused 4, 289 times. His handset was also used to communicate with the handset of accused 5 165 times. Mr Khanyile declined to deal with any of this evidence.

[18] Having previously told the court that he had no previous convictions, it was put to Mr Khanyile by the state that he in fact had a previous conviction. He

eventually admitted having a previous conviction for theft, and his explanation for changing his evidence was that he thought that his counsel was referring only to convictions for which he had been sentenced to imprisonment. Mr Khanyile confirmed that he was in possession of a red Toyota motor vehicle at the time he was arrested, but he alleged that that vehicle belonged to a person in Pietermaritzburg who was in the process of selling the car to him. It was also suggested to Mr Khanyile in cross-examination that a witness to the murder of Mr Mdlalose was threatened. Mr Khanyile maintained that he knew nothing about that because he was in prison. Mr Khanyile also claimed to have no knowledge of the fact that there were between 15 and 20 peoples' lives that were insured by accused 3, 4 and 5.

[19] Mandla Dhoda Khumalo, who was accused 2, testified next and his evidence may be summarised as follows:

- (a) He is 38 years old and engaged to one Nonhlanhla Zondi.
- (b) He lived at Ematimatolo in a homestead with his mother, two siblings and two children as well as his sister's child. He has lived there for approximately nine years, and supports everyone in that homestead. He has three children aged from 13 years to five years. They all attend school and Mr Khumalo pays for their school fees.
- (c) Mr Khumalo has a pending appeal against a decision of the Regional Court convicting him of armed robbery committed on the 30th July 2009 and for which he was sentenced to 12 years imprisonment. He was released on bail of R5 000 pending the outcome of that appeal. Mr Khumalo also had previous convictions for escaping from lawful custody and threatening a police officer with death or bodily harm. He was sentenced to 12 months' imprisonment and one months' imprisonment or a R500 fine respectively for those offences.

- (d) Mr Khumalo testified that he operates a tuck shop and three taxis. They bring him an average income of between R6 000 and R7 000 per month. He suggested that being in prison will seriously hamper his membership of the Taxi Association and his ability to conduct business as a taxi owner.
- (e) Mr Khumalo's arrest had come about when he had heard that the police were looking for him and he approached an attorney in Durban to assist him. He eventually handed himself over to the Pietermaritzburg Police. Three weeks elapsed between the time when he first heard the police were looking for him, and when he handed himself over.
- (f) Mr Khumalo stated that he had a health problem because he had injured his right arm which required an operation which was scheduled for the 18th February 2017.
- (g) Mr Khumalo confirmed that he was a neighbour of the first accused, but declined to say whether he knew the other accused. He testified that his previous conviction for escaping from lawful custody was that he had escaped from the holding cells at the Mudén police station.
- (h) Mr Khumalo admitted that he was the owner of a red Toyota Hi-Lux. When it was put to him that his vehicle was used in the killing of one of the deceased persons, he declined to comment. He also declined to comment on the fact that he had been paid R90 000 by the fourth accused, Miss Dladla/Zaca for the killing of one of the deceased. He also declined to comment on the fact that the state was in possession of video footage recording that Mr Mdlalose who was killed on the 19th March 2016 was being conveyed in Mr Khumalo's red Toyota on the day in question.

[20] Ms Dladla/Zaca, accused 4, also testified at the bail hearing. She stated that her maiden surname was Dladla and then she had assumed her married surname of Zaca. She had no previous convictions and no other cases pending against her. She

was 53 years' old and had two homesteads, one at Myandu and one at Pietermaritzburg. Her further evidence may be summarised as follows:

- (a) She lived at the Myandu homestead until 2005 when she separated from her husband. They are currently undergoing a divorce.
- (b) She has three children who are all adults, and a child which she had adopted in foster care. A letter from the Department of Social Development in Pietermaritzburg confirmed that fact.
- (c) She also has another adopted child who is in grade 11, and she pays the school fees for both of them as well as a child who is in University.
- (d) Ms Dladla/Zaca's great concern was her health problems because she is a diabetic and suffers from high blood pressure and has heart problems. She claimed to be unable to receive the appropriate medical attention in prison.
- (e) She was employed in the Department of Education and paid by them on a month basis. She was not however performing any functions and had not been doing so for approximately four years because of her health.
- (f) The children that are cared for by Ms Dladla/Zaca do not live with her but live with other persons nearer to their schools. The owner of the place that is rented for the children wishes to sell the premises and Ms Dladla/Zaca needs an opportunity to go and find permanent accommodation for them. Her brother has been assisting and she had been discussing the matter of their parental homestead with him.
- (g) In cross-examination Ms Dladla/Zaca admitted that she only knew the third accused and the fifth accused. She admitted that she had met the third accused at an education workshop. She had exchanged telephone numbers with the third accused. She stated that she knew the fifth accused but not very well. They had, however, exchanged telephone numbers.

- (h) Ms Dladla/Zaca admitted that she obtained medication through members of her family who had given the medication to the Westville prison authorities. She had lodged a complaint with the head of Westville prison with regard to her medical condition. She claimed not to have received treatment at the Westville prison hospital despite requesting on many occasions that she do so. She claimed that the prison authorities had placed her life in danger by not ensuring that she received medication when her personal medication had run out. She then appeared to shift ground, suggesting that the state would prevent her from using medication prescribed by her own doctors and specialists and brought to her by her family, because they told her on the last occasion when it happened that they would not allow her out again.
- (i) As a result of not receiving medication Ms Dladla/Zaca had gone into a hypoglycaemic coma on the 26th October 2016. This was because her medication had finished on the 25th and the prison doctor only visited on Thursdays. The head of the prison then contacted her son and asked him to bring medication, but it did not arrive on time.
- (j) Ms Dladla/Zaca was challenged on the fact that she attended workshops conducted by the Department of Education, because she had not worked for the previous five years. When it was put to her that she was not invited to attend those workshops she suggested that maybe one of the staff members had spoken to her and she attended the workshop without permission, because nobody really checked. She then declined to reply when the prosecutor put to her that she was never invited to any workshop by the principal.
- (k) Ms Dladla/Zaca also testified that she had applied to be medically boarded by the Department of Education in 2015.

[21] The prosecutor put to Ms Dladla/Zaca that Mr Naidoo, the principal of the school where she had been employed, Eastwood Primary School, had never met her

and did not know her. Ms Dladla/Zaca denied this and said that she had been at the school during 2016. Despite the threat to lead this evidence the prosecutor did not do so.

[22] Ms Dladla/Zaca denied that she knew the complainant in count 2 (attempted murder) as well as the deceased in count 3, Mr Mdlalazi. She declined to answer when asked whether she knew the deceased in count 1, Mr Zuma, and the deceased in count 4, Ms Gcabashe. This was despite the fact that the prosecutor put to her that the state would present evidence that she had taken out four policies on the life of Ms Gcabashe and was recorded as the beneficiary. Ms Dladla/Zaca declined to answer.

[23] It was also put to Ms Dladla/Zaca that she had taken out 35 policies on the lives of various persons, and that those policies were current and valid. Ms Dladla/Zaca then admitted that a number of policies were taken off her payslip and two policies were paid, by the bank, presumably from her account.

[24] In assessing whether the three appellants have provided exceptional circumstances or demonstrated on a balance of probabilities that they will succeed in the trial, it is relevant to look at the grounds for denying bail which are set out in sub-s 60 (4), read with the factors which may be taken into account, which are set out in sub-s 60 (5), (6), (7), (8A) and (9).

[25] When considering the likelihood that the appellants, if released on bail, would endanger the safety of the public or any particular person or would commit a schedule 1 offence, the court may take into account the degree of violence towards others which is implicit in the charges against the appellants. In this matter the degree of violence implicit in the charges against the appellants is extreme. I say this because the conspiracy involved identifying persons, insuring them, then getting them intoxicated or drugging them and then running them over with a motor vehicle.

That is what is alleged to have occurred in three of the four counts, with the other count involving the use of a firearm to kill the deceased by shooting him. In my view this is a factor which counts heavily against all three appellants. The State also alleges threats of violence against a potential witness, although this threat is not alleged to have been made by one of the accused directly,

[26] With regard to any disposition of violence on the part of an appellant, which is evident from their past conduct, the second appellant has been accused of threatening a police officer with death or the use of bodily harm against him or his family as well as of robbery. With regard to the third appellant, she is alleged to have attempted to instigate the death of the complainant in the attempted murder charge, whilst the complainant was lying injured in hospital.

[27] With regard to the likelihood that the appellants may seek to evade their trial, the court was entitled to take into account the emotional and family ties of the appellants, their assets, travel documents which would enable them to leave the country, the affordability to forfeit the amount of bail and the nature and gravity of the charge on which they are to be tried. In addition the court is entitled to assess the strength of the case against the appellants and the incentive that they have in consequence thereof to attempt to evade the trial. It is also relevant in this regard to look at the nature and gravity of the punishment which is likely to be imposed on them if they are convicted of the charges against them. Whilst the third appellant has surrendered her travel documents to the police, and the first and second appellants claim to have no passports, the severity of the nature of the charges, the apparent strength of the state's case against all of them, and the sentences which will almost inevitably be imposed upon them if they are convicted, all point to a likelihood that the appellants will attempt to evade their trial.

[28] The fact that the appellants may have surrendered themselves to the police does not assist them in this case. In particular, with regard to the first and second appellants they appeared to have had no choice once they heard that the police

were looking for them, and at that stage they would have had no idea of the strength of the state case against them. It is evident from the affidavit of the investigating officer, Detective Warrant Officer Naicker, that the third appellant had no idea of the strength of the case against her and was mortified when she learnt of it.

[29] With regard to the likelihood that the appellants, if released on bail, would attempt to influence or intimidate witnesses or conceal or destroy evidence, the court is entitled to take into account the fact that the appellants, although denying knowledge of the identity of the witnesses, must have some knowledge of the identity of some of the potential witnesses, particularly where the witnesses have already made statements and agreed to testify, as is the case here with a number of the witnesses, or are persons to whom they are related. This is particularly so considering the *modus operandi* alleged by the state.

[30] Although there are some items outstanding in the state case which still require further investigation, the State already appears to be in possession of a great deal of evidence which weighs heavily against the appellants. In my view the imposition of bail conditions will not greatly assist in preventing any interference with witnesses. In this regard there is the evidence of Detective Warrant Officer Naicker that the third appellant had approached a nurse at the hospital where the victim in the attempted murder charge was recuperating, in order to attempt to persuade her to administer a lethal injection to kill the complainant. An attempt was made to deal with this in argument, but no evidence was adduced by the appellants. There are also apparently a number of s 204 witnesses, and it is not hard to imagine that the appellants will be able to establish the identity of those persons, despite the fact that they are currently on a witness protection program. There has apparently already been an attempt to bribe relatives of the deceased, Mr Mdlalose, which involved the second appellant and a co-accused.

[31] With regard to the likelihood that the appellants would undermine or jeopardise the objectives of the proper function of the criminal justice system,

including the bail system, the allegation that the second appellant supplied false information to the police and lied in court about his previous convictions is relevant.

[32] There is also the factor that the release of the appellants will undermine public peace or security or public order because during the hearing in the Regional Court at Greytown there were apparently competing groups of persons, one supporting the appellants and the other wanting them to be imprisoned. The learned magistrate was not swayed by either group but there is every probability that the release of the appellants would engender shock and outrage in the greater Greytown community. In this regard I do not bow to public pressure, but rather decide the issue in what I view as the public interest. In addition there seems every likelihood that the safety of the appellants themselves may be jeopardised by their release.

[33] In assessing the evidence led by the appellants I am conscious of the duty of the court *a quo* to decide the matter by weighing the interests of justice against the interests of the appellants to their personal freedom and particularly the prejudice which they are likely to suffer if they are detained in custody.

[34] Mr *Mlotshwa*, who appeared for the appellants, submitted that the learned magistrate had erred in not advising the appellants that if they failed to answer incriminating questions, that could be held against them. The learned magistrate:

- (a) told the appellants that anything they said during the bail hearing could be used against them during the trial;
- (b) said that during the bail application they may be called upon to answer some incriminating questions which they were not obliged to answer, and which they could reserve for the trial; and

- (c) in his judgment the learned magistrate recorded that the failure or refusal by an accused to answer questions (which may be incriminating) has consequences.

The right to silence and the right against self-incrimination are choices to be made by any accused in a sub-s 60(11) application.

See: *S v Dlamini*

S v Dladla & Others

S v Joubert

S v Schietekat 1999 (4) SA 623 (CC), para 93.

[35] Mr *Mlotshwa* referred to the medical condition of the appellants, submitting that they required to be out of prison in order to be able to receive the appropriate medical attention that they require. In my view this was dealt with fully by the learned magistrate, and no criticism can be levelled at his judgment in that regard.

[36] In my view there are no matters, constitutional or otherwise, which would prevent them remaining incarcerated. The children and other dependants of the appellants will all be prejudiced in the sense that the incomes of the appellants may be reduced or limited and that will have an impact upon them. They are not however, in any danger and there are clearly supporting family members in each case who can assist in providing the necessary care, failing which Social Welfare could do so .

[37] With regard to the businesses of the first and second appellants suffering as a result of their imprisonment, that is an inevitable consequence of imprisonment. In my view it is not a factor which the learned magistrate could have regarded as an exceptional circumstance warranting the release of the appellants on bail.

[38] Assessing all the evidence together, I find myself unable to say that I am satisfied that the decision of the learned magistrate not to grant the appellants bail was wrong. None of the factors adduced by the appellants, viewed either singularly or collectively, constitute exceptional circumstances. In my view they do not come close to establishing on a balance of probabilities that the appellants will be acquitted at the end of their trial

[39] In those circumstances I make the following order:

The appeals of the three appellants against the refusal of bail by the learned magistrate in the Regional Court at Greytown, are refused.

Lopes J

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Instructed by:

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Counsel for the Respondent:

Instructed by:

A Truter

Director of Public Prosecutions

High Court Building

Pietermaritzburg

Date of hearing:

3 March 2017

Date of Judgment:

9 March 2017

