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## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

### GAUTENG DIVISION, PRETORIA

**CASE NO: A455/2015**

- |     |                                                    |
|-----|----------------------------------------------------|
| (1) | <u>REPORTABLE: YES/NO</u>                          |
| (2) | <u>OF INTEREST TO THE JUDGES:</u><br><u>YES/NO</u> |
| (3) | <u>REVISED.</u>                                    |

DATE

SIGNATURE

In the matter between:

**ANTONIO JACOBIE SNYDERS**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

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### JUDGMENT

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**MSIMEKI J:**

### **INTRODUCTION**

- [1] On 26 March 2015 the appellant brought an application for bail in the Vereeniging magistrate court. The application served before magistrate L Ferreira who refused it. The appellant then appealed the decision and the appeal now serves before me.
- [2] The appellant, in the magistrate court, was represented by Mr. Van Wyk while the State was represented by Mr. Kruger. The appellant, on appeal, was represented by Adv E Kilian SC (Ms. Kilian) while the respondent was represented by Adv H Creighton (Ms. Creighton).
- [3] Mr. A J Snyders, the appellant, testified when the application was brought. No witness was called to testify on his behalf. Constable Elsie Molina Moletsane was called as a witness for the state.
- [4] The parties agreed, and this was common cause, that the charges that the appellant faces are referred to in Schedule 6 of the Criminal Procedure Act 51 of 1977. This, because the appellant has previously been convicted of an offence referred to in schedule 5 and the offence that he now faces is a schedule 5 offence.
- [5] The magistrate refused the bail application on the basis that:
1. The appellant would again commit an offence listed in schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA)
  2. The court, by releasing the appellant on bail, would be placing his safety in danger.
  3. There was nothing abnormal in the appellant's evidence which justified his release on bail. The appellant's evidence, according to the magistrate, contained only the usual circumstances which, in his view, would not assist the appellant to discharge the onus which rested on the appellant.

[6] Ms. Creighton submitted that the court a quo had been correct when it refused the bail application while Ms. Kilian held a view contrary to that.

[7] It is noteworthy that the appellant has a previous conviction of murder which is a schedule 5 offence. He now faces two charges one of murder and the second of attempted murder. This has now resulted in the appellant having to face an offence which is listed in schedule 6 of the CPA.

[8] Bail applications of accused persons in court are regulated by section 60 of the CPA.

[9] Section 60(1) (a) provides that:

“(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 interests of justice so permit”.

In other words every accused is entitled to be released on bail as soon as the court is satisfied that, it indeed, will be in the interests of justice that such accused be so released.

[10] Section 60 (11) (a) provides:

“(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”.

Section 60 (11) (a) places the burden or the on an accused onus to satisfy the court by way of evidence, that there are, indeed, exceptional circumstances in his case which, “in the interests of justice permit his or her release”. This appears to be a heavier burden than the one which is prescribed by section 60 (11) (b).

### **THE ISSUE**

[11] The issue to be determined is whether the appellant has discharged the burden which rests on him in terms of section 60 (11) (a) of the CPA for him to be admitted to bail.

[12] Having said this, the question which immediately springs to mind is as to what these “exceptional circumstances” are. In **S v Bruintjies 2003 (2) SACR 575 (SCA) at 577f Shongwe AJA** said:

“what is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence”.

At 577I, the court said:

If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail”.

**Legodi J in S v D V & Others 2012 (2) SACR 492 (GNP) at [8]** found that cumulatively “ the fact that the state was subject to some doubt, the low risk pertaining to flight, the absence of likelihood of interference with state witness and the low risk of re-offending” constituted “exceptional circumstances”.

**In S v Rudolph 2010 (1) SACR 262 (SCA) at 266 g-h** the court again dealt with what exceptional circumstance are and reiterated that the applicant in a schedule 6 offence-bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release”. This, according to the court, involves the balancing” between the liberty interests of the accused and the interests of which”, society in denying the accused bail,

will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.

The court at 266 g-h further said that:

“Exceptional circumstances do not mean that ‘they must be circumstances above and beyond, and generally different from those enumerated’ in ss (60) (4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified”.

[13] Section 60 (4) of the CPA provides that:

“(4) 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 (my emphasis)
- (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.
- (e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or [sic]

[14] Having regard to the issue to be determined one has to determine whether the magistrate, indeed, erred in not having granted the appellant the bail that he needed.

[15] The appellant testified that he is a South African citizen with identity number [.....]. He was born on [.....]. He has a passport which he is prepared to surrender as part of the bail condition. He has no ties overseas as he has no

family member or property there. He was renting a property which is [.....] in Vereeniging when he was arrested. He testified that he could also live with his brother at [.....] Ormonde in Johannesburg should such a need arise. He is married and has two [.....] aged [...] and [...] years respectively with his current wife. He also has another [.....] aged [...] who was born prior to the marriage. The state did not dispute this evidence, instead, it conceded that the appellant has a fixed address which had been verified.

- [16] Constable Moletsana did not dispute the fact that the appellant, if released on bail, would stand his trial and that he is not a flight risk.
  
- [17] The appellant testified that he owns a registered company called Virtuous Tale (Pty) Ltd which removes rubbish from Public Works institutions such as courts, Police stations and hospitals. This evidence was not controverted by the state.
  
- [18] Constable Moletsane testified that she had taken statements from some of the eye witnesses and that she was still to take further statements from the remaining eye witnesses. She testified that she is the investigation officer in this case. The statements she had in the docket revealed that there was a bash at the Rust de Vaal Community hall where the deceased and his friends were playing music in his motor vehicle. The motor vehicle was stationary inside the yard of the community hall. The appellant arrived in his motor vehicle and parked next to theirs. The appellant played loud music with the boot of his motor vehicle open. The appellant was approached and requested to lower the sound of his music. This did not please the appellant who closed the boot of his motor vehicle and left, after he had promised to come back. He came back after one and half hours accompanied by his son who hit the deceased with the bottle which he had in his hand. The deceased tried to retaliate but failed because the appellant pulled out a firearm from his waist and shot him once therewith. The son is accused number 2 in the case. The complainant in the attempted murder charge, on seeing this, ran away. The deceased followed the complainant and shot him twice with the very firearm.

The complainant needs to be fed as he cannot eat on his own and is unable to use his hands.

[19] The appellant, in his evidence, indicated that he would plead not guilty to the charges on the basis that he had been defending himself. His further evidence was that he needed to be released on bail because he supported his family and his sick father. He also wanted to be released on bail because he needed to run his business which would go under unless he himself took charge of the running of the business. The business, according to him, has employed five people who would suffer if he was not released on bail.

[20] The appellant testified that he has a previous conviction of murder which is very relevant in so far as the present charges are concerned. He testified that he was convicted in 2009. The appellant was cross-examined on other previous convictions which the State contended he has. His answers regarding thereto were not that satisfactory. Exhibit "X1" was produced when the matter was argued. Save that the previous conviction of murder does not appear thereon the other previous convictions seem to be in line with the previous convictions appearing on exhibit "X1". The appellant indeed, has previous convictions.

[21] The appellant testified that he also needed to be released on bail because he was responsible for transporting his [.....] to school where they are involved in sport. His further evidence was that, like in the other murder case, he, in this case, handed himself in.

[22] A petition which is Exhibit "A", appearing on page 66 of the court record, has 311 signatures. The petition reads:

"WE THE COMMUNITY OF RUST-TER VAAL ARE DEEPLY CONCERNED OF THE HEINOUS CRIME THAT WAS COMMITTED BY MR ANTONIO JACOBS SNYDERS (ALIAS JAY-BY). WE THEREFORE URGE THAT THE LATTER'S CONSTITUTIONAL RIGHT MUST BE CURTAILED".

[23] The appellant, under cross-examination, conceded that the community would not accept him with open arms. He further conceded that the murder that he

had been involved in previously had something to do with the shooting with a firearm. The 357 revolver that had been used was his. He was then convicted and declared unfit to possess a firearm. He conceded that there was, indeed, an atmosphere of enmity between him and the community. Asked if he would be safe once released on bail he answered that he would be safe. He, however, when the same question was put to him indicating that he would not be safe, answered that he had no comment. Told that he would also not be safe if he were to go and live with his brother, he answered that he would not comment. He testified that he had forgotten to mention the fact that he had other previous convictions. This in, indeed, was very strange. This did not satisfy the court a quo. Informed that someone could fetch medicine for his sick father if he was not released on bail, he answered that he could not comment. He knows the deceased and the complainant in the murder and the attempted murder charges

- [24] It was submitted, on behalf of the respondent, that the appellant was a violent person. This was based on the previous murder case where a firearm had been used. The further submission, on behalf of the respondent, was that a firearm was again used in the current case where one person is dead and the other critically injured and cannot help himself. The presence of previous convictions listed in schedule 1 to the CPA in the list of his previous convictions, according to the State, showed and shows that the appellant does not deserve to be released on bail.
- [25] It was also submitted on behalf of the respondent that the fact that the community was up in arms in the sense that it found it necessary to voice its opinion regarding the conduct of the appellant as well as his concessions relating to his safety meant that it would not be wise to release the appellant on bail. Indeed, the appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.

[26] The court, in the final analysis, has to determine if the provisions of Section 60 (4) (a) – (e) have satisfactorily been addressed by the appellant for him to be entitled to bail.

[27] The court a quo found that:

1. for the purposes of the bail application it could not find that the offence had not been planned. To arrive at this decision one needs to deal with the merits of the case. For the purposes of the bail application, the court a quo did not have to make such a pronouncement as that was not its function.
2. the appellant failed to disclose the previous convictions that he has because he did not want to take it into his confidence and that he did not play open cards with it. The court, as a result, drew a negative inference against the accused.
3. the appellant, based on the evidence at its disposal, would stand his trial.
4. there was no evidence to show that his release on bail would disturb the public order or undermine the public peace or security
5. There was no evidence to show that the appellant would attempt to influence or intimidate witnesses if he were to be released on bail.
6. The appellant and his family would not be safe if he were released on bail.

[28] It was submitted, on behalf of the appellant, that his business would close down unless he were released on bail. It was further submitted, on his behalf, that he would live with his brother in Johannesburg if he were to be released on bail. This was to show that the appellant would be safe in Johannesburg. This, however, was controverted by the appellant himself under cross-examination when he said he could not comment and that the community, according to him, would not accept him with open hands. This demonstrates that he too realized how unsafe it would be if he were released on bail.

[29] Save for pronouncing that the offence was planned nothing has been tendered to show that the court a quo misdirected itself or committed an

irregularity when dealing with the bail application. It has not been shown that the court a quo's discretion was not exercised reasonably or properly.

[30] It is self-evident that the appellant has failed to show that exceptional circumstances which, in the interests of justice, permit his release exist. The provisions of section 60 (4) (a) have not been satisfied by the appellant who has previous connections and has conceded that all is not well between him and the community. His release on bail, in my view, would jeopardise his safety and that of his family. The fact that his business will have to close down unless he is released on bail cannot on its own be regarded as an "exceptional circumstance". The fact that the applicant in both cases handed himself in, in my view, and especially having regard to the facts of the case, is of no assistance to him.

[31] Section 60 (4) of the CPA clearly provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds referred to in the subsections of section 60 (4) are established. Evidence has demonstrated that the appellant has previous convictions which show that he has the propensity of committing schedule 1 offences. Evidence, has also demonstrated that his release on bail will jeopardise his safety and that of his family. The community is up in arms. This is borne out by its petition which is exhibit "A"

[32] On the basis of what I say above, it can therefore not be said that the appellant has shown that exceptional circumstances exist in his case which would show that the interests of justice permit his release. The appeal should fail.

### **ORDER**

[33] **I make the following order:**  
**The appeal is dismissed.**

**M.W MSIMEKI**  
**JUDGE OF THE GAUTENG**  
**DIVISION, PRETORIA**

**COUNSEL FOR THE APPELLANT:**  
INSTRUCTED BY:

**ADVOCATE E KILLIAN**

**COUNSEL FOR THE RESPONDENT:**  
INSTRUCTED BY:

**ADV H CREIGHTON**

DATE OF HEARING:  
DATE OF JUDGMENT:

30/07/2015