



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Case No: K/S 46/2012

Date Heard: 27/03/2014

Date Delivered: 25/04/2014

In the matter between:

THE STATE

V

DD

JUDGMENT – BAIL APPLICATION

KGOMO JP

1. On 27 March 2014 I convicted the minor accused, Mr DD, born on 15 August 1996, of the following offences:
 - 1.1 Count 1: The Rape of his sister (Ms M): Guilty as charged;
 - 1.2 Count 2: The Murder of his father (Mr D): Guilty as charged;
 - 1.3 Count 3: The Murder of his mother (Mrs C): Guilty as charged;
 - 1.4 Count 4: The Murder of sister (Ms M): Guilty as charged; and
 - 1.5 Count 5: Defeating the ends of justice: Guilty as charged.

2. Consequent upon these convictions the minor, his guardian (Mr Bennie Heckroodt) and his attorney, Mr Riaan Bode, immediately brought an application that he be admitted to bail pending sentencing. I dismissed the application and reserved my reasons, which now follow. The case has been postponed to 13–16 May 2014 for, what I would generically term, pre-sentencing reports by the State and the defence and to complete the sentencing phase. See **S v Le Roux and Others** 2010(2) SACR 11 (SCA) at para 35.
3. The case has, in view of the accused minor's age, been conducted in terms of s63 of the Child Justice Act, No75 of 2008 (the CJA), read with s154(3) of the Criminal Procedure Act, No 51 of 1977 (the CPA).
4. Section 25 of the CJA regulates the procedure to be followed when a child applies for his/her release on bail. It provides that:

"25. Release of child on bail. - (1) Chapter 9 of the Criminal Procedure Act applies to an application for the release of a child on bail, except for section 59 and section 59A, to the extent set out in section 21 (2) (b).

(2) An application for the release of a child, referred to in section 21 (3)(c), on bail, must be considered in the following three stages:

- (a) Whether the interests of justice permit the release of the child on bail; and*
- (b) if so, a separate inquiry must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount; and*
- (c) if after an inquiry referred to in paragraph (b), it is found that the child and his or her parent, an appropriate adult or guardian are—*
 - (i) unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail; or*
 - (ii) able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances."*

It is therefore evident from the construction of s25(1) of the CJA (above) that Chapter 9 of the CPA applies to bail proceedings involving minors, with two exceptions which are not relevant to the investigation before me.

5. Section 58 of the CPA stipulates that the bail of an accused person who has been released on bail shall endure, unless terminated under some provisions of the CPA, until a verdict is given by the Court in respect of the charge(s) to which the offence(s) in question relate(s). The section further provides that:

"58. Effect of bail. - The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60 (11) (a) or (b), as the case may be, and the court shall take into account—

(a) the fact that the accused has been convicted of that offence; and

(b) the likely sentence which the court might impose."

6. In terms of s 77(4) of the **CJA** a minor may not be sentenced to Life Imprisonment but a maximum sentence of 25 years may be imposed. At para 81 of the judgment (relating to the verdict) I found that:
"The murders were not only pre-meditated but were in fact planned and executed with the direct intent to murder."

7. In the circumstances s60(11)(a) of the **CPA** is applicable. This section provides:

"60. Bail application of accused in court.—(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.

(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."

8. In **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC) at para 76 the ConCourt held:

"76. Likewise I do not agree that, because of the wide variety of 'ordinary circumstances' enumerated in ss (4) to (9), it is virtually impossible to imagine what would constitute 'exceptional circumstances', and that the prospects of their existing are negligible. In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated. Under the subsection, for instance an accused charged with a Sch 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice. Other examples are readily to hand in the small body of case law that has already been established in the short period since the 1997 amendment came into operation on 1 August 1998. Thus, an otherwise dependable and charged with consensual sexual intercourse with a 15-year-old girl,

technically fall within the ambit of ss (11)(a). Yet a prudent judicial officer could find those circumstances sufficiently exceptional to warrant bail provided there were no other facts adverse to the grant. Schietekat on the other hand also falls under Sch 6 and ss 11(a) indecent assault on a child under 16 and previous convictions for the same offence), but in his case the test for exceptional circumstances produced the opposite answer. In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form. "

9. S 60(5) of the **CPA** sets out the factors which a Court may take into account, where applicable, in considering whether the grounds in s60(4)(a) have been established, in other words; the likelihood that the accused, if released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence. These factors are:

"(5) In considering whether the ground in subsection(4) (a) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the degree of violence towards others implicit in the charge against the accused;*
- (b) any threat of violence which the accused may have made to any person;*
- (c) any resentment the accused is alleged to harbour against any person;*
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;*
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;*
- (f) the prevalence of a particular type of offence;*
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or*
- (h) any other factor which in the opinion of the court should be taken into account."*

10. In an effort to persuade me to admit the minor to bail the defence intimated that he has been on bail since 03 September 2012 and attended his court appearances without fail; that he has a good support system in the form of his guardian, his guardian's wife and their children who are 22 and 27 years old. That Grey College, Bloemfontein, would not register him as a final matric student but Panorama Combined School in Jacobsdal is prepared to admit him. A letter to that effect, Annexure "C", has been furnished.

11. Mr Heckroodt testified in confirmation of the arrangement and the situation alluded to in para 10 (above). What concerns me is that Mr Heckroodt literally confirmed that the minor had unlimited access to the many firearms he (Mr Heckroodt) owns. The State produced a recent photograph showing the minor showing off his blesbok trophy that he hunted; with a powerful rifle in his hand. What is disturbing is that Mr Heckroodt was unaware of the photo which has been circulating in the social media, whereas the minor has been staying in his house since 07 April 2012. This is an indication that the minor lacks proper supervision or he does not subject himself to supervision or discipline.

12. I deem it imprudent to deal in detail with some of the reasons why I refused bail because I must maintain an open mind to enable me to impose an appropriate sentence later. I prefer to confine myself to the following comments made in the verdict judgment:
 - 12.1 In para 37 I state:

"37. Twelfth: If the minor reacted as described by his relatives, and also by the investigating officer and further when he testified in court then it would be fair to say of him the deaths of his family "left him cold"; indifferent. He saw his father sprawled and full of blood. He looks at him and walks past. Next he sees his mother prostrate and bloodied and adopts a similar attitude. His beloved younger sister of 14 years, who was heavily wounded, strains every sinew, evidently to summon help; even on the minor's own account to Pastor Otto ---, reaching out to him for help, was

pushed away. He says he was repulsed by her blood. How can a regular hunter be so blood-squeamish. He has his cellphone with him. He does not call an ambulance or the police or a relative. All he can think of is to change his T-shirt which was soaked in his sister's blood and drive some 10 km away purportedly to raise the alarm. I reject the minor's statement that his sister would have told him that she loved him. The circumstances militate strongly against such endearment."

12.2 In para 42 I said of the minor:

"42. Dr Fouchè testified that the .22 gunshot wounds caused instantaneous death. This must be so. Of immense significance is the evidence of W/O Phillemon Nhlapo. He is an expert on ballistics and attached to the Ballistic Section of the Forensic Science Laboratory of SAPS in Cape Town. He also attended the post-mortem examination with Capt Joubert conducted by Dr Fouchè. The evidence of the three are consonant where their fields of expertise converge or conflate. He testified that each one of the deceased were shot through his/her body with the lighter calibre Magnum .357 first and, when they were already prostrate, then executed with the heavy calibre .22 rifle; almost without exception through their heads. The following excerpts encapsulate it all:

"State Counsel: Yes. And then paragraph 8. Paragraph 8 contains the conclusions you reach as a result of what you observed of the wounds.===Yes My Lord.

Yes, you can then move to paragraph 8.1. --- 8.1 will read as follows: The wound mentioned in paragraph 5.1 was caused by the bullet fired with a downwards trajectory My Lord.

And just to remind ourselves Warrant Officer Nhlapo, this wound we see on photos 20 and 22 of exhibit "FF", is that correct?=== That's correct My Lord.

While we are on this particular wound, would this be consistent if somebody who is sitting and getting up from the sitting position when such a wound is inflicted?=== That's correct My Lord. The upper body of the person being exposed to the shooter, slightly bent into the shooter My Lord.

Court: Bending forward?===Forward My Lord.

Mr Cloete: And then you can move on to paragraph 8.2 and read it out for purposes of the record.===8.2: The wound mentioned in paragraph 5.2 was caused by the bullet fired from the right with a downwards trajectory My Lord.

And again, these are the wounds we see on photos 19 and 23 of exhibit "FF", namely the wound on the right side of [Mr D], is that correct?=== That's correct My Lord.

And you say this was also with a downward trajectory?=== That's correct My Lord.

Then you can move on to paragraph 8.3. === 8.3: The wounds mentioned in paragraph 5.3 was caused by a bullet fired from the left to the right My Lord.

Now what is important here, and this is the wound which we see on photo 24? === That's correct My Lord.

Of exhibit "FF". While we are on this particular wound. Is it possible that the shooter was standing up and the deceased was lying down when this particular shot was fired which caused this wound? === That's correct My Lord.

Yes. And then I would like you to move to paragraph 8.4. === 8.4: The wound mentioned in paragraph 6.1 and 6.2 were caused by a bullet fired from the back to the front My Lord.

Okay. And again we now know these were the bullets fired as recorded and the wounds recorded on photos 15 and 16 of exhibit "FF", is that correct? === That's correct My Lord.

When one looks at paragraph 8.5 can you just present your findings or your conclusion in this regard? This is now the wound as we know at the back of the head of [Mrs C]. We are at 8.5. === The wound mentioned in paragraph 6.3 was caused by the bullet fired from the back of the head of the deceased towards the front My Lord.

And this is the wound we see on photo 17 of exhibit "FF", is that correct? === That's correct My Lord.

Yes. Now is it possible that the deceased was already prone in a lying position when she was shot in this manner? === Indeed My Lord.

And then also – then you can move on to paragraph 8.6. === 8.6: The wound or the wounds mentioned in paragraph 7.1 and 7.2 were caused by a bullet fired with a downwards trajectory.

Okay. And these are the wounds we see in photos 3, 4, 5 and 6 of exhibit "FF", is that correct? === That's correct My Lord.

These are the wounds [in respect of] the deceased [Ms M]. And then also you can read out paragraph 8.7. === 8.7 read as follows; The wound mentioned in paragraph 7.3 was caused by the bullet fired from the back of the head of the deceased towards the front My Lord...

But again the question is, from your observations and from what you can recall from your observations. Is it possible that the deceased was already lying down when she was administered this particular wound? === That's correct My Lord". (Emphasis added)"

12.3 In para 67 I concluded:

"67. In my view the torturer wanted to achieve something; and **THAT** something on the evidence was to have sexual intercourse with the girl. The girl refused and defended her modesty. In consequence she was tortured, raped and murdered to prevent her from reporting to her parents that she was raped. Because the girl's parents would bear witness against the perpetrator they too had to be eliminated, and were. This is the most plausible motive for the murders. In the leading case on the relevance of motive for purposes of proving intention or identity **Innes CJ** held in **R v Khumalo and Nkosi** 1918 AD 500 at 504:

"The ordinary man does not perpetrate a grave criminal offence without a motive; and although it is not essential, nor always possible, to ascertain what it was, the matter is often of considerable importance. A crime for which no motive likely to affect the person charged can be assigned is difficult to bring home. So that the presence of such a motive is an element in favour of the Crown, and its absence an element in favour of the accused. Now it is seldom that direct evidence on the point, such as would be afforded by the accused's own statement, can be produced. In the majority of cases the probable existence or non-existence of motive must be deduced from external circumstances. And such circumstances may as a general rule be proved if they are relevant - that is to say if they are circumstances from which the presence or absence of the particular motive may be reasonably inferred. Thus, if a husband were charged with the murder of his wife, evidence that he had formed an adulterous connection with another woman would be admissible as showing a possible motive for the crime. On the other hand proof might be properly given of affectionate marital relations in order to negative motive."

12.4 On defeating the ends of justice I remarked in paras 69 and 70:

"60. Having regard to the conspectus of the entire evidence in the trial it is evident that the minor's most intractable concern was to give a plausible account of how his clothing came to be contaminated with his deceased sister's blood. Hence his irreconcilable and therefore materially conflicting reports that Ms M died lovingly in his arms and, self-contradictorily, that he pushed her away violently because he was nauseated as she was awash with blood. The latter part of the statement was meant to explain how his T-shirt that he discarded in his bedroom before he reported the incident to the police was torn.

70. The minor was given the benefit of the doubt from 06 April 2012 until 12 August 2012 when Col De Waal stopped the charade by charging the accused minor with the offences listed in the indictment, after a full, thorough, scientific and fair investigation was carried out. From 12 August 2012 nothing said or done by the minor in respect of the defeating the ends of justice count can be held against him as he was an accused and had the right to remain silent."

13. From what is stated in paras 12.1 – 12.4 I am prepared to say that is the only side of the minor accused that I know. I do not wish to go further than to say he is unpredictable. I will know him better after receipt of the pre-sentencing reports and the evidence in mitigation and aggravation that lie in the future. I am satisfied that the minor has not presented exceptional circumstances to show that it would be in the interests of justice to release him on bail pending sentencing.

14. The minor has been remanded in custody to the Kimberley Correctional Service where Mr Phillip Phayane described the facilities as follows:

- "1. *I am the Area Coordinator, Development and Care, Kimberley Management Area. I am responsible for the spiritual care, social work services, health care services, education and training of all offenders.*
2. *Kimberley Correctional Centre currently has facilities inter alia for the detention of youth detainees. The remand youth detainees are kept separate from the convicted youth detainees. The facility also caters for the different age groups. In high profile cases the decision is also taken by our department to secure proper detention to prevent victimisation.*
3. *The current departmental policy on remand detainees is that no schooling is provided to the detainees. However, facilities are provided for those detainees who are willing to study for private schooling, like writing examinations.*
4. *Different remand youth detainees are kept separate, like the age group 18 to 21 years are kept separate. If an offender is younger than 18 years, the provisions of the Child Justice Act (Act 75 of 2008) will be applicable and such a detainee will be kept separate from the age group of 19 to 21 years."*

It is for the foregoing reasons that I dismissed the minor's application to be admitted to bail pending sentencing.

F DIALE KGOMO
JUDGE PRESIDENT

Northern Cape Division, Kimberley

On behalf of the State:

Assisted by:

Instructed by:

Adv J J Cloete

Adv Q Hollander

Director Public Prosecutions

On behalf of the Accused:

Assisted by:

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Thereafter:

On behalf of the Accused:

Instructed by:

Mr R Bode (as from 09/12/2013)

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