

REPUBLIC OF SOUTH AFRICA

22/02/13



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: A 82/2013

In the matter between:

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22/02/2013

SIKHETO ALBERT NKUNA

Appellant

and

THE STATE

Respondent

JUDGMENT

MAGARDIE AJ

1. This is a bail appeal emanating from the Mamelodi Regional Court against the latter Court's refusal to admit the Appellant on bail on 25 October 2012.
2. The Appellant stands accused of murder as contemplated in the provisions of Schedule 6 of the Criminal Procedure Act 51 of 1977 as amended (the CPA).
3. It appears from the record that the Appellant found the deceased dead with a gunshot wound in the head in the bathtub. The evidence of the investigating officer was that the crime scene was tampered with; however he could not tell if the person who tampered with the scene was the Appellant or otherwise. Such could only be established with forensic evidence which was not yet in hand.
4. The Appellant presented evidence by way of a sworn affidavit in which he, *inter alia*, denies liability for the crime. He pleaded for the Court *a quo* to release him on bail because, according to him, he intended to make funeral arrangements for his deceased wife and that he had to take care of his 9 year old daughter. It is apposite to mention that the Appellant is employed as a police officer for the past 27 years and is apparently stationed at Wierdabrug police station.
5. It appears from the record that the Court *a quo* determined that the charge which the Appellant was facing was one of premeditated murder, thus falling within the ambit of Schedule 6. That being the case, it is trite that in terms of the provisions of section 60(11)(a) of the CPA an Applicant for bail for a Schedule 6 offence is required to prove that there exists exceptional circumstances warranting his release on bail pending the outcome of his trial.

Therefore, the onus rests on the accused to persuade the Court that it is in the interest of justice that he should be released on bail by demonstrating such circumstances that are considered to be out of the ordinary.

6. The affidavit that the Appellant presented in the Court *a quo* in support for his application for admission on bail, fell short of dealing with the requirements contemplated in section 60(11)(a). One observes the regurgitation of the provision of section 60(4)(a) to (d) in the Appellant's affidavit. I must state that, although during cross examination of the investigating officer the Appellant's representative dealt with the strength of the prosecution case, such was not covered in the Appellant's affidavit.
7. The investigating officer however, testified that he did not think that the Appellant would evade his trial or endanger the safety of the public or commit any other offence or influence witnesses.
8. The investigating officer conceded that, without the forensic evidence and DNA results, it could not be determined whether the Appellant was the one who committed the crime. He went further to state that the bulk of the evidence that would be presented against the Appellant would be specialist witnesses. It also appears that the prosecution intends to present evidence of the history of conflict between the deceased and the Appellant to prove motive for the crime.
9. The question that has to be asked is, whether the totality of the evidence that was presented before the Court *a quo* was sufficient to establish the exceptional circumstances as contemplated in section 60(11)(a). Inasmuch as an accused person should be presumed innocent until proven guilty, such is

not a pre-trial right but a right which an accused person enjoys during trial.¹ The Appellant is required to present evidence of the existence of exceptional circumstances on a balance of probabilities. The incident of exceptional circumstances should not be considered in isolation from all the relevant facts *"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"*.²

10. In **S v Botha & Another**³ it was held that proof by the accused that he will probably be acquitted on trial can serve as exceptional circumstances. As already alluded to hereinbefore, although in his affidavit the Appellant did not contest the strength of the prosecution case against him, his legal representative dealt with the issue during cross-examination of the investigating officer.

11. In **S v Kok**⁴ it was said that *"in the context of section 60(11)(a) of the Act the strength of the State case has been held to be relevant to the existence of 'exceptional circumstances' ... There is no doubt that the strength (or weakness) must be given similar consideration in determining where the interests of justice lie for the purpose of section 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima*

¹ S v Mbaleki & Another 2013 (1) SACR 165

² S v Bruintjies 2003 (2) SACR 575 at paragraph 6

³ 2002 (1) SACR 222 SCA

⁴ 2003 (2) SACR 5 SCA at paragraph 15

facie view as to its strength or weakness the accused must receive the benefit of the doubt".

12. I am of the view that, considering that there is no direct evidence linking the Appellant to the crime committed and that, at the time of the bail application, there was also no forensic evidence linking the Appellant to same, it follows that it may well be that the prosecution case against the Appellant is frail. That is not to say that a conviction may not follow based on circumstantial evidence. However, such is a matter for the trial court to decide. Regard must also be had to the fact that it was not contested that the Appellant was the one who called the police and also handed his firearm over to the police.

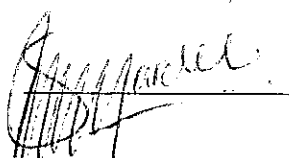
13. In view of the foregoing I am of the view that the Magistrate should have found that exceptional circumstances existed and that it was in the interest of justice that the Appellant should be admitted on bail. The Magistrate also considered that the evidence that the prosecution relies upon was mainly circumstantial.

14. In the result, the appeal is upheld and the Court *a quo*'s decision of refusing to admit the Appellant on bail is set aside and the following order is made:

14.1 Bail is fixed in the amount of R10 000.00;

14.2 The Appellant is ordered not to interfere with State witnesses; and

14.3 The Appellant is ordered to report to the Mamelodi police station every Monday and Friday between 06h00 am and 18h00.


MAGARDIE AJ