

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. A24/2012

In the appeal between:

MORAKE JOSEPH RAMAISA

Appellant

and

DIE STAAT

Respondent

CORAM: JORDAAN, J *et* MHLAMBI, AJ

JUDGMENT: MHLAMBI, AJ

HEARD ON: 16 APRIL 2012

DELIVERED ON: 3 MAY 2012

[1] This is an appeal against the refusal of the Magistrate to release the Appellant on bail pending his trial. The Appellant, a schoolteacher, is charged with the crime of the murder of his deceased wife.

[2] On the 21 September 2011, the matter was set down for a formal bail application, the state being of the view that the charge fell under

the ambit of schedule 6 of the Criminal Procedure Act, 51 1977 as amended. The court ruled that it was a schedule 5 offence after hearing evidence. The court then heard further evidence to determine whether the Appellant should be granted bail or not.

[3] On the 30 September 2011, the court refused to grant bail.

Briefly, the Magistrate's reasons are as follows:

- i) The threat made by the appellant against the child;
- ii) The offence was very violent and absolutely gruesome murders were prevalent in the Welkom area;
- iii) The crime has led to a feeling of shock and anger in the community;
- iv) The release of the appellant can shock the public trust in the justice system;
- v) The two children will be in a vulnerable position with regard to the appellant and be manipulated by him to change or try to change the evidence;
- vi) The Appellant's inclination to try and commit suicide, even

though it came as an afterthought.

[4] The court *a quo* found the following in favour of the Appellant:-

- i) The Appellant does not show an inclination to commit Schedule 1 offences;
- ii) The Appellant is not a flight risk;
- iii) The investigation is still not finalised, forensics results are still outstanding, the finalisation being a time consuming process;
- iv) The release of the Appellant although it would not lead to public violence his safety could not be guaranteed;
- v) There was no evidence in support of section 60 (4) (d): paragraph 10-15 on page 153 of the record.

[5] Both counsel for the Appellant and the Respondent are at one that only the evidence of the first bail application, and not the second, which was launched after the appeal was filed, should be considered. I agree with this approach.

[6] The issues in this appeal are as follows:

- i) Has the Appellant convinced the Court on a balance of probabilities that the interest of justice do not require his detention;
- ii) Has the Magistrate exercised her discretion to grant bail wrongly;
- iii) If so, is this Court sufficiently persuaded that this is so, without imposing its view on the court *a quo*.

[7] Section 60(4) of the Criminal Procedure Act 51 of 1977 provides as follows:

“(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;
- (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 circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;”

[8] Section 60(9) of the Act provides as follows:

“60(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

- (a) the period for which the accused has already been in custody since

his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into account."

- [9] In an appeal against the refusal of the bail, it should be stressed that no matter what the Appeal Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail, exercised that discretion wrongly. **S v BARBER** 1979 (4) SA 218 (D).

[10] On page, 150 and 151 of the judgment the Court says:

“There is a lot of things the court can do if the evidence is there, but there is very little the Court can do if there is no evidence. Every accused has the right to come to court and ask the Court to be released, that is true. And the Court even has the right, like the Court did in this case, to call extra witnesses if the court feels there is not enough before court to make a decision! It is therefore evident that the Court “felt it did not have enough before it”, when it decided to call Machitje and Khanyane to testify in terms of section 60(3) of the Act.”

[11] On page 152, paragraphs 15 – 25, the Court quotes section 4, subsection (c) *in toto* and says:

“.. the court cannot say that any of those things can happen, there was no evidence really in that regard.”

[12] The court then refers to the evidence of Ms Khanyane “I can understand that Ms Khanyane had felt threatened,”. See page 152 –

153, paragraph 22 – 7. The court finds that “she is a grown up person, she’s not a child. That is for the court the difference between section 4(a) and section 4(c). These children are for all intents and purposes, the only witnesses of what happened that evening and one of them was already threatened”.

[13] Counsel for Respondent admitted during argument and in response to the Court’s question that the learned Magistrate relied on section 60(4)(a) and (c) of the Act in refusing to grant bail.

[14] On page 101, paragraph 10 – 15, the prosecutor addresses the Court as follows:

“The State case as well as the defense case, has already been closed but in terms of section 63 of the Criminal Procedure Act, the court felt that it does not have enough evidence to come to a conclusion and instructed the state to call upon the domestic violence clerk, your worship, like I indicated...” Her evidence is captured on page 107 paragraphs 10 – 15. “.... So lyk my die hoofdoel dan vir daai aansoek was maar net dat hy moet ophou vloek, sy was meer bekommerd oor die vloek as die aanranding?... Ja, edelagbare”.

[15] In the light of the above, the only inference to be made is that, the evidence of the two witnesses clarified the doubt that the Magistrate had in granting the bail or not.

“Now when you look at the Criminal Procedure Act, at section 60(c), sub section 4 and there is 4, 5, 6,7,8,9 and 10, there are a, 4, nearly 5 pages of things that the Court can take into consideration when the Court has to make a decision whether it is in the interest of justice.”

Having quoted sub-section 4(a), the Court goes on

‘The state does not have to prove that it will happen, it must just be probable’.

[16] On page 152, paragraph 8-12,

“Just like that, the Court cannot prove to the defence, that anything will happen if the accused is released. The threat against that child was

made and for that reason, and one of the reasons, the court does not think that the accused should be released, it will not be in the interest of justice”.

[17] The evidence surrounding the threat to the child was led before the Court acted in terms of section 60(3) of the Act. This section is to the effect that if the court is of the opinion that it does not have reliable or sufficient evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the Court.

[18] It was therefore unnecessary for the Court to invoke the provisions of section 60(3), as it could have refused the application merely on the suggested threat of the child if the court believed in the credibility and/ or reliability of the Police witnesses. Therefore, to rely on the latter factor to refuse to grant bail is very opportunistic.

[19] It is quite evident that the Court misdirected itself and failed to grasp

the import of section 60 of the Act. The “five pages of things that the Court can take into consideration” must be read and interpreted correctly in order to make a proper analysis and evaluation of the evidence.

[20] It is trite law that bail has to be granted except where this was not in the interest of justice. See **S v SWANEPOEL** 1999 (1) SACR 311. Section 60(4) sets out the grounds that would make an accused ineligible to be released on bail. Sections 60(5); 60 (6); 60(7); 60(8) and 60(8)(A) merely set out the factors which a Court considers whether the grounds in subsections 4(a); 4(b); 4(c); 4(d) and 4(e) are established.

[21] The Court in terms of section 60 (9), in considering the question in subsection (4) shall decide the matter by weighing the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody, taking into account the factors set out thereunder. These factors are clearly in favour of the appellant. The court failed to apply its mind as to the contents of this subsection

and accordingly misdirected itself. On page 153 paragraph 18-25, the Court quotes section 60(4) (e) in an attempt to justify the evidence of the woman from the ANC Women's League. This attempt is futile as this subsection has no application in the present case and as she had also found. It refers to exceptional circumstances, which are not applicable here. Consequently calling this witness was unnecessary.

[22] It is clear to me that the Magistrate is "clutching at straws" in order to arrive at the conclusion she did. It is further evident that on her dealing with section 60 of the Act, that she had embarked on a system of elimination of the grounds and factors which might or might not be applicable. This selective reasoning led her to quoting and interpreting the sections out of context and incorrectly.

[23] The word "probable" in section 60(4) above is defined as "capable of being proved, demonstrable, moveable, having the appearance that may reasonably be expected to happen".

“Likely” is defined as “seeming as if it would happen or prove to be as stated”. See the shorter Oxford English Dictionary on Historical Principles: Prepared by William Little: 3rd Edition: Volumes 1 and 2.

[24] I opine that the cross – examination of the appellant, despite its aggressive nature, did not reflect badly or portray him in a bad light. He concedes that he initiated the interdict to stay the burial as he wanted to attend the funeral and not manipulate the system.

[25] What stands out clearly in his evidence is his denial that he will manipulate the children, his concern for the welfare of the children: their accommodation, transport to school, education and safety.

[26] On page 51, paragraph 5 – 10, the Prosecutor asks:

“Now, I, you know I liked your expression at one stage when you testified, after I commenced my cross – examination, you said: “It is in the interest if my children to be at school”, is that correct? You said

that? Yes, I did.”

[27] It is interesting to note that the prosecutor never pursued this matter any further. I am therefore convinced that the Magistrate never considered the provisions of section 60(9) in coming to her conclusion. It is also evident that it was opportunistic to rely on the untested evidence of the police in respect of the threat to the minor child, as she was in doubt as to her decision even after the State and the accused closed their cases.

[28] What remains to mention is that from the onset, the Appellant never denied to the Police that he could be responsible for her death. His legal representative advised the Court (despite their refusing to answer questions about the “merits”) at the inception of the bail application, that their defense was self - defense. It is clear to me that the evidence on record militates against the Appellant planning or wishing harm to his children.

[29] I am therefore of the considered view that the Magistrate overlooked

some important aspects in this matter, justifying a Court on appeal to interfere with that decision. See **S v BRANCO** 2002 (1) SACR 531.

ORDER

[30] Accordingly, I make the following order:

30.1 The appeal is allowed and the Magistrate's order refusing bail is set aside.

30.2 Bail is fixed in the amount of R10 000.00

30.3 The appellant shall refrain from communicating with any witnesses.

30.4 The appellant shall not leave the area of Riebeeckstad, Welkom without the prior leave of the investigation officer.

J. J. MHLAMBI, AJ

I concur.

A. F. JORDAAN, J

On behalf of the appellant:

Adv. I J Nel

Instructed by:

Symington & De Kok

BLOEMFONTEIN

On behalf of the respondent:

Adv. M Strauss

Instructed by:

The Director: Public Prosecutions

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