

<i>Reportable:</i>	YES/NO
<i>Circulate to Judges:</i>	YES/NO
<i>Circulate to Magistrates:</i>	YES/NO
<i>Circulate to Regional Magistrates:</i>	YES/NO

**IN THE HIGH COURT OF SOUTH-AFRICA
(NORTHERN CAPE DIVISION)**

KIMBERLEY

CASE NO.: CA&R 13/07

DATE HEARD: 19 -02-2007

DATE DELIVERED: 23-03-2007

In the Bail Appeal of:

EDEN HARMSE

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT: BAIL APPEAL

MOLWANTWA AJ:

1. This is a bail appeal pending the determination of appellant's trial on a charge of murder. The matter came before me on 19 February 2007. On 20 February 2007 after hearing argument, I

then made following order upholding the appeal of the appellant.

“1. Application of the appellant to be admitted for bail pending determination of his trial is granted.

2. *The appellant is released on bail of R5 000, 00 (Five thousand rand) on the following conditions:*

2.1 *He should not interfere with any State witness, including his son and his father-in-law;*

2.2 *He should not threaten, intimidate and or communicate in any manner with any State witness including the two mentioned in paragraph 2.1 above;*

2.3 *He should not come or be found in Kimberley pending the determination of his trial except on the specific days and times he appears in the Court;*

2.4 *He should report every Monday, Wednesday and Friday between 06h00 and 18h00 at Welkom or Jagersfontein Police Stations. Jagersfontein during the week and Welkom during weekends; and*

2.5 *He should not leave Welkom or Jagersfontein without the permission of the Investigation officer: Inspector Cilliers. Should he wish to leave the area(s) he should notify the Investigation Officer 24hrs prior to his departure;*

3. *Should he fail to keep any of the conditions specifically mentioned in paragraph 2.1 – 2.5 supra and other normal bail conditions a warrant of arrest will be authorized in this respect for immediate issue and execution and will forfeit his bail money.*

Additional conditions

- 1. The appellant must hand over all passports, visas to the investigation officer; and**
- 2. The appellant must hand over any firearm that he possesses to the investigation officer.”**

2. The appellant’s bail application was heard in the Magistrates court. The appellant gave evidence first .It was for him to satisfy the Magistrate that the interests of justice permitted his release on bail as set out in 60(11) (1) of the Criminal Procedure Act 51 of 1977 (“the Act”) which provides *inter alia*:

“(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.”

(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 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*
- (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 a 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 a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail*

system;

(e) *where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or*

(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;*

(b) *in Schedule 5, but not 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, adduce evidence which satisfies the court that the interests of justice permit his or her release. ”*

3. It is a settled principle that a court hearing a bail appeal may only interfere with a Magistrate's exercise of his/her discretion refusing to admit an accused to bail if the Court is satisfied that such discretion was wrongly exercised. See **Hefer J** (as he was then) whereat he made the following pronouncements in **S v Barber** 1979(4) SA 218D at 220 E-G.

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this 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.”

See also **S v Branco** 2002(1) SACR 531(W) and cases cited at 533i.

4. In his Heads of argument and orally before me Mr. Van Heerden argued that:

4.1 The Magistrate found that the offence was a schedule 6 offence which meant that the appellant had to show that *exceptional circumstances* existed for him to be released on bail, which is not the correct approach. This, he submitted was a schedule 5 offence as also indicated and argued by the prosecutor during the bail hearing;

4.2 The Magistrate found that the appellant had to satisfy cumulatively all the factors mentioned in section 60(4) a-e of the Act before an accused could be released on bail, which he submitted was not the correct interpretation.

5. Section 60(11)(a) of the Act provides that where the accused is charged with an offence which falls within Schedule 6, he carries the burden of satisfying the court on a balance of probabilities that “*exceptional circumstances exist*” which permits his or her release on bail, in the interest of justice. One of the offences listed in Schedule 6 is murder, premeditated and/or planned. The burden of proof is ostensibly no different from that which is applicable in terms of Schedule 5 offences.

See **S v Botha en ‘n Ander** 2002(1) SACR 222 (SCA) at 230e-f.

6. In contrast section 60(11) (b) of the Act provides that where the accused is charged with a Schedule 5 offence the *onus* lies with the State. The ordinary burden of proof that the interest of justice would be best served by the continued detention of the accused remains with the State until such time as it has shown the offence with which the accused is charged to be one that falls within Schedule 5. The State may discharge this burden by giving a full and proper description of the alleged offence in the charge or by leading evidence or by resorting to a certificate from the Director of Public Prosecutions ("*DPP*") in terms of section 60 (11A) of the Act.
7. It is then open to the accused to challenge the evidence or certificate from the DPP by himself leading evidence to counter it or cross-examining the State witnesses at the bail hearing with a view to show what the nature of the alleged offence is. Schedule 5 includes the offence of murder but not planned or premeditated.
8. I highlight and refer to these two Schedules in order to determine whether the Magistrate indeed adopted the wrong approach in finding that this murder is a Schedule 6 offence and therefore the appellant bore the burden to prove that exceptional circumstances existed justifying his release on bail.

9. Section 60(11) (b) of the Act in respect of Schedule 5 offences is distinguishable from 60(11) (a) in respect of Schedule 6 offences in that while the burden of proof is placed upon the accused to show that he or she is entitled to bail, he or she is not required to discharge that burden by proving the existence of *exceptional circumstances*.

A bail application under section 60(11) (a) is more invasive of the accused's right to liberty than under section 60(11) (b). See **S v Dlamini et al** 1999(2) SACR 51 (CC) at 85f-g.

10. Mr. Bagananeng for the State has argued that although this was not argued in the Magistrate Court, there was a history of violence by the appellant against the deceased which indicated that the murder *in casu* was planned or premeditated. This argument however cannot hold water in these circumstances because the prosecutor in the bail application who was privy to the contents of the docket and all state witnesses' statements submitted that it was a Schedule 5 offence. Nowhere, in his opening address and closing address did he refer to the murder being premeditated or planned. Nor could this be discerned from the record before this Court.
11. I am of the view that the evidence at my disposal indicates that

this murder is one of the offences specifically mentioned in Schedule 5. See **John Van Der Berg** in his book titled ***Bail: A Practitioner's Guide***, second edition, 2001, 69. The Magistrate accordingly erred in finding that this murder was a Schedule 6 offence and therefore that the appellant was burdened with the *onus* to prove *exceptional circumstance* to be released on bail. I am therefore at large on the strength of **S v Barber** *supra* to undertake my own assessment of the evidence and come to a conclusion whether the appellant was entitled to be released on bail or not.

12. The evidence showed that the appellant was a family man and was married to the deceased. He has two minor children aged 13 and 5 years, who are in the custody of their grandfather. The appellant is also the legal guardian of two other children (his late brother's), one doing second year engineering at Kathu and the other is a first year student at a tertiary institution in Roodepoort. He had been employed by Goldfields Development at Jagersfontein and Gariepdam in the Free State until his arrest. He earned a gross salary of between R20 000, 00 and R35 000, 00 per month. He has no fixed property in the Northern Cape. He is staying with his mother in Welkom in the Free State. He denied the allegations against him and intends to plead not guilty at his trial.

13. During his evidence he refused to answer any questions on the charges, after been warned of his rights by the Magistrate and on the advice of his counsel, because of the fear of self incrimination.
14. The State led evidence through the investigation officer. During cross-examination he could not substantiate his fears that the appellant will intimidate or influence the state witnesses or that he would jeopardize the administration of justice if released on bail. He could not say that the appellant was a flight risk; that he would not stand trial or would commit a Schedule 1 offence.
15. I have considered all the factors in s60(4)(a-e) of the Act mentioned above (para 3) and have weighed the interests of justice against the appellant's right to freedom and in particular the prejudice he is likely to suffer if he is to be detained in custody until this matter is finalized. I am unable to agree that these factors individually or cumulatively raised the probability that the appellant would act in a manner inimical to the State case. There was a complete absence of any substantiated allegation that the appellant will intimidate any state witness. To the contrary there was fear that he, the appellant, would kill himself which he emphatically denied.
16. What was clear on record, but was overlooked by the

Magistrate, was that there was no evidence that the appellant had attempted to influence any witnesses including his son and father-in-law prior to or after his arrest. The appellant had undertaken under oath that he would not make contact with them if released. The conclusion that the appellant is a danger to himself and will not desist from contacting his children is devoid of factual support. As a possibility it was no more than speculative.

17. The appellant is working and the sole bread-winner for his family including his minor children. He has committed himself not to have any contact with them but to continue to maintain them. He is not staying in Kimberley any more. Even before this incident he had been staying in Welkom in the Free State whereas the state witnesses stay in Kimberley in the Northern Cape. The prosecution has already formulated a charge of murder against him. There are no investigations outstanding apart from the DNA results from the forensic laboratory. The appellant does not have a passport or visa. In the circumstances the interests of justice, considered in the context of section 60(4) (a-e) of the Act, and taking into account his personal circumstances, lean in favour of the appellant to be granted bail.

It is for these reasons that I made the order in para 1 *supra*.

B C MOLWANTWA

ACTING JUDGE

NORTHERN CAPE DIVISION

Date heard:	19-02-2007
For Applicant:	Adv Van Heerden
For Respondent:	Adv Baganeneng
	On behalf of Director of Public Prosecutions, Kimberley