

REPUBLIC OF SOUTH AFRICA

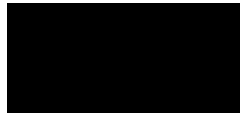


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

23 April 2024

DATE



SIGNATURE

CASE NUMBER: A32/2024

In the matter between:

TSHITETETE, GOODWILL NTSHEDEDZENI

Appellant

and

THE STATE

Respondent

Coram: DOSIO J

Heard: 19 April 2024

Delivered: 23 April 2024

ORDER

1. The appellant's application for bail is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal by the Magistrate at Kagiso to grant bail to the appellant pending his trial.
- [2] The appellant is charged with two counts of assault with intent to do grievous harm.
- [3] Bail was refused by the Court a quo on 14 November 2023.
- [4] The court a quo dealt with this matter as a schedule five offence. There is no basis for the Court a quo to have dealt with it in this matter. The two charges of assault with intention to do grievous bodily harm do not dictate that this matter is a schedule five offence, accordingly, the bail application should have been dealt with as an opposed bail application outside the realm of schedule five. Both counsel confirmed same during the hearing of this bail appeal.
- [5] The State initially charged the appellant with an additional charge of violating a protection order, however, this charge was subsequently withdrawn by the State.

Evaluation

- [6] The following are common cause:
- (a) the appellant and the complainant are mother and son.
 - (b) the mother of the appellant obtained a protection order against the appellant on 14 April 2022.
- [7] Even though this matter does not fall within the ambit of a schedule five offence, the provisions of ss60(2A), (2B), (4)-(9) of the Criminal Procedure Act 51 of 1977 ('Act 51 Of 1977') still apply. These subsections must be construed consistently with s35(1)(f)

of the Constitution, which guarantees the right of an arrested person ‘to be released from detention if the interests of justice permit, subject to reasonable conditions’.

- [8] In the matter of *S v Smith and Another*,¹ the Court held that:
 ‘The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby’²
- [9] In the matter of *S v Dlamini*³ the Constitutional Court held that:
 ‘...The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.’
- [10] In terms of section 65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.
- [11] This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant the appellant’s release.
- [12] The appellant is 24 years old and a South African citizen. He has no previous convictions. He resided at 10894 Kagiso extension 6 prior to his arrest. He has been residing at this address with his domestic partner since 2021. He was in his final year of studying towards a Bachelor of Administration at the University of Limpopo. He has a three-year old son. He was self-employed as a driver for Bolt and earned between R2000 to R3000 per month. His license has subsequently been suspended. He does not have any family outside the Republic of South Africa and he does not possess any travelling documents. He is able to pay R1000 bail.
- [13] The respondent, in opposing the granting of bail, filed the affidavit of the investigating officer, sergeant Susan Mamokota Suzianne Mohapi and led the viva voce evidence of the complainant, namely, Ms. Mabel Tshitete (‘the appellant’s mother’).

¹ *S v Smith and Another* 1969 (4) SA 175 (N)

² *Ibid* page 177 para e-f

³ *S v Dlamini* 1999(2) SACR 51 (CC)

[14] The following factors are of concern to this Court, namely:

- (a) the appellant's mother testified in the bail application and stated that she had to take out a protection order against the appellant, due to the continued harassing of herself and her son, who is the appellant's 13-year old brother. It is alleged by the appellant's mother that it is the fourth time that the appellant has tried to kill her and her son. On 16 September 2023 it is alleged that the appellant hit his mother on the forehead and on the right eye with an axe. This assault ceased as the community were able to break open the house and rescue the appellant's mother and his brother. Although the medical J88 report states that the appellant's mother told the doctor that she was hit with a stick, it is common cause that the appellant and his mother were fighting over an axe when the community entered and liberated the appellant's mother. Whether it was a stick or an axe, the fact remains that the appellant's mother sustained a 5cm laceration on the left eyebrow.
- (b) the appellant's mother also stated that on 16 September 2023 she saw the appellant pointing a knife at her son's stomach.
- (c) the protection order that was granted on 11 April 2020 states at paragraph five and six that the appellant has threatened to kill her on previous occasions.
- (d) there is a petition which has been signed by 153 community members who support the assertion that the appellant is dangerous.

[15] Whilst the strength of the State's case is an important consideration, it is not the only factor which a court should consider in determining whether to grant or refuse bail. It is trite that further considerations as stipulated in ss60(2A), (2B) and (4)-(9) of Act 51 of 1977 must be considered cumulatively.

[16] During the course of the bail proceedings the appellant did not testify. An affidavit was filed in support of his bail application.

[17] In the matter of *S v Bruintjies*,⁴ the Supreme Court of Appeal stated that:
 '(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel.'⁵

⁴ *S v Bruintjies* 2003 (2) SACR 575 (SCA)

⁵ *Ibid* page 577

- [18] Although this Court cannot draw a negative inference from the appellant proceeding by way of affidavit, the fact remains that he could not be cross-examined on the fact that he never received the protection order whilst he was in Cape Town. He could also not be cross-examined about the fact that the community who signed the petition regard him as dangerous and do not want him to be granted bail.
- [19] Section 60(2A) (b) of Act 51 of 1977 states that:
 ‘The court must, before reaching a decision on the bail application, take into consideration...
 (b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety’.
- [20] The appellant’s mother has expressed her view that she does not want the appellant to be released on bail.
- [21] Section 60(4)(a) of Act 51 of 1977 states that:
 ‘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, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;’
- [22] Section 60(5) of Act 51 of 1977 states that:
 ‘(5) In considering whether the grounds in subsection (4)(a) have 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 a person against whom the offence in question was allegedly committed or any other person;
 (c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other 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—
 (i) offences referred to in Schedule 1;
 (ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or
 (iii) an offence referred to in—
 (aa) section 17(1)(a) of the Domestic Violence Act, 1998;

- (bb) section 18(1)(a) of the Protection from Harassment Act, 2011; or
- (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, 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—
 - (i) referred to in Schedule 1;
 - (ii) against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or
 - (iii) referred to in—
 - (aa) section 17(1)(a) of the Domestic Violence Act, 1998;
 - (bb) section 18(1)(a) of the Protection from Harassment Act, 2011; or
 - (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under correctional supervision, day parole, parole or medical parole as contemplated in sectionv73 of the Correctional Services Act, 1998; or
- (h) any other factor which in the opinion of the court should be taken into account.’

[23] With reference to s60(5)(a) to (g) of Act 51 of 1977, it is evident from the viva voce evidence of the appellant’s mother, that the appellant has demonstrated a degree of violence towards her and her son, not only on 16 September 2023, but also on previous occasions. It is further alleged that the appellant threatened to cut up the appellant’s mother into pieces, burn her house and to destroy evidence. It is clear to this Court that the appellant harbours resentment towards his mother as she has excluded the appellant from claiming from the estate of his father. It is further clear that there is an additional charge of assault in respect to the appellant’s brother, who was in a domestic relationship with the appellant.⁶

[24] In terms of s60(6)(b) of Act 51 of 1977, this Court finds that the appellant has no fixed property as he lives with the family of his partner.

[25] Section 60(8A) of Act 51 of 1977 states that:
 ‘(8A) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely—

⁶ see section 1 of The Domestic Violence Act 1998 which states that the definition of ‘domestic relationship’ includes ‘(d) they are family members related by consanguinity, affinity or adoption.’

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;’ [my emphasis]

[26] In this regard, 153 people have signed a petition. These people do not appear to gain from the inheritance of the appellant’s father, therefore, they must have signed this petition due to the harassment of the appellant in their community. To ignore this would not be in the interests of justice, especially since it is due to the community’s intervention on the last incident, that the house was opened by force and the appellant’s mother and her son were saved.

[27] This Court does not believe that releasing the appellant on bail, with conditions, will deter him from having contact with his mother again. The appellant failed to comply with a protection order. Whether the appellant received the protection order or not, the fact remains that it was obtained on 11 April 2022 and on 16 September 2023 he allegedly assaulted his mother. Even if this court imposes any conditions, there is no guarantee that he will comply with those conditions.

[28] It is clear that due to the familiarity between the appellant, his mother and his brother, should the appellant be granted bail, he would be able to contact his mother and brother, which in terms s60(7)(a) of Act 51 of 1977, would not be in the interests of justice.

[29] After a perusal of the record of the Court a quo, this Court cannot find any demonstrable misdirection of the court a quo in coming to its conclusion in refusing bail.

[30] There are no grounds to satisfy this Court that the decision of the Court a quo was wrong. The requirements of sections 65(4) of the Act were thus not met.

Order

[31] In the result, the appellant’s application for bail is dismissed.



D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 April 2024.

Date Heard: 19 April 2024
Judgment handed down: 23 April 2024

Appearances:

On behalf of the Appellant: Adv. P Milubi
Instructed by: Legal Aid SA

On behalf of the Respondent: Adv V.H. Mongwane
Instructed by: Office of the DPP, Johannesburg