

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

13 June 2024

DATE

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SIGNATURE

CASE NUMBER: A54/2023

In the matter between:

MABIZELA NKOSIKHONA

Appellant

And

THE STATE

Respondent

Coram: DOSIO J

Heard: **5 June 2024**

Delivered: **13 June 2024**

Summary: Criminal Law — Bail Appeal — Appellant did not stop the perpetrator from firing a shot — After shot was fired the Appellant walked back home without alerting the police — Appellant's actions do not appear

to be an act of disassociation — Should the Appellant be found guilty on the basis of common purpose it is not an exceptional circumstance to be released on bail.

ORDER

The appeal of the appellant is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail by the Orlando Regional Court on 16 April 2024.

- [2] The appellant, along with a co-accused faces a charge of murder, read with s51(1) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'). The murder is alleged to have occurred on 28 March 2024 at Soweto and the respondent contends that it was premeditated.

- [3] It is common cause that this bail application falls within the ambit of a schedule 6 offence and that the appellant was burdened with establishing the existence of exceptional circumstances which in the interests of justice would permit his release on bail.

- [4] The appellant was legally represented during the bail application proceedings.

- [5] The appellant adduced evidence by way of a written affidavit which was read into record.

Background

- [6] It is alleged by the respondent that on 28 March 2024, at Soweto, the accused did unlawfully and intentionally kill Thokozani Vilakazi by shooting him on the face. It is alleged that a group of six young men were consuming alcohol at Room 3 Dube hostel. They then decided later that evening to leave Room 3 to purchase a bottle of Jameson at Steve's tavern. On their arrival the appellant and his co-accused entered the tavern to purchase alcohol. While in the queue an altercation ensued between these young men. On their way out they were approached by the deceased. On the street, a firearm was discharged by Siboniseni Mbatha ('Siboniseni'), who is at large, which led to the passing of the deceased.
- [7] The appellant has raised the following issues as grounds of appeal, namely that:
- (a) The Court a quo erred by finding that it is a premeditated murder and that life imprisonment can be imposed if he is found guilty.
 - (b) The Court a quo failed or neglected to give due consideration to s60(4)(a)-(e) of Act 51 of 1977 and s35(1)(f) of the Constitution. Furthermore, exceptional circumstances exist which in the interests of justice permit the appellant's release on bail.
 - (c) The Court a quo misdirected itself when it failed and ignored the case presented by the appellant in that it selectively dealt with the evidence provided by the state. It is contended that there is no evidence which shows that the appellant knew that Siboniseni had a firearm in his possession.
 - (d) The Court a quo misdirected itself by accepting video evidence showing the appellant having a discussion with other Zulu males prior to the shooting of the deceased and incorrectly assumed that on the basis of common purpose the appellant associated himself with the killing of the deceased.

- [8] The appellant's counsel referred this Court to the matter of *S v Jones*,¹ where the Court stated that exceptional circumstances are established when the accused is able to deduce acceptable evidence that the case against him is non-existent, or is subject to serious doubt.
- [9] The respondent's counsel contended that the Court a quo dealt fully with these aspects and supports the refusal to admit the appellant to bail. The respondent contends that the appellant failed to discharge the onus resting upon him that there are exceptional circumstances that in the interests of justice warrant his release on bail.
- [10] The respondent's counsel contended that all that is required for the State to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person, and reconciles himself to that possibility. It was further contended that it is not necessary for the appellant to have thought or planned their action over a long period of time in advance, before carrying out their plan. Time is not the only consideration, because even a few minutes is enough to carry out a premeditated action.
- [11] The respondent's counsel argued that the appellant failed to show that the judgment of the Court a quo was wrong as required by s65(4) of Act 51 of 1977 and that there are no irregularities committed by the Court a quo.

Legal principles

- [12] Section 60(11) (a) of Act 51 of 1977 states:
- ‘Notwithstanding any provision of the 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

¹ *S v Jones* 1998 (2) SACR 673

that exceptional circumstances exist which in the interests of justice permit his or her release on bail.'

[13] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed*² ('*Mohammed*'), it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed*,³ it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[14] In so far as the weakness of the State's case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*⁴ ('*Mathebula*') held that:

'...In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...'⁵

[15] In the matter of *S v Smith and Another*,⁶ 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'.⁷

[16] In the matter of *S v Rudolph*,⁸ the Supreme Court of Appeal stated that in

² *S v Mohammed* 1999 (2) SACR 507 (C)

³ *Ibid*

⁴ *S v Mathebula* 2010 (1) SACR 55 (SCA)

⁵ *Ibid* para 12

⁶ *S v Smith and Another* 1969 (4) SA 175 (N)

⁷ *Ibid* 177 e-f

⁸ *S v Rudolph* 2010(1) SACR 262 (SCA)

respect to schedule 6 offences:

'The section places an onus on the appellant to produce proof that exceptional circumstances exist which in the interests of justice permit his release. It contemplates an exercise which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist'.⁹

[17] In *S v Bruintjies*¹⁰ ('*Bruintjies*'), 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.'¹¹

[18] In *Mathebula*,¹² the Supreme Court of Appeal stated that:

'In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive'.¹³

Evaluation

[19] Presumption of innocence is an important consideration, but a Court needs to look holistically at all the circumstances presented in a bail application.

[20] The personal circumstances of the appellant are that:

- (a) He was 23 years old at the time the bail application was brought.
- (b) He is a South African citizen residing at room 3 Dube hostel, Soweto for 15 years.
- (c) He does not own a passport and has not travelled outside the borders of South Africa.
- (d) He is unmarried and has one child aged two years old.
- (e) He does not own any immovable or moveable property.

⁹ Ibid para 9

¹⁰ *S v Bruintjies* 2003 (2) SACR 575 (SCA)

¹¹ Ibid para 7

¹² *Mathebula* (note 3 above)

¹³ Ibid page 59 B-C

- (f) His highest level of education is grade 12.
- (g) At the time of his arrest he was employed at United Pharmaceutical Distributors earning an income of R2700 per fortnight.
- (h) He has no previous convictions.

[21] The appellant contends that an additional exceptional circumstance is that the mother of his child is unemployed and he is solely responsible for the financial support of his two-year old daughter. His mother and father are also unemployed and they both depend on him financially.

[22] The Constitutional Court clarified the position in *MS v S (Centre for Child Law as Amicus Curiae)* ('*MS v S*'),¹⁴ by stating that:

'I am mindful that a sentencing court is not required to protect the children from the negative consequences of being separated from their primary caregivers. It is required only to pay appropriate attention to their interests and take reasonable steps to minimise damage. This requires a balancing exercise that takes account of the competing interests.'¹⁵

[23] The Constitutional Court in the matter of *MS v S*¹⁶ specifically referred to a primary caregiver as opposed to a breadwinner. The appellant stated that he provides financially for his child, this in no way makes him the primary caregiver of the child.

[24] In terms of s65(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.¹⁷

[25] The appellant bears the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.¹⁸ A mere denial of the considerations and/or probabilities of events, as

¹⁴ *MS v S (Centre for Child Law as Amicus Curiae)* 2011(2) SACR 88 (CC)

¹⁵ *Ibid* para 35

¹⁶ *Ibid*

¹⁷ *S v Rawat* 1999 (2) SACR 398 (W)

¹⁸ *S v Mabena and Another* 2007 (1) SACR 482 (SCA) and *S v Van Wyk* 2005 (1) SACR 41 (SCA)

contained in s60(4) — (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.

- [26] The appellant did not present viva voce evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings. In his affidavit he stated that although he was in the company of Siboniseni, who shot the deceased, he left the scene as he was in shock. He stated that he was also not found in possession of a gun and he cooperated fully with the police.
- [27] As stated in the case of *Bruintjies*¹⁹ and *Mathebula*,²⁰ evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen his version. As a result, the State could not cross-examine the appellant to test the veracity of the averment in his affidavit. This affects the weight to be attached to the averments made in the affidavit as the probative value of the affidavit could not be tested.
- [28] The investigating officer did not oppose the bail application and left it in the Court a quo's hands. Irrespective of this, s60(10) of Act 51 of 1977 stipulates that: 'Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'
- [29] The witness, sergeant Dlebe, in his affidavit states that he viewed the CCTV footage of the incidents that evening and he saw the appellant, Mongezi Nkosi and Siboniseni having a discussion just before the shooting occurred. It is clear that it was through the investigation of the police that lead to the appellant being arrested. The appellant played no role in assisting the police prior to his arrest.

¹⁹ *Bruintjies* (note 6 above)

²⁰ *Mathebula* (note 3 above)

- [30] The appellant contends that the offence happened in the spur of the moment and that he could not have known that the perpetrator was about to kill the deceased. The appellant contends he could not have foreseen the possibility that Siboniseni was about to shoot.
- [31] The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons to commit a crime.
- [32] In the matter of *S v Mdlala*,²¹ the Appellate Division as it then was, stated that: 'Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof –
- (a) that he individually killed the deceased, with the required *dolus* e.g. by shooting him, or
 - (b) that he was party to a common purpose to murder, and one or both of them did the deed, or
 - (c) that he was party to a common purpose to commit some other crime, and he foresee the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted reckless of such fatal consequences, and it occurred....
 - (d) that the accused must fall within (a) or (b) or (c) – it does not matter which, for in each event he would be guilty of murder'.²² [my emphasis]
- [33] In the matter of *S v Safatsa*,²³ the Appellate Division, (as it then was), stated that:
- 'In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants'.²⁴
- [34] In the matter of *S v Mgedezi and Others*,²⁵ the Appellate Division, (as it then was), stated that in the absence of proof of a prior agreement, the accused

²¹ *S v Mdlala* 1969 (2) SA 637 (A)

²² *Ibid* page 640 para F-H

²³ *S v Safatsa* 1988 (1) SA 868 (A)

²⁴ *Ibid* page 898 para A-B

²⁵ *S v Mgedezi and Others* 1989 (1) SA 687 (A)

who was not shown to have contributed causally to the killing could be held liable only if certain prerequisites are satisfied. These prerequisites would be:

- (a) that he was present at the scene where the violence was being committed.
- (b) he must have been aware of the assault.
- (c) he must have intended to make common cause with those who were actually perpetrating the assault.
- (d) he must have manifested his sharing of common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others, and
- (e) he must have had a requisite mens re, ie. he must have intended them to be killed, or he must have foreseen the possibility of them being killed and performed his own act of association with recklessness as to whether or not death ensued. [my emphasis]

[35] From the evidence of sergeant Dlebe it appears the appellant was present at the scene having a discussion with Siboniseni before the shot was fired. Due to Siboniseni being in possession of firearm the appellant must have known that a shot could be fired.

[36] In the matter of *S v Molimi and another*,²⁶ the Supreme Court of Appeal stated that:

‘.... It has long been accepted that the operation of the common purpose doctrine does not require each to know of foresee in detail the exact manner in which the unlawful consequence occurs..... All that is required for the State to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person, and reconciles himself to that possibility.’²⁷ [my emphasis]

[37] In the matter of *S v Mambo and others*,²⁸ the Supreme Court of Appeal stated that:

²⁶ *S v Molimi and another* 2006 (2) SACR 8 (SCA)

²⁷ *Ibid* para 33

²⁸ *S v Mambo and others* 2006 (2) SACR 563 (SCA)

‘Appellants 1 and 2 were found guilty of murder on the basis that they shared a common purpose with appellant 3. The evidence against appellant 1, that he uttered the word “skiet” as appellant 3 cocked the firearm, which I found to be true, in my view, constitutes sufficient proof that he shared a common purpose with appellant 3 – which might have been formed on the spur of the moment – to cause the death of the orderly. He too, was therefore correctly convicted of murder.’²⁹ [my emphasis]

[38] The appellant contends that he disassociated himself from the actions of the shooter. In the matter of *S v Musingadi and others*,³⁰ the Supreme Court of Appeal stated that:

‘... What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation...it appears much will depend on the circumstances: on the manner and degree of an accused’s participation; on how far the commission of the crime has proceeded; on the manner and timing of the disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of circumstances is not exhaustive. To reduce the composite of variables to a workable rule of law may be artificial, even unwise’.³¹[my emphasis]

Further,

‘The abovementioned authorities indicate, in my view, that on a practical level the courts in several countries, including South Africa, proceed from this premise: That the greater the accused’s participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.’³² [my emphasis]

[39] From the evidence available it is clear that the appellant did not try to stop Siboniseni firing a shot and furthermore, after the shot was fired, he walked back to his home without alerting the police. This does not appear to be an act of disassociation. In addition, should the appellant be found guilty on the basis

²⁹ Ibid para 17

³⁰ *S v Musingadi and others* 2005 (1) SACR 395 (SCA)

³¹ Ibid para 35

³² Ibid para 39

of common purpose, this is not an exceptional circumstance to release the appellant on bail.

[40] When it comes to sentencing under the doctrine of common purpose, the following factors are considered by a Court, namely, the degree of participation, intent and foreseeability, mitigating and aggravating factors, proportionality, consistency and fairness.

[41] Section 60(4)(b) of Act 51 of 1977 is of importance in the matter in casu. The section states the following:

‘60(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: ...

(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...’

[42] In considering whether the ground in subsection (4)(b) has been established, the Court may, where applicable, take into account the factors referred to in s60(6) of Act 51 of 1977, namely:

‘(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;’ [my emphasis]

[43] This Court finds that the likelihood of the appellant not attending his trial is high due to the following factors:

- (a) He has no moveable or immovable assets in his name.
- (b) The nature and gravity of the charge for which he will be tried is murder which carries a term of life imprisonment, if premeditation is successfully proven by the State. There is video footage which shows that the appellant was close to Siboniseni when he fired the shot and he did nothing to stop this or to alert the police after the shooting had taken place.

[44] In the matter of *S v Masoanganye and another*,³³ the Supreme Court of Appeal held that:

‘It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.’³⁴

[45] After a perusal of the record of the court a quo, this Court finds that there is no persuasive argument to release the appellant on bail. The Court a quo was fully aware of the appellant's personal circumstances and considered them. The appellant has not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail. Accordingly, there are no grounds to satisfy this Court that the decision of the court a quo was wrong.

Order

[46] In the result, the appeal of the appellant is dismissed.

³³ *S v Masoanganye and another* 2012 (1) SACR 292 (SCA)

³⁴ *Masoanganye* (note 7 above) para 15

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**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 13 June 2024 .

APPEARANCES

ON BEHALF OF THE APPELLANT: Mr Shivuri
(Attorney with right of appearance)
Shivuri Attorneys Inc

ON BEHALF OF THE RESPONDENT: Adv. A De Klerk

Instructed by Office of the National
Prosecuting Authority