

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A6712024

A QUO: 42I37612023

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

DATE: 8 July 2024


SIGNATURE OF JUDGE:

In the matter between:

ZITA ZUMA

1st APPELLANT

THAPELO MKHONZA

2nd APPELLANT

And

THE STATE

RESPONDENT

ORDER

1. The first Appellant's appeal against the refusal of bail by Regional Magistrate Jooma on the 23rd of January 2024 is dismissed.
2. The second Appellant's appeal against the refusal of bail by Regional Magistrate Jooma on the 23rd of January 2024 is dismissed.

JUDGMENT

K. STRYDOM, AJ

Introduction

1. The Appellants, on an urgent basis, have appealed the refusal of their respective bail applications by Regional Magistrate Jooma on the 23rd of January 2024.

2. In the Court a *quo* they were respectively Accused 3 (Zuma) and Accused 4 (Mkhonza) who were, together with two others, charged with:
 - 2.1. Assault with the Intention to do grievous bodily harm, with the allegation that the appellants acted in common purpose;
 - 2.2. Assault with the Intention to do grievous bodily harm, with the allegation that the appellants acted in common purpose;
 - 2.3. Kidnapping; and
 - 2.4. Murder.
3. The State alleges that, following the theft of a cellphone and laptop of the 1st Appellant's brother, the four accused kidnapped and assaulted four persons on the 3rd of December 2023. As a result of the assaults, two of the persons so kidnapped passed away. One of them, a certain Tebogo, passed away in hospital, whilst the body of the other, a certain Nhlanhla, was found on the 4th of December 2024 in an open space where the accused had left him.
4. At the inception of the bail hearing, the state alleged that the murder was premeditated and, as such, that the bail application stood to be decided in terms of Schedule 6. The prosecutor indicated that the State would “...attach the certificate to the chargesheet.” The “certificate” is one as contemplated by Section 60(11)(A) of the Criminal Procedure Act, which up[on] production would serve as prima facie proof of the Schedule to be applied.
5. The legal representative for the accused objected and indicated that Schedule 5 should apply. The following interchange then took place:

COURT: No, state is alleging premeditated murder.

MS MHLANGA: Yes, ...[intervenes]

COURT: The state is alleging premeditated murder so you will proceed in terms of Schedule 6 or Schedule 5.

MS MHLANGA: Your Worship, I oppose Schedule 6 this is a Schedule 5 ...[intervenes]

COURT: But the state is alleging. What does the act say with regards to the schedule?

MS MHLANGA: Your Worship, for Schedule 6 we have to prove the exceptional circumstances ...[intervenes]

COURT: No, what does it say about premeditated murder if the state is saying it is premeditated murder. Is it Schedule 5 or Schedule 6?

MS MHLANGA: It is Schedule 6 premeditated murder.

COURT: So, Schedule 6 the state is alleging that it is premeditated murder. Are you proceeding on basis of Schedule 6?

MS MHLANGA: Thank you, Your Worship.¹

6. It is common caused that subsequent to this ruling, but prior to judgment, said certificate, confirming Schedule 6, was appended to the charged sheet.

Grounds of appeal

7. The appellants argue that the Magistrate was wrong in ruling that the matter proceed as a Schedule 6 application before having had sight of the certificate. It was submitted that without such a certificate an inquiry into the facts should have been made before making the ruling. Insofar as the facts are concerned, the submission is that the murders were not premeditated as “...*there were allegedly venous interruptions in the alleged assault, leaving other people and the alleged victims behind.* “
8. The Appellants are of the view that the Magistrate incorrectly found that the State had a strong case. In this regard they refer to various inconsistencies between the statement of the investigating officer and that of the witness (one of the two surviving kidnapped persons).
9. Reliance was further placed on the fact that the investigating officer had not opposed the granting of bail to the accused.
10. For purposes of Schedule 5, it was submitted that the appellants had made a clear case that it would be in the interest of justice for them to be permitted to bail.
11. For purposes of Schedule 6, it was submitted that the following exceptional circumstances existed:
“36. *The Honourable Magistrate found that the length of the Trial is an exceptional circumstance.*
37. *The material contradictions between the witness of the state and the investigating officer statement of the facts, clearly demonstrates that the state has a weak case. This is argued to be a further exceptional circumstance.*”²

Discussion

12. The importance attached to the timing of the ruling on the applicable schedule by the Appellants, is more illusionary than real. As correctly submitted by the state, a determination as to the applicable Schedule can be made either per the certificate or per the facts. Whilst

¹ Transcript pages 2 and 3

² Appellant’s heads of argument

the Magistrate *in casu* made the ruling prior to receipt of either, is neither here nor there. Of importance is that, prior to refusing bail, he had been in receipt of both.

13. Even if it were to be found that the Magistrate erred in ruling prior to receipt of the certificate or before conducting an enquiry into the facts, that would not affect the finding of this Court.
14. Section 65(4) of the CPA provides in relation to bail appeals that "(t)he court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given." The appeal lies against the decision and not the reasons for the decision. *In casu* the decision was a refusal of the bail applications of the Appellants.
15. Furthermore, as was held in *S v Petersen* 2008 (2) SACR 355 (C): "*In the Porthen case, however, Binns-Ward AJ ... expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60(11)(a) of the Act.*"
16. This Court has been placed in possession of the facts underscoring the charges of premeditated murder. The Appellants argued that the facts do not disclose that the murders were premeditated. Much reliance was placed on the fact that the witness stated that after the assault, he and the one deceased, Tebogo had been dropped off by the appellants. The sequence of events, per the witness is as follows:

"I told them, I told them. Meneer and one of his friends left us behind with 2 African males. One of them was holding a firearm. Mongezi tried to run away. He shot him on his leg. Meneer came back with Hlanhla. They took off his clothing and started beating him with the sjambok and the hockey stick. They were using knives. They put us they put the burning tyres on our necks. They asked Mongezi about his friend. He said it is Tebogo. They went to fetch him. They undressed him and assaulted him also. When they saw that Hlanhla has now passed away they moved me and Mongezi to Dube hostel and left Hlanhla alone. They put us inside the shack and started beating us again until the community members were complaining that they were going to kill us..... "

“They moved us under the tree around the hostel. They came back with Tebogo, and they also took off his clothing and assaulted him with the sjambok and the hockey stick. Meneer was busy asking us about his laptop and his cell phone that was stolen. We told him that we did not steal his laptop or cell phone. They kept on beating us. Later they put us inside the car and drove back to Doornkop. They dropped Tebogo on the street opposite number 2466 Block 5, Doornkop.”³

“They dropped us at home and left.”⁴

17. It is evident that the accused only dropped the witness off at home after the assaults on both the deceased had occurred. The one deceased, Nhlanhla had been left for dead in the open, whilst the other, Tebogo had been left on the street. Furthermore, the fact that the assaults were suspended on several occasions to enable the accused to fetch more victims, hardly negates premeditation – to my mind, it, in fact, contributes to such a finding.
18. I am satisfied that the facts prove that provisions governing charges in terms of Schedule 6 applied. As such, the onus was on the Appellants to prove exceptional circumstances.
19. The court *a quo* held that the only exceptional circumstance presented was that of the length of the trial. As to the challenge to the strength of the State’s case, it was found that neither of the accused, save for averring that the state had a weak case had presented proof to that effect. The discrepancies between the investigating officer’s statement and that of the surviving witness were not raised in argument in the court *a quo*.
20. However, insofar as I may be tasked with reviewing the evidence afresh, I am of the view that the complained of discrepancies are not material. For instance, the investigating officer refers to four accused, whilst the witness stated that there were five perpetrators: The fifth perpetrator has not yet been apprehended and as such, the investigating officer’s reference to four persons (being those that have been arrested) is entirely explicable. The Appellants also reference the fact that the witness refers to injuries sustained by the kidnapped persons as a result of assaults with a sjambok, a gunshot and burning tyres, whilst the investigating officer only refers to sjambok injuries sustained by the two deceased. This discrepancy also is not material. The witness and the investigating officer’s statements confirm that the kidnapped persons were assaulted (regardless of the instrument of assault), which assault

³ Transcript page 19

⁴ Transcript page 20

lead to the hospitalisation of two and the death of two others. The discrepancies so raised may form the subject matter of cross examination during trial, but do not for purposes of bail prove on a balance of probabilities that the accused would be acquitted. As was held in *Mathebula v S*:⁵

"[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. 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: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: S v Viljoen at 561f-g.

[13] As will be apparent from the paucity of facts in support of his case, the appellant fell substantially short of the target. Despite the weak riposte of the state, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the state case than he had been when the application commenced. It follows that the case for the appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances."

21. The fact that the investigating officer did not oppose bail, likewise, does not constitute "exceptional circumstances."
22. Over and above finding that the court *a quo* correctly found that the Appellants had failed to discharge their onus to prove exceptional circumstances in terms of Schedule 6, I have also noted that the court *a quo*, in any event, considered whether they had proven that it would

⁵ *Mathebula v S* (431/2009) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA) ; [2010] 1 All SA 121 (SCA) (11 September 2009)

be in the interest of justice (Schedule 5) to grant them bail. In this regard the Court *a quo* considered:

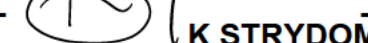
- 22.1. the potential severity of the sentences to be imposed as a possible incentive for the Accused to evade trial;
- 22.2. the fact that the witnesses and complainants are known to the accused coupled with the fact that the accused had already kidnapped and assaulted the accused as potential for possible interference with witnesses and complainants should bail be granted; and
- 22.3. the fact that, had the community not intervened during the assaults, the potential existed that more deaths would have followed, as indicative of the potential shock and outrage that would follow should bail be granted.

23. By virtue of all the aforementioned, I am unable to find that the learned Magistrate incorrectly exercised his discretion in refusing the Appellants' bail applications.

ORDER

24. As a result, the following order is made:

1. The first Appellant's appeal against the refusal of bail by Regional Magistrate Jooma on the 23rd of January 2024 is dismissed.
2. The second Appellant's appeal against the refusal of bail by Regional Magistrate Jooma on the 23rd of January 2024 is dismissed.


-  K STRYDOM
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Judgment reserved: 5 July 2024

Judgment delivered: 8 July 2024

Appearances:

For the Appellants:

Mr SJ Meintjes

For the Respondents:

Adv Peck