IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO:CA&R317/2018
DATE HEARD: 19/12/2018
DATE DELIVERED: 20/12/2018

In the matter between

SIYABULELA DURUWE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The appellant was arrested for murder allegedly committed on 1 October 2018, and applied for bail in the Magistrate's Court, Grahamstown. His application was dismissed and he now appeals against that order. The offence is one in Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA) and therefore the provisions of s 60 (11) (b) of the CPA applied to his application, namely that the court shall order that an accused be detained in custody unless he adduces evidence which satisfies the court that the interests of justice permit his release. This places a onus on an accused person to satisfy the court on a balance of probabilities that the interests of justice permit his release.

[2] The appellant elected to present evidence by way of an affidavit in support of his application. He is 27 years old, is a first offender and has no pending cases against him. He has three minor children who reside with their respective mothers. He is currently unemployed but has applied for employment with the Shamwari anti-poaching unit. He has successfully applied for a firearm licence, which is a

requirement for this employment. He was formerly employed as a waiter at a game reserve.

[3] He and members of his family are resident in Makhanda (formerly Grahamstown). He has an uncle who resides in Port Elizabeth who will permit the appellant to live with him for the duration of the trial, if he is granted bail.

[4] On 2 October 2018 the appellant's uncle informed him that the police were looking for him. He reported at the Makhanda police station and met the investigating officer. After signing a statement he was told he could go home and would be contacted at a later stage. On 4 October 2018 he was called to the police station and was arrested there. After an interview with a police captain, without legal representation, he was requested to sign a statement without it having been read back to him.

[5] The appellant undertook not to endanger the safety of the public, not to influence or intimidate witnesses or conceal or destroy evidence. He said he could relocate to Port Elizabeth for the duration of his trial and report to the nearest police station so that his movements could be monitored. He further undertook not to undermine or jeopardise the proper functioning of the criminal justice system. He proposed conditions which included reporting to the police station and not contacting State witnesses.

[6] Detective Constable Montshojang is the investigating officer in the case. He testified about the circumstances of the alleged offence as follows: on 1 October 2018 two persons reported at the police station that they had found a deceased person whose face was covered in blood. His upper bod y was on the ground and the rest of his body was still inside a motor vehicle. There is a strong case against the appellant. There are seven witnesses who saw the appellant chasing the deceased and

assaulting him with a wooden plank. These witnesses were sitting in a motor vehicle. These witnesses have made statements and have told Montshojang that the appellant pointed his finger at them, told them to keep quiet and act as though they had not seen anything. The witnesses, who reside in Makhanda, are frightened and fear that if the appellant is released on bail he will come back for them. The appellant knows their identity. The witnesses might not come to court to testify. If the appellant moved to Port Elizabeth, Montshojang said he would not be able to monitor his movements.

[7] Further, according to Montshojang, the brother of the deceased has made it clear to him that if the appellant is released he will track him down and kill him. The brother is a former APLA soldier and Montshojang believes that he will carry out his threat, even if the appellant moved to Port Elizabeth. Montshojang warned the brother that he could be arrested if he carried out his threat, but the brother said that it was a case of "an eye for an eye, a tooth for a tooth". Family members have said that they do not want the appellant to be released. Montshojang is of the view that the release of the appellant will undermine public confidence in the criminal justice system. Montshojang agreed that the appellant was not a flight risk.

[8] In her judgment the magistrate accepted that the appellant was not a flight risk. In refusing bail, she relied on the evidence that the appellant knew the State witnesses, had threatened them, and that they were afraid of him. She reasoned that even if he moved to Port Elizabeth it would still be possible for him to come to Makhanda to interfere with the witnesses. She also took into account that the appellant's life had been threatened. She decided that the interests of justice did not permit the appellant's release.

[9] Section 65 (4) of the CPA provides:

> "The 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."

[10] In *S v Barber* 1979 (4) SA 218 (D) at 220G-E, the following was said:

"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 it 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."

[11] Section 60 (4) of the CPA provides:

"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; 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 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; or

(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."

[12] It was submitted on behalf of the appellant that, with regard to the threat to the State witnesses, the magistrate failed to pay sufficient regard to the imposition of a condition that the appellant should report regularly to a police station. Such a condition would allow for the appellant's movements to be monitored. The magistrate, while not expressly dealing with the desirability or otherwise of imposing such a condition, nonetheless took into account that the appellant could not be monitored

constantly and would have an opportunity to leave Port Elizabeth. I cannot fault this reasoning. It is worth mentioning, as pointed out by Counsel for the State, that s 60 (7) (a) of the CPA provides that in considering whether the ground in s 60 (4) (c) has been established, the court may take into account the fact that an accused is familiar with the identity of the witnesses and the evidence they may bring against him. Section 60 (7) (e) provides that in considering whether the ground in s 60 (4) (c) has been established, the court may take into account how effective bail conditions prohibiting communication between an accused and witnesses are likely to be. These two provisions are most apposite in the present matter. The appellant chose not to give oral evidence and therefore could not be cross-examined on his assertion that he would not interfere with State witnesses. The evidence of Montshojang in this regard prevailed.

[13] It was further submitted that the magistrate placed too much emphasis on the danger to the appellant. The appellant would, so it was submitted, move to Port Elizabeth to an undisclosed address. When it was pointed out that the appellant would have to attend court from time to time, if released on bail, it was submitted that special security arrangements could be made for his safety, or the matter could be postponed in his absence.

[14] I am of the view that the magistrate did not misdirect herself in this regard. Montshojang, an experienced police officer of ten years' service, and who appeared to be fair and objective witness, believed the threat of the deceased's brother that he would track the appellant down. I regard this threat as a real one and that there is a strong possibility that it will be carried out if the appellant is released, even if he did move to Port Elizabeth. Even if there was security at court, the appellant would have to travel to and from Makhanda. I am of the view that this threat amounts to an

exceptional circumstance, as contemplated in s 60 (4) (e). Section 60(8A) of the CPA provides that in considering whether the ground in s 60 (4) (e) has been established, the court may take into account, inter alia, whether the safety of the accused might be jeopardised by his release.

[15] In the result I am not satisfied that the decision of the magistrate was wrong, and I agree with Counsel for the State that the appellant failed to discharge the onus imposed on him by s 60 (11) (b) of the CPA.

[16] The appeal is dismissed.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:
For the Appellant: Mr A Mqeke, Mqeke attorneys, Grahamstown
For the State: Adv S Hendriks, Director of Public Prosecution, Grahamstown