REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A 468/11

DATE:07/12/2011

NOT REPORTABLE

In the matter between

JOHANNES GERHARDUS JANSEN VAN VUUREN **APPELLANT**

and

THE STATE **RESPONDENT**

Criminal Procedure – appeal against refusal of bail pending trial on charge of murder and assault – Schedule 5 of Criminal Procedure Act offence – onus on applicant to establish that in interest of justice to be permitted on bail - factors affecting – misdirection by court a quo as to assessment of evidence – appeal allowed – bail granted subject to appropriate conditions

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J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal against the refusal of bail pending trial, by the Magistrate, Randburg. The appellant is charged with murder and assault and the trial has been set down for hearing in this court on 30 January 2012.

[2] The appellant was arrested on 2 May 2011. The allegations against him are that he on this day had visited his girlfriend, the deceased, that probably as a result of some altercation, he chased her towards the entrance gate of the security housing complex where she was living and that he stabbed her in

front of the security officer who was on duty at the gate at the time. The security officer tried to intervene but the appellant threatened him and continued with the assault on the deceased. The appellant on the spot attempted to commit suicide but he was apprehended.

[3] An application for bail was lodged and the hearing thereof commenced on 31 May 2011. The charge of murder is referred to in Schedule 5 to the Criminal Procedure Act 51 of 1977 and the appellant accordingly bears the onus of satisfying the court that the interest of justice permits his release on bail. The application by the appellant proceeded by way of affidavit. The State called the investigating officer in this matter to testify and to furnish his reasons for opposing bail. On 6 June 2011 the Magistrate refused bail.

[4] On 15 September 2011 the appellant renewed the application for bail. The further evidence presented consisted of an affidavit by the appellant dealing with new evidence. The evidence introduced concerned the appellant's version concerning a protection order that had been obtained against him by the deceased, in 2007, and a Psychiatric Risk Assessment Report on the appellant by Dr Matjane, a consultant Psychiatrist in the Department of Correctional Services. In its response thereto the State handed in a letter by Brigadier GN Labushagne, the Section Head: Investigative Psychology of the SA Police Service. I will revert to the evidence where necessary later in the judgment. The Magistrate again refused bail essentially based on the findings firstly, with reference to *inter alia* the protection order, that the appellant had a propensity to violence, and secondly, based on the report of Brig Labuschagne, that the appellant's previous threats to family members of the deceased should be taken seriously. The appeal is against the refusal of bail.

[5] In deciding this appeal it is necessary, as was the approach correctly adopted by the Magistrate, that all the facts pertaining to both applications should be considered. It is at the outset necessary to consider the finding of the court a quo concerning the appellant's propensity to violence and in conjunction therewith the appellant's attempt to commit suicide immediately after he had stabbed the deceased. In this regard the protection order and circumstances surrounding the granting thereof cannot be ignored. But the

enquiry does not end there: the events occurred during 2007 and at a time that the relationship between the appellant and the deceased had become strained. The appellant states in the second bail application that he and the deceased, during the latter part of 2007, reconciled their differences and continued their relationship which is confirmed by photographs taken of the deceased at family functions they attended. The protection order, as the appellant correctly asserts, must in the course of time and in the nature of their continued relationship, have faded into oblivion. The protection order therefore, should be viewed in its proper perspective: it is of historical relevance and certainly points to the appellant resorting to violence in that particular situation of conflict. This is then exactly what occurred again when the deceased was stabbed.

[6] This brings to the fore the view expressed by Brig Labuschagne which was heavily relied on by the court quo as a ground for refusing bail, that “any individual who has already exhibited a tendency to ignore legal restrictions, such as protection orders, poses a high risk to ignore other legal restrictions, such as bail or parole conditions”. I do not think that the view can unreservedly be accepted in the circumstances of this case: Labuschagne has not interviewed the appellant, he has evidently not considered the lapse of time between the protection order and the incident and moreover in particular, the conduct of the appellant outside the sphere of a strained relationship. In this regard an affidavit by the employer of the appellant was filed stating that the appellant maintained sound inter work relationships with staff members and that he coped well under stressful circumstances. I am accordingly not prepared to accept as a generalised conclusion that the appellant constitutes a high risk of evading trial.

[7] Much was made of the appellant’s suicide attempt in refusing bail at the first bail application. Again, the incident should be viewed in its proper perspective: in this regard Dr Matja’s opinion that the risk of suicidal behaviour as at present, is low, in my view, deserves preference, which he motivates as follows: “Whilst he (the appellant) has a previous serious attempt of suicide, it is my opinion that this occurred during a period of uncharacteristic behaviour for which he has no clear recollection. Furthermore, this suicidal behaviour

occurred in a particular context of his relations to his girlfriend and has not occurred in any other situation before. Suicidality is thus not a frequently occurring behaviour in his behavioral repertoire of dealing with stressful situations". Finally, there is no evidence of suicidal behaviour or a tendency to violence in the appellant's present situation in prison which, although controlled and supervised, must be stressful. I am accordingly unable to find that the safety of the appellant will be jeopardised by his release on bail.

[8] I am satisfied upon a consideration of all the facts of this matter that the Magistrate has misdirected herself in affording too much weight and failing to consider the aspects I have referred to, in their proper perspective. It follows that this court is at large to consider the question of bail afresh. The appellant's defence to be raised at the trial has been disclosed as a reliance on non-pathological automatism. Consultations with experts outside the prison environment therefore are inevitable. The matter is ripe for hearing and the witnesses have made statements. Having regard to the factors set out in s 60(4) of the CPA it in my view will be in the interests of justice to permit the appellant's release on bail. I am moreover satisfied that such risks as the allowance of bail may present can properly be taken care of by imposing appropriate conditions, which is what I propose to do.

[9] In the result I make the following order:

1. The appeal is upheld.

2. Bail is fixed in the sum of R15 000,00 cash to be deposited with the Registrar of this Court. Upon the deposit of the said amount and surrendering his passport to the investigating officer in this case, Constable TC Ntembu, or the Registrar of this Court, the accused is to be released on the following conditions:

2.1 That he attends and appears in this Court on 30 January 2012 at 10h00 and that he remains in attendance until excused by the court.

2.2 That he in person attends and reports to the said investigating officer at the Douglasdale Police station or to such Police station and police official as the investigating officer may

designate, on every Monday, Wednesday and Friday between the hours of 16h00 and 19h00.

2.3 That he refrains from coming into contact with any of the state witnesses whose names appear on the List of Witnesses having been furnished to the appellant.

2.4 That he will keep the investigating officer informed of any change of his residential address, whether temporary or permanent, or of any intention to leave the Gauteng area for a period of more than 24 hours.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV SW VAN DER MERWE***
COUNSEL FOR THE RESPONDENT	***ADV AA MULAUDZI***
DATE OF HEARING	***7 DECEMBER 2011***
DATE OF JUDGMENT	***7 DECEMBER 2011***