REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A57/2011

MAGISTRATE'S COURT CASE NO: 43/1507/2010

APPEAL CASE NO: SCA 11/11

HIGH COURT REF NO: 57/2011

DATE:22/03/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

ZITHA MBULELO Appellant

and

THE STATE Respondent

J U D G M E N T

KGOMO, J:

Bail Appeal : Against refusal of bail by Regional Court, Protea Soweto.

[1] On 12 November 2010, the Regional Magistrate, Mr Nemavhidi, of the Protea Magistrate's Court refused an application by the appellant to be admitted to or released on bail in this matter.

[2] He was charged (at time of bail application) with one (1) count of murder, one (1) count of possession of an unlicensed firearm, one (1) count of unlawful possession of ammunition and one (1) count of robbery with aggravating circumstances.

[3] Presently and even at his bail application in the court *a quo* he was represented by Mr Nardus Grové, an attorney in Johannesburg.

[4] The State is represented herein by Adv T Byker from the Directorate of Public Prosecutions, Johannesburg.

[5] What is and was in issue or dispute in the applicant's application was whether the offences he was charged with resorted under Schedule 5 or 6 to the Criminal Procedure Act 51 of 1977 in addition to the other general points, among others, whether it would be in the interests of justice that the accused be released on bail.

[6] The State argues that the offences the applicant was charged of fell within the ambit of Schedule 6 to Act 51 of 1977 whereas the applicant argued that they fell within the ambit of Schedule 5.

[7] In his short judgment, the Regional Magistrate, Protea North did not go into the question of which of the schedules was applicable. What I could decipher from his judgment is that that aspect was not material because according to him, even if the charges fell within the ambit of Schedule 5, he would still have refused bail as the accused's previous brushes with the law, his knack or propensity to use firearms, the fact that he was on bail in an attempted murder case wherein he shot at his girlfriend and her mother and most importantly, the fact that the empty cartridges retrieved from the scene of the attempted murder and the one found at the murder scene were ballistically linked to one firearm.

[8] He ruled that the accused can be regarded as a person who, if released on bail, may endanger the safety of the public, the victims or witnesses or any person linked or related to the witnesses. He further ruled that public order may be undermined and that there might be community outrage if the applicant was granted bail.

[9] The facts surrounding this matter are simple:

9.1 On 17 August 2010 the applicant went to his girlfriend, Pearl Phalatse's workplace in Booysens, Johannesburg and allegedly intimidated her. Apparently they were having some standing quarrel. They were sent to Moroka Police Station in Soweto where the police apparently knew of their quarrels for mediation.

There they were advised to stay away from each other's presences. The applicant then accompanied Pearl to her residence where he collected his personal belongings and went his way. Pearl returned to her workplace where she was advised to open a criminal charge. She did so at Booysens Police Station.

9.2 After work Pearl arrived at her place accompanied by her mother Sylvia at Phiri, Soweto. She was driving her car. They found the applicant waiting for them. As she stopped the car the applicant fired shots at them with a firearm. She tried to reverse the car but hit a wall. She and her mother then jumped out of the car and fled on foot. The accused got into the car and drove away in it. They opened a charge at Moroka Police Station.

9.3 At the scene of the shooting two spent catridges were retrieved.

9.4 The Phalatses took the police to the applicant's home but he was nowhere to be found. After several visits the applicant's photo was published in the Daily Sun newspaper. Still he did not report to the police. After a month he handed himself to the police accompanied by his attorney.

9.5 He was charged with attempted murder, kidnapping, intimidation, malicious injury to property, pointing of a firearm

and robbery with aggravating circumstances. He appeared in the Protea Magistrate's Court 7 and was granted bail of R5 000,00.

9.6 In the meantime, a day or so after the applicant shot at the Phalatses and took their car, a relative of the Phalatses was shot dead through the window of her house at Molapo, Soweto as she was seated on a sofa. Her car went missing that same night. The State averred that it had an affidavit by a neighbour of the deceased that he saw the applicant driving away in the deceased's car the night she was shot dead. The car was recovered at Berea, near Hillbrow, Johannesburg.

9.7 At the scene of the murder, a spent cartridge was retrieved by the police. It was sent for forensic or ballistic analysis and the results were that this spent cartridge and the cartridges fired by the applicant at the Phalatses were fired from the same firearm. This firearm, despite the applicant admitting firing it at the Phalatses has not yet been recovered by the police. For interest sake, the applicant's story is that he was firing blanks, not live ammunition, at the Phalatses on 17 August 2010. The applicant's fingerprints were also found in the deceased's recovered car.

9.8 The accused was then arrested at his home on 22 October 2010 and he then failed in his bail bid on 12 November 2010 as stated above.

[10] The applicant's appeal against the court *a quo's* refusal to grant him bail is based on the following grounds:

10.1 That the State, which bore the duty to put evidence before the court *a quo* on the Schedule applicable, did not do so, consequently his bail application should have been regarded as a Schedule 5 one;

10.2 That the State has not shown that the murder the applicant is charged of was premeditated or not as a basis for the application of Schedule 6;

10.3 That the magistrate in the court *a quo* erred by not making a specific ruling as to which Schedule was applicable, thus entitling the applicant to being admitted to bail;

10.4 That the magistrate erred in finding that the applicant, if released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; and

10.5 That the learned magistrate erred by finding that even where in exceptional circumstances there was a likelihood that the release of the applicant will disturb the public order or undermine the public peace, bail should still have been granted as courts should not be held ransom by outcries and opinions.

[11] I have listened to arguments from both sides and read the heads of argument filed of record.

[12] The personal circumstances of the applicant were in short that:

(a) he was 29 years old and a South African citizen;

(b) he was single but had three (3) children out of wedlock;

(c) he was residing with his mother at 1748 Ntokwezine Street, Dlamini 1, Soweto and at some stage stayed at his father's house, also in Dlamini, Soweto;

(d) at the time of his arrest he was employed on a part-time basis as a mechanic and he owned a Mazda 3 motor vehicle as well as other movable assets, jointly worth around R120 000,00;

(e) he had two (2) previous convictions – one for theft and the other for assault;

(f) he had a pending case – i.e. the one in which he is on R5 000,00 bail as stated above.

[13] The respondent submitted that the State had a strong *prima facie* case against the applicant and that the applicant, by his own admission has a knack of disappearing without trace and as such, knowing that he will be tried in the High Court with the possibility of life imprisonment, he is likely to decamp or disappear. Furthermore, the applicant only handed himself over to the police during the Phalatse shootings after a month when he realised that he was only charged with attempted murder, a lesser charge.

[14] Consequently the applicant was a flight risk who could and did abandon his property and went into hiding from the law. The respondent further argued and submitted that the circumstances of this case pointed the applicant being a person who could endanger the safety of the public or specific persons or the public interest or commit a Schedule 1 offence or influence or intimidate witnesses or conceal or destroy evidence as well as undermine or jeopardise the objectives or proper functioning of the criminal justice system.

[15] On the other hand, the applicant submitted and argued that he has shown to the court that he was no flight risk by attending court regularly in the matter in which he was granted bail. He explained that he disappeared for a month when he was told by his mother that the police were looking for him so as to accumulate funds for legal representation since he feared that the police

threatened to kill him wherever they found him. The applicant also submitted that the investigation officer who has since been removed from this case hated him and as such could have fabricated the evidence of a ballistic match of spent cartridges. On the aspect of his fingerprints he argued that they would be found in the deceased's car since he used to ride in it in the past.

[16] How this last aspect is probable is, in my view, suspect as the deceased herein was not his girlfriend. The accused attempted to implicate the deceased's boyfriend, Thabo Matoko on the aspect of the deceased's motor vehicle: he stated that the deceased's motor vehicle was registered by Thabo Matoko into his own names the day after the deceased's shooting and death. This theory was shown to be fallacious or untrue as it emerged that a different car was involved which was registered in Thabo's names.

[17] It is so that a court hearing a bail application should make a determination whether the offence(s) in issue fell within the ambit of Schedule 1, 5 or 6 or whichever Schedule should be applicable. In this case, if it was ruled that Schedule 6 was applicable, the duty would have rested on the applicant to begin first to lead evidence in which he ought to have shown that there are exceptional circumstances justifying his release on bail. Had it been ruled that it was a Schedule 5 offence, the duty would have rested on the prosecution to prove that the interests of justice dictated that the applicant not be admitted to or granted bail.

[18] In this case again, the applicant lead evidence first. One may be tempted to surmise that that presupposed an acknowledgement that this was a Schedule 6 offence or case. It is my considered view that the question of who started leading evidence first is not a yardstick of whether the charges relate to a Schedule 6 offence(s) or not. Any of the parties may begin to lead evidence first.

[19] The next question this Court should answer is whether it will serve any purpose to decide whether the offences or charges fell under the ambit of Schedule 5 or 6.

[20] It is my considered view that the evidence led in an application is a pointer to what Schedule the offences could fall under.

[21] Counsel for the applicant conceded that should this Court rule that the offences/charges resorted under Schedule 6, then the applicant would have failed to advance exceptional circumstances justifying his release on bail in terms of section 60(11) of the Criminal Procedure Act 51 of 1977.

[22] It is my further considered view that that determination should have been done by the court *a quo*, more so that the charge sheets then were not completed. It would be unfair and unjust to deal with this appeal on the basis that it was a Schedule 6 matter under the circumstances. As a result, I will deal with it as if it was a Schedule 5 matter. In short, I am not making any

determination or ruling whether or not Schedule 6 would or should have been applicable.

[23] In any event, the court *a quo* arrived at its ruling on the basis of the available evidence without mentioning Schedule 6.

[24] A court of law can only refuse the granting of bail to an applicant if it is in the interests of justice that it so refuse it. Section 60(4) of the Criminal Procedure Act decrees 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:

24.1 where there is a likelihood that he/she would endanger public safety or a particular person or will commit a Schedule 1 offence, or

24.2 where there is a likelihood that he/she will attempt to evade justice or trial, or

24.3 where there is a likelihood that he/she will attempt to or influence or intimidate witnesses or conceal evidence, or

24.4 where there is a likelihood that the accused will undermine or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system, or

24.5 where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[25] In sections 60(5) to 60(9) of the Act, specifics elucidating and/or explaining or expatiating on the above requirements are set out in more detail.

[26] The million dollar question to be answered here is whether the applicant herein, in the light of all the circumstances prevailing herein as brought to the fore by the evidence led is a person who should or may be released on bail.

[27] He is on bail on almost similar charges although he was only arrested later on the charges herein due to further investigations that culminated in him being linked to the other case through a ballistic report.

[28] Both cases involve extreme violence and the use of one firearm. The applicant is also allegedly linked to the deceased's car's disappearance through an eyewitness and the investigator testified that they have reasonable apprehensions or fear that the applicant may intimidate or interfere with the eyewitness or other potential witnesses. His girlfriend, Pearl and her mother have even fled their home in Phiri Soweto to somewhere in the Alberton area as they fear the accused may harm them. There is also evidence that the accused's fiancé(s) may also be called as witnesses and as such he may interfere with them also.

[29] On behalf of the accused it was argued that the State can cure this loophole by withholding the identities of witnesses in this case.

[30] It is trite fact t hat the applicant is by law entitled to copies of witnesses' statements to enable him to prepare for his trial. How he would not come to know who the witnesses are and what their testimonies would be is in my view improbable or impractical. I thus find this suggested solution to be of little or no assistance in this case.

[31] The deceased in this case is closely related to the Phalatses who are complainants in the case on which the applicant is on bail. She was gunned down in her house a day or so after the applicant shot at the Phalatses – at their home. The spent cartridges found at both crime scenes are ballistically linked to one firearm and the applicant fired that firearm.

[32] He (applicant) denies categorically having been involved with the murder of the deceased herein or the disappearance of her car. Despite the eyewitness account, it was argued on behalf of the applicant that because it cannot be said whether the deceased's car was robbed or stolen as it cannot be ascertained if it was taken before, during or after the shooting, therefore this aspect should not have a bearing on the outcome of the bail application and appeal.

[33] I beg to differ. At this stage, this Court is not dealing with proof of any guilt against anybody. All those aspects that the applicant is talking about will be ventilated at his eventual trial. What is important and material is whether the applicant is a candidate for release again on bail.

[34] What bothers me is how the applicant's claim can be probable that his fingerprints should be in the deceased's car if in the same breath he denies not having driven in it or coming up with any shred of evidence in his presentation to that effect. Since he knew that this aspect was one of the cornerstones of the State's opposition to his application for bail, it is my considered view that the applicant ought to have dealt with it, however flimsily, but in a manner that would have shed some light about his claim. Absence of some light on this aspect in my view strengthens the respondent's (read the State's) argument.

[35] In the handbook, *Bail : A Practitioner's Guide*, 2nd Edition by Johan van den Berg, the learned author puts it as follows at pp 100, paragraph 73:

> "*… the primary interest which is sought to be protected when the risk of interference with state witnesses (or for that matter with the police investigations) is assessed, is the proper administration of justice. It is therefore somewhat vague and imprecise to refuse bail in order to safeguard and ensure the proper administration of justice. It is submitted that the proper approach is to ask whether it is likely that the accused will, not may, interfere with state witnesses in the sense that he will attempt, unduly, to influence the content or slant of the evidence or to persuade them not to testify against him at all.*"

[36] The applicant's behaviour and *modus operandi* in my view, do not lend themselves to a favourable view about him. He can disappear when he wants to and re-appear when he wants to. His own mother can remain tight lipped about his whereabouts despite various visits by the police to the home she shares with her son, the applicant. People related to those that laid charges against him are shot dead and the applicant comes up with ingenious explanations in attempts to deflect pointing fingers towards himself so that they point to other persons.

[37] Section 65(4) of the Criminal Procedure Act reads as follows:

> "*(4) 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.*"

[38] I have perused all the evidence led in this application in the court *a quo* as well as the Regional Magistrate's reasons for judgment. Short and incomprehensive though they may be, the court *a quo's* grounds for refusing bail to the applicant cannot be faulted. By not looking at or mentioning exceptional circumstances in his ruling I can accept that he regarded Schedule 5 as being applicable also. I have tested the totality of the evidence herein against the requirements for the granting of bail in respect of a Schedule 5 offence and have come to the conclusion that the interests of justice do not warrant the release of this applicant on bail.

[39] There are no reasons why this Court should set aside and substitute the court *a quo's* ruling. In arriving at the above decision I have taken into account the court's duty to ensure the maintenance of law, order and justice and consequent prevention of the evils that the criminal justice system be seen or viewed as so weak that people feel the need to avoid courts and then take the law into their own hands. I have isolated the greater obligation of jealously guarding the rule of law from the inclination to allow uniformed and/or ignorant public outcries or government of the day perceptions clouding judgment have and ensured that same did not influence my ruling.

[40] The applicant's appeal against the refusal of bail by the Regional Magistrate, Protea is thus rejected and dismissed.

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N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE APPLICANT	:	MR GROVÉ
FOR THE RESPONDENT	:	ADV T BYKER
DATE OF ARGUMENT	:	18 MARCH 2011
DATE OF JUDGMENT	:	22 MARCH 2011