REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: A45/2020

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

01 June 2020 .....

DATE SIGNATURE

In the matter between:

DERRICK KHOZA Applicant

And

THE STATE Respondent

JUDGMENT

MOGALE, AJ:

INTRODUCTION

[1] This is an appeal against the refusal of bail by the Acting Regional Magistrate Mr Britts sitting in Tembisa Magistrate Court on the 17th of March 2020.

[2] The Appellant is facing one count of Murder read with the Provisions of Section 51(2) of Act 105 of 1977.

[3] Both the Applicant and the Respondent have mutual concession to have the Appeal decided on their Heads of Arguments.

[4] The court has drafted a written Judgment.

BACKGROUND

[5] It is common cause that the Appellant and the deceased had a love relationship which started in March 2019. The Appellant is married and rented a place to stay in house number […] Exubeni Section, Tembisa.

[6] The Appellant rented a room at No […] Mashemong Section, Tembisa where he was staying with his girlfriend (hereinafter "the deceased").

[7] On the morning of the 13th January 2020, the decomposed body of the deceased was discovered by the police on her bed and next to it was a broken bottle.

[8] There is no direct evidence of how and when the deceased died but according to the Doctor's Post Mortem report, the cause of death was undetermined due to decomposition but had signs of blunt trauma.

Factors leading to the refusal of bail:

[9] Bail application was opposed on the basis that the Appellant faced a serious offence which carries a maximum sentence of 15 - 20 years imprisonment.

[10] The Appellant was flight risk, he lied about his address and further that he concealed evidence that might assist the State in their investigation.

[11] The offence outraged the community as a result the safety of the Appellant is not guaranteed.

[12] The Appellant submission is that the Appellant address was positively identified as a result, the judgment is not clear as to what basis the magistrate made a conclusion that the Appellant is a flight risk. The Appellant also gave his brother's address who is a Captain as an alternative address where he will be staying until the matter is finalized and the address was also verified. The Appellant handed himself to the investigating officer after receiving a report that the police were looking for him. There is no evidence that he tried to abscond. There is no direct evidence linking the Appellant to the offence as a result, the case is all circumstantial, as a result, there is no likelihood to interfere with witnesses. There is no DNA report linking the Appellant and the State is not in possession of cell phone record to ascertain communication between the deceased and her friends proving that he is a violent person. The appellant has clean record with no pending cases.

[13] The Respondent submission is that the Applicant failed the test that the interest of Justice permits for his released based on the fact that, he took cellphone of the deceased in order to temper or destroy the state evidence. That Matron's affidavit is to the effect that he did not reside at No 162 Exubeni between October and November as he moved out and that shows that he is a flight risk. The appellant is a violent person as stated by the deceased friend by way of a WhatsApp message from the decease and further that he mislead the police with information about his employment statues. The community is outraged at gender based violence and has no hesitation to take the law into their hands if the applicant is granted bail. Therefore the bail court has a duty to protect the applicant from such threat. The respondent submits that the applicant's application must be dismissed.

[14] An appeal against the refusal of bail is governed by section 65(4) of the Criminal Procedure Act 51 of 1977 which provides that:

> "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 shall have given."

[15] The approach of a court hearing a bail appeal is trite. In ***S v Barber 1979(4) SA 218 (D) at 220 E_H*** it was held 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 of bail. This court has to be persuaded that the magistrate exercised the discretion which is wrong. Accordingly, although this court may have a different view, it should not be substituting its own view for that of the magistrate because it would be 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.

[16] At the commencement of the bail application, the state contended that the application resorted within the ambit of Schedule 5 of the Criminal Procedure Act and by implication, the provisions of Section 60(11)(b) of the Criminal Procedure Act which applicable are as follows:

> *"Notwithstanding any provisions of this ACT, where an accused is charged with an offence referred to in section 5 but not Schedule 6, the court shall order that the accused be detained in custody until he or she 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 that the interest of justice permits his or her release."*

[17] The magistrate refused bail by finding a likelihood of the ground set out in section 60 (4) (a) (b) (c) (e) read with section 60(5) (6) (7) and 8A of the Criminal Procedure Act.

[18] Before proceeding to deal with the grounds of appeal, it is clear that the personal circumstances of the appellant's were not an issue at the bail application and not disputed by the investigating officer. Therefore, I am not going to repeat the personal circumstances in this judgment.

[19] Section 60 (4) (a) provides that the interest of Justice do not permit the release from detention of an accused:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of public or any person or will commit a Schedule 1 offence. The

magistrate in summarizing the evidence of the Investigating officer, Sergeant Rapatswane that based on the WhatsApp massages taken from one of the deceased friends, the appellant is a violent person. Based on the information from one of the deceased friends, the appellant once warned her to stay away from the deceased, if the appellant is admitted to bail, he will interfere with these witnesses. During cross-examination the witness admitted that the deceased never mentioned the name of the appellant in her message. The Investigating officer did not mention the names of possible witnesses who might be intimidated. The magistrate based on this evidence found that the respondent successfully rebutted the evidence of the appellants' by showing that there is a reasonable likelihood that the appellant would intimidate witnesses if released on bail. The appellant in his affidavit indicated that he would not interfere with or intimidate state witnesses. What is required is a likelihood of the offending behavior manifesting itself and not a mere possibility. The gravity and the seriousness of the offence cannot be overlooked, which was at face value brutal, but that itself, cannot lead to a conclusion that the witnesses would be intimidated. The imposition of suitable bail conditions were overlooked by the magistrate as a way of mitigating such likelihood.

(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. The magistrate found that the appellant is a flight risk. The fact that his affidavit indicated that he resided at […] Ekhubeni Section was contradicted by the Metron's affidavit who stated that the Appellant moved out of the residential place in October 2019 and in November when the incident took place, he was no longer staying in the abovementioned address. Under cross-examination, the investigating officer confirmed that the plaintiff address in Mpumalanga, his brother who is a Police Captain address in Alberton which was provided as an alternative

address where the appellant will be staying during the period of the trial and further confirmed that the Applicant and his wife rented a room at […] Ekhubeni Section for the past 15 years. The appellant received information that the police were looking for him and he handed himself to the police with the assistance of his brother, Captain Goodwill Khoza. There are no objective facts before the magistrate to draw the inference that the appellant is a flight risk. The deceased was last seen on the 10 November 2019 and the applicant was only contacted after the deceased body was discovered on the 13 November 2019, he then handed himself. I believe that if the appellant wanted to evade trial or skip the country he had ample opportunity to do so.

(c) Where there is likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence. The magistrate submits that the appellant is either in possession of the deceased phone or destroyed it with the intention to destroy the communication which might prove that he was an abuser and a violent person. Under cross-examination he agreed that in the course of his investigations, he can apply to obtain cell phone records of the deceased in terms of Section 205 of the Act. It is also common cause that there are no witnesses to the murder charge, only circumstantial facts are link the appellant with the commission of the offence.

(d) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public peace and security

And

(8A) in considering whether the ground is subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely:

a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

c) whether the safety of the accused might be jeopardized by his or her release;

d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused.

e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.

[20] The approach to this ground has been settled in ***S v Dlamini [1999] ZACC 8; 1999 (2) SACR 51 (CC)*** where Kriegler J held as follows at paragraph [57]:

> *"It is important to note that sub-section 4(e) expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-section 4(e) also expressly stipulates that a finding of such circumstances has to be established on a preponderance of probabilities ("likelihood"). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-section (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for subsections 4(e) and (8A) will be extremely limited. Judicial*

officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interest of all."

[21] The incident, notwithstanding submissions to the contrary, manifested violence against women and children. The understandable public outcry in incidents of this nature is understandable. The call for bail to be refused is likewise understandable. However, the magistrate should not have lost sight of the very high watermark of section 60(4)(e) read with section 60(8A) and the salutary warning expressed in ***S v Schietekat 1999 (1) SACR 100 (CC)*** at paragraph 104 where the court said:

"It is true to say that it is the duty of courts of law to ensure the maintenance of law, order and justice and so prevent that greatest of all evils, a criminal justice system so weak and vacillating that people felt the need to avoid the courts and take the law into their own hands. Despite this courts have a greater obligation to society at large. They must jealously guard the rule of law."

[22] The magistrate appears clearly to have been influenced by the number of people who signed petition, the comments written therein and protesters who had gathered opposing the release of the accused on bail. On what public outcry constitutes the magistrate indicated that she did not need a dictionary to tell her what public outcry was but had merely to have regard to section 60(8A). It is apparent that the magistrate turned the blind eye to the statutory provision.

[23] On the factors the magistrate had considered, I am of the view that he had misdirected himself in respect of each of these grounds and that this court is at liberty to give the decision which the magistrate should have given in the first instance.

[24] In the result the following order is made:

24.1. The appeal against the refusal of bail is upheld;

24.2. The decision of the learned magistrate Mr Britts in the court a quo is set aside;

24.3. The order is replaced with an order as set out at Annexure "A".

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K MOGALE (Ms)

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 01 June 2020

Date of judgment: 01 June 2020

APPEARANCES

Counsel for the Applicant: Adv G Ngobeni

Instructed by: Gibson Ngobeni Attorneys

Counsel for the Respondent: Adv M. Papachristoforou

Instructed by: Director of Public Prosecution, Johannesburg

Annexure “A”

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. A45/2020

Before: Judge Mogale AJ

On 01 June 2020

In the matter between:

DERRICK KHOZA APPLICANT

And

THE STATE RESPONDENT

COURT ORDER

THE STATE versus Khoza Derrick (Hereinafter referred to as the accused)

In terms of Section 60 of Act 51 of 1977 it is ordered-

That the accused be granted bail in the sum of R3 000-00 cash

AND

That upon payment of the said sum of money, the accused shall be released immediately from custody on condition that:-

1. He appears at the Tembisa Magistrates Court at 08h30am (time) on the 27th day of May 2020 and thereafter on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge to which the offence in this case relates, or where sentence is not imposed forthwith after verdict and the court extends bail, until sentence is imposed;
2. the accused does not communicate with witnesses for the prosecution, either directly or indirectly.
3. the accused should reside at house number […] Leopard Rest, Alberton, Gauteng until the case is finalized. The appellant must report to the Investigating officer when travelling to Mpumalanga to visit his family.
4. the accused is informed that, in terms of section 67(1) Act 51 of 1977, if, after his release on bail, he fails to appear at the place and on the date and at the time appointed for his trial or to which the proceedings are adjourned, or fails to remain in attendance at such

trial or at such proceedings, or fails to comply with the above conditions, the Court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for his arrest. The accused is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition. (A copy of this order is to be brought to the attention of the accused by their legal representatives upon his release from custody).

BY ORDER OF COURT

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REGISTRAR

COUNSEL O.B.O. APPLICANT: Adv. G Ngobeni 081 3333 050

COUNSEL O.B.O. RESPONDENT: Adv. M Papachristoforou 079 194 9787