IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A261/2016

Date: 17 May 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

17/5/2016 Pretoria
DATE SIGNATURE

In the matter between:

SIBUSISO SIDWELL MAHLANGU

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

(BAIL APPEAL)

PRETORIUS J,

(1) The appellant has been charged with murder read with the provisions of section 51(1) and 51(2) of the **Criminal Law Amendment Act**[1]. He was also charged with defeating the ends of justice.

(2) The magistrate, Mr Thage, heard an application for bail in the Kwa-Mhlanga Magistrate's Court and refused the application on 8 January 2016. The appellant was represented by Mr Mabena throughout the proceedings.

(3) The appellant now approaches the High Court on appeal for the granting of bail. It is not clear whether the appellant faces a Schedule 5 or a Schedule 6 charge. In the instance of a Schedule 6 crime, the appellant has to show exceptional circumstances exist on a balance of probabilities that he should be released on bail.

(4) In the instance of a Schedule 5 crime the appellant has to show, on a balance of probabilities, that it will be in the interest of justice to release him on bail.

(5) It is common cause that the appellant did not give *viva voce* evidence, in his application for bail, but that his legal representative had furnished the court with an affidavit, deposed to by the appellant.

(6) The State presented *viva voce* evidence by Sergeant Ndlala. His

[1] Act 105 of 1997

evidence was that on 27 October 2014 the deceased's body was found under a bridge at Van Dyk Spruit. She was identified as Ms Nomya Paletla. Acoording to Sergeant Ndlala an occurrence book entry was made on 26 October 2014 where the appellant had reported that the deceased, his wife, had left the home to jog, but did not return. On the 27th of October 2014 the police requested the appellant to attend at the police station, which he did.

(7) On 27 October 2014 the police went to appellant's home and investigated. Traces of blood were found at the house and in the appellant's bakkie. The *post mortem* examination indicated that the deceased had sustained serious injuries, as she had a blood stain in her face, a fractured skull, abrasions on the abdominal region, loose teeth and subdural bleeding on the brain.

(8) Once more, after receiving the *post mortem* report, the appellant was requested to attend the police station, which he did. After being interviewed by the police, he was sent home. When the blood tests confirmed that the blood found in the appellant's house and bakkie was that of the deceased, the police went to the appellant's house to arrest him. The appellant was arrested at his house on 21 December 2015 – almost fourteen (14) months after the body of the deceased had been found.

(9) The reasons by Sergeant Ndlala for opposing bail were that, although

they went to the appellant's house on several occasions, they did not find him; he is facing a serious charge of murder; that he may interfere with witnesses and that the police investigation had not been completed as the SAP69 was still outstanding.

(10) Appellant's affidavit set out the following personal circumstances: he is a widower with a child, aged eight (8) years; he was arrested on 21 December 2015; he owned his home where he lived at number 349, Section BA at Kwa-Mhlanga since 2005; he is 35 years old; his parents live close by; the investigating officer has his cellphone number; he has no previous convictions and is self-employed as a car salesman and he manufactures fences and gates earning approximately R5 000 per month. He intends pleading not guilty.

(11) In **S v Botha**[2] Viviers AJ held:

> *"Die vereiste van "buitengewone omstandighede" beteken dat die gewone oorwegings vir die verlening van borgtog wat in art 60(4) - (9) uiteengesit word, waar die aangehoudene se reg op vrylating opgeweeg word teen die faktore wat sy vrylating in die belang van geregtigheid sou verhinder, nie voldoende is om sy vrylating te verkry nie. 'n Blote ontkenning van die waarskynlikheid van die gebeure in art 60(4)(a) - (e) sou dus nie voldoende wees nie.*
>
> *Artikel 60(11)(a) meld nie die aard van die vereiste*

[2] 2002(1) SACR 222 (SCA) at paragraph 18 and 19

"buitengewone omstandighede" nie. Dit word nie vereis dat "buitengewone omstandighede" verskillend van aard, of andersoortig moet wees as die omstandighede wat in subartikels (4) - (9) genoem word nie. Gewoonlik, maar nie noodwendig nie, sal dit omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a) - (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerk kan word (S v Vanqa 2000(2) SASV 371 (TkH) op 376 b-d). Dit is vir die hof om in elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerk kan word."

(12) In **S v Branco**[3] Cachalia AJ held:

"The fundamental objective of the institution of bail in the democratic society ***based on freedom is to maximise personal liberty****. The proper approach to a decision in the bail application is that: The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby."* (Court emphasis)

[3] 2002(1) SACR 531 (SCA) at page 533

(13) The court *a quo* in the judgment found: "This means that minimum sentence is applicable in schedule six offences only and not on schedule offence". This is patently incorrect. The further finding by the court that the murder was pre-meditated is not sustained by the evidence which is purely circumstantial. The fact that a different set of fingerprints was uplifted where the deceased was found cannot justify the finding that more than one person was involved in the murder.

(14) The magistrate found that *"It is common cause that there is no direct evidence linking the accused to the commission of this offence"*. The evidence is circumstantial.

(15) It is clear that the appellant is not a flight risk. He has a permanent home where he lives with his young daughter. His parents live close by. He was arrested at his home fourteen (14) months after the death of the deceased. There is no reason to believe that the appellant will interfere with witnesses as the witnesses are members of the police force. If the appellant intended absconding he would have done so in the fourteen months between the death of the deceased and his arrest.

(16) The Director of Public Prosecutions ("DPP") opposes the application due to the fact that, according to the DPP, it was a pre-meditated murder and therefor Schedule 6 applies. In **S v Lulane and Others**[4] Didcott J remarked:

[4] 1976(2) SA 204 (N) at 211 F-G

"Although the opinion of the Attorney-General always commands respect because of his experience and the responsibilities of his office, it seems to me that, once it is evident that he is no better informed than the Court, it is in as good a position as he to assess the likelihood or otherwise that an accused person will abscond."

(17) It is also clear that there is no indication on the charge sheet that Schedule 6 applies.

(18) I have considered all the facts and the arguments and I have come to the conclusion that the State has not proved that this is a Schedule 6 offence. The DPP's case is based on circumstantial evidence, the appellant has co-operated with the police, reported to the police when requested to do so, was only arrested fourteen (14) months after the deceased's death and cares for his daughter who is eight (8) years old. Each of the provisions of section 60(4) (a – e) have been taken into consideration and there does not seem a reason for not granting bail.

(19) Therefor I find that it will not be in the interest of justice to keep the appellant incarcerated in these circumstances.

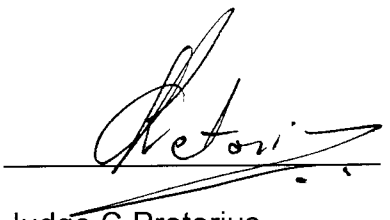
(20) I make the following order:

1. The appeal is allowed and the magistrate's order, refusing bail, is set aside;

2. Bail is fixed in an amount of R3 000, subject to the following conditions:

   a) The appellant shall report on a Monday and a Friday between 18h00 – 19h00 at the Kwa-Mhlanga Police Station;

   b) The appellant shall not leave the district of Kwa-Mhlanga without the prior permission of the investigating officer.



Judge C Pretorius

Case number	: A261/2016
Matter heard on	: 16 May 2016
For the Appellant	: Adv Aphane
Instructed by	: AJ Masingi Attorneys
For the Respondent	: Adv Sono
Instructed by	: Director of Public Prosecutions
Date of Judgment	: 17 May 2016