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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 19/04/18

CASE NO: A890/2017
APPEAL NO: 02/18

TREASURE MAWELELE — **APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an Appeal in terms of s 65 (1) (a) of the Criminal Procedure Act 51 of 1977 ("the Act") against the refusal by the magistrate, Fochville, of Appellant's Application to be released on bail.

[2] The Appellant was brought before the magistrate on 13 November 2017, duly represented facing charges of Murder, kidnapping and pointing a firearm.

[3] The parties agreed that the offences fall under Schedule 5 and therefore the bail application resorted under s 60 (11) (b) of the Act. The Appellant had to adduce evidence that satisfies the court on a balance of probabilities that it is in the interest of justice that he be released on bail.

[4] The charges arise from an incident that happened on 5 November 2017 at Merafong in Fochville when a 17 year old girl "(the deceased") was kidnapped by a gun wielding perpetrator and later brutally murdered. The deceased was in the company of two 14 year old girls when she was kidnapped, bundled into a motor vehicle and later her lifeless body

thrown out of a moving vehicle. The pointing of a firearm was at a person from whom the deceased sought refuge when she was chased by the perpetrator and taken away. A few hours after the kidnapping, the perpetrator was spotted by the girls who were in the company of the police, near where the incident took place. The perpetrator evaded arrest and sped away. He threw the deceased out of the vehicle whilst being chased by the police. He later abandoned his vehicle and escaped on foot. The Appellant was afterwards arrested in a house 4km from where the incident occurred. He was in possession of a firearm.

[5] In the court a quo, the learned magistrate refused the Applicant bail on the ground that:

[5.1] the state had a strong prima facie case against the Appellant

[5.2] the granting of bail to the Appellant will not be in the interest of justice.

[6] The interests of justice would, in terms of s 60 (4) of the Act, not permit the release of the accused if **one or more** of following grounds are shown to exist:

(a) Where there is a 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

© Where there is a 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 a likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

(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.'

[7] In term of s 65 (4) (b), the Appellant has to persuade the appeal court that the decision of the magistrate, to refuse him bail was wrong. The section reads:

> '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 even the court or judge shall give the decision which in its opinion the lower court should have given.'

[8] Appellant contends that the learned magistrate erred:

[8.1] in considering the strength of the state's case and ignoring the version of the Appellant.

[8.2] failing to consider that there was no identity parade conducted to positively identify the Appellant, when none of the accused claimed to know the Appellant.

[8.3] the court failed to take note of the provisions of s 60 (5) of the CPA.

[9] Section 60(6) lists several factors which a court may take into account, amongst other relevant things, in order to consider whether the ground stated in **ss (4) (a) and (b), namely the likelihood that if he was released on bail will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, and the likelihood of him evading his trial, has been established**.

> [9.1] The factors in ss 4 (a) include: **the degree of violence towards others implicit in the charge against him; any threat of violence which he may have made to any person**; any resentment he is alleged to harbour against any person; **any disposition to violence on his part, as is evident from his past conduct**; any disposition to commit offences referred to in Schedule 1 as is evident from his or her past conduct; **the prevalence of a particular type of offence;** any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; any other factor which in the opinion of the court should be taken into account.
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> [9.2] The factors in (b) are: his emotional, family, community and occupational ties to the place of prosecution; his assets and where they are situated; his means of travel and available travel documents; whether he can afford to forfeit the amount of money paid in relation to bail; prospects of extradition; **the nature and gravity of the offences charged with; the strength of the case against him and the incentive that in consequence he may attempt to evade his trial;** whether his extradition could be readily be effected should he flee across the borders of South Africa; **the nature and gravity of the likely punishment in the event of the accused being convicted**; the binding effect of possible bail conditions and the ease with which they could be breached, **and any other factor which in the opinion of the court should be taken into account**.

[10] Appellant submitted his evidence in support of' his Application in the court a quo, by way of an affidavit that was read into the record by Appellant's legal representative: that Appellant is 30 years old, a South African citizen married to a Lesotho national with 4 children whose ages range from 6 to 2 months. He resides in Vanderbylpark, holds a B-Tech qualification and is employed at Vaal University of Technology as a Technician since 2012, earning a salary of R18 000.00. His assets include furniture and 3 motor vehicles, one of which is in the custody of the police and **the other being used by his father.** He o**wns no immovable property.** He has three other dependents, who are his two siblings and **his mother who is unemployed**. He carries a South African passport. He offered a bail amount of R2 000.00.

[11] Furthermore, he indicated that he was going to plead not guilty and believes that exceptional circumstances exist in that the state's case is weak, he therefore will not abscond notwithstanding the sentence that might be imposed. He has undertaken not to interfere with the witnesses or the smooth running of the case. He indicated that he has no previous convictions. As regards **his arrest, he said he called the police and cooperated with them.**

[12] The investigating officer on the other hand testified in opposition of the granting of bail, highlighting the evidence that the state was going to rely upon in prosecuting the

Appellant. According to him the evidence was that on that day the three girls were walking in Bosman Street passing flats in Bathroom Garden when they encountered the Appellant. The girls requested water from the Appellant. One of them mentioned being tired which in another Sotho dialect can mean that she was hungry. They were as a result offered food by the Appellant. He at the same time proposed love to the deceased who rejected him. The Appellant went to buy them food from KFC and brought it back to the girls who were now walking along the corner of Bosman and North. After eating the food, they tried to leave. Appellant pulled out a firearm. The girls ran away. Appellant chased after the girls who ran in different directions. The two 14 year olds ran in one direction whilst the deceased ran to a separate direction. The deceased was pursued by the Appellant. She ran and sought refuge from a man that was tendering a garden nearby. The Appellant pointed a firearm at this man threatening him. He grabbed the deceased who was screaming out for help and forcefully put her into his vehicle.

[13] The two girls who escaped managed to stop a police vehicle and reported the matter to them. The police drove around with the girls for 2-3 hours trying to locate the Appellant's vehicle. After which Appellant's vehicle was located back near where the incident occurred. The Appellant was driving with the deceased in the vehicle. When the police approached the Appellant's vehicle, signaling him to stop, he sped off and a chase ensued. The police had the blue lights on and a siren activated. At some point they drove next to him and told him that they were police officers he must stop. He pretended to stop the vehicle but when the police were about to park their vehicle he sped off, driving with his hazards on and he jumped a four way stop. He relentlessly tried to evade the police, when the police were closer he grabbed the deceased and threw her out of the vehicle. He continued to speed away whilst the police stopped to check on the deceased. The driver of the police vehicle then continued with the chase but Appellant managed to escape, abandoning his vehicle. The local community watch dog K9 that was alerted and requested to assist got information that the person had fled into a house in Greenspark, 4 km from the incident, which is where the Appellant was arrested. He was found in possession of a firearm.

[14] The investigating officer indicated that even though he had no previous convictions or any outstanding matters he was opposing bail because the Applicant evaded arrest when the police tried to pull him over. He also told lies to the owner of the house where he fled to, that he was hijacked. He was offered a cellphone to contact his family and inform them that he has been hijacked. Also due to the circumstances under which the young deceased was murdered. He pointed out that the investigation is also not complete as they are still awaiting a post mortem to find out if more charges are to be added against him, including that of rape. He indicated that his investigation has revealed that the Appellant was not hijacked. The two girls were also at the station when the Appellant was brought in by K9 officers and they confirmed that he was the perpetrator.

[15] The argument of the Appellant is more focused on the identity of the Appellant that since an identification parade was not conducted, there cannot be a strong case against the Appellant. It was put to the investigating officer that the Appellant disputes that the children or the police identified him at the police station. Appellant's denial was relayed not under oath of his Affidavit or oral evidence. However the court a quo took into consideration that the girls spent some time with the Appellant after they met him even if he was unknown to

them. He had a conversation with them, drove off to a KFC outlet and brought them food. He came back, waited upon them until they finished eating. They later managed to spot his vehicle which they pointed out to the police. That is when the police also saw the Appellant who was in the vehicle with the deceased. The police spent some time chasing his vehicle and also tried to speak to him. It therefore would not have been difficult for the girls and the police to recognize him when he was brought to the station on the same day of the incident. Under the circumstances the court was convinced that even absent the identification parade the state has, including the other factors that existed established a strong case against the Appellant. The issue concerning their statements only appeared for the first time in the Appellant's heads of argument and was not canvassed during the hearing.

[16] It is so that the presence of one or more circumstances against or for the granting of bail is not decisive but it is after **all the information has been gathered and assessed according to relative value, that a weighing up of interests takes place. Not a piecemeal evaluation or one fact in isolation.**

[17] Mr Mabi on behalf of the Appellant, has also argued that the Appellant has co-operated with the police as he phoned them when they arrested him. However he called the police under the pretence that he has been hijacked, he did not surrender. Oddly, that was only as far as Appellant was prepared to explain the hijacking story. The evidence of the investigating officer is that as soon as questions were raised with regard to his hijacking, he refused to answer any further questions from the police. The owner of the house had asked him, after realizing that Appellant was carrying a gun, how he was hijacked at that time of day and why he did not use his firearm. He thereafter no longer wanted to cooperate with the police. The magistrate was therefore correct to not have placed any value to that allegation.

[18] It was also an issue that the firearm used was not identified. The investigating officer pointed out that the general knowledge of people about firearms especially children is limited. They would only be able to tell if it was a long or short or small gun. They would not be able to mention any other special detail that is beyond that. The court agrees that it is an obvious reflection.

[19] The Appellant argued that the state does not have a strong case whilst the state has submitted that due to the strength of its case, the Appellant might evade attending trial. The court considered what was said about Appellant's actions when the police tried to stop him in order to effect arrest. He indicated that he is susceptible to not abiding by the law and lacks respect for the processes of the law, when he evaded arrest and continued to defeat the ends of justice, claiming to have been hijacked. The police asked him twice to stop, and they had the police siren and blue light on, making it obvious for him to see that it was the police, unperturbed he continued to escape, in defiance of the ends of justice. His conduct confutes any confidence that he will stand trial or abide with the conditions of bail. Especially if he went to such length and so much trouble to evade arrest.

[20] The violent nature and the prevalence of the crime that the Appellant is accused of, is conceded by the Appellant and notably dominant against women and children. Society is frighteningly overwhelmed as this group remain vulnerable. It has been a testing battle to try and stop its scourge. The protection of children against any potential harm is therefore paramount.

[21] The alleged threat of violence that the Appellant made against the witness who was trying to help the deceased and the three girls, by pointing a firearm at them, as well as the degree of the viciousness and inhumanness that was implicit when the deceased was thrown out of a moving vehicle during the chase by the police are factors to be considered to assess the safety of the public.

[22] Considering the judicious counterbalance the court a quo was required to do between the different circumstances established in order to ensure that none of the circumstances is unduly accentuated at the expense of and to the exclusion of the others, I am satisfied that the weight of what Appellant raised in terms of his personal situation, that is his emotional, family, community and occupational ties to the place; ownership of the assets located in the court's jurisdiction, tendering of his travel documents; having no previous convictions or pending cases, is diminished by the circumstances that have been established by the state, of a strong case against him, the seriousness and prevalence of the offences, his likelihood to evade trial and being a potential threat to the public.

[23] I am therefore satisfied of the magistrate's conclusion that it will not be in the interest of justice to admit the Appellant to bail.

It is therefore ordered that:

1. The Appeal against the refusal by the Magistrate Fochville to admit the Appellant to bail is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

For Appellant: Adv D T Molea

Instructed by: Ramatshosa Attorneys

For Respondent: Adv Masilela/ Venter

Instructed by: The Director of Public Prosecutions

Gauteng Local Division : Johannesburg