



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: CC2/2021

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

09/03/2022
DATE

SIGNATURE

In the matter between:

MUHAMAD SAJID KHAN

Applicant

v

THE STATE

REASONS

MOSOPA, J

1. On 4 March 2022, I convicted the accused on the following counts; two counts of murder read with the provisions of section 51(1) of Act 105 of 1997 and one count of attempted murder.
2. After the accused was convicted, an application for the extension of the bail of the accused was brought on his behalf by Adv Kilian SC, an application which was opposed by the State.

3. After having heard both counsel for the accused and the State, I revoked the bail of the accused and remanded the accused into custody until 30 May 2022, when the court will commence the sentencing proceedings of the accused. I then promised parties I would give my reasons for such an order at a later stage. This judgment thus sets out such reasons.
4. It is common cause between the parties that when the initial bail proceedings of the accused were determined, the charges the accused faced resorted under the provisions of section 60(11)(b) of the Criminal Procedure Act 51 of 1977 ("CPA"). The application for the extension of bail was brought in terms of the provisions of section 58 of the CPA. It is therefore common between the parties that this application should proceed under the provisions of section 60(11)(b) of the CPA.
5. For the sake of completeness, I find it prudent to mention the provisions of section 60(11)(b) of the CPA, which provides;

"60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(b) in Schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is 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 interests of justice permit his or her release."

6. The subsection places a burden on the bail applicant to adduce evidence, to the satisfaction of the court, that the interests of justice permit his release on bail.
7. A substantive application was brought on behalf of the accused, accompanied by an affidavit in support of extension of bail pending the sentencing process of the accused. In the affidavit, the following is apparent;

- 7.1. That the accused was arrested on 3 February 2020, after he handed himself over to the Investigating Officer in this matter and was granted bail in the amount of R10 000.00, pending the finalisation of the trial and he has never defaulted on his bail conditions.
- 7.2. He travelled out of the Republic once, to Pakistan, on 23 November 2021 and returned on 29 November 2021. His passport is currently with the Investigating Officer.
- 7.3. He married his wife, who is South African, in community of property on 28 December 2007. Five (5) minor children were born from this marriage, with their ages ranging from nine (9) years to sixteen (16) years.
- 7.4. He is a businessman and he owns a chicken farm and chicken abattoir on a plot in Carltonville. He also owns a car dealership in Pretoria West. His chicken business is valued at R15 million and car dealership business at R6 million.
- 7.5. He currently resides at 300 5th Avenue, Laudium, the address which was confirmed by the police as a correct address. The property is valued at R2.8 million and the accused has resided there since 2014. He also owns ten (10) other properties to the total value of R10.2 million. In addition, he has moveable property, consisting of vehicles and household furniture, to the total value of R1.5 million.
- 7.6. He employs a total 34 employees in his businesses, who are responsible for the maintenance of 34 families and their extended families. He earns a salary of R75 000.00 and he is able to pay bail of R20 000.00, should his bail be granted.
8. Section 58 of the CPA deals with the extension of bail in the event an accused person is convicted of a charge proffered against him, pending the finalisation of the sentencing process. The section provides that where the accused is convicted of a Schedule 5 or 6 offence (which is relevant *in casu*), in

considering the question of whether bail should be extended, the provisions of section 60(11)(a) or (b), as the case may be, must be applied. The court shall take into account the following; (a) the fact that the accused has been convicted of that offence, and (b) the likely sentence the court might impose.

9. The sentencing of the accused, after conviction, did not immediately follow after his conviction, mainly for two reasons;

- (a) The matter was only allocated one (1) day, of which the majority of time was spent delivering judgment, and

- (b) The fact that the accused wanted to utilise the services of a private person for purposes of obtaining a pre-sentence report. This is an extensive process which involves consultations with the relevant sources and the compilation of a report and preparation for appearance in court by the person who compiled the report, to give evidence.

10. When revoking the bail of the accused after his conviction, the main purpose of that was not to punish the accused, as bail is non-penal in character, but the court had in mind that the accused is convicted of very serious offences, namely two counts of murder, and thus the accused stands to be sentenced to direct imprisonment. Section 51(1) of Act 105 of 1997 prescribes a sentence of life imprisonment, in the event of a conviction, but the court can impose a lesser sentence in the event that the accused shows that substantial and compelling circumstances exist, but this must not be construed that the legislation places a burden of proof on the accused, as the accused is not compelled to do so.

11. I am alive to the fact that when bail was initially granted by the lower court, that court had in mind the possibility of the sentence to be imposed in the event of a conviction, and I presume that the accused was also apprised of that possibility. That fact did not encourage the accused to default on his bail conditions and he regularly attended court. As already indicated, he was able

to visit his family in his country of origin while out on bail, a factor which will be considered in more detail later in this judgment.

12. However, the difference between now and then is that currently the accused has been convicted with the possibility of being sentenced to direct imprisonment.

13. Section 60(4)(a)-(e) provides;

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the 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*
- (c) where there is the 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 the likelihood that the accused, if he or she were 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”*

14. The jurisdictional factors mentioned in subsection 60(4)(a)-(e) must be established in order for the court not to extend the bail of the accused. In the absence thereof, the accused is entitled to have his bail extended.

15. The accused cannot at this stage interfere with State witnesses as all the witnesses on behalf of the State and the defence have testified. It is not clear

as to why some of the witnesses on the State's witness list did not testify, save for the two (2) former State witnesses who were made available to the defence, Mr Rasheed and Mr Shan. There is no evidence presented by the State that the accused interfered with State witnesses, while out on bail.

16. The accused's bail conditions allowed him to travel to his country of origin and he did so, traveling to Pakistan on 23 November and returning on 29 November 2021, as clearly indicated in his affidavit in support of his bail extension. The reasons for this trip was not clearly indicated in the affidavit, whether it was a visit to his family or a business trip, but this shows that the accused has the financial means to travel in and out of the country with ease. It is not clear from the evidence presented whether the accused's family or relatives are still in Pakistan or whether they all reside in the Republic. It is also not clear if he has any other business interests in Pakistan, as mention was only made of his businesses in South Africa.
17. Ms Kilian contended that the accused's passport can be permanently surrendered to the Investigating Officer, who is currently in possession of his passport.
18. However, my concern lies in the fact that our borders are porous, and it is easy for a person to move in and out of the country without legal and proper documentation. Our country lacks proper border control, which is a fact I cannot easily ignore. The problem is further exacerbated by the ease with which one can obtain fraudulent papers from corrupt officials employed by the Department of Home Affairs. I am not using this aspect to justify my reasons for revoking the bail of the accused, but unfortunately that is the reality of the current situation South Africa is faced with.
19. If the accused decides to travel outside of the country, whether legally or illegally, I am of the view that he will evade trial, given the possible sentence which may be imposed. Once the accused has evaded his trial, it will not be easy to arrest him and return him to South Africa to finish his trial.

20. There is no extradition and mutual legal assistance in criminal matters treaties in place between South Africa and Pakistan. Currently the situation is that the Department of International Relations and Cooperation is still in the process of negotiating for the conclusion of such an agreement, and once the agreement has been concluded, it must still be signed and ratified. This is a very lengthy process. For instance, the treaty entered into between South Africa and the United States of America was ratified by Parliament on 9 November 2000 and only entered into force on 25 June 2001. The treaty between South Africa and Nigeria was ratified by Parliament on 9 November 2002, but it has not yet entered into force.
21. I am of the view that if bail is extended the possibility of the accused evading trial is high, given the charges he has been convicted of and the possible sentence to be imposed.

ORDER

22. I therefore make the following order;

- (1) The bail of the accused is hereby revoked and accused will remain in custody until his next court appearance.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv E Kilian SC
Instructed by: Victor Nkhwashu Attorneys Inc.

For the State: Adv E Sihlangu
Instructed by: The DPP

Date of hearing: 4 March 2022
Date of judgment: Electronically delivered