

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A709/2007

DATE:

12 DECEMBER 2007

5 In the matter between:

PAMELA KUTUMANE

First Appellant

THENJIWE NATALIE BELLE

Second Appellant

and

THE STATE

Respondent

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J U D G M E N T

DAVIS, J:

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[1] This is an appeal against the decision of the magistrate on 31 October 2007 in which the magistrate refused to grant bail to first and second appellants.

20 [2] This is a case in which the appellants are charged with murder and therefore it is a matter which falls under Schedule 6 in which the *onus* is clearly upon the appellants to show that there were exceptional circumstances as to why bail should be granted. The concept of exceptional circumstances and the *onus* which is placed upon the appellants does not of course mean

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that the State is free to say nothing. One has to balance the act clearly against constitutional rights which are inherent in our new society.

5 [3] There are, however, exceptional circumstances which have been raised by the appellants. In the first place, it has been argued, reliance having been place on the case of N v State & One Other, a judgment of the Constitutional Court of 26 September 2007, that the issue of a primary caregiver is of importance. Sachs, J said in that case that when considering whether to impose imprisonment on the primary caregiver of the young children, the Court needs to pay sufficient attention to the constitutional imperative that in all matters considering children, children's interests should be paramount.

[4] In this case, it is clear that the appellants are primary caregivers and indeed are looking after minor children of relatively young age. That is an argument that is clearly extremely important. There is also no doubt that neither of the appellants have outstanding cases, outstanding warrants of arrest or previous convictions. There is no suggestion that they are flight risks. Much of this is treated in a fairly superficial fashion by the magistrate in

his judgment, although he does refer to the fact that these arguments were raised, one searches in vain in his judgment for any engagement, particularly with the question of the constitutional issues of the rights of children.

[5] When one then examines the State case, particularly the evidence given by the investigating officer Mr Hendrick Johannes Phillips, further doubts emerge. Mr Phillips is asked in terms as to whether the accused would be a flight risk and he answers that that is not the case. He raises questions about the intimidation of witnesses. Very little appears to me to be raised in that regard, although there is some suggestion that because a knife has not appeared they may on bail seek to secrete such knife, but there is little more than that.

[6] Arguments are raised about the fact that there may be threats to the appellants if they are to be released because Mr Phillips says:

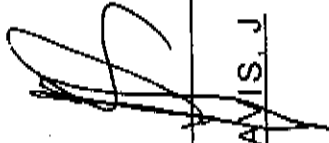
"When I left court last week and I received a couple of phone calls also to where Nilama Mahnia had to go to Bishop Lavis police station in order for her to protect Pinkie's house because they wanted to break down that house".

The question arises as to whether those sorts of allegations alone are sufficient to counter the weight of the exceptional circumstances.

5 [7] In my view, the allegations that there may well be some
anger directed at the appellants because of the brutal
nature of the murder is not in itself sufficient to ensure
that primary caregivers of this kind should remain for a
fairly lengthy time in prison and not be granted bail. In
10 my view, there were exceptional circumstances. When I
weigh them against the State case, the latter is not
sufficient to outweigh the former.

[8] Accordingly, I do find that there are exceptional
15 circumstances and that bail should be granted.

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DAVIS, J.