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

LOWER COURT CASE NO. A/144/08
HIGH COURT CASE NO. A594/08

In the matter between:

MARIA POVLSEN First Appellant

STELLA SSENGENDO Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 18 FEBUARY 2009

MITCHELL A.J.

[1] The appellants appeal against the refusal of the magistrate in the Strand District Court to grant them bail pending their trial on a charge of murdering the first appellant's husband on or about 14 January 2008. This is the second bail appeal in the matter. The appellants applied for and were refused bail on 27 February 2008. An appeal against that refusal was dismissed by Cleaver J in this Division on 23 May 2008.

[2] A further bail application was made on 4 November 2008 and refused on the same date. The magistrate found that no new facts had been presented by the appellants to justify the granting of bail. He did so after hearing a lengthy argument from the then legal representative of the appellants. The argument, which was recorded and transcribed, can fairly be termed *'rambling'*. I had difficulty in discerning therefrom precisely what was being advanced as new facts and what was nothing more than a re-arguing of the first bail application.

[3] Mr *Konstabel*, who represented the appellants before me, conceded, correctly in my opinion, that the only new fact that was placed before the magistrate was that the State was no longer considering adducing evidence at the trial from the minor children of two appellants (aged 4, 6 and 7 years). During the first application, the investigating officer, Inspector PJ Greef, testified that the children might be called to give evidence to contradict the statements made by their mothers. He stated that, in his opinion, there was a reasonable possibility that, if the appellants were to be released on bail and reunited with their children (by then placed by the welfare authorities with other families) they might influence the testimony of the children. This he advanced as one of the grounds on which bail should be refused.

[4] Now that they are not to be witnesses, Mr *Konstabel* submitted, the rights of the children enshrined in s 28 of the 1996 Constitution weighed all the more heavily in favour of the release of the appellants on bail.

[5] Mr *Wolmarans*, for the State, accepted that the decision no longer to consider the children as potential witnesses constituted a new fact, but argued that this was insufficient to warrant the grant of bail in the light of all the other considerations that continued to apply.

[6] In *S v Porthen and Others* 2004 (2) SACR 242, Binns-Ward AJ held that the discretion exercised by a magistrate considering the grant or refusal of bail was a discretion in the wide sense and that therefore a higher court, hearing an appeal, was entitled to interfere with the order, if satisfied that it was wrong, giving due deference and appropriate weight to the fact that the lower court had exercised its discretion in a particular way. It seems to me to be correct, therefore, to consider all of the matters before the magistrate and to determine whether, in my opinion, the decision of the magistrate was right or wrong.

[7] No evidence was placed before the magistrate to counteract that adduced by the State at the first hearing. It appeared from the testimony of the investigating officer that evidence available to him suggested strongly that the statement made by the first appellant that she knew nothing of the fate of her husband on 14 January 2008, was wrong. She was implicated by a statement made by the second appellant to the police, to the effect that the first appellant had assisted in cleaning the bloodstains in the house that morning. She was implicated further by witnesses from whom she had allegedly purchased new carpeting for the main bedroom later the same morning.

[8] The affidavit by the second appellant which was submitted at the first bail application was also contradicted by her own earlier statement to the police and by the fact that evidence had been found of blood spatters in the main bedroom, signs of extensive cleaning and the replacement of the carpets.

[9] Added to this is the fact that the curtaining used to wrap the deceased's body apparently came from that bedroom. This, and the fact that the injuries described during the post-mortem were not consistent with the (partially exculpatory) statement made by the brother of the appellants, Francis Kameze, serve to cast serious doubt on the reliability of his attempts to exculpate his sisters in his statement and (at least impliedly) in the two letters written by him to them and translated by the first appellant.

[10] In my opinion, discounting the information apparently gleaned from the children, there remains a strong *prima facie* case that the two appellants were closely involved in the events culminating in the death of the first appellant's husband and the attempted concealment of his body.

[11] There was a debate, during the hearing of the appeal, as to whether or not the *prima facie* evidence tended to support that the offence charged fell under Schedule 6 or Schedule 5 of the Criminal Procedure Act No. 51 of 1977. It would fall under Schedule 6 if it could be categorised as:

> '*Murder, when* –

(a) it was planned or premeditated;

...

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.'

Otherwise, it would fall under Schedule 5. The difference relates to the onus that an applicant for bail must discharge. In the case of a Schedule 6 offence, exceptional circumstances justifying the release of the applicant on bail must be established.

[12] During the first bail application, the magistrate ruled that the offence shown *prima facie* by the evidence fell within Schedule 6. On appeal Cleaver J also considered this to be the case, but added that, even if the offence fell within Schedule 5, in his opinion the appellants had failed to discharge the (lesser) onus of showing that *'the interests of justice permit his or her release'*.

[13] In view of the fact that the task of this Court is to approach this appeal on the principles set forth in *Porthen's* case (supra) I do not consider that the question is (as Mr *Wolmarans* argued) *res judicata*. For myself, I do not think that the *prima facie* evidence establishes premeditation. The word, as used in the section, denotes at least some appreciable period during which the accused contemplated the intended act and decided to go through with it. I do not think that a decision not to cease from a lengthy assault (as Mr *Wolmarans* argued) constitutes the sort of premeditation envisaged by the Schedule. At best, it could be argued that the evidence might establish that all three of the accused

participated in the crime in common purpose with each other, which would bring the crime within the ambit of Schedule 6.

[14] I shall, however, assume in favour of the appellants that the offence is one falling under Schedule 5.

[15] An important consideration in relation to question of bail is the flight risk of the appellants. Neither is South African. The first appellant has a right of residence in Denmark as well as her own country (Uganda). They have no ties here, although Mr *Konstabel* argued that the first appellant's prospect of inheriting from the estate of her deceased husband would tend to keep her here. Of course, if convicted of his murder, that prospect disappears. In my opinion, there is little to keep the appellants in South Africa to stand trial and there would be a strong incentive to flee the country if released on bail. Their *ipse dixit* to the contrary in the affidavits presented at the first bail hearing carries little persuasive weight, given the contradictions on other points between these affidavits and earlier statements. *Cf* Fayen v State (CPD unreported judgment case no. A60/2008, March 2008, Webster AJ).

[16] The investigating officer testified that he was concerned that the appellants may interfere with State witnesses if released on bail or tamper with as yet undiscovered evidence such as the carpets removed from the main bedroom or the murder weapon. There is no suggestion that either has since been found.

[17] In this regard, too, the statements of the appellants that they will not do so can carry little evidential weight.

[18] I have given earnest consideration to the question of the best interests of the children of the appellants. Their continued separation from their mothers will undoubtedly cause them hardship, although it appears that arrangements for visits have now been put in place. Their interests must, however, be balanced against the public interest of ensuring that the appellants do stand trial for the offence charged. In my opinion, the flight risk and the risk of tampering with witnesses and evidence outweigh the interests of reuniting the children with their mothers. No evidence was adduced at the second bail application to show that the circumstances in which the children currently find themselves are actively harming them.

[19] In summary, then, I am of the opinion that, in the light of the strength of the *prima facie* case against them, the risk of flight and the risk of interference with the State case, the appellants failed to adduce evidence sufficient to satisfy the court that the interests of justice permit their release on bail. I consider that the magistrate was correct in refusing the application, even on the lower threshold test that I have assumed in favour of the appellants.

[20] In the result, the appeal is dismissed.

D R MITCHELL, AJ