



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA  
[WESTERN CAPE DIVISION, CAPE TOWN]**

**Case number: A340/16**

In the matter between:

**DIEGO DOUGHERTY NOVELLA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**JUDGMENT – 12 OCTOBER 2016**

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**Le Grange, J**

[1] This is an appeal against the refusal by the Magistrate at Cape Town to release the appellant on bail. The Appellant is charged with one count of murder. According to the indictment the charge of murder stems from the allegation that on or about 28 July 2015, the Appellant unlawfully assaulted and strangled his girlfriend, causing her death. The Appellant will stand trial in the High Court.

[2] The offence the Appellant is charged with is listed in Schedule 5 to the Criminal Procedure Act, 51 of 1977 ("the CPA"). Accordingly there is an onus on the Appellant to

discharge on a balance of probabilities that the interests of justice permit his release on bail.

[3] The Appellant advanced several grounds upon which it was submitted that the Magistrate had erred in finding that he failed to show that the interests of justice permits his release on bail.

[4] Mr. Booth, a local attorney, who appeared on behalf of the Appellant, argued that the Magistrate erred in coming to the conclusion that the Appellant is a flight risk. According to Mr. Booth, the State failed to establish any grounds for such a finding. Furthermore, it was contended that the Appellant has shown he will stand his trial by demonstrating his willingness to be placed under 'unique circumstances' if released on bail. It was advanced in argument that the 'unique circumstances' will *inter alia* include the payment of bail in the amount of R 100 000 to secure the Appellant's attendance at trial, the willingness to report at a local police station and his preparedness to be monitored by private security and by an electronic device. It was also contended that the local Guatemalan Ambassador and Professor Zabow, (who was one of the forensic psychiatrist who examined the Appellant as to his mental condition and ability to stand trial), supported his release on bail. Furthermore, it was argued that the Magistrate erred and misdirected himself in not correctly balancing the relevant factors and rights of the Appellant against the interests of justice.

[5] The State, in opposing the appeal, argued that the Magistrate properly considered all the relevant factors pertaining to bail and correctly determined that the interests of justice does not permit the appellant's release on bail. It was also contended that the Appellant, as a foreigner, has no real roots and interest in the country and can easily abscond his trial. Furthermore, it was argued the Appellant has the lifestyle of a constant traveller and frequently abused illicit drugs, and if released on

bail would undermine or jeopardize the objectives or proper functioning of the criminal justice system.

[6] The circumstances under which the alleged offence was committed, according to the papers filed of record, briefly stated are the following. The Appellant and the deceased, an American citizen, booked into a local hotel, in Camps Bay on 26 July 2015. According to the statements provided to the police, no person other than the Appellant and the deceased stayed in the room. By all accounts no staff entered the room occupied by the two, on the evening before the body of the deceased was discovered. The deceased was only discovered after members of the hotel staff enquired from the Appellant as to her whereabouts. According to the reports from the hotel staff, the Appellant reportedly answered that she was dead. Upon this revelation, they immediately checked the appellant's room and discovered the deceased.

[7] The police were called and the Appellant was immediately arrested. According to the police, the scene of the crime was chaotic with clothing and food substances strewn on the floor. The manner in which the body of the deceased presented to forensic staff, indicated that the perpetrator was known to the deceased. At the scene a number of exhibits were seized including a large quantity of foreign currency belonging to the Appellant. Electronic devices including iPhones and tablets were also seized by the police. The pathologist recorded the cause of death as being "*UNNATURAL: Consistent with strangulation in a person with signs of blunt head injury.*"

[8] Soon after his arrest, and upon the insistence by his legal team, the Appellant was referred to Professor Zabow, a forensic psychiatrist, who compiled a provisional psychiatric report into the mental state of the Appellant. Professor Zabow was also part of the forensic psychiatric panel who compiled a unanimous report in terms of section 77 of the CPA. The said panel found the Appellant is fit to stand trial.

[9] The personal circumstances of the Appellant, in summary are the following. He is single and has no dependant children. He was born and raised in Guatemala City, in

Central America. The Appellant is the 5<sup>th</sup> of 7 children. He received schooling in Guatemala and the United States of America. His family controls a group of companies which is a diversified conglomerate with its main focus on production of construction materials. Apparently the main company was founded in Guatemala by the Appellant's great-grandfather and has been in operation for more than 117 years. It is the principal provider of cement in Central America as well as being involved in the retail of construction materials with more than 5000 employees. The Appellant's inheritance allowed him to travel extensively all over the world. He also receives a monthly allowance of 10 000 US dollars per month. He is currently 42 years' old and not dependant on casual or permanent employment for his financial well-being.

[10] The Appellant experimented with illicit drugs from the age of 21. He also used it on occasions as part of his spiritual rituals. The Appellant has over the years' tried to address his drug dependence and attended a few rehabilitation centres. At one stage he spent about 5 months in a Buddhist retreat in Barcelona.

[11] The Appellant has been issued with two passports, namely, a Guatemalan as well as an Italian passport.

[12] The Appellant arrived in South Africa in April 2015 and joined a party in Nelspruit that was exploring various spiritual nature sites, especially 'high-energy places' such as the Cradle of Humankind and the Tsodilo Hills. In May 2015 he booked into a retreat in Magaliesburg for a week to undergo spiritual treatment. At this centre he apparently received a single dose of a natural occurring psychoactive substance called Ibogaine to help with his addiction difficulties. The Appellant thereafter stayed at a number of places in and around Cape Town.

[13] According to the psychiatric reports compiled by the panel in terms of s 79(4) of the CPA, the Appellant has led a somewhat unstable lifestyle in which he has abused a variety of illicit substances often in pursuit of spiritual enlightenment and lived in many places around the world.

[14] The Magistrate, at page 143 of the record made the following remarks:

*"I am duty-bound to consider the following facts:*

- 1. The accused has never had any formal employment, or at least for a long period of time. The indication is that the accused has only worked for a period of 2 to 3 years for a particular company.*
- 2. The accused has no immediate family roots, referring to a wife and children in the country.*
- 3. The accused has travelled the globe extensively.*
- 4. The accused has the financial means to hide anywhere in the world, should the need arise.*
- 5. The accused could very easily afford to forfeit any amount of bail which may be granted.*
- 6. There is no extradition treaty between South Africa and Guatemala.*
- 7. Lastly, to my mind, the state has a very strong circumstantial case against the accused.*

*Having considered all the facts placed before me, as well as the law, I am of the opinion that the accused is indeed a flight risk, despite the assurances provided by his legal team."*

[15] It is now trite that our Constitution and the common law value personal freedom, protect the presumption of innocence and make express provision for an accused person to be released from detention if the interests of justice permits same. In this regard see Hiemstra's Criminal Procedure [Issue 9] at 9-23 and the cases referred to therein.

[16] The offence with which the Appellant is charged, as mentioned earlier, falls within the ambit of schedule 5 of the CPA. In the result, sections 60(11)(b), 60(4), 60(6), 60(8) and 60(9) of the CPA are applicable.

1. Section 60(11) of the Criminal Procedure Act provides as follows:

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

*(a)...*

*(b) in Schedule 5, but not in 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.*

2. Section 60(4) of the Criminal Procedure Act provides as follows:

*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)...*

*(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; ...*

3. Section 60(9) of the Criminal Procedure Act provides as follows:

*In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-*

*(a) the period for which the accused has already been in custody since his or her arrest;*

*(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;*

*(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;*

*(d) any financial loss which the accused may suffer owing to his or her detention;*

*(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;*

*(f) the state of health of the accused; or*

*(g) any other factor which in the opinion of the court should be taken into account.*

4. Section 60(6) of the Criminal Procedure Act provides as follows:

*In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors, namely-*

*(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;*

*(b) the assets held by the accused and where such assets are situated;*

*(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;*

*(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;*

*(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;*

*(f) the nature and the gravity of the charge on which the accused is to be tried;*

*(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;*

*(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;*

*(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or*

*(j) any other factor which in the opinion of the court should be taken into account.*

5. Section 60(8) of the Criminal Procedure Act provides as follows:

*In considering whether the ground in subsection 4(d) has been established, the court may, where applicable, take into account the following factors, namely-*

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;*
- (b) whether the accused is in custody on another charge or whether the accused is on parole;*
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or*
- (d) any other factor which in the opinion of the court should be taken into account.*

[17] In determining whether or not an applicant for bail has established or adduced evidence which satisfy the court that the interests of justice permits his release on bail, within the meaning of s 60 (11)(b) of the CPA, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case, might not be enough to warrant the grant of bail in the particular context of another matter.

[18] With regard to an appeal, as in this instance, to a Superior Court in respect of a refusal by a Lower Court to grant an accused person bail, s 65 (4) of the CPA provides as follows:

*"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 event the court or judge shall give the decision which in its or his opinion the lower court should have given."*



[19] In S v Barber 1979 (4) SA 218 (D) Hefer J held at 220 E – H:

*“It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of his discretion. I think it should be stressed that, no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”*

[20] The abovementioned approach has been approved in a number of decisions. Accordingly, in a case like the present where the Magistrate refused bail because he found that the Appellant had not discharged the onus on him in terms of s 60(11)(b) of the CPA, and if this court, on its assessment of the evidence comes to the conclusion that the Appellant did discharge the burden of proof it must follow that the Magistrate’s decision was wrong within the meaning of section 65(4), and that this court can substitute it with its own decision in the matter. In this regard see S v Porthen and others 2004 (2) SACR 242 (C) at par [11].

[21] In casu, the sting of the Appellant’s attack is against the Magistrate’s finding that the Appellant is a flight risk and will evade his trial despite the assurances that he will remain in the country and stand trial if released on bail.

[22] The Magistrate gave a well-reasoned and detailed judgment. The criticism that the Magistrate’s decision was wrong within the meaning of section 65(4) and that it will

be in the interest of justice to permit the release of the Appellant on bail, is in my view without merit.

[23] The Appellant is currently 42 years old. He is a Guatemalan by birth. He comes from an extremely wealthy family. After formal schooling he travelled extensively. He lived in various parts of the world. The Appellant is single with no dependants to maintain. He receives a monthly allowance of approximately USD 10 000 and does not require casual or permanent employment to continue living his current lifestyle. It appears that the Appellant is in a permanent state of transition. In fact according to the psychiatric report compiled by the forensic psychiatric panel at Valkenberg Hospital, the Appellant *'has led a somewhat unstable lifestyle in which he has abused a variety of substances (often in pursuit of spiritual enlightenment) and lived in many places.'*

[24] On the established facts it appears the Appellant is in pursuit of some form of spiritual enlightenment and will not hesitate to move around the world and to stay at various retreats or places to achieve his spiritual goals. The Appellant has also been using a variety of illicit drugs, as so called tools, to assist in raising his consciousness. In fact Professor Zabow who compiled a provisional psychiatric report on 27 August 2015 described the Appellant, at the time, as 'grandiose and that his affect is incongruous'.

[25] The criticism that the Magistrate erred and misdirected himself in not attaching sufficient weight to the various guarantees that the Appellant had put in place for securing his attendance at the trial, is unfounded. Upon a careful reading of the judgment, the Magistrate did consider *inter alia* the suggested electronic tagging device, house arrest at the premises that was leased from a South African citizen, security surveillance and psychiatric care at home.

[26] The fact that most of these guarantees will be financed either by the Appellant or his family does create a sense of unease as it could be open to manipulation and may well bring the administration of justice into disrepute.

[27] The assertion that the Appellant could have fled the country if that is what he sets out to do, is contrived. The Appellant was arrested shortly after the discovery of the deceased. There was thus no time for him to have escaped. Moreover, according to Professor Zabow's provisional psychiatric report of August 2015, the Appellant's account of events regarding the incident was variable and somewhat bizarre.

[28] The retention of the Appellant's travel documents is also of cold comfort as the lack of travel documents in recent times is hardly a deterrent to persons who are serious and have the means to skip the country. Experiences in courts have shown that these documents can readily be obtained and one may depart the Country with ease.

[29] On a conspectus of all the facts and the law, I am unconvinced that the Magistrate was wrong in his findings. Moreover, the State's case, although circumstantial, points prima facie strongly to the guilt of the accused. In weighing up all the relevant factors pertaining to the Appellant which may favour his release on bail, he has in my view failed to show that the interests of justice in this instance permits his release on bail.

[30] In lieu of the above the appeal cannot succeed.

[31] In the result the following order is made.

The appeal is dismissed.

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**LE GRANGE, J**