IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A81/2023

In the matter between:

Indiphile Sodinga **Appellant**

And

The State **Respondent**

JUDGMENT ELECTRONICALLY
DELIVERED 24 AUGUST 2023

Baartman, J

[1] On 11 March 2021, the magistrate at Khayelitsha refused to release the appellant on bail. This is an appeal against that refusal.

[2] On 22 March 2020, L[…] M[…], 16 years old, sustained multiple fatal stab wounds when a group of men attacked her in Khayelitsha. The police arrested the appellant and 4 others for the murder. At the time of their arrest, the 5 accused were in the same house and did not respond when police officers identified themselves and requested the occupants to open the door. They complied with the request when the police went to the back door which had a

small window. The investigating officer, Sergeant April, said that it appeared as though there had been an attempt to escape through the window. The appellant and his co-accused claimed that they all lived at that house. The police were not persuaded and took the group to the local police station where they were questioned individually. The police followed up their various versions which led to accused 4's girlfriend, who said the following:

> '...she said that when her boyfriend came home the Sunday morning, he was so nervous and he started to explain to her as to what transpired on that Sunday morning, that all five accused before court...came under attack and that they stabbed a lesbian girl and then from there, the [girlfriend] even begged him, why don't you go to the police station to hand yourself over? They said, no, we're waiting for the police to come, should the police have evidence or information or investigation against us, then they can come and fetch us, we'll be waiting.'

[3] The police further seized a pair of blood-stained jeans from a cupboard linked to accused 4. Accused 3 further led the police to another premises where officers seized 4 blood-stained knives. DNA results from the items seized were still outstanding. Accused 5 made a statement implicating the whole group in the murder. State witnesses identified accused 4 and 5 in an identification parade. Sergeant April said the following about the deceased's orientation:

> '... [The deceased] was a lesbian,...accused before court, they also knew, ...either prior,... or after the incident because when the independent witness walked up to the accused...and asked them [why] did the person die, and they said they don't care and then they were saying something pertaining to a lesbian girl. Even when accused 2 went to his girlfriend to inform her... he referred to a lesbian girl [whom] they stabbed. And on top of that,...the victim

was stabbed on the eye...'

[4] Sergeant April further testified that the deceased and the accused lived in the same area and that the accused used to hang out at a local shop in the area. Accused 2 gave the following as the reason for the attack:

'...[The appellant] was in the vicinity of Enkanini when a tomboy and two male persons bumped into [him]...There was an argument between those two parties. As a result, the two male persons drew knives at him...so a fight broke out... they stabbed the tomboy... '

[5] It is against the above background that the state alleged that the accused had acted with common purpose and proffered charges against them in terms of Schedule 6[1]. The relevant provision provides as follows:

'Murder when

4(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.'

[6] The bail application was governed by the provisions of Section 60(11)(a) of the CPA, which provide as follows:

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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 exceptional circumstances exist which in the interests of justice permit his or her release.'

[1] Schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA).

[7] The appellant, 23 years old, attested to an affidavit which his attorney read into the record. He gave an alternative address outside the area where the crime had been committed as the place he would reside if released on bail. The appellant further indicated that he was a first offender and had no outstanding warrants. He was unmarried and the father of a 3-year-old child who resides with his mother. The appellant, with the assistance of his family, could pay R1 000 bail. He said the following about the charges proffered against him:

'At this stage I will not plead guilty. I understand the charges against me.'

[8] The court *a quo* was not persuaded that the appellant had met the onus that rested on him and held that there 'were no exceptional circumstances which in the interest of justice permitted' the granting of bail. That finding prohibited the court *a quo* from granting bail. It is in issue whether the court *a quo* was correct. It is now settled law that exceptional circumstances do not mean extraordinary; instead, they mean persuasive or compelling circumstances to distinguish the case from the ordinary bail application. However, circumstances that may be ordinary in a particular set of facts may yet be exceptional in another set of facts. The default position is that an accused charged with offences within the ambit of Schedule 6 must be kept in custody. A court must make a value judgment whereby it considers a range of factors to determine whether an exception should be made to the default position[2]. The court *a quo* took all the relevant factors into consideration in assessing whether exceptional circumstances justified a deviation from the default position.

[9] Mr Mhlanga, the appellant's counsel, submitted that the court *a quo* had

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[2] S *v Liesching and Others* 2019 (1) *SACR 178 (CC);* S *v Viljoen* 2002 (2) SACR 550 (SCA) and S *v Botha and Another* 2002 (1) SACR 222 (SCA).

erred in more than one respect. He submitted that the court, among others, had failed to consider the weak state case. It is correct that the state relies on hearsay evidence in respect of the appellant. However, the trial court may allow that evidence if it is in the interest of justice to do so. In addition, the evidence indicates that the group acted with common purpose and further that the appellant ordinarily associated with the group. He was also arrested with the group and claimed that he resided with them at the same premises.

[10] As indicated above, the appellant has not decided how he will plead to the charges proffered against him; he merely said, 'At this stage I will not plead guilty'. That falls far short of a challenge to the merits of the state's case. The appellant must prove on a balance of probabilities that he would be acquitted of the charges levelled against him if he decides to challenge the merits of the state's case. In the circumstances of this matter, there is no merit in the criticism levelled at the court *a quo's* finding in respect of the strength of the state's case. This is so even though the evidence of a co-accused would be inadmissible against the appellant.

[11] Mr Mhlanga further submitted that none of the factors listed in section 60(4)(a)-(b) had been established, therefore the court *a quo* had erred in holding that it was not in the interest of justice to release the appellant on bail. Section 60(4)(a)-(e) provides that the interest of justice does not permit the release on bail of an accused if one or more of the following five 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 circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

[12] Counsel conceded that the appellant had given 'a wrong address at the time of the arrest.' However, that was immaterial, so the submission went, 'given the fact that the correct address was given during the bail application.' An astonishing submission given that the default position is that the appellant is to be kept in custody unless exceptional circumstances exist which in the interests of justice permit his release on bail. However, it is only one factor that the court a *quo* had to take into consideration in making its value judgment. There is no indication that this factor was given undue weight. I am persuaded that the court a *quo* took all the relevant factors into account and made a value judgment that I cannot fault. It follows that I cannot interfere with the decision.

Conclusion

[13] I, for the reasons stated above, make the following order:

(a) The appeal is dismissed.

Baartman, J