

REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A86/14
DATE: 13/2/2014

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

In the matter between

1. NDAEDZO ISAAC VELE
2. NDITSHENI DANIEL NEFOLOVHODWA
3. TSHEPO LEON MOSAI
4. ROGER GAOREKWE MOSEKI

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT

And

THE STATE

JUDGMENT

THULARE AJ

[1] This is an appeal against a judgment where the appellants were refused bail after a formal bail application was held in the Pretoria North District Court. The appellants are charged with two counts of conspiracy to commit murder, one count of murder, one count of robbery with aggravating circumstances and one count of using a motor vehicle without the consent of the owner.

[2] The one count of conspiracy to murder, murder, robbery with aggravating circumstances and the use of a motor vehicle without the consent of the owner relates to circumstances around the death of Major General Maswanganye of the South African Police Services, whose vehicle and body were discovered along and in the vicinity of the R101 road in Rooiwal outside Hammanskraal, north of Pretoria during the night of 17 June 2013 after he was last seen that afternoon en route to Johannesburg, where he worked. The other count of conspiracy to commit murder relates to General Nkonyene, of the South African National Defence Force.

[3] The question is whether the appellants, having been given a reasonable opportunity to do so, adduced evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit their release.

[4] Appellant 1 had his affidavit read into the record by his legal representative at the time, wherein he dealt with his personal circumstances which are, in the main, not in dispute. He alleges he is a member of the SANDF, the State alleges he is a reservist. In his affidavit in support of his application he alleges he has never been outside the borders of the Republic and also alleges that he has one previous conviction. Appellant 1 confirmed the contents of the affidavit read out. After a change of legal representation, it was conceded that he was indeed outside the borders of the Republic and that he did not disclose the other previous conviction on the advice of his erstwhile representative, who held the view that it was no longer considered a previous conviction. He sets out an alibi as his defence, in that he was on duty.

Appellant 1 also submitted the affidavit of Colonel AM Ratshilumela of the SANDF who confirms that appellant 1 does duty as a driver for the SANDF and that on the 17th June 2013 appellant 1 drove to ORTIA to pick up a senior member of the SANDF who was returning from KwaZulu-Natal, giving the makes of the vehicles appellant 1 drove on both the 12th and 17th June 2013.

Winnie Domdi Zodo Zinobobelo is a Chief of Staff at Joint Operational Headquarters of the SANDF. He was fetched by appellant 1 from ORTIA at 12H00 on 17 June 2013. At about 13H30 appellant drove her home and he sent him to Bosman station to attend to a bus ticket. He last heard from appellant 1 at about 14H30 when he reported that he was unsuccessful.

Appellant 1 alleges he was brutally assaulted and tortured by members of the SAPS, forcing him to make a confession and some pointing outs at a scene of crime. He admitted what he was told by members of the SAPS as he was tortured severely. The State does not have direct evidence against him.

[5] Appellant 2 testified that he is a member of the SANDF holding the rank of corporal. His personal circumstances are common cause. His defence is also an alibi, in that he was at work from 08H00 until 16H00 on the 17th June 2013. He was with 10 people all of whom can testify to that effect. Thereafter he went to his barracks in Thaba Tshwane where he was later joined by his girlfriend as it was father's day. He was assaulted and tortured and cannot recall if he made any statement. He works at the same place with appellant 1 but in different units. He is the one who gave appellant 1 the order from above and the permission to use the vehicle to drive to the airport and that is the last time he saw appellant 1 on that day.

On 12 June 2013 appellant 1 phoned him and told him that he was angry about the situation at his place of employment and wanted a firearm. Appellant 2 then spoke to appellant 4 who asked them to come immediately to Roodepoort. Appellant 1 and 2 then drove to Roodepoort where they met with appellant 4 who introduced them to appellant 3. Appellant 2 personally spoke to appellant 4 about the intention of appellant 1 to buy a firearm from appellant 4. Appellant 4 spoke to appellant 3 about the firearm. Appellant 4 set the price of the firearm at R600-00 and when the money was given appellant 4 suggested that the money be given to appellant 3. The firearm was not received that day as appellant 3 said the firearm was with his younger brother who was not available at the time. Appellant 2 alleges this was one way in which as friends they borrowed money from each other, as the money so received under false pretences would be refunded at the end of the month. The firearm sale was such a "knocking game". After the report that appellant 3's brother is not available, phone numbers were exchanged between appellant 2 and 3. Appellant 2 sent appellant 3 sms messages to enquire if the firearm was received, as part of playing appellant 1, for appellant 1 to believe that indeed he was going to get a firearm. Appellant 2 sent another

sms on Thursday, as appellant 1 was demanding his money then. The message to appellant 3 on Thursday was “do you want a fight”. Appellant 3 responded and said “do not worry, immediately when I get that thing I will let you know”. On Friday again he sent appellant 3 a message, saying that “we are at your place waiting for you”. Appellant 2 was then in the company of appellant 1. Ever since the 12th June 2013 he never saw appellant 3 again until his arrest. He never discussed Major General Maswanganyi or mentioned the killing of any person. He denies ever going to Roodepoort on the 14th.

Appellant presented the affidavit of Manyako Sibongile Masufe who indicates that she took over duties from appellant 2 on 17 June 2013 at 16H00.

[6] Appellant 3’s personal circumstances are common cause. Besides being self-employed he is also a police informer. He met appellant 1 and 2 for the first time at appellant 4’s home on 12 June 2013. He grew up with appellant 4. They both come from Kagiso and stay near each other in Roodepoort. He discussed with the other three appellant about him selling a firearm, but did not conspire to commit a murder. It was appellant 4 who asked him to join in in knocking appellant 1 of some money, using the sale of a firearm. He agreed to participate and did participate. The reason given to him as to why appellant 1 sought a firearm was because there was problematic senior person at appellant 1’s work. Appellant 1 and 2 left without a firearm although they paid R600 for its rental. He was not in possession of a firearm and created an impression that his brother, who had the key to where the firearm was, was not home. Of the R600-00 he received for the lease of the firearm, he gave appellant 4 an amount R300-00.

He received a number of sms from appellant 2 from the same afternoon to the Friday. The next Thursday, after having regard to news reports about the murder of Major General Maswanganyi, he and appellant 4 met with General Taiwa to report the incident involving appellant 1 and 2. He made a statement to General Taiwa.

He was once told by appellant 4 that appellant 4 was also working with the police and that appellant 4’s contact person in the SAPS was a Vele.

He further testified of how he was tortured until he relieved himself and urinated in his pants and then told what to say to other police officers who would later arrive. He was asked to repeat what he was told until they were satisfied with his repetition. He later told what he was told to a policeman who then asked him to sign therefor. He indicated to this policeman that he was told what to say, but it was insisted that he sign, which he did. He was taken to Roodepoort, then to

some place where there were trees and to a mall, where he was told where to point out, and photos of him doing those pointing outs were taken. He made three statements, of which two were reduced to writing. He would not have made any statement if he was not tortured.

[7] Appellant 4 testified that he got a call from appellant 2 on 11 June 2013 who wanted to speak to him about something urgent. They agreed to meet the following day the 12th. On the 12th he went to fetch appellant 1 and 2 from a BP garage in the CBD in Roodepoort and they drove to his place of residence. Appellant 2 introduced him to appellant 1 and they told him they were looking for a firearm. He had earlier called appellant 3 who then arrived. Appellant 3 then told them that he had contacts on getting a firearm. Appellant 3 then took them to a block of flats which he indicated is where his cousin who can get a firearm resided. Appellant 3 got out and later came back to report that his cousin is not home and the place is locked. They drove back to his place and on the way appellant 3 mentioned to appellant 2 that they can leave the money so that he can secure the firearm from his cousin and they will get the firearm later. Back at his place they were told appellant 1 had a problem with a colleague at work. Appellant 1 decided that he would leave the money and they drove to a Sasol garage where appellant 1 withdrew R600-00 for the deposit on the firearm. The agreed price was R1100-00 and an agreement with appellant 3 was that a deposit of R600-00 was payable. The money was given by appellant 1 for him to count, after which he handed the money to appellant 3. They drove back to his place. He asked appellant 2 about the firearm, who told him that he was just making money out of appellant 1. When he asked appellant 1 about why appellant 1 wanted a firearm, appellant 1 said there was a person at his workplace who was giving him trouble and threatening appellant 1. Appellant 1 and 2 left without the firearm. For he was concerned that a uniformed member of the SANDF was looking for an unlicensed firearm, he asked appellant 3 to play along for them to get more information, and the same afternoon he called Colonel Hein Marais stationed in Krugersdorp and informed him. Colonel Marais advised him to inform Willem van der Merwe who is also from the intelligence unit. Van der Merwe was in Durban on work assignments and he decided to wait for him as he does not trust anyone. He learned from appellant 3 that appellant 2 was trying to contact him but appellant 3 did not answer the calls. On Sunday Van der Merwe called him and informed him that they will be back either Monday or Tuesday. He met Van der Merwe on Wednesday after Van der Merwe called him.

He was present when the itemized calls transcripts from the cellphone of the Major General Maswanganyi's was considered and the last dialed numbers was called and a lady answered the phone and the police made arrangements to meet with the lady. He also learned from Van der Merwe that two ladies were arrested arising from that. On the advice of Van der Merwe, he met and made a statement to General Taiwa and also made arrangements that he and appellant 3 meet General Taiwa at ORTIA.

At ORTIA, General Taiwa told him that he (the General), had made certain changes to the statement that appellant made to him in Krugersdorp in order to enable them to apply for warrants of arrest and it is not going to be used further. Appellant 4 then initialed each and every page and signed the statement. He did not read the statement. He did not read the statement as he trusted the General. He sought the intervention of Van der Merwe when he and Sibiya disagreed as Sibiya wanted to change the whole thing from what he was telling the SAPS. He and appellant 3 went to the SAPS to inform them about appellant 1 and 2 sourcing a firearm, not that they killed Major General Maswanganyi. He then received a call from his aunt that his grandfather had passed away and left for Mafikeng the following day and came back after a week. Whilst in Mafikeng he received a call from Van der Merwe so bring back a copy of the birth certificate and also that he should inform Van der Merwe as soon as he is back. Upon his arrival he did inform Van der Merwe. He also learned that appellant 3 was arrested but Van der Merwe was not aware of same. He was taken in for questioning by other policemen. He was tortured and told that the police are aware that he was communicating with the Major General's wife, which he disputed. He is a trained person and the police did not manage to break him down. He was taken to Pretoria where, amongst others Colonel Mabasa told the police to work as he should point out the scene. He was told to write a statement. He told them what he had said before and the captain who was to write down did not write anything. A photographer arrived and said he must go and point out the scene of crime in Hammanskraal. The photographer continued driving although he told him that he has never been to Hammanskraal. He noticed that the captain also did not know where he was going. He picked up a phone, spoke to somebody asking for directions and made a u-turn. They drove to a point where they stopped and he was told to alight from the vehicle and he refused. He did not get out of the vehicle. The captain was instructed to take him back to Pretoria. He was visited by general Taiwa who told him to say something about the wife and he will get his freedom. On a later date the same General visited and told him to

consider being a state witness. He does not know anything about the death of the Major General. Van der Merwe visited him and told him that the investigators threatened him and told him not to contact him anymore as Van der Merwe is protecting him.

[8] Colonel Richard Abednigo Shivuri testified for the State in response to the application. The State case is that on or before 12 June 2013, appellant 1 and 2 met and discussed the killing of General Nkonyeni because the General was involved in the investigation of a case against 1st appellant relating to a motor collision. Appellant 1 showed appellant 2 the house of the General in Naturena and they monitored the house and the movements of the General. Appellant 1 and 2 drove to Roodepoort where they met appellant 4 on 12 June 2014 in order to source a firearm. Appellant 4, who was a friend of appellant 2 at the time, introduced them to appellant 3 as the person who was to provide the firearm. The purchase price was agreed at R1200-00 but R600-00 was paid for the lease of the firearm although the firearm was not delivered the same day. Appellant 3 and 4 shared the R600-00 between them. On 14 June 2013 appellant 1 and 2 drove to Roodepoort again in search of appellant 3 for the delivery of the firearm.

[9] The State case is further that appellant 4 chaired the meeting where the killing of Major General Maswanganyi was discussed as he held the Major General responsible for many policemen in the SAPS losing their jobs. The Major General had a residence in Hammanskraal, but worked and stayed in Johannesburg during the week. Appellant 3 and 4 drove to Hammanskraal on 17 June 2013 where they joined appellant 1 and 2, and another person unknown to appellant 3. Appellant 4 was the person who was in telephonic communication with the others who were at the time following the Major General in his vehicle on that afternoon. The Major General was captured and killed. The Major General showed signs of electrocution and interference with his breathing resulting in his death. He was killed at a place other than where his body was discovered and the scene of the discovery of the body and the vehicle was staged to mislead the investigators. His three cell phones and a Sumsang Tabloid were robbed.

[10] Lizelle Lorraine Smith also testified that she would not know of appellant 3 was assaulted to give the information that he gave her to compile an identikit. She did not ask him if he was assaulted but he appeared comfortable to her at the time she compiled an identikit.

[11] Snyders JA in *S v Rudolph* 2010 SACR 262 (SCA) at page 266e paragraph 8 and 9 wrote the following:

“[8] ... Section 60(11)(a) of the Act prescribes that in the case of offences falling within the ambit of Schedule 6 that –

‘... 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’.

[9] The section places an onus on the applicant to produce proof, on a balance of probabilities, that ‘exceptional circumstances exist which in the interests of justice permits his release. It contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless ‘exceptional circumstances’ are shown by the accused to exist. Exceptional circumstances do not mean that ‘they must be circumstances above and beyond, and generally different from those enumerated’ in ss 60(4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.”

Comrie AJA said the following in *S v Van Wyk* 2005(1) SACR 41 (SCA) page 44 i at paragraph 6:

*“... Indien die geval onder subart (11) resorteer, rus die las natuurlik op die applikant om aan te toon dat die Staat se saak geen of relatief min meriete het. Die applikant, indien daartoe geadviseer en gewaarsku (vgl art 60 (11B(c))), kan oor die meriete getuig en daaroor gekruisvra word. Natuurlik kan hy aan die hand van die dossier aantoon dat die getuienis teen hom weining of geen waarde het nie. Dit is nogtans nie vir die borghof om n’ voorlopige bevinding van skuld of onskuld in te bring nie. Die hof se plig is om prima facie sterkte of swakheid te oorweeg. Dit kan natuurlik aan die einde van so n’ ondersoek blyk dat die staat se saak teen n’ applicant swak is. *S v Mohammed* 1999 (2) SASV 491 (C) was so n’ geval, asook *S v Kock* (supra). Maar om so n’ gevolgtrekking te bereik aan die hand van geloofwaardigheidsbevinding is normaalweg ongewens en n’ miskiening van die feit dat die borgverrigtinge nie n’ kleedrepetisie is nie.”*

[12] From Shivuri's testimony, there is no direct evidence of appellant 1 and 2 conspiring to kill General Nkonyeni on or before the 12th June 2013. At best, someone saw the two of them together at the barracks and Shivuri deduces from there that the two conspired. As regards the conspiracy to murder Major General Maswanganyi, the source of that information according to Shivuri is appellant 1. According to Shivuri, the source of his information as regards what the appellants allegedly did in Hammanskraal and/or Rooiwal and/or along the R101 to the Major General is appellant 1 and 3. According to Shivuri, appellant 1 implicated himself to have been in the meeting where it was conspired to kill the Major General and also that he took part in the killing of the Major General. Appellant 1 also indicated that appellant 4 chaired the meeting where the conspiracy to murder the Major General was discussed, and appellant 4 was also the one who kept contact with those following the Major General's vehicle in Hammanskraal. He also implicated the other three appellants as well as 3 other persons unknown to him. Appellant 3 also implicated himself in being involved in the meeting and also during the killing of the Major General. He also implicated the other three appellants and one unknown male whose identikit he made. Both appellant 1 and 3 also pointed out the same scene.

[13] The objectivity of Shivuri is very worrying. I will just mention three aspects in their order of gravity:

(1). Whilst he was driving 1st appellant to Leratong hospital for DNA samples, his testimony is that appellant 1 told the captain in their company that he was assaulted. Shivuri does not ask for a full medical examination for the appellant, but blames the appellant for not requesting same. His comments that nothing to him indicated that appellant 1 was assaulted gives his attitude and approach away. His answer to a question by the prosecution is that his reaction regarding the assault as regards appellant 1 would be applicable to the rest of the appellants.

(2) He in his evidence in chief sought to suggest that he arranged for the Independent Police Investigations Directorate for the appellants and that the appellants did not lay any charges. In cross-examination he was forced to concede that he has no knowledge that charges were indeed laid.

(3) He clearly says that Warrant Officer Moerane, the 3rd appellant's handler, told him that they were having an informer regarding the murder of the Major General which he was investigating. When he gives a report on what appellant 3 specifically told him, it clearly transpires that the information relate to the transaction to purchase a firearm by a soldier unhappy with his senior in the SANDF. From his testimony of what appellant 3 told him and Modise, there is no reason for anyone to say that appellant 3 was an informer with information regarding the murder of the Major General.

Just to conclude on the question of Shivuri, he gives the reasons for the re-interview of appellant 3 and the decision to investigate him on appellant 3's expression that he feared that appellant 4 being an informer, might implicate him. Shivuri gives the reason for the re-interview of and the decision to investigate appellant 4 as his comments that they cannot find anything that can link the accused because the murder was done professionally and clean.

In Shivuri's own interview of appellant 2, according to Shivuri appellant 2 admitted to some of the developments around the meeting of the 12th in Roodepoort, including the transaction to secure the firearm and the problematic army General. The further reason that Shivuri gives for the implication of appellant 2 is that transcripts suggest that he phoned a sangoma and informed the sangoma that appellant 1 has been arrested and the sangoma must make the case to go away.

[14] Shivuri is not the only senior police officer whose approach to his constitutional responsibilities is worrying. Appellant 4's testimony is that whilst awaiting trial, well aware that he enjoys legal representation and that the National Prosecuting Authority is seized with the conduct of the case and appellant 4 enjoys legal representation, Shivuri and two Generals, Taiwa and Sibiya visited appellant 4 in custody. At that meeting, General Taiwa told appellant 4 to implicate the wife of the Major General in exchange for his freedom. Appellant declined the offer and General Sibiya gave his phone numbers in case appellant 4 changed his mind. Generals Taiwa and Sibiya again visited appellant and suggested that he turn State witness. Appellant declined as he had no knowledge of the murder of the Major General. It is to be noted that appellant 3 also had visits from Shivuri, Taiwa and Colonel Modise, and that General Taiwa suggested that he becomes a State witness and he will get a suspended sentence. These allegations were never rebutted by the State.

[15] It is very worrying when senior members of the SAPS demonstrate no respect to other officers of the court as well as institutions that support a regular, fair and just process of the administration of justice and involve themselves in activities that tend to undermine the administration of justice in this country. The activities of the Generals and the Colonels are to be understood in the light of the facts. In my view, the actions are prompted by the Generals' realization of problems as regards the strength of the case against the appellants. In my view, their disrespect for the National Prosecuting Authority, the Advocate's profession and the Attorneys profession and by extension the Court seized with the matter is to be understood in that light.

[16] In my view, the circumstances in this matter demonstrate the need for the National Prosecuting Authority, before any evidence is led in bail proceedings, to address the Court for the purpose of explaining the charge(s) leveled against the accused person(s) and indicating to the court what evidence the State has in support of the charge. In my view, this definition of the ambits of the case against the accused will also assist the court in ensuring that the bail application is not turned into some mini-trial or dress rehearsal of the actual trial. It will assist in narrowing down the issues in facilitating the bail applicant's crystallization of the true issues to allow their proper ventilation through evidential material at the bail application hearing.

[16] In my view, the State has a *prima facie* case against appellant 1 and 2 on the charge of conspiracy to murder General Nkonyeni. I am unable to make the same conclusion as regards appellant 3 and 4.

[17] In my view, as regards to the charges relating to Major General Maswanganyi, the State relies on statements made by the appellants, which statements are in dispute and may be ruled to be inadmissible (see *S v Mthembu* [2008] 4 All SA 522 (SCA) at 523 – 526 paragraphs 22 to 32.

[18] Appellant 3 and 4, in my view, showed the court that exceptional circumstances exist which in the interests of justice permit their release on bail.

[19] A planned attack on an army General, based on displeasure with his enforcement of discipline within the South African National Defence Force, is by extension an attack on the discipline and authority of the State. *Prima facie*,

appellant 1 and 2 have been shown to attack the endeavours for peace and tranquility, if not the authority of the Republic of South Africa.

I make the following order:

1. The appeal by appellant 1 and 2 against the order refusing them bail is dismissed.
2. The appeal by appellant 3 and 4 against an order refusing them bail is set aside and replaced with the following order:
 - 2.1 Bail in an amount of R5000-00 is granted to appellant 3 and 4 on condition appellant 3 and 4:
 - 2.1.1 Appear and remain in attendance at each and every date to which this matter is postponed until excused by the court.
 - 2.1.2 Report at SAPS Roodepoort each Monday, Wednesday and Fridays between the hours 6H00 and 18H00.
 - 2.1.3 Surrender all passports and other travel documents to the Station Commissioner, Roodepoort SAPS, and do not apply for any new travel documents without the leave of the court.
 - 2.1.4 Do not leave Gauteng Province without giving notice 24 hours before such departure to the Station Commissioner, Roodepoort SAPS, and obtaining such written permission from the Station Commissioner, Roodepoort SAPS.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT